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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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JUDGES

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

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Hon. CHARLES H. ROBB, Associate Justice.....Washington, D. C.
Hon. JOSIAH A. VAN ORSDEL, Associate Justice.....Washington, D. C.

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CASES REPORTED

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ARRANGED UNDER THEIR RESPECTIVE CIRCUITS

FIRST CIRCUIT.

SECOND 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

UNITED STATES v. ATCHISON, T. & S. F. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1921.)

No. 5495.

1. **Witnesses ⟸269(9)—Cross-examination as to matter not testified to on direct examination properly excluded.**
   In an action for statutory penalties under the Hours of Service Act (Comp. St. §§ 8677–8679), where a witness testified regarding delay of a train on January 4 and 5, a cross-question as to tying up crews on January 11 was properly excluded.
2. **Master and servant ⟸13—Finding held not to authorize penalty under Hours of Service Act.**
   In an action for penalties under Hours of Service Act (Comp. St. §§ 8677–8679), where the court found specially that the delays on account of which the employés were detained in service were caused by unavoidable accidents, which were the results of causes not known to the carrier or its officers or agents at the time they left the terminals, that such causes and accidents could not have been foreseen, that the detention on duty was caused wholly by those accidents, and could not have been avoided by the exercise of reasonable diligence after the respective accidents, the findings supported a judgment for defendant.
3. **Appeal and error ⟸237(6)—Existence of substantial evidence not reviewable, without motion, ruling, or exception.**
   Under Rev. St. § 1011 (Comp. St. § 1672), prohibiting reversals on writs of error for errors of fact, the question whether there is substantial evidence to support the judgment or finding in a case tried without a jury is not reviewable, where there was no motion raising that question at the trial, ruling thereon, or exception to the ruling.
4. **Appeal and error ⟸969—Trial ⟸388(2)—Action regarding special findings discretionary, and not reviewable.**
   In an action at law, tried by the court on waiver of a jury, the making of special findings is discretionary, and the court's action in making such findings, refusing to make requested findings, or refusing to amend findings made, is not subject to review.
5. **Appeal and error ⟸969—Rulings on requests for findings, after filing of findings, discretionary, and not reviewable.**
   Where no requests for findings, or for modifications of findings, were made until subsequent to the close of the trial, it was too late, after

the court had filed its findings and its conclusion that judgment must be entered for defendant, to except to the rulings on the issues tried, and subsequent requests and rulings were discretionary, and not subject to review.

6. Appeal and error ⇐733—Specifications that court erred in entering judgment are too indefinite.

General specifications that the court erred in entering judgment for defendant, or in failing to enter it for plaintiff, upon specified counts, but setting forth no specific issues of law or rulings thereon excepted to, which conditioned the entries or refusals to enter, are too indefinite for review.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Action by the United States against the Atchison, Topeka & Santa Fé Railway Company. Judgment for defendant, and the United States brings error. Affirmed.

Roscoe F. Walter, Sp. Asst. U. S. Atty., of Washington, D. C. (Summers Burkhart, U. S. Atty., of Albuquerque, N. M., and J. O. Seth, Asst. U. S. Atty., of Santa Fé, N. M., on the brief), for the United States.

William C. Reid, of Albuquerque, N. M., and Gardiner Lathrop, of Chicago, Ill. (James L. Coleman and Emmet Trainor, both of Chicago, Ill., on the brief), for defendant in error.

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

SANBORN, Circuit Judge. The United States brought this action at law against the defendant railway company in 15 counts, to recover 15 penalties of $500 each, for requiring 5 of its employés on each of three trains to remain on duty continuously for more than 16 hours, in violation of the Hours of Service Act of March 4, 1907, 34 Stat. 1415, 1416, 1417 (U. S. Comp. Stat. §§ 8677, 8678, and 8679). The defendant answered that the detention in each case was caused by an unavoidable accident, which was not and could not have been foreseen; that such accident caused a delay that was the result of a cause which was not known and could not have been foreseen by it, or its officers or agents in charge of the employés at the time the latter left the terminal. The parties to the action waived a jury; the case was tried by the court, which made special findings of facts, and rendered a judgment for the defendant. The plaintiff assigned 52 alleged errors, but an examination thereof discloses the fact that the assignment presents only 2—Nos. 24 and 34—which challenge any ruling reviewable by an appellate federal court.

[1] No. 24 charges error in sustaining the objection to a cross-question addressed to F. L. Myers, superintendent of the defendant, who on his direct examination had testified regarding the accident and delay of the train with engine No. 1655, which left Las Vegas at 11:45 p. m. on January 4, 1917, and arrived a Albuquerque on January 5, 1917. This was the train whose delay resulted in the alleged violation of the

act of Congress set forth in the first 5 counts of the complaint. The cross-question was:

"Now, in regard to tying up crews at Lamy: Did you not, on January 11th, tie up Rathburn, engineer, Hayes, engineer at 9:10 p. m.?"

To this question counsel for the defendant objected on the ground that—

"That is a different transaction; different circumstances; would compel us to go into an entirely different case."

No questions had been asked this witness on his direct examination, nor had he testified, about any transaction on January 11th, and it is too clear for discussion or comment that the court committed no error not to permit the plaintiff to enter upon the trial of such a second and different transaction.

[2] The thirty-fourth specification of error is:

"The court erred in entering judgment for the defendant because the facts found do not support the judgment."

But among the facts found by the court below and set down in its special findings were these: That the delays of the three trains on account of which the employés were detained in service more than 16 consecutive hours were caused by unavoidable accidents, which were the results of causes not known to the carrier or its officers or agents in charge of the employés at the times they respectively left the terminals; that these causes and accidents could not have been foreseen; that the detention of these employés on these trains on duty more than 16 hours was caused wholly by these accidents; and that the keeping of them on duty for more than 16 consecutive hours could not have been avoided by the defendant by the exercise of reasonable diligence after the respective accidents. It is clear that the facts thus found would have been fatal to any judgment for the plaintiff, and they are not insufficient to sustain the judgment for the defendant. The other alleged errors which counsel for the United States assign and discuss relate to matters not reviewable by this court in this case.

[3] The question whether or not the evidence was sufficient to sustain the special findings of facts, or any of them, or the judgment itself is not reviewable because:

"When an action at law is tried without a jury by a federal court, and it makes a general finding, or a special finding of facts, the act of Congress forbids a reversal by the appellate court of that finding, or the judgment thereon, 'for any error of fact' (Rev. St. § 1011, U. S. Comp. St. 1913, § 1672, p. 700), and a finding of fact contrary to the weight of the evidence is an error of fact. The question of law whether or not there was any substantial evidence to sustain any such finding is reviewable, as in a trial by jury, only when a request or a motion is made, denied, and excepted to, or some other like action is taken which fairly presents that question to the trial court and secures its ruling thereon during the trial. * * * An exception to any ruling which counsel desire to review, which sharply calls the attention of the trial court to the specific error alleged, is indispensable to the review of such a ruling." Wear v. Imperial Window Glass Co., 224 Fed. 60, 63, 139 C. C. A. 622, 625, and cases there cited; Mercantile Trust Co. v. Wood et al., 60 Fed. 346, 348, 8 C. C. A. 658.

In this case no request or motion was made to the court below, nor was any similar action had to present to that court the question of law whether or not there was any substantial evidence to support a judgment or finding for the defendant, nor was any ruling made on that issue or exception to the ruling taken before the trial closed.

[4] The making of special findings of facts in an action at law tried by the court on a waiver of a jury is discretionary with the trial court, and its action in making such findings, in refusing to make requested findings, or in refusing to amend findings made, is not subject to exception, or to a subsequent review in a federal appellate court. City of Key West v. Baer, 66 Fed. 440, 444, 13 C. C. A. 572; Berwind-White Coal Min. Co. v. Martin, 124 Fed. 313, 60 C. C. A. 27; Ætna Life Ins. Co. v. Board of County Commissioners of Hamilton County, 79 Fed. 575, 576, 25 C. C. A. 94.

[5] Again, the trial ended in this case when, after full hearing and submission of the issues of fact and law on January 24, 1919, the court, after consideration on January 28, 1919, filed its findings of fact and its conclusion that judgment must be entered for the defendant. After that filing it was too late to take exceptions to rulings of the court on the issues tried, and no requests for findings or for modifications of findings were made by the plaintiff until subsequent to the close of the trial. Such subsequent requests and rulings thereon are, like motions for new trials after verdicts and the rulings thereon, discretionary with the trial court, and are not subject to review in the federal appellate courts. Tyng v. Grinnell, Collector, 92 U. S. 467, 469, 23 L. Ed. 733; United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan., 145 Fed. 144, 151, 76 C. C. A. 114, 121.

[6] General specifications that the court erred in entering a judgment in favor of the defendant, or in failing to enter it for the plaintiff, upon specified counts of the complaint, but which set forth no specific issues of law, or rulings thereon excepted to, which conditioned the entries or refusals to enter, are too indefinite to present anything for consideration here, and are futile. Mercantile Trust Co. v. Wood et al., 60 Fed. 346, 348, 8 C. C. A. 658, 660; United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan., 145 Fed. 144, 150, 76 C. C. A. 114; Webb et al. v. National Bank of Republic of Chicago, 146 Fed. 717, 718, 719, 77 C. C. A. 143, 144, 145; Morris et al. v. Canda, 80 Fed. 739, 26 C. C. A. 128.

Let the judgment below be affirmed.

CITY OF RATON v. POLLARD.

(Circuit Court of Appeals, Eighth Circuit. December 28, 1920.)

No. 5497.

1. **Municipal corporations ⇐648—Adverse use of street for prescriptive period shows acceptance.**
   Under statutes giving a city the usual broad powers of municipal corporations to establish, improve, and vacate streets, and imposing the duty to keep them open and in repair, and containing no restriction requiring formal acceptance of a street created by prescriptive use, the continuous and adverse use by the public for the requisite time is sufficient to show acceptance of the street.
2. **Adverse possession ⇐8(4)—Title to railway right of way may be acquired.**
   As a general rule, title may be by adverse possession to portions of a railway company's right of way.
3. **Highways ⇐4—May be established by prescription on railway right of way.**
   As a general rule, highways may be established by prescriptive use over or along the right of way of a railway company.
4. **Municipal corporations ⇐817(1)—General public use of street where injury occurred held to raise presumption that it was adverse.**
   In an action for injuries sustained on a bridge on a road within the limits of a railway right of way, the general public use of the road as a highway for the prescriptive period, without anything to explain how it began, raised a presumption that it was adverse and under a claim of right, and cast the burden on the city to show that the right was permissive, so as to prevent the road from becoming a public street.

In Error to the District Court of the United States for the District of New Mexico; Colin Neblett, Judge.

Action by J. W. Pollard, Sr., against the City of Raton. Judgment for plaintiff, and defendant brings error. Affirmed.

Judgment was recovered against the city of Raton, N. M., for personal injuries sustained by defendant in error. His claim was based upon alleged negligence of the city in failing to keep a bridge in one of its public streets and the approaches to it in proper repair. The questions in the case all relate to the existence of a public street at the place of the accident. It was within the city limits, but not upon any street that had been platted or established by any formal act of the city. The tracks of the Atchison, Topeka & Santa Fé Railway Company, hereafter called railway company, run through the city in a general course from southeast to northwest. The main part of the city lies to the west and south of the railway. North Third street is one of the principal streets of the city, and as platted extends northerly to the railway right of way; but for more than 20 years there has been a well-defined roadway crossing the tracks in continuation of this street. The right of way is of the width of 200 feet, and there are double tracks along its center. Going north on Third street, after crossing the railway tracks, the traveled roadway merges into a road which lies between the railway tracks and the northeast line of the right of way. This road runs parallel to the tracks, and keeps within the right of way for at least the distance of a city block to the southeast of its junction with the Third street crossing and for a little longer distance to the northwest. It then emerges from the right of way and continues to run northwesterly along the side of the right of way, leading to a dairy a mile distant.

The bridge where the accident occurred is about 300 feet to the northwest of the place where the crossing over the tracks at Third street joins this

road on the right of way, and the bridge and roadway are within the right of way at this point. The railway from Raton to the north and west follows a narrow valley between the mountains. It holds its right of way along this route by virtue of a deed to its predecessor from the Maxwell Land Grant Company. The railroad was constructed about 1879. Before that time there had existed a highway, known as a part of the Santa Fé trail, running from Colorado to and beyond where Raton is now situated. This road had existed since about 1846, and its general course was not far from where the railroad was afterwards built. After the railroad was constructed, the highway fell into disuse, except the portion near where Raton is situated. Raton was platted in 1882, and incorporated as a town in 1891. It is not clear whether the road ran and the bridge was situated, prior to 1891, at the same place where they were at the time of the accident; but it is undisputed that since about 1891 their location has not been changed. A small coal mine, a rock quarry, and a dairy farm were located north and east of Raton, and for more than 20 years before the accident this road along the railroad right of way had been generally and continuously traveled, not only by those who hauled the products of these industries, but by the public generally. It was not shown that the city had constructed or repaired the bridge or the road, or that its officers had recognized it as a public street belonging to the city. It was not shown that the railway company had ever given permission to use its right of way for the purpose of this road, but that use had been well-defined and obvious for more than 20 years. After testimony showing these facts had been heard, the court left to the jury the question whether a public street existed at the scene of the accident, instructing them that the liability of the city depended upon the existence of a public highway at this place by prescription, and that the highway could not be found to exist unless it was shown that it had been traveled and used by the public as a highway, and had as a matter of right been claimed as such for 10 years continuously, uninterruptedly, adversely, and not by mere permission of the owner. The plaintiff had a verdict, and judgment was entered upon the verdict.

A. C. Voorhees, of Raton, N. M. (H. L. Bickley, of Raton, N. M., on the brief), for plaintiff in error.

H. A. Kiker, of Raton, N. M. (Elmer E. Studley, of Long Island City, N. Y., on the brief), for defendant in error.

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

MUNGER, District Judge (after stating the facts as above). [1] The plaintiff in error claims error because the court refused a peremptory instruction in favor of the city. It claims that the evidence was not sufficient to show a public street at this place, because it did not show that the city had ever accepted it by some affirmative act of its officers recognizing it as a street of the city. It then maintains that such an acceptance is necessary under the statutes of New Mexico. It is unnecessary to set out the statutes. They clothe the city of Raton with the usual broad powers of municipal corporations to establish, improve, or vacate streets, and impose a duty to keep the streets open and in repair. Some restrictions are imposed upon the power of the city to condemn property for streets, and other restrictions are imposed upon the creation of streets in platted additions; but no statutory restrictions are found which limit the creation of a street by prescriptive use or which require any formal acceptance of it by official action. Section 3365, Statutes of New Mexico, provides:

"No person or persons, nor their children or heirs, shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments, against any one having adverse possession of the same continuously in good faith, under color of title, but within ten years next after his, her or their right to commence, have or maintain such suit shall have come, fallen or accrued, and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments so held, shall be commenced within ten years next after the cause of action therefor has accrued."

Plaintiff in error does not contend that it is not the general rule, applicable in New Mexico, that a street or highway may be established by prescriptive use, where the general public under a claim of right and not by mere permission of the owner, have used some well-defined way without interruption, but contends that it must also be shown that the municipality accepted or recognized the highway by some act of its officers. Although there is some division in the cases, the better rule and the one established by the weight of authority is that the continuous and adverse use by the public for the requisite time is sufficient to show acceptance of the highway. Bassett v. Inhabitants of Harwich, 180 Mass. 585, 62 N. E. 974; Gallagher v. City of St. Paul (C. C.) 28 Fed. 305; Phelps v. City, 23 Minn. 276; Green v. Canaan, 29 Conn. 157; Jones on Easements, § 459.

[2, 3] Plaintiff in error also contends that a highway cannot be established by prescription over the right of way of the railway company because the right of way is already devoted to a public use. In support of this proposition is cited the case of City of Albuquerque v. Garcia, 17 N. M. 445, 130 Pac. 118, denying the power of condemnation to a city for street purposes of a community acequia in actual use, and the case of Northern Pacific Railway Co. v. Townsend, 190 U. S. 267, 23 Sup. Ct. 671, 47 L. Ed. 1044, holding that an individual could not for private purposes acquire any portion of the right of way of the Northern Pacific Railway Company. But the question here involved is not the power to acquire by condemnation against the railway company's consent, but the power to acquire by prescriptive use, which presumes the consent of the owner; neither is it determined by the decision in the Townsend Case, which interpreted the acts of Congress granting a right of way to the Northern Pacific Railway Company as prohibiting its alienation, for the right of way of the Santa Fé Railway Company is not shown to have been granted by Congress, but is shown to have been acquired by deed from the Maxwell Land Grant Company, and no restriction on alienation is shown to exist. The general and approved rule is that title may be gained by adverse possession to portions of a railway company's right of way (Illinois Central R. Co. v. Houghton, 126 Ill. 233, 18 N. E. 301, 1 L. R. A. 213, 9 Am. St. Rep. 581; Illinois Central R. Co. v. O'Connor, 154 Ill. 550, 39 N. E. 563; Illinois Cent. R. Co. v. Moore, 160 Ill. 9, 43 N. E. 364; Donahue v. Illinois Cent. R. Co., 165 Ill. 640, 46 N. E. 714; Metropolitan Bank of Minneapolis v. Northern Fuel Co., 173 Ill. 345, 50 N. E. 1062; Pittsburgh, C., C. & St. L. Ry. Co. v. Stickley, 155 Ind. 312, 58 N. E. 192; Northern Pacific Ry. Co. v. Townsend, 84 Minn. 152, 86 N. W. 1007, 87 Am. St. Rep. 342; Wilmot v. Yazoo & M. Val. R. Co., 76 Miss.

374, 24 South. 701; Spottiswoode v. Morris & E. R. Co., 61 N. J. Law, 322, 40 Atl. 505; Texas & P. Ry. Co. v. Maynard [Tex. Civ. App.] 51 S. W. 255; Northern Pac. R. Co. v. Ely, 25 Wash. 384, 65 Pac. 555; 2 Corp. Jur. 225, 54 L. R. A. 526, 87 Am. St. Rep. 766, 780, note), and that highways may be established by prescriptive use over or along the right of way of a railway company (Gay v. Boston & A. R. Co., 141 Mass. 407, 6 N. E. 236; Hall v. Boston & M. R. R., 211 Mass. 174, 97 N. E. 914; Pittsburgh, C., C. & St. L. Ry. Co. v. Town of Crow Point, 150 Ind. 536, 50 N. E. 741; Blumenthal v. State, 21 Ind. App. 665, 51 N. E. 496; Gage v. Township of Pittsfield, 120 Mich. 436, 79 N. W. 687; Village of Peotone v. Illinois Central R. Co., 224 Ill. 101, 79 N. E. 678; Gulf, C. & S. F. Ry. Co. v. Bluitt [Tex. Civ. App.] 204 S. W. 441; Gulf, C. & S. F. Ry. Co. v. Bryant [Tex. Civ. App.] 204 S. W. 443).

[4] Plaintiff in error expresses some doubt of the sufficiency of the evidence of a general public use of the road and bridge under claim of right and not by permission of the railway company, to allow the case to be submitted to the decision of the jury. The evidence was ample and undisputed that for more than 20 years there had been general public travel over this highway by all who chose to go. It was used for purposes of business and pleasure. It had the appearance of an established and well-traveled road. The bridge was a very substantial frame structure, and had been in place all of this time. The road connected with and was the direct outlet of one of the main streets of the city. Several residences were built to front on it. No interruption of travel had occurred during this period of time. The use of the road was as general as the nature of the country adjacent to the city required and permitted. There was no evidence of any expressly asserted claim of right to travel over this highway, other than this user; nor was there any evidence that any permission to travel on this way had ever been sought of the railway company, nor that any had ever been granted or denied. The general public use of land as a highway for the prescriptive period, without anything to explain how it began, raised a presumption that it was adverse, under a claim of right, and cast the burden on the city to show that the right was permissive. Washburn on Easements & Servitudes (4th Ed.) 126, 127; Meade v. City of Topeka, 75 Kan. 61, 88 Pac. 574; Hartley v. Vermillion, 141 Cal. 339, 74 Pac. 987; White v. Chapin, 12 Allen (Mass.) 516; Barnes v. Haynes, 13 Gray (Mass.) 188, 74 Am. Dec. 629; Steffy v. Carpenter, 37 Pa. 41; Esling v. Williams, 10 Pa. 126; Polly v. McCall, 37 Ala. 20; Smith v. Ponsford, 184 Ind. 53, 110 N. E. 194; Mitchell v. Pratt, 177 Ky. 438, 197 S. W. 961; Moll v. Hagerbaumer, 98 Neb. 555, 153 N. W. 560; Wendler v. Woodward, 93 Wash. 684, 161 Pac. 1043; Muncy v. Updyke, 119 Va. 636, 89 S. E. 884; Wooldridge v. Coughlin, 46 W. Va. 345, 33 S. E. 233; 19 Corp. Jur. 959.

Upon the record, we think the evidence was sufficient for the jury to find the existence of a public street at the place of the accident, and the judgment will be affirmed.

WILLIAMS et al. v. COW GULCH OIL CO.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1921.)

No. 5508.

1. **Specific performance ⟸65—Action for damages not adequate, and does not bar remedy.**
An action for damages for the breach of a contract to convey land does not afford as adequate a remedy as a suit for specific performance, and is no answer to such a suit, as it does not place the parties in the same situation as before the agreement was made, and is not as prompt, complete, and efficient as a suit in equity.

2. **Specific performance ⟸65—May not be denied when consideration has been paid, except for insuperable principle of law.**
In equity, the vendee of land under a contract of the vendor to convey to him is treated as the owner, and the vendor is deemed to stand seized of the land in trust for the vendee, and when the entire purchase price has been paid the equity of the vendee is of the highest character, and specific performance may not be denied, unless forbidden by some insuperable rule of law or equity.

3. **Specific performance ⟸29(2)—Contract to convey part of tract to be selected by agent held sufficiently certain.**
A contract by one owning 6,320 acres of oil and gas lands to convey 640 acres of the probable average value per acre of the remaining acreage, to be selected by a designated agent of the vendor, or, if he cannot act, by some other competent geologist, is sufficiently certain to support specific performance, under the rules that what one agrees to do by another he agrees to do himself, and that that is certain which can be made certain.

4. **Specific performance ⟸29(2)—Contract requiring selection of land by third person enforceable.**
A contract for the sale of land of the probable value of the vendor's remaining land, to be selected by a third party, may be enforced in equity by the selection of the land itself, or by appraisals or arbitrators, or a master which it may appoint.

5. **Specific performance ⟸105(1)—Attempted performance by defendant before time for performance held to authorize suit.**
Where a vendor agreed to convey 640 acres of the probable average value of its remaining land, when it had cleared its title, the land to be selected by a designated agent, but before it had cleared its title the agent selected land in bad faith of a much less probable value than that of the remaining acreage, which the purchaser refused to accept, a suit for specific performance was not prematurely brought, as the attempted performance compelled plaintiff to proceed, or incur the danger of an estoppel.

6. **Vendor and purchaser ⟸160—Contract to convey land of average value of remaining land not performed by conveyance of land of substantially less value.**
An agreement to convey 640 acres of land of the probable average value of the vendor's remaining acreage, to be selected by a designated agent, is not performed by the selection and conveyance of land of substantially less probable value than the average value of the remaining acreage, whether selected by the designated agent or by some other person.

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit by Frederick A. Williams and others, as executors of Louis D. McCall, deceased, against the Cow Gulch Oil Company. From an

order dismissing the suit, plaintiffs appeal. Reversed and remanded, with directions.

William A. Riner and Frederick A. Williams, both of Cheyenne, Wyo., for appellants.

John D. Clark, of Cheyenne, Wyo., for appellee.

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

SANBORN, Circuit Judge. This is an appeal from an order of dismissal of the suit of Louis D. McCall to enforce the specific performance of a contract of the Cow Gulch Oil Company, a corporation, to assign to him an oil and gas lease or leases of 640 acres of land in the Buck Creek oil field in the state of Wyoming. The dismissal was made on the motion of the Oil Company, on the ground that the allegations of the complaint were insufficient to enable the plaintiff to maintain his suit in equity, because the land, the oil and gas leases upon which the Oil Company agreed to convey, was not described with sufficient certainty in the contract to justify a court of equity in enforcing specific performance thereof.

The contract is set out in the complaint. The parties to it were Louis D. McCall and the Oil Company. It was in writing, and was made, signed by the Oil Company, by its president, J. W. McKim, and delivered to the plaintiff on May 13, 1917. It recited that the Oil Company had received from McCall an oil and gas lease of four oil placer mining claims, each consisting of 160 acres, in Natrona county, state of Wyoming; that it then held titles and possessory rights by gas and oil leases from locators in and to various tracts of land in the Buck Creek oil field in Natrona county, Wyo., and was conducting negotiations for the necessary clearance of its titles covering these premises; that in consideration of the oil and gas lease to the four placer claims, consisting of 640 acres, which it had received from McCall, it would immediately upon completion of its negotiations and the clearance of its titles to the oil and gas leases it had acquired to lands in the Buck Creek field, assign to him all its right, title, and interest and leasehold estate in its oil and gas leases and claims upon 640 acres of the land it should then hold, of an average probable value per acre of the remaining lands it should then hold, which 640 acres should be selected by J. W. McKim as its agent, or in case of his inability to make such selection by some other competent geologist. In addition to setting forth this contract, the plaintiff alleged in his complaint that the Oil Company was and still is the owner of certain oil and gas placer mining locations or oil and gas leases of lands in the Buck Creek oil fields, which are clearly described and identified in the complaint, and which amount in the aggregate to about 6,320 acres; that he demanded that the defendant make assignments to him of oil and gas leases of 640 acres of these lands, of the probable average value per acre of that portion of these lands that should be retained by the Oil Company; and that it has refused so to do.

There are no other allegations in the complaint pertinent to the answer to the objection that the contract fails to describe the leases of

the lands to be assigned with sufficient certainty to justify a court of equity in enforcing its specific performance. "The jurisdiction of courts of equity to decree the specific performance of agreements," says the Supreme Court, "is of a very ancient date, and rests on the ground of the inadequacy and incompleteness of the remedy at law. Its exercise prevents the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach." Union Pacific R. R. v. Chicago, R. I. & P. Ry., 163 U. S. 564, 600, 16 Sup. Ct. 1173, 1187 (41 L. Ed. 265).

[1] An action at law for damages for the breach of a contract to convey land does not afford as adequate a remedy as a suit in equity for specific performance, and it is no answer to such a suit because, in the case of a contract for real estate, the action at law does not place the parties in the same situation in which they were before the agreement was made, and it is not as prompt, complete, and efficient as is the suit in equity. Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 11, 76 C. C. A. 516, 519, 8 Ann. Cas. 660; Boyce v. Grundy, 3 Pet. 210, 215, 7 L. Ed. 655; Williams v. Neely, 134 Fed. 1, 10, 67 C. C. A. 171, 181, 69 L. R. A. 232; Wilhite v. Skelton, 149 Fed. 67, 72, 78 C. C. A. 635, 640.

[2, 3] In equity, the vendee of land, or of a right or interest therein under a contract of the vendor to convey it to him, is treated as the owner thereof, and the vendor is deemed to stand seized of it in trust for the vendee, and when, as in the case at bar, the entire purchase price has been paid and is in the hands of the vendor, who refuses to perform his part of the agreement, the equity of the vendee is of the highest character, and specific performance of the contract may not be denied, unless it is forbidden by some insuperable principle or rule of law or equity. Gunton v. Carroll, 101 U. S. 426, 430, 431, 25 L. Ed. 985. Why, then, may not a court of equity compel the performance of this contract? Counsel answer, because it does not point out and specifiy by section, town, and range the particular 640 acres in the Oil Company's 6,320 acres, the oil and gas leases upon which the Oil Company agreed to convey. But the Oil Company's contract is more than a mere agreement to convey oil and gas leases on 640 acres of land that cannot be identified. It is an agreement that the oil company will convey oil or gas leases of 640 acres of its 6,320 acres, of the probable average value per acre of the 5,680 acres thereof which will remain after such conveyance, and that the 640 acres to be conveyed shall be selected by "J. W. McKim as agent for said undersigned" (the Oil Company), or in case he cannot act "by some other competent geologist."

What one does or agrees to do by another, he does or agrees to do himself, and the incontestable legal effect of this contract was and is that the Oil Company would select by its chosen agent out of its oil and gas leases of 6,320 acres and convey to the plaintiff oil and gas leases on 640 acres thereof, of a probable average value per acre of its remaining acreage. That is certain which can be made certain, and if the 6,320 acres out of which the 640 acres are to be selected are

readily ascertainable from their description in the contract as the lands in the Buck Creek oil field on which the Oil Company had oil and gas leases at the time the performance of the agreement became due, if the character and value of the 640 acres was specified in the contract as 640 acres of the probable average value of the remainder of the 6,320 acres, and if the Oil Company agreed to make the selection of this land by its agent, and to convey it, there is no doubt or uncertainty about the oil and gas leases upon the lands which the Oil Company agreed to convey which cannot be made certain, and there is no tenable objection here to the enforcement of the contract by a court of equity.

[4] A contract by a vendor to convey a certain number of acres of land out of a larger tract described, of the average value of the remainder of the latter tract, contains a sufficient description of the land to be conveyed to sustain a suit by the vendor, who has paid the full consideration, and empowers him to make the selection. McCarty v. May (Tex. Civ. App.) 74 S. W. 804, 805; Oxsheer v. Watt, 91 Tex. 124, 41 S. W. 467, 468, 66 Am. St. Rep. 863; Nye v. Moody, 70 Tex. 434, 8 S. W. 606, 607; Call v. Gray, 37 N. H. 428, 75 Am. Dec. 141; Winnipiseogee Paper Co. v. Eaton et al., 65 N. H. 13, 18 Atl. 171, 172. Again a contract by a vendor to convey a certain number of acres of land out of a larger tract described, of the average value of the latter tract, and to be selected by the vendor, contains a sufficient description of the land to be conveyed to sustain a suit for its performance by a vendee who has paid the consideration thereof. Fleishman v. Woods, 135 Cal. 258, 259, 67 Pac. 276. And when the contract conditions its performance by a selection, appraisal, or arbitration by a third party or third parties, a court of equity has ample power to effect the performance by its decree, and by the selection of the land itself, or by appraisals or arbitrators, or a master which it may appoint. Gunton v. Carroll, 101 U. S. 426, 430, 25 L. Ed. 985; Castle Creek Water Co. v. City of Aspen, 146 Fed. 8, 11, 12, 76 C. C. A. 516, 519, 520, 8 Ann. Cas. 660; Lowe v. Brown, 22 Ohio St. 463, 467. So it is that upon an application to the contract here under consideration of the rule that that is certain which may be made certain in the light of the allegations of the complaint, the objection that the land, the oil and the gas leases upon which the oil company agreed to convey, is not described in the written contract with sufficient certainty to warrant a decree of its specific performance, is untenable, and the decree of dismissal cannot be sustained upon this ground.

[5] Three other objections in support of the dismissal are urged to the complaint: That the date at which the value of the acreage in question is to be determined is not fixed by the contract; that the defendant has fully performed the agreement; and that this suit was brought before the time for the defendant's performance arrived. The facts conditioning these objections which are alleged in the complaint are: That the oil company agreed to convey the 640 acres to be selected by McKim or some other competent geologist, immediately upon its completion of its negotiations for the clearance of its titles to the 6,320 acres; that it did not act with due diligence to clear those titles; that at some time prior to February 12, 1918, A. W. McKim,

as the Oil Company's agent, selected out of its oil and gas leases on lands in the Buck Creek field its oil and gas leases on a certain 640 acres; that the defendant assigned these leases to the plaintiff on February 12, 1918, and recorded the assignment; that the defendant had not then, and had not when the complaint herein was filed, cleared the title covering the premises; that the 640 acres so selected was of a much less probable value than the average value of the defendant's remaining acreage; that McKim's selection was not made in good faith, was a gross abuse of his discretion, and a gross violation of the trust reposed in him, and that the assignment of the 640 acres has never been delivered to the plaintiff; that he has never accepted it, that he disclaims any interest thereunder, and that he duly notified the defendant that the selection was unauthorized and that he would not assent to it.

There can be no doubt that under these facts the time for the determination of the average value of the lands in question, and for the selection and conveyance by the defendant, was either when the defendant completed its negotiations for the clearance of its titles, or when by the exercise of reasonable diligence it might have completed them, were it not for the facts that as early as February 12, 1918, the defendant made the assignment of the leases on the 640 acres and acted upon the theory that the time for its performance had arrived, and the plaintiff on February 18, 1919, filed his complaint and prayed for specific performance of the contract. In this state of the facts there is no merit in the objection that the suit was prematurely brought. By its attempted performance of the contract by the assignment of the leases of the 640 acres and the record thereof, it compelled the plaintiff to proceed or to incur the danger of an estoppel from proceeding later by reason of acquiescence or laches after the assignment was made, and the defendant is thereby estopped from now insisting that the plaintiff brought his suit too early.

[6] Nor do the facts alleged in the complaint evidence a performance of the contract by the defendant. It agreed to convey to the plaintiff oil and gas leases on 640 acres out of its gas leases on 6,320 acres, of the probable average value of its remaining acreage in the Buck Creek coal field, and it agreed to select this land of average value by its agent, McKim, or, if he was unable to act, by some other competent geologist. But the conveyance of leases on 640 acres, of the probable average value per acre of the remaining acreage, was the major and indispensable condition of the promised performance. If this condition be fulfilled, the selection may have been made or may be made by McKim, or by a master or other appointee of a court of equity, and in that case the contract may be specifically performed. But it cannot be specifically performed by the selection and conveyance of oil and gas leases on 640 acres of one-third, or of one-half, or of substantially less than the whole, of the probable value per acre of the average value of the remaining acres, whether the selection be by McKim or by any other party or person. The plaintiff alleges that the acreage of the 640 acres, the oil and gas leases upon which the defendants assigned to the plaintiff, was of much less probable value than the average value of the

defendant's remaining acreage in the Buck Creek oil field. A conveyance of such oil and gas leases was not a performance of the contract, and it is also alleged in the complaint that McKim, who acted under the contract as defendant's agent in the selection, grossly abused his discretion and violated his trust in making it.

No insuperable obstacle, either at law or in equity, to the enforcement of the specific performance of this contract, is perceived, and the decree below must be reversed, and the case must be remanded to the court below, with directions to permit the defendant to answer, and to take further proceedings in accordance with the views expressed in this opinion; and it is so ordered.

SAVAGE v. UNITED STATES.*

(Circuit Court of Appeals, Eighth Circuit. December 28, 1920.)

No. 5549.

1. **Indictment and information ⟸203—One valid count, sufficient to sustain sentence, prevents reversal for defective indictment.**
   A conviction will not be reversed for error in overruling the motion to quash the demurrer to the indictment, which contained 15 counts, on all of which defendant was convicted, if any count was valid, and the sentence imposed did not exceed that which could have been imposed on conviction of any one count.

2. **Post office ⟸48(4)—Indictment for fraud need not allege organization of partnership, whose name defendant appropriated.**
   Under Rev. St. Colo. 1908, § 4778, as construed by the Supreme Court of that state, the failure of a partnership to file the affidavit of organization therein required does not prevent it from doing business, and therefore an indictment for using the mails in furtherance of a fraudulent scheme to form a corporation having the same name as the partnership, and purchase goods from those relying on the partnership's credit, need not allege that the partnership was duly organized.

3. **Criminal law ⟸1186(4)—Failure to allege organization of partnership, whose name was appropriated, held not prejudicial.**
   Where the substance of the fraudulent scheme charged was not the mere use of the corporate name similar to the name of an existing partnership association, but its use to obtain the benefit of the credit and reputation of the partnership, to obtain goods intended for the partnership, failure to allege that the partnership, then doing business and in actual operation, was duly organized, did not prejudice the defendant, so as to make the indictment fatally defective, in view of Rev. St. § 1025 (Comp. St. § 1691).

4. **Post office ⟸48(4)—Particulars of scheme to defraud need not be alleged with same certainty as mailing letter.**
   In an indictment for use of the mails in furtherance of a scheme to defraud, the particulars of the scheme are matters of substance, and must be set forth with sufficient certainty to acquaint the defendant with the charge against him; but the gist of the offense is the mailing of the writing, in pursuance of the scheme, so that the scheme need not be pleaded with the certainty as to time, place, and circumstance required in charging the gist of the offense.

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

*Rehearing denied May 19, 1921.

5. **Post office ⇐35—Use by corporation of name of partnership held fraudulent scheme.**
The mailing of letters in furtherance of a scheme to defraud, by forming a corporation having the same name as a partnership, and thereby obtaining the credit and reputation of the partnership, is not disproved by the fact that the letter mailed was on a letter head having the word "(Inc.)" after the name, and giving the true address of the corporation, where it was signed merely by the association name, since it is unnecessary to allege or prove that the letters mailed in furtherance of a scheme to defraud were calculated to be effective in carrying out the scheme.

6. **Criminal law ⇐1149—Denial of bill of particulars not reviewable.**
A motion by accused for a bill of particulars is addressed to the discretion of the court, and ordinarily his denial thereof is not reviewable.

7. **Criminal law ⇐1054(3)—Insufficiency of evidence may be reviewed without exception.**
Even though no exception was taken to the denial of defendant's motion for a directed verdict, the evidence can be examined on writ of error to see whether there is substantial evidence to support the conviction.

8. **Criminal law ⇐1175—Evidence to sustain any count authorizing sentence is sufficient.**
Where accused was convicted on all 15 counts of the indictment against him, and the sentence could have been imposed for conviction on any one of the counts, the conviction will not be reversed for insufficiency of the evidence, if there is sufficient evidence to sustain any one count.

9. **Post office ⇐35—Acts held to constitute fraudulent scheme, furthered by use of mails.**
That defendant, after being informed that a partnership association had an exclusive contract to handle a certain manufacturer's goods, formed a corporation having the same name as the association, and ordered goods from the manufacturer, directing them to be shipped to the corporation's address, and thereafter failed to pay for the goods, showed a fraudulent scheme by defendant, warranting conviction for using the mails in furtherance thereof.

10. **Post office ⇐49—Evidence held to show corporate transactions were for defendant's scheme.**
In a prosecution for using the mails in furtherance of a scheme to defraud, evidence that the corporation which obtained the goods was formed by accused and two others, neither of whom had any interest therein, and that accused was solely in charge of the business, *held* to warrant the jury in believing that defendant was the designed beneficiary of the fraudulent transactions.

11. **Criminal law ⇐1129(4)—Assignments of error in admitting groups of testimony or exhibits are not proper.**
An assignment of error in the admission in evidence of a portion of the testimony of 7 different witnesses relating to different subjects, and an assignment of error in admitting in evidence 100 different exhibits, violate Circuit Court of Appeals rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), requiring each error to be set out separately and particularly.

12. **Criminal law ⇐1036(4), 1054(1)—Admission of evidence without objection or exception cannot be reviewed.**
Assigned error in admitting testimony concerning a contract, without having the contract in evidence, does not require reversal, where no objection was made at the trial with reference to the testimony as to one exhibit, and no exception as to the court's ruling on the other exhibits.

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13. **Criminal law ⊜1169(4)—Admission of testimony concerning exhibits thereafter introduced is not error.**
Admitting testimony, over objection that it was concerning an exhibit not yet in evidence, was not error, where the exhibit was offered and received in evidence after a few more questions, and before the cross-examination of the witness.

14. **Criminal law ⊜402(2)—Copies of writings in defendant's hand admissible, without demand for originals.**
In a prosecution for using the mails to defraud, copies of writings, the originals of which were shown to have been in the possession of defendant or the companies controlled by him, could be given in evidence, without the defendant being notified to produce the originals.

15. **Post office ⊜49—Defendant held to have made bank agent for mailing draft.**
In a prosecution for mailing a draft in furtherance of a scheme to defraud, evidence that defendant's employé, by his direction, signed the draft as an officer of the corporation controlled by defendant, and that it was deposited in the bank where the corporation kept an account, and by the bank sent by mail to another bank for presentation to the drawee, with evidence showing similar general method of doing business by the use of sight drafts deposited, to be sent through the mails for collection, shows that the draft was intrusted to the mails by the bank at the instance and request of defendant, and is sufficient.

16. **Criminal law ⊜762(5)—Court may express opinion defendant is guilty.**
A statement by the court in his instructions that he was of opinion defendant was guilty on all but four counts, with repeated statements that was a mere opinion, and that the jury should follow its own judgment, and disregard the court's opinion, if they were of a contrary opinion, was not error.

17. **Criminal law ⊜1059(2)—General exception to charge insufficient, if any portion is correct.**
Error cannot be predicated on a general exception to the charge of the court in a criminal prosecution, where any part of the charge was correct.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

John A. Savage was convicted of using mails with intent to defraud, and he brings error. Affirmed.

William H. Dickson, of Denver, Colo., for plaintiff in error.

Otto Bock, 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 and CARLAND, Circuit Judges, and MUNGER, District Judge.

MUNGER, District Judge. The plaintiff in error (hereafter called defendant was convicted of a violation of section 215 of the Penal Code (Comp. St. § 10385). The indictment contained 15 counts. Four different schemes were alleged, with a charge in each count of the mailing of a letter or other writing in the attempted execution of the scheme. In each count it was charged that the defendant devised a scheme to defraud by planning to incorporate a company under the laws of Colorado, adopting as its name the firm name of an existing unincorporated partnership or association then doing business, and in op-

eration, buying and selling merchandise, of which latter company defendant would not be a member and in which he would have no interest, and further planning to have stationery and letter heads printed bearing the name of the unincorporated company. Some of the counts aver that the defendant also planned to ascertain from whom the unincorporated association purchased goods, and then through letters, telegrams, and other means of communication to receive merchandise not intended for him, and for which he would not pay but would convert to his own use. Other counts charged a plan to obtain goods without paying for them, without averring that the persons to be defrauded had previously sold goods to the unincorporated company. Other counts charged plans to have the mail intended for the unincorporated company diverted to his company, and thereby to ascertain to whom the unincorporated company had made shipments of goods, and then to obtain control of such merchandise and to obtain payment for it himself; the remaining counts charged a plan to obtain possession of checks and negotiable instruments belonging to the unincorporated company, and then to convert them and their proceeds to his own use. The defendant was found guilty under each count of the indictment, and a single sentence was imposed.

[1] The defendant contends that it was error to overrule his motion to quash, and his demurrer to, the indictment. No exception was taken to the ruling of the court, but independently of this the sentence imposed did not exceed that which could have been rendered upon conviction under any count of the indictment, and therefore there would be no reversible error, if one of the 15 counts stated an offense. Claasen v. United States, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; Evans v. United States, 153 U. S. 608, 609, 14 Sup. Ct. 939, 38 L. Ed. 839; Abrams v. United States, 250 U. S. 616, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173; Pierce v. United States, 252 U. S. 239, 40 Sup. Ct. 205, 64 L. Ed. 542; Doe v. United States, 253 Fed. 903, 904, 166 C. C. A. 3; United States v. Lair, 195 Fed. 47, 50, 115 C. C. A. 49; Haynes v. United States, 101 Fed. 817, 819, 42 C. C. A. 34.

[2] It is said that no scheme to defraud was stated, because it was not alleged that the unincorporated partnership or association whose name the defendant would adopt as a corporate name for his incorporation, was a duly organized partnership or association. In support of this contention is cited section 4778 of the Revised Statutes of Colorado (1908), which provides that such associations shall file with a county officer an affidavit setting forth the full names and addresses of all persons so represented, and that in default of such filing the association shall not be permitted to sue for the collection of debts, and the person in default shall be guilty of a misdemeanor. The penalties thus imposed are limited, and do not expressly deprive the associations of the right to transact business, and as interpreted by the Supreme Court of Colorado, the statute is to be strictly construed and does not embrace any penalty except those provided by the terms of the act. Wallbrecht v. Blush, 43 Colo. 329, 332, 95 Pac. 927.

[3] Moreover the substance of the scheme charged was not the

mere use of a corporate name similar to the name of an existing association, but to use it so as to have the credit and reputation of the other company in order to obtain goods not intended for defendant, and for which he would not pay, and the failure to allege that the unincorporated partnership or association, then doing business and in actual operation, was duly organized, did not prejudice the defendant, and make the indictment fatally defective, in view of the provisions of section 1025, Rev. Stat. (section 1691, U. S. Comp. Stat.). See McClendon v. United States, 229 Fed. 523, 525, 143 C. C. A. 591.

[4] The particulars of the scheme are matters of substance, and must be set forth with sufficient certainty as to its existence and character that the indictment will fairly acquaint the defendant with the scheme charged against him; but the gist of the offense is the mailing of the letter, writing, or article in pursuance of the scheme, and the scheme itself need not be pleaded with all the certainty as to time, place, and circumstance that is required in charging the gist of the offense, the mailing of the matter in execution or attempted execution of the scheme. Colburn v. United States, 223 Fed. 590, 592, 139 C. C. A. 136; McClendon v. United States, 229 Fed. 523, 525, 143 C. C. A. 591; Gardner v. United States, 230 Fed. 575, 578, 144 C. C. A. 629; MacKnight v. United States (C. C. A.) 263 Fed. 832, 837.

[5] It is urged that some counts of the indictment do not state an offense, and no offense under them was proved, because the letters set out in the indictment and given in evidence bore a heading which read "The Rocky Mountain Purchasing Association (Inc.), 311 Ideal Building, Denver, Colorado," and that the words "the," the abbreviation "(Inc.)" and the address "311 Ideal Building" showed no intent to defraud as it clearly indicated that the defendant's company, and not the unincorporated company, was transacting the business. But the letters are signed by the same name as that of the unincorporated association, and the contents of the letters are such as might readily lead the addressees to believe they were dealing with the unincorporated association. It is not necessary to allege or to prove that the letters mailed in pursuance of the scheme to defraud under this section of the Penal Code are calculated to be effective in carrying out the scheme. Durland v. United States, 161 U. S. 306, 315, 16 Sup. Ct. 508, 40 L. Ed. 709; Lemon v. United States, 164 Fed. 953, 957, 90 C. C. A. 617.

There are 4 counts, numbered 11, 12, 13, and 15, which set out writings in which appear only the name "The Rocky Mountain Purchasing Association," and count 14 alleges a writing setting out the name "Rocky Mountain Pur. Ass'n." We see no reason for holding the indictment invalid, because of any of the objections urged.

[6] It is assigned that the court erred in refusing the defendant's motion for a bill of particulars, but such a motion is addressed to the discretion of the court and ordinarily is not reviewable (Dunlop v. United States, 165 U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799; Knauer v. United States, 237 Fed. 8, 13, 150 C. C. A. 210; Horowitz

v. United States [C. C. A.] 262 Fed. 48, 49); and no such motion is found in the record.

[7, 8] Complaint is made because the case was submitted to the jury. At the close of the evidence the defendant asked for opportunity to present a motion for a directed verdict, and the court answered that it would be overruled, but gave leave to put it in any form desired later on. No exception was taken to the ruling of the court, and no motion appears to have been filed or presented. Notwithstanding this failure to accept, the court may notice a claim that the evidence is insufficient (Doe v. United States, 253 Fed. 903, 915, 166 C. C. A. 3), and the record has been examined to see whether there is substantial evidence in support of any count of the indictment, for the rule is that a judgment of conviction will not be reversed for insufficiency of the evidence, if it is sufficient to support one of several counts in the indictment and the penalty imposed is not in excess of that which could be imposed under that count. Blackstock v. United States (C. C. A.) 261 Fed. 150, 152; Bold v. United States (C. C. A.) 265 Fed. 581, 582; Schoborg v. United States (C. C. A.) 264 Fed. 1, 10; Wessels v. United States (C. C. A.) 262 Fed. 389, 391; Baldwin v. United States, 238 Fed. 793, 795, 151 C. C. A. 643; Harrington v. United States (C. C. A.) 267 Fed. 97, 103.

[9] It is not very seriously contended that the defendant did not cause the letters and writings to be mailed as charged in the indictment, but the claim is that no scheme to defraud was proved. No extensive review of the evidence is practicable, but there was evidence relating to the first 5 counts tending to show that the defendant had been the active manager and apparently the only person interested in a company at Denver called the Northwestern Supply Company. This company dealt in electrical and automobile supplies. It opened correspondence with the Miniature Incandescent Lamp Corporation of New Jersey, seeking to purchase automobile lamps made by the latter company. The New Jersey company refused to quote prices, and referred the inquirer and the inquiry to the Rocky Mountain Purchasing Association of Denver, with whom it had a contract for the exclusive sale of its goods in that territory. The manager of the Rocky Mountain Purchasing Association telephoned to the Northwestern Supply Company, and gave prices at which the lamps could be purchased. About a week afterwards the defendant had prepared and filed at Denver the articles of incorporation of a company also called the Rocky Mountain Purchasing Association. Three days later this corporation sent a telegram to the New Jersey company, asking how soon it could ship several thousand lamps. The telegram was signed by the name of Rocky Mountain Purchasing Association, and directed that all mail and telegrams to the Denver office should be sent to 311 Ideal Building, which was not the address of the company having the contract with the New Jersey company. This was soon followed, within less than three weeks, by three other telegrams ordering 12,000 lamps, each signed in the same way. This merchandise was shipped, and none of it was ever paid for. A large amount of correspondence and testimony was offered,

which afforded a proper basis for the jury to find that the defendant had formed a plan to use the name of the other company at Denver, and thereby to deceive and defraud the seller of these goods, and to acquire them without intending to pay for them. There was ample evidence to sustain the jury's verdict in support of some, if not of all, of the other schemes alleged.

[10] It is particularly objected that it was not shown that the plan contemplated any gain to be derived by the defendant personally, as the dealings were all in the corporate name; but it was shown that of the three incorporators, two had no interest then or afterwards in the company, and that no one but the defendant ever appeared to have any interest in it. He was the active and sole manager, and the employés never knew of any one else in connection with the business, and from these and other facts the jury were warranted in believing the defendant was the designed beneficiary of the transactions.

[11] There are two assignments of error relating to rulings upon admission of evidence. The first assigns error in the admission in evidence of portions of the testimony of 7 different witnesses relating to different subjects. The second alleges error in admitting in evidence of 100 different exhibits. This is a violation of rule 11 of the Court of Appeals Rules (150 Fed. xxvii, 79 C. C. A. xxvii), which requires that each error shall be set out separately and particularly. Davidson S. S. Co. v. United States, 142 Fed. 315, 318, 73 C. C. A. 425; Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 457, 461, 77 C. C. A. 601; Smith v. Hopkins, 120 Fed. 921, 923, 57 C. C. A. 193. But the assignments have been considered in detail. Defendant's counsel admit that none of the first group of rulings may be sufficient to require a new trial, and we think those that are argued are plainly without merit.

[12, 13] It is said that the court allowed witness Blunt to testify about a contract without placing it in evidence; but no such objection was made on the trial as to Exhibit 10, and no exception was taken to the court's ruling on the other exhibits. The objection to witness Mandel's testimony regarding arrangements made by defendant's incorporation for receiving mail are not founded upon any assignment of error. A further objection to her testimony is based upon the objection that it was concerning an exhibit not yet in evidence; but the exhibit was offered and received in evidence after a few more questions and before her cross-examination.

[14] While the other assignment of error challenges the rulings of the court in admitting in evidence of 100 separate exhibits, the defendant's brief limits the challenge to the admission of 75 of them. Some of the objections are founded upon the untenable theory that copies of writings, where the originals were shown to have been in the possession of defendant or of the companies controlled by him, could not be given in evidence until the defendant had been notified to produce the originals.

[15] Another objection is the lack of proof to show that the defendant caused the mailing of a sight draft set forth in the thirteenth count. It was shown that defendant's stenographer by the defendant's

direction signed this draft as assistant treasurer of the defendant's corporation, and it was deposited by some one for the corporation in the Ideal State Bank at Denver, where the corporation kept an account. It was sent by the bank through the mails to another bank in Colorado for presentation to the drawee, a customer who had purchased goods from the rival company, was paid, and the proceeds were transmitted to the Ideal State Bank, and the bank deposited the amount in the account of the defendant's corporation. There was other evidence showing a similar general method of doing business by the use of sight drafts deposited by the defendant or his company to be sent through the mails for collection. While it was not shown that defendant himself intrusted this draft to the mails, it was done by the bank at his instance. As was said in a similar case (Spear v. United States, 246 Fed. 250, 251, 158 C. C. A. 410, 411):

"Collection of the drafts and checks was essential to the full consummation of the fraud, and the evidence of Spear's guilty assistance was sufficient. When he intrusted them to the bank he made it his agent, although it was innocent of the fraud. United States v. Kenofskey, 243 U. S. 440, 37 Sup. Ct. 438, 61 L. Ed. 836. The drafts and checks were drawn on banks in distant cities. The custom among banks, almost invariable, is to forward such collection items by mail with letters of transmittal, and Spear must have known the local bank would follow the ordinary course in the absence of instructions to the contrary. When the bank deposited the letters of transmittal in the mails, Spear, in legal effect, caused them to do so. United States v. Kenofskey, supra."

The rulings of the court as to each of the other exhibits have been carefully considered, and no serious error has been found affecting the substantial rights of the defendant, or which requires a reversal of the judgment, in view of the provision of section 269 of the Judicial Code (Comp. St. § 1246).

[16] Complaint is made of a portion of the instructions expressing the court's opinion as to the guilt of the defendant founded upon a general exception to "the remarks of the court concerning the guilt or innocence of the defendant." The court said that, as to four transactions which were named and described, there could not be any doubt that a fraud was perpetrated, but left it to the jury to find who had perpetrated the frauds. The court further said that it was of the opinion that the defendant was guilty on all counts but 4 and refused to express an opinion as to the defendant's guilt as to those 4. The court stated repeatedly that this was a mere expression of its opinion, and that the jury were not bound by it, and that it was the jury's duty to follow its own judgment, and that, if the jury were of a contrary opinion, it was its duty to disregard the court's opinion. In the courts of the United States the judge may state to the jury his opinion upon the evidence, provided they are left free to determine the facts. Allis v. United States, 155 U. S. 117, 123, 15 Sup. Ct. 36, 39 L. Ed. 91; Horning v. District of Columbia (decided Nov. 22, 1920), 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed. —; Aerheart v. St. Louis, I. M. & S. Ry. Co., 99 Fed. 907, 909, 40 C. C. A. 171; Smith v. United States, 157 Fed. 721, 732, 85 C. C. A. 353; Keller v. United States, 168 Fed. 697, 698, 94 C. C. A. 368.

[17] Other portions of the charge are criticized, but the criticisms cannot be considered, because there was only a general exception to the charge, other than has been stated, and error cannot be predicated upon such a general exception, where any part of the charge was correct. Block v. Darling, 140 U. S. 234, 238, 11 Sup. Ct. 832, 35 L. Ed. 476; McClendon v. United States, 229 Fed. 523, 527, 143 C. C. A. 591; Tucker v. United States, 224 Fed. 833, 841, 140 C. C. A. 279; Donaldson v. United States, 208 Fed. 4, 7, 125 C. C. A. 316.

The judgment will be affirmed.

COLES et al. v. DENSLOW et al.

(Circuit Court of Appeals, Eighth Circuit. January 6, 1921.)

No. 5624.

1. **Appeal and error ⇐187(2)—Objection to misjoinder of plaintiffs cannot be first made on appeal.**
   In a suit for the specific performance of an option for the purchase of land, the objections that a subsequent purchaser from the optionees was improperly joined as plaintiff cannot be first raised on appeal, especially where the defendants asked affirmative relief against that plaintiff, as well as against the others.

2. **Principal and agent ⇐69(1)—Agent making profit owes duty to disclose all facts to principal.**
   An agent owes his principal the duty to communicate all facts coming to his knowledge in respect to the agency, to act with the utmost good faith, and not to use the subject-matter of the agency or information acquired therein to make a profit for himself without the knowledge and consent of the principal, and where the agent's acts are questioned it is incumbent upon him to establish that he acted openly, fairly, and honestly.

3. **Specific performance ⇐121(8)—One of several agents to sell property held not to have concealed facts in buying from principal.**
   In a suit for specific performance of an option for the sale of land, evidence *held* not to show that one of the optionees, who was one of several agents for the sale of the land, concealed any fact within his knowledge from the owner, and therefore not to defeat the right to specific performance, especially where there was nothing to impeach the contract as to the other optionees.

4. **Vendor and purchaser ⇐18(½)—Optionees can contract for resale of property at profit.**
   The holders of an option for the purchase of land, which was not assignable without consent of the owner, can contract without such consent for the resale of the land at a profit, without defeating their right to specific performance of the option contract.

5. **Appeal and error ⇐1054(1)—Admission of irrelevant evidence in trial to court not prejudicial.**
   In a suit for specific performance, tried to the court, the admission in evidence of a conversation, which was irrelevant, was not prejudicial.

6. **Specific performance ⇐120—Expenditures by purchasers competent to determine equities.**
   In a suit for specific performance of an option for sale of land, evidence as to expenditures made on the land by the optionees is relevant as to the equities of the case, and is competent.

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

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

Suit for specific performance of a contract for the sale of land by Jay H. Denslow and others against Frank A. Coles and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Frank C. Goudy, L. F. Twitchell, J. H. Burkhardt, and Frank B. Goudy, all of Denver, Colo., for appellants.

Charles A. Stokes, Jesse H. Sherman, and Charles A. Murray, all of Denver, Colo., and Robert Kerr, of Colorado Springs, Colo., for appellees.

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

CARLAND, Circuit Judge. On April 10, 1917, appellees Richardson, Church, and Johnson entered into a contract with appellant Coles as lessor for the leasing of the Pomona Ranch, located in Jefferson county, Colo., and certain water rights appurtenant thereto. The lease was to expire March 1, 1918. The ranch contained about 900 acres of land and is more particularly described in the record. The stipulated rent was $4,000. The lease also contained a grant of an option by Coles to the above-named appellees to purchase the leased premises, and 35 shares of the capital stock of the Farmers' Highline Canal & Reservoir Company, and all water rights appurtenant to the ranch for the sum of $85,000; $500 cash, $14,500 cash on or about March 1, 1918, and $70,000 in deferred payments, secured by mortgage on the property to be sold. By the terms of the option, Coles was to deliver a deed of conveyance to the purchasers upon payment of the $14,500 cash. No assignment of the option was to be valid unless Coles should consent thereto in writing. If the purchasers decided to exercise their option, they were to notify Coles personally or by registered mail, not later than January 1, 1918. Time was declared to be of the essence of the contract, which bound the heirs, executors, administrators, and assigns of the parties thereto.

About September 1, 1917, Church, Johnson, and Richardson entered into a contract with appellee J. H. Denslow by the terms of which they agreed to sell to Denslow the Pomona Ranch and the water rights heretofore mentioned for $100,000, payable as follows: $500 cash, $5,000 cash on or before September 15 or 20, 1917, and $94,500 cash on or before February 23, 1918. Within the time prescribed by the option granted by Coles, Richardson, Church, and Johnson duly notified the former of their intention to purchase the Pomona Ranch within the time limited by the option. On February 27, 1918, Richardson, Church, and Johnson exhibited to Coles a receipt for the payment of the taxes upon said property for the year 1917, which taxes they had agreed to pay, and thereupon they tendered to said Coles the sum of $14,500 in legal tender of the United States of America, and likewise at the same time tendered to said Coles the notes and trust deed above mentioned, all properly signed and executed by the said Richardson, Church, and Johnson, and otherwise fully complied with the terms of the option. Thereupon Richard-

son, Church, and Johnson demanded of Coles the performance of the terms of the option on his part. Richardson, Church, and Johnson went into possession of the Pomona Ranch under the lease, and remained in possession thereof until they made the contract above referred to with Denslow. Coles wholly refused to perform the terms of the option granted by him, and also refused to accept performance of the same by Richardson, Church, and Johnson. Whereupon the present action was commenced by appellees to obtain specific performance of the option agreement with Coles. Denslow was made a party plaintiff as having an interest in the land. Coles made answer to the complaint, and the Middletown Trust Company was granted leave to intervene in the action.

It appears from the record that in the case of Brackett et al. v. Middlesex Banking Co., pending in the superior court of Middlesex county, state of Connecticut, and in the case of Receivers of the Middlesex Banking Co. v. Realty Inv. Co., pending in the same court, Silas A. Robinson and John L. Dower were appointed receivers of the Banking Company. These receivers entered into an agreement with the Middletown Trust Company, whereby the Trust Company was appointed a trustee of the lands and water rights constituting the Pomona Ranch. Under the terms of said trust agreement and the authority thereby vested in the Middletown Trust Company as trustee, said Trust Company designated as its nominee appellant Frank A. Coles, to whom was conveyed as representative of the intervener, the property in controversy. It was by virtue of such nomination that appellant Coles held the legal title to the Pomona Ranch. After a hearing on pleadings and proofs, the relief prayed for by appellees was granted. Coles and the Trust Company appeal.

Certain defenses that were pleaded by the appellants have been abandoned, and are not now before the court for consideration. One of these defenses is the alleged lack of power on the part of appellants, or either of them, to execute the option contract. This defense was abandoned at the trial, and is specifically abandon 1 on this appeal; the appellants having omitted from the record the trust agreements under which the trustee received its authority. In setting forth the testimony of Mr. H. H. Warner, a witness on behalf of appellants in the court below, the following statement is made by counsel with reference to the question of the power of the Trust Company:

"The remainder of the testimony of the witness under cross-examination is confined to the issue covering the power of the Trust Company, set forth in complainant's bill, and as no issue is presented on appeal covering this power, this testimony is not here reproduced."

Other similar statements are made in the record, and we therefore do not further consider that question. The appellees have never claimed that the contract of option was assigned to Denslow by them, and therefore the authorities cited by appellants regarding suits by assignees are irrelevant.

[1] There is an objection made in the brief of counsel for appellants to the effect that Denslow was improperly joined as plaintiff. This question cannot be raised for the first time in this court, especially in

view of the fact that the record shows that the appellants asked affirmative relief against Denslow, as well as the other appellees. Estoppel was pleaded by the appellees as a defense to the plea of lack of power in the trustee; but, as that contention has been abandoned, the plea of estoppel falls with it, and needs no further consideration.

[2] One of the principal contentions of appellants is that Richardson was an agent of appellants, and as such agent he owed them certain duties, which the law required should be strictly performed; that among these duties are those that the agent is bound to communicate all facts coming to his knowledge in respect to the agency, to act with the most perfect good faith, honesty, and fairness, to exhibit the most open, ingenuous, and disinterested dealing while acting as such toward his principal, and above all not to use the subject-matter of the agency or information acquired therein to make a profit for himself, without the full knowledge, understanding, and consent of the principal, and, where the acts of the agent are in any manner in question, it is incumbent upon him to establish clearly that there was no fraud, influence, or concealment on his part, either directly or indirectly, and that he acted openly, fairly, and honestly, and derived no advantage from the agency not known, understood, and consented to by the principal. The duties of the agent are as stated beyond question.

[3] Counsel for appellants claim that in the present case it is not shown that Richardson gave to his principals all the knowledge which he had concerning the value of the property and concerning his intention to again sell the property. We have carefully examined all the correspondence which passed between Richardson and appellants, and also the testimony regarding conversations had by Richardson with Bernard, Warren, and Simonson, and other agents of appellants, and we cannot find that Richardson violated his duties as agent, conceding that he was such. Richardson was not the sole agent of appellants in regard to the sale of the property. He had been relieved as agent at the time the agency was turned over to Simonson by Bernard. It was thought that Richardson's knowledge of the property, he having had charge of the same for many years, would be advantageous in making a sale, and therefore Richardson was allowed to continue as an assistant to Simonson, and in case of sale he was to receive a portion of the commission. Moreover, Richardson was only one of the grantees in the option, and there is nothing to impeach the contract so far as the other optionees are concerned, and we are satisfied from the evidence that there is nothing to impeach the contract so far as Richardson is concerned. Appellants possessed all the knowledge that Richardson did as to the value of the property. Richardson did not know, at the time the option was given, that the ranch could be sold to Denslow at a profit of $15,000, and the latter has not as yet, and may never, perform his contract.

[4] The optionees had the right to sell the land without telling appellants. It was no concern of theirs. They had agreed to take the amount mentioned in the option, without being induced to do so by any fraud or unfair dealing, and could not complain if the optionees sold the land for a higher price. The object of taking these options in most cases is to sell the land again at a profit. The optionees did not know

what they could get for the land when they received the option, and the matter all rested in uncertainty and speculation until the contract with Denslow was made. We find the following language in the brief of counsel for appellants:

"It is, of course, impossible to determine whether Mr. Richardson had knowledge of facts which he did not disclose."

We understand this remark to refer to the evidence in the case. If it does, how can counsel claim that the option is void because Richardson did not disclose some fact that he ought to have disclosed. The excerpt from counsel's brief causes no surprise, because it is the opinion which any unprejudiced mind would have after a perusal of the evidence. We see nothing in the alleged agency of Richardson that would avoid the option.

[5] Complaint is made of the admission in evidence of a conversation had by Mr. Richardson with Mr. Dower in 1915. Dower was one of the receivers of the property of the Middlesex Banking Company, and the evidence tended to show that in the conversation referred to Richardson did not conceal anything whatever in regard to the ranch. No ground was stated for the objection made by counsel for appellants to this testimony, and while it may have been irrelevant, in a case being tried to the court, there could not possibly have been any prejudice.

[6] There is no merit in the contention that the court erred in allowing testimony as to expenditures made upon the Pomona Ranch by appellees. It was relevant as to the equities of the case. The complaint that the court erred as to the question of interest results from a misinterpretation of the decree. As the trial court reserved for future consideration all matters requiring adjudication to carry out the decree, and as this appeal will require new adjustments as to interest, the matter is left to the trial court to adjust.

Decree affirmed, subject to necessary adjustments resulting from the lapse of time occasioned by this appeal.

PEARL RIVER COUNTY, MISS., v. WYATT LUMBER CO.

SAME v. EDWARD HINES LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. January 27, 1921.)

Nos. 3607, 3608.

1. Removal of causes ⇐41—County held party in interest in suit on conveyance of timber on school section to foreign corporation.

Under Code Miss. 1906, §§ 4695–4716 (Hemingway's Code, §§ 7505–7527), which, as construed by the courts of that state, conferred on counties all the powers of suit regarding the sixteenth sections of land given to the state for school purposes under the Enabling Act, and made said counties the beneficiaries of the funds derived from such conveyances, a suit by a county to construe a conveyance and lease of timber on such sections, executed to a foreign corporation by the county board of supervisors, is a controversy between the county and the lessee, not

between the state and lessee, and the cause is removable to the federal court.

2. **Courts ⇐307(1)—County a "citizen" for jurisdictional purposes.**
Counties are corporations, and as such citizens, for purpose of suits based on diverse citizenship in the United States courts.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Citizen.]

3. **Public lands ⇐54(1)—Supervisors held not authorized to convey school land timber thereafter becoming merchantable.**
Under Hemingway's Code Miss. § 7512, authorizing the board of supervisors to sell the merchantable timber on the sixteenth sections of land, as construed by the Supreme Court of Mississippi, the supervisors are authorized to sell only the timber which is merchantable at the time of the sale, not that which may thereafter become merchantable within the time granted to remove the timber.

4. **Logs and logging ⇐3(10)—Conveyance of timber held not to include that thereafter becoming merchantable.**
A conveyance by a county of merchantable timber, with the right to enter within a fixed time to cut and remove, in the absence of any other language, conveys only the timber merchantable at the time of conveyance.

Appeals from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge.

Separate suits by Pearl River County, Miss., against the Wyatt Lumber Company and against the Edward Hines Lumber Company. Decrees for defendants (Robertson v. Hines, 267 Fed. 605), and complainant appeals. Reversed and remanded.

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. Each of these suits was brought in the chancery court of Pearl River county, Miss., by Pearl River county, alleging itself to be a political subdivision and corporation of the state of Mississippi, against the respective defendants above named, to construe certain timber deeds made by the board of supervisors of complainant, conveying to said defendants, respectively, the merchantable pine timber standing or growing on section 16 of two townships in said county, with the right as to one of said sections at any time within 25 years after the date of said deed to enter upon said lands for the purpose of removing the said pine timber, which said time was by subsequent deed for a further consideration extended to October 22, 1929, and as to the other section with a right to enter upon said lands for such purpose for the space of 15 years, which said time was for a valuable consideration extended to the 1st day of September, 1932.

The defendant in each suit removed the same to the United States District Court for the Southern District of Mississippi, alleging itself to be a corporation chartered by and a citizen of a state other than Mississippi. No resistance to the removal was offered, and no motion

to remand made in said District Court; but the point has been raised in this court that the complainant is only a nominal party, that the suit is really maintained in behalf of the state of Mississippi, and that the suit does not, therefore, present a controversy between citizens of different states.

The legal title to said sixteenth sections in the several townships was acquired and vested in the state of Mississippi for school purposes under the Enabling Act of the United States admitting the state of Mississippi into the Union (3 Stat. 348, c. 23). The several counties wherein are situated any of such lands have, through their respective boards of supervisors, under the general supervision of the land commissioner, jurisdiction and control thereof, and of all funds arising from any disposition thereof, heretofore or hereafter made, and shall cause all such funds to be paid into their respective county treasuries. The boards of supervisors in said counties are empowered to sell "the merchantable timber of any and all varieties" on such land. The funds arising from such sale shall be credited to the proper township by the county treasurers, the same to be loaned out by the board of supervisors, and the interest arising therefrom to be expended for the support of the township school.

The board of supervisors and a competent person, whom they are directed to employ, are ordered to institute and prosecute in the chancery court of the county where the land lies in the name of the county all necessary suits to establish and confirm the title to each such parcel of such land or to fix the date of the expiration of any lease of the same. Hemingway's Annotated Code of Miss. §§ 7505–7527; Code of Miss. 1906, §§ 4695–4716. These statutes have been held to confer on the counties all powers of suit in regard to such sixteenth sections. Jefferson Davis County v. James-Simrall Lumber Co., 94 Miss. 530, 49 South. 611.

[1] It is manifest from these sections that the counties have a direct interest in the suits and in the results thereof and that in each case the decree would construe deeds made by this complainant, through its board of supervisors and directly affect its pecuniary interest. We therefore think that the complainant had such an interest as to authorize it to bring each suit and that it does present a controversy between the county and the defendant.

[2] Counties have been recognized as corporations, and as such citizens, for the purpose of suits based on diverse citizenship in the federal court. Mercer County v. Cowles, 7 Wall. 118, 19 L. Ed. 86; Lincoln County v. Luning, 133 U. S. 529, 531, 10 Sup. Ct. 363, 33 L. Ed. 766. We therefore think the United States District Court had jurisdiction of these cases.

The exhibits in the bills in these cases show the execution of timber deeds to the grantees named therein by the board of supervisors of Pearl River county, through its president, to all the merchantable pine timber standing or growing on the land described in said named townships, with the covenant for entry upon said lands heretofore mentioned.

The bills averred that these deeds conveyed only the right to cut and remove from said land those pine trees which were at the date of said deeds merchantable pine timber, and averred that defendants claim the right to cut and remove, not only such merchantable pine trees, but all of the pine trees on said lands which were not as aforesaid merchantable at the date of said deed; that by merchantable pine trees were meant trees of a certain diameter and with certain other descriptions. While each answer denied any purpose to presently cut any timber upon said lands, or any purpose other than of cutting and removing said merchantable timber, it denied that defendant was confined by its deed only to the cutting of such timber as at the date of said deed fell within the description of merchantable pine trees as stated in said bill of complaint.

By agreement of the parties the case was submitted to the court on two questions of law: First, did the defendant have a right as a matter of law to cut any timber from the sixteenth section of land involved in each suit? Second, if the defendant had such right, was its right confined to the merchantable timber on the land at the time the deed was executed, or did it extend to the timber that had become merchantable between the date of the deed and the time the timber was cut?

The District Court after argument decided: First, that the defendant had the right as a matter of law to cut and remove the timber from said sixteenth section of land; second, that such right was not confined to the merchantable timber on the land at the date of the execution of the deed, but the lessee and vendee had the right to cut and remove any timber that became merchantable between the date of the deed and the expiration of the lease.

The court in each case entered a decree reciting that said case coming on to be heard on the bill of complaint and answer of the defendant and upon the written agreement of the parties complainant and defendant submitting to the court these two preliminary law questions, and being of opinion that the law on both of said points as submitted is with the defendant, which decision and determination goes to the whole of said cause, and entirely determines the controversy thereof in behalf of the defendant, dismissed the bill on the merits, at complainant's cost.

The court in its opinion, recognized the general rule that a provision as to the size of timber conveyed will generally be held to refer to the date of the conveyance rather than to some time in the future in the absence of anything showing a contrary intention, but held that in this case under the instruments as drawn, and the facts as appeared from the record, it was the intention of the parties for the vendee to acquire the right to cut and remove the merchantable pine timber which became so during the lease, holding that the case came within the ruling of this court in Nelson v. Americus Mfg. Co., 186 Fed. 489, 108 C. C. A. 467. Although the answers did not directly claim that the timber deeds executed by said board of supervisors carried the right to cut and remove merchantable timber which became so after their respective dates, the stipulation between the parties clearly

asserted this contention, and the case was decided upon this construction of the timber deeds.

[3] The deeds were made by public officials, whose authority must be drawn from the act of the Legislature authorizing them to make sales of this timber. The board of supervisors is authorized "to sell the merchantable timber of any and all varieties * * * on such land." Hemingway's Annotated Code, § 7512. The rule of construction is that the grant of power to public officials is to be strictly construed, and certainly cannot confer any authority beyond what the usual signification of the terms employed would embrace.

It is clear that this does not confer authority to sell all of the timber on the land. It is confined to "the merchantable timber," and the board of supervisors is restricted to granting a reasonable time in which to remove the same; the grant of indefinite time being unlawful. Dantzler Lumber Co. v. State, 97 Miss. 355, 53 South. 1.

There are no words in the statute indicating a purpose to confer authority to sell what is not embraced in the usual signification of "the merchantable timber." The words used mean timber that was merchantable at the date of the deed. Were this not true, then the board of supervisors would be selling timber which at the time of making the sale was not merchantable, and there would be no reason in holding that they were confined, in a grant of a right to enter and remove, to a reasonable time.

[4] There is nothing in the language of the conveyance made which indicates a purpose to do more than convey timber merchantable at the time of the deeds. The language of each deed is "the merchantable pine timber standing and growing on section 16," etc. The further grant is simply of a right to enter to cut and remove said timber; i. e. timber merchantable at the time. We are of the opinion that, in the absence of any other language in these deeds, they did not convey timber not merchantable at their dates. McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513; Zimmerman v. Wilson, 201 Ala. 70, 77 South. 364; Griffin et al. v. Tully, 91 Ark. 292, 121 S. W. 297, 134 Am. St. Rep. 73; Wilson Lumber Co. v. Alderman & Sons, 80 S. C. 106, 61 S. E. 217, 128 Am. St. Rep. 865; Vandiver v. Byrd-Matthews Lumber Co., 146 Ga. 113, 90 S. E. 960; Whitfield et al. v. Rowland, 152 N. C. 211, 67 S. E. 512; Hicks et al. v. Phillips et al., 148 Ky. 670, 147 S. W. 42.

The deeds in this case are unlike the lease construed in Nelson v. Americus Mfg. Co., 186 Fed. 489, 108 C. C. A. 467. The report of this case does not give the language of the lease, but the opinion clearly is confined to the construction by the court of that particular lease. An examination of the lease in the records of this court shows that it was a lease of—

"all the timber upon the following described tracts of land for sawmill and turpentine purposes, * * * to have and to hold, cut, work, and otherwise use said timber for sawmill and turpentine purposes as aforesaid, unto the said parties of the second part, their heirs and assigns. And it is hereby expressly covenanted and agreed that the said parties of the second part, their heirs and assigns, may commence working or otherwise using the timber for sawmill and turpentine purposes as aforesaid or any portion thereof at any

time they may desire, and shall have the right to continue to cut, work, or use the said timber and every portion thereof for sawmill and turpentine purposes as aforesaid until the said timber and each and every part thereof suitable for sawmill and turpentine purposes as aforesaid has been cut, worked, and otherwise used for the said purposes stated: Provided, however, that the right of said parties of the second part, their heirs and assigns, so to cut, work, or otherwise use the timber and every portion thereof for sawmill purposes as aforesaid, shall cease and terminate upon the expiration of a period of twenty years from this date."

The language of this deed, especially that portion thereof which granted the right to continue to cut, work, or use said timber, and every portion thereof, until all parts thereof suitable for sawmill and turpentine purposes had been used, indicates a right to grant more than what would be conveyed by the words "all the merchantable timber standing and growing" on a certain lot. We do not think, therefore, that the present case is controlled by the decision in Nelson v. Americus Mfg. Co., 186 Fed. 489, 108 C. C. A. 467.

It cannot be assumed that the court intended to establish a rule of construction that a timber deed conveying "the merchantable timber standing and growing" on a tract of land would, as a general thing, convey timber not merchantable at the date of the conveyance, in view of the general rule to the contrary. That this lease was construed according to its particular language is further evident from the fact that, at the time, the decisions in the state of Georgia, where the timber was situated, construing timber leases, had clearly established the general rule that a timber lease covering all the merchantable timber on the land, extending for a period of years, only conveyed the timber merchantable at the date of the lease. Goette v. Lane, 111 Ga. 400, 36 S. E. 758; McRae v. Stillwell, 111 Ga. 65, 36 S. E. 604, 55 L. R. A. 513.

The decree of the court below in each case is reversed. As each case was decided upon the two preliminary questions of law above stated, and as the facts may be different upon its further progress, said cases are remanded for further proceedings in conformity with this opinion.

Reversed and remanded.

ROTHMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 16, 1920.)

No. 35.

1. Indictment and information ⇐111(1)—Indictment under Narcotic Act need not negative exceptions.

The second proviso in Harrison Narcotic Act, § 8 (Comp. St. § 6287n), that "it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this act, and the burden of proof of any such exemption shall be upon the defendant," *held* to apply to the entire act, and not merely to the exemptions specified in that section.

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

2. Criminal law ⟸841—Exceptions to instructions must be taken before retirement of jury.

Exceptions to the charge of the court must be taken before retirement of the jury.

3. Courts ⟸356—Federal courts not governed by state practice as to bill of exceptions.

Conformity Act, § 5 (Comp. St. § 1537), has no application to bills of exception, and the practice of the federal courts with respect to such bills is not governed by that of the state courts.

4. Criminal law ⟸37—Defense of entrapment.

A government detective, suspecting that a person is engaged in an unlawful business, may seek information directly from him under an assumed name, and if such person responds, and violates the law, he cannot set up as a defense that he would not have done so if the person approaching him had not been an officer.

5. Statutes ⟸219—Acting on an erroneous construction of statute by Treasury Department not a defense.

Where the Supreme Court has authoritatively construed a statute, it is not error for a trial court to refuse an instruction based on a prior erroneous construction by the Treasury Department.

6. Conspiracy ⟸27—Participation in substantive offense not essential to conviction.

Under an indictment charging an offense and also a conspiracy to commit the same, acquittal of one defendant of the substantive offense does not preclude his conviction on the conspiracy count.

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

Criminal prosecution by the United States against Solomon Rothman, Louis Cohen, and William Cohen. Judgment of conviction, and defendants bring error. Affirmed.

The plaintiffs in error, who were defendants below, will be hereinafter referred to as defendants. The defendants and one Jacob Weinberg were indicted on September 17, 1918, for unlawfully selling heroin and for conspiracy respecting such sale. They pleaded not guilty, and were put on trial on July 21, 1919. The jury brought in a verdict of guilty on August 1, 1919, against the two Cohens and Rothman, and acquitted Weinberg. Sentence was pronounced against the defendants on August 14, 1919, and each was sentenced to imprisonment for 2 years in the penitentiary at Atlanta. Bail was fixed for each in the sum of $7,500, and for 15 months they have been out on bail pending this appeal, which was heard in this court on October 15, 1920. There thus appears excessive delay in bringing these men to trial after their indictment, as well as in bringing the case to a final determination in this court after their conviction. But circumstances explained to the court seemed to make the delay inevitable.

Louis Marshall and C. G. F. Wahle, both of New York City, for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (Peter B. Olney, Jr., Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The defendants have been indicted under what is known as the Harrison Act, being the Act of December 17, 1914, 38 Stat. pt. 1, c. 1, p. 785

(Comp. St. §§ 6287g–6287q). That act was amended as to section 1 by the Act of February 24, 1919, c. 18, § 1006, 40 Stat. p. 1130 (Comp. St. Ann. Supp. 1919, § 6287g). The amendatory act, having been passed after the acts complained of were committed is not involved herein.

The original act provides for the registration of all persons who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, their salts, derivatives, or preparations, and for other purposes. The act makes it an offense punishable by a fine of not more than $2,000 or by imprisonment for not more than five years, or both, to deal in the drugs described therein contrary to the provisions of the act. The indictment also charges the defendants with a conspiracy to violate the said act, contrary to section 37 of the Criminal Code (Comp. St. § 10201). The crime charged is the crime created by section 2 of the act (section 6287h), and so far as it is material to the present inquiry it is found in the margin.[1]

The defendant Rothman is a physician. Louis Cohen was the owner of a pharmacy, and his brother William had been in partnership with Louis, but had retired therefrom. The claim was that the Cohens had filled the physician's prescriptions with knowledge of the fact that the physician was writing the prescriptions, not in good faith, and not with the intention of treating those to whom he issued them for the purpose of curing them, but in order that such persons might circumvent the law.

[1] The first objection to be considered is one which goes to the sufficiency of the indictment. It is said that the indictment fails to charge a crime within the terms of the act; that as the crime is a statutory one, and the statute defining the offense contains certain exceptions, the rules of good pleading require that an indictment founded

[1] "It shall be unlawful for any person to sell, barter, exchange, or give away any of the aforesaid drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Commissioner of Internal Revenue. * * * Nothing contained in this section shall apply—

"(a) To the dispensing or distribution of any of the aforesaid drugs to a patient by a physician, dentist, or veterinary surgeon registered under this act in the course of his professional practice only. * * *

"(b) To the sale, dispensing, or distribution of any of the aforesaid drugs by a dealer to a consumer under and in pursuance of a written prescription issued by a physician, dentist, or veterinary surgeon registered under this act. * * *

"(d) To the sale, barter, exchange, or giving away of any of the aforesaid drugs to any officer of the United States government or of any state, territorial, district, county, or municipal or insular government lawfully engaged in making purchases thereof for the various departments of the Army and Navy, the Public Health Service, and for government, state, territorial, district, county, or municipal or insular hospitals or prisons.

"The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall cause suitable forms to be prepared for the purposes above mentioned, and shall cause the same to be distributed to collectors of internal revenue for sale by them to those persons who shall have registered and paid the special tax as required by section one of this act in their districts, respectively. * * *"

upon the statute should negative the exceptions. The exceptions are in section 2 which have been already set forth herein. In this connection it is necessary to consider section 8 (section 6287n) which appears in the margin.[2]

It will be observed that sections 2 and 8 define different offenses, and that the exceptions in section 2 are exceptions to certain prescriptions, while in section 8 they relate to certain classes of persons; and the question arises whether the second proviso in section 8 relates merely to the exceptions in that section or extends as well to the exceptions in section 2. This question came before the Circuit Court of Appeals in the Seventh Circuit in 1917 in Wallace v. United States, 243 Fed. 300, 304, 156 C. C. A. 80, and it was held that this proviso was intended to apply to all exceptions in the act, and not merely to those found in section 8; the conclusions arrived at being based on the words it shall not be necessary to negative the exemptions "in any * * * indictment * * * brought under this act," which the court said indicated that the proviso was intended to apply to the entire act. The same question has been several times since before the Circuit Court of Appeals in the Fifth Circuit and a similar ruling has been made. Fyke v. United States, 254 Fed. 225, 228, 165 C. C. A. 513; Melanson v. United States, 256 Fed. 783, 785, 168 C. C. A. 129; Oakshette v. United States, 260 Fed. 830, 831, 171 C. C. A. 556. We shall follow the decisions referred to and hold that the indictment was not invalidated by the omission complained of.

[2] It appears that the persons to whom, upon this record, the prescriptions were given, were two government agents, and it is said that these men sought to entrap the defendants by means of fraud into the commission of a crime, and that on this account the government is estopped from urging a conviction on such premises. The jury was instructed on this subject as follows:

"Now, I will charge you, gentlemen, that some point has been made that Hanake was an internal revenue agent; that Devine was also an internal revenue agent; that they went to the doctor and to the druggist for the purpose of trapping him. I charge you that, if the officers of the government

[2] Section 8. "That it shall be unlawful for any person not registered under the provisions of this act, and who has not paid the special tax provided for by this act, to have in his possession or under his control any of the aforesaid drugs; and such possession or control shall be presumptive evidence of a violation of this section, and also of a violation of the provisions of section one of this act: Provided, that this section shall not apply to any employee of a registered person, or to a nurse under the supervision of a physician, dentist, or veterinary surgeon registered under this act, having such possession or control by virtue of his employment or occupation and not on his own account; or to the possession of any of the aforesaid drugs which has or have been prescribed in good faith by a physician, dentist, or veterinary surgeon registered under this act; or to any United States, state, county, municipal, district, territorial, or insular officer or official who has possession of any said drugs, by reason of his official duties, or to a warehouseman holding possession for a person registered and who has paid the taxes under this act; or to common carriers engaged in transporting such drugs: Provided further, that it shall not be necessary to negative any of the aforesaid exemptions in any complaint, information, indictment, or other writ or proceeding laid or brought under this act; and the burden of proof of any such exemption shall be upon the defendant."

believe these defendants were violating the law, it is not only legal, but commendable, that they should endeavor to find it out in just the way they did, and if the druggist and the doctor violated the law by selling to these agents of the government, they are just as much guilty, and your verdict will be based on those transactions just the same, as if they had sold to persons having no connection with the government at all."

The giving of this instruction is the fifty-fourth assignment of error. We do not, however, find that at the time the charge was given any exception was taken to that part of it which relates to the above instruction. After the verdict had been returned, when defendants appeared for sentence two weeks thereafter, their counsel stated that he desired to except to that part of the charge and the court stated that he would allow the exception. This was too late. No exception to a charge after the jury has retired can be considered. Before the charge was given requests to charge were submitted to the court which cover 52 printed pages of the record. We do not feel called upon to examine them, our attention not having been specifically directed to them.

An exception was taken to the refusal to charge the fifty-sixth request, but no other exception was taken to any refusal of the other requests. That exception is properly before us and will be subsequently considered.

[3] There can be no possible excuse for presenting to the trial judge such a volume of requests to charge as we find in this record, and it is difficult for us to see why all these requests should be incorporated into what purports to be a bill of exceptions, but which cannot possibly be so regarded. Under the federal practice this was not only unnecessary, but improper. We ought to add that the counsel for defendants who argued the case in this court did not try it in the court below and is not responsible for the requests to charge or for the bill of exceptions in which those requests appear. We also ought to say that bills of exceptions in the federal courts are not governed by the rules governing appeals in the courts of record of the state within which the federal courts are held. The Act of Conformity of June 1, 1872, c. 255, § 5 (Comp. St. § 1537) has no application to bills of exceptions. In re Chateaugay Ore & Iron Co., 128 U. S. 544, 9 Sup. Ct. 150, 32 L. Ed. 508; Buessel v. United States, 258 Fed. 811, 819, 170 C. C. A. 105.

[4] But in view of the Act of February 26, 1919, c. 48, § 269, 40 Stat. p. 1181 (Comp. St. Ann. Supp. 1919, § 1246), we will say concerning the instructions objected to in this court that the contention of the defendant's counsel is disposed of by what was laid down in Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550. It was there decided that when a government detective, suspecting that a person is engaged in an unlawful business seeks information under an assumed name directly from him, and that person responds thereto, violating a law of the United States, he cannot, when indicted for the offense, set up that he would not have violated the law, if the inquiry had not been made of him by the government official. A number of cases in the federal courts in support of the doctrine are cited in the opinion. See, also, Andrews v. United States, 162 U. S.

420, 16 Sup. Ct. 798, 40 L. Ed. 1023; United States v. Lynch (D. C.) 256 Fed. 983.

[5] The court was requested (the fifty-sixth request) to charge as follows:

"The defendants are to be judged by the interpretation accepted by the constitutional authorities and given to the Harrison Narcotic Law in the years 1917 and 1918, and if the defendants, in the conduct of their business, complied with the decisions and orders of the Treasury Department through the Bureau of Internal Revenue, as the same were issued in the years 1917 and 1918, under the provisions of the Harrison Narcotic Law, then these defendants must be acquitted. They cannot be judged by an interpretation of the law after the filing of this indictment, which reverses or is contrary to that adopted and duly promulgated during the times mentioned in the indictment."

The material part of Treasury Decision No. 2200, which is the interpretation alluded to in the above request, is found in the margin.[3] It was issued on May 11, 1915, and prior to the indictment. Treasury Decision No. 2879 was subsequent to the indictment and before trial, and was promulgated on July 2, 1919. It also may be found in the margin.[4]

[3] "To Collectors and Other Officers of the Internal Revenue: The Act of December 17, 1914, provides that a physician, dentist or veterinary surgeon, registered under the provisions of the law, may dispense or prescribe any of the narcotic drugs coming within its scope to those whom he shall 'personally attend' and in the course of his professional practice only. * * *

"While the law does not limit or state the quantity of any of the narcotic drugs that may be so dispensed or prescribed at one time, it does provide that it shall be unlawful to obtain, by means of order forms, any of the aforesaid drugs for any purpose other than the use, sale, or distribution thereof in the 'conduct of a lawful business in said drugs or in the legitimate practice of his profession.' * * *

"Therefore, where a physician, dentist or veterinarian prescribes any of the aforesaid drugs in a quantity more than is apparently necessary to meet the immediate need of a patient in the ordinary case or where it is for the treatment of an addict or habitue to effect a cure of a patient suffering from an incurable or a chronic disease, such physician, dentist or veterinary surgeon should indicate on the prescription the purpose for which the unusual quantity of the drug so prescribed is to be used. In case of treatment of addicts, these prescriptions should show the good faith of the physician in the legitimate practice of his profession, by a decreasing dosage or reduction of the quantity prescribed from time to time, while on the other hand in cases of chronic or incurable diseases, such prescriptions might show an ascending dosage or increased quantity. Registered dealers selling such prescriptions shall assure themselves that the drugs are prescribed in good faith for the purpose indicated thereon and if there is reason to suspect that the prescriptions are written for the purpose of evading the provisions of the law such dealers should refuse to fill the same."

[4] "To the Collectors of Internal Revenue and Others Concerned: The ruling contained in Treasury Decision 2200 of May 11, 1915, permitting a practitioner to dispense or prescribe narcotic drugs in a quantity more than is necessary to meet the immediate needs of a patient, is hereby revoked, and the revocation shall be applicable in all cases whether a decreasing dosage is indicated or not. The Act of December 17, 1914, as amended February 24, 1919, permits the furnishing of narcotic drugs by means of prescriptions issued by a practitioner for legitimate medical use, but the Supreme Court has held that an order for morphine, issued to a habitual user thereof, not in the course of professional treatment in any attempted cure of the habit, but for the purpose of providing the user of the morphine sufficient to keep

It is said that these Treasury Decisions were issued in accordance with section 1 of the Harrison Act which provides as follows:

That "the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, shall make all needful rules and regulations for carrying the provisions of this act into effect."

And we are told that the defendants relied upon Treasury Decision 2200 in the transaction of their business in giving prescriptions to addicts. Counsel say that the later Treasury Decision, No. 2879, changed the rule as to giving prescriptions to addicts and that the jury was instructed in accordance with the subsequent modification. We are informed in the brief for the defendants that—

"It is therefore shocking to one's sense of justice that the plaintiffs in error, who conducted their business in accordance with the decisions and orders of the Treasury Department, are to be deemed guilty of a crime because of an interpretation subsequently given to the law by the same branch of the government which had previously given the interpretation acted upon."

Assuming that these Treasury Decisions conflicted, and that Decision No. 2200 was wrong and Decision No. 2879 was right and in accordance with the decision of the Supreme Court in Webb & Goldbaum v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497, the trial judge was bound to disregard No. 2200; the meaning of the act is authoritatively determined by the court, and not by the Treasury Department. Ignorance of the law excuses no one. It could be no excuse that the defendants relied on a Treasury Decision which was wrong. In the Webb Case it was authoritatively settled that if a practicing and registered physician issues an order for morphine to an habitual user thereof, the order not being issued by him in the course of professional treatment in the attempted cure of the habit, but for the purpose of providing the user with morphine sufficient to keep him comfortable by maintaining his customary use, such order is not a physician's prescription under exception (b) of section 2 of that act. The instruction given by the court conformed to the ruling of the Supreme Court and there was no error in refusing the instruction requested.

[6] The learned counsel for defendants in his argument in this court urged upon us that this record contains no evidence which justified a conviction of William Cohen on the conspiracy count. The point made is that inasmuch as the jury acquitted him of any of the substantive counts in the indictment, and as the overt acts charged in the conspiracy are two of the sales to the agents of the government which are the subject-matter of substantive counts, he cannot be convicted of a conspiracy. This is to lose sight of the fact that, if a conspiracy is proved to have existed between the defendants, it is not necessary to prove that all of the defendants did the overt acts which they are

him comfortable, by maintaining his accustomed use, is not a prescription within the intent and meaning of the act. U. S. v. Doremus, October Term, 1918, Treasury Decision 2809.

"In view of this decision, the writer of such an order, the druggist who fills it, and the person obtaining the drugs under it will all be guilty of violating the law."

alleged to have done. All that is necessary is that one or more of such parties did an act to effect the object of the conspiracy. If the evidence clearly showed that William Cohen took part in the conspiracy and that the overt acts were done by the other conspirators, then he was properly convicted. Every act of each member of the conspiracy in pursuance thereof was in contemplation of law the act of them all, and was evidence against each of them. The doing of the overt acts charged by two of the conspirators is established by the verdict finding them guilty on the substantive counts based on the acts alleged as overt acts. The question whether there was a conspiracy and whether William Cohen participated in it was for the jury, and without reviewing the testimony in detail it must suffice to say that in our opinion there was evidence from which the jury might conclude that he was in the conspiracy. During the period covered by the indictment William Cohen was, in the absence of his brother Louis, in charge of the drug store, and filled or verified prescriptions and waited on customers, and received checks from Louis which are claimed to have been received as his share in the proceeds of the business of the drug store.

There are other assignments of error, which we have considered, but do not find it necessary to review at length. We find nothing in them which should lead the court to reverse the judgment. The case was ably argued on behalf of the defendants, but we find no error, and

Judgments are affirmed.

PAYNE, Director General of Railroads, v. BUCHER.

(Circuit Court of Appeals, Third Circuit. February 3, 1921.)

No. 2619.

1. **Master and servant ⊜265(8)—Falling of bucket moved by crane held not to create presumption of negligence.**
   In an action for the death of an employé, caused by the fall of a heavy bucket moved by a crane, the falling of the bucket carried with it neither proof nor presumption of negligence in the adjustment of the hooks holding the bucket, where there was evidence of contact between the bucket and a pile of trench rails, which might have released the strain on the hooks and permitted them to slip.

2. **Master and servant ⊜278(1)—Negligence must be established with certainty.**
   In an action under the Employers' Liability Act (Comp. St. §§ 8657–8665) for death, the employer's negligence is an affirmative fact to be established by plaintiff, and evidence that the employer may have been guilty of negligence is not sufficient.

3. **Master and servant ⊜291(3)—Instruction referring to things as almost touching, when evidence showed actual contact, held misleading.**
   In an action for the death of an employé, caused by the fall of a heavy bucket being moved by a crane, where the evidence showed contact with a pile of trench rails, which may have relieved the strain on the hooks and permitted them to slip off, the instructions should have called attention with particularity to this aspect of the case, and an instruction re-

ferring to the fact that the bucket "almost touched" the pile may have misled the jury.

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

Suit by Minnie Bucher, administratrix of the estate of William Bucher, deceased, against John Barton Payne, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed, and new trial ordered.

Frederic B. Scott, of New York City, for plaintiff in error.

Edward J. McCrossin and Harry R. Cooper, both of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. This writ brings here for review a judgment recovered under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665). The sole question, arising from the court's refusal of the defendant's motion for a directed verdict, is, whether there was any evidence of negligence on the part of the defendant to submit to the jury. Shortly stated, the plaintiff's case was as follows:

Bucher was an experienced employé of the Director General of Railroads. His grade was that of checker or boss of a small gang whose duties consisted in moving freight from place to place in the Terminal Yards of the Delaware, Lackawanna & Western Railroad Company at Hoboken, New Jersey. For the performance of his work the defendant had supplied him with appliances. These included tackle and a steam crane, whose crew was under his direction. On the day in question, Bucher was engaged in moving from one place to another iron buckets weighing two and one-half tons. He had at his disposal heavy metal hooks of two kinds: One, Vulcan hooks, curved in shape, each of which, when used in pairs, is attached to a separate cable suspended from block and fall hanging well above, and depend for their hold upon the object to which they are attached on the continuous upward strain of the connecting cables; the other, box hooks, each composed of two straight arms positioned at right angles one to the other. These hooks, being used in pairs, are not fastened to separate cables but are held together at the top by one cable passing through eyes in their upper arms, so that when placed together they form a rectangle, or box, as their name denotes, with the result that the greater the vertical strain from the cable the greater is the horizontal contraction of the hooks and the better their hold.

To do the work at hand Bucher selected Vulcan hooks against the caution of one of his men that hooks of that kind would not hold the buckets. Bucher, nevertheless, directed this employé to "hook them up" with these hooks. This the man did by placing their curving points under the bucket's flanges, which were but two and one-half inches wide. Four buckets thus hooked were safely moved. On raising the fifth and moving it toward the place at which it was to be put, it fell upon Bucher and killed him.

Bucher's administratrix brought this suit. The verdict in her favor

puts out of view any question of contributory negligence by Bucher in selecting hooks ill-adapted to the task he was performing, and resolves the case, as presented by this writ of error, to the question whether there was evidence of negligence on the part of the defendant which in some measure brought about the accident.

From the case made by the plaintiff, we have had trouble in finding just what duty the defendant owed the decedent which he violated. Turning to the plaintiff's complaint, we surmise that she too had the same difficulty, for in order certainly to cover the case by sufficient allegations she variously charged the defendant with negligence in placing her intestate at work with incompetent and inexperienced help; in setting him at a task with which he was not familiar and in failing to give him proper instructions; in supplying him with defective appliances, and with appliances not adapted to the work; in failing to warn him of the perils incident to the work and appliances; in permitting another employé, who was more experienced with such work and appliances, to absent himself at the time this work was being done; in failing to supply him with safe and adequate appliances with which to work and with a safe place in which to work; wherefore, "through the negligence and carelessness of the agents and servants of the defendant, other than the plaintiff's intestate, engaged in such work, one of such heavy metal buckets was caused to fall suddenly and without warning" and to strike and crush the plaintiff's intestate.

[1, 2] It is evident that the trial judge was unable to find any evidence upon which to predicate submission on any of these charges, save one. He gave the case to the jury, therefore, on the one issue of negligence, whether the defendant, through his servant who attached the hooks to the bucket, so carelessly adjusted them that they slipped off and brought about the accident resulting in Bucher's death. There was no evidence that this employé carelessly fixed the hooks upon the bucket, except as it was inferred from the fact that they slipped off, that is, except as it was inferred from the accident. The fact of accident carries with it neither proof nor presumption of negligence on the part of the employer. Negligence of the employer is an affirmative fact to be established by the one speaking for the deceased employé. Texas & Pacific Ry. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136. Evidence that the employer may have been guilty of negligence is not sufficient. In this connection the Supreme Court has said:

"The evidence must point to the fact that he was [guilty]. And where the testimony leaves the matter uncertain and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible and for some of which he is not, it is not for the jury to guess between these half a dozen causes and find that the negligence of the employer was the real cause, when there is no satisfactory foundation in the testimony for that conclusion." Patton v. T. & P. Ry. Co., 179 U. S. 658, 663, 664, 21 Sup. Ct. 275, 277 (45 L. Ed. 361).

While the accident may have been due to the employé's carelessness in adjusting the hooks, it was equally attributable to another happening testified to for the defendant, which, if believed by the jury, would wholly change its character.

[3] It was this: After the curved Vulcan hooks had been placed on the bucket, Bucher directed the engineer of the steam crane, who was under his orders, to raise the bucket and move it about one hundred feet with the purpose of lowering it on a pile of trench rails to which the first four buckets had been safely moved. In response to his order, the engineer hoisted the bucket, turned the crane and moved the car bearing the crane toward the pile. As the boom, for some reason, would not carry the bucket to the place desired, Bucher with his hands, and one of his men with a stick, "pushed [the bucket] in far enough so they could land it on [the] pile," where, either on being lowered or at its then present elevation, "it touched the end of the trench tracks and fell off the hooks," killing Bucher. Manifestly, if contact of the bucket with the pile was such as to release the vertical cable strain on one of the hooks,—on which strain alone it depended for its hold,—that hook would slip off however carefully placed at the beginning, and the accident, inevitably following, would conceivably not be due to any fault of the defendant. We are constrained to think this aspect of the case, appearing in the testimony of two eye-witnesses, should have been called to the attention of the jury with more particularity, and we are inclined to believe that the only reference to the contact of the bucket with the pile of rails made by the learned trial judge in his charge—that in its shifting movement "the bottom of the bucket almost touched" the pile—may have led the jury away from the evidence that the bucket actually touched the pile, and from drawing their conclusion as to the consequences. This instruction, though in accord with the issue on which counsel seemingly joined argument, put the case, we fear, where the plaintiff had left it, that is, as though the bucket fell in transit, on which theory alone her charge of careless adjustment of the hooks was based, instead of placing the case where the defendant had carried it (without contradiction), namely; to the end of the transit at the point where the bucket fell on contact with the pile.

From the story of the accident as made by the plaintiff's witnesses, we find no evidence that it was due to the defendant's negligence. It is not a case where res ipsa loquitur. From the story of the accident as completed by the defendant's witnesses, showing another happening at another place, a jury might find, without disregarding any of the testimony introduced by the plaintiff, that the accident resulted, not from carelessness in placing the hooks, but from the contact of the bucket with the pile slacking one cable and releasing its hook, and therefore without fault on the part of the defendant.

For these reasons we are constrained to reverse the judgment and order a new trial.

THE GREENWICH.

SEABOARD EQUIPMENT CORPORATION v. RED STAR TOWING & TRANSPORTATION CO. et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1919.)

No. 23.

1. **Towage ⟸12(1)—Sinking of scow due to unseaworthiness.**
The sinking of a dump scow, when dumped after being towed to the dumping grounds in calm weather, *held* caused by her leaking from the strain of dumping, due to unseaworthiness, and not from fault or negligence of the tug.

2. **Shipping ⟸54—Charterer not liable for loss through unseaworthiness.**
The charterer of a scow *held* not liable for her loss, due to unseaworthiness.

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

Suit in admiralty by the Seaboard Equipment Corporation against the steam tug Greenwich, the Red Star Towing & Transportation Company, claimant, and the Builders' Brick & Supply Company. Decree for respondents, and libelant appeals. Affirmed.

A. J. Lindsay, of New York City (Richmond J. Reese, of New York City, of counsel), for libelant.

Burlingham, Veeder, Masten & Fearey, of New York City (Chauncey I. Clark and Charles E. Wythe, both of New York City, of counsel), for claimant.

Hyland & Zabriskie, of New York City (Nelson Zabriskie, of New York City, of counsel), for respondent.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The libelant was the owner of the scow S. Y. No. 7. While in tow of the tug Greenwich, off Eaton's Neck, Long Island Sound, on June 23, 1915, bound for the dumping grounds, off the Neck, a distance of about 22 miles, she was damaged, thus giving rise to this claim. This dumper scow had four pockets having a capacity of 350 yards. She was loaded on June 22, 1915, at West Farms Creek, with mud and brick, dug from its bottom. She was picked up at Stakeboat No. 2 off College Point, Long Island Sound, by the Greenwich. She had no power, and there was no caretaker aboard. She was placed in the tow with another boat, the Blue Hummer, in tandem; No. 7 towing ahead. The weather was clear. She had a list of 1½ feet to starboard and a freeboard of about one foot on her starboard side. The Blue Hummer was dropped at Captain's Island, and the Greenwich, with the "No. 7," continued on to the dumping grounds, 4 or 5 miles further. The weather continued clear, and she reached the dumping grounds about 11 o'clock. A deckhand on the tug was sent back to dump her. He was paid for dumping the scow by the respondent. She listed to starboard, and when the pockets were dumped, she rose out of the

water 4 or 5 feet and immediately began to settle. An examination revealed that she had about 3 feet of water in her, and, although an effort was made to beach her, she sank after proceeding about 500 yards.

The scow was chartered by the libelant, the terms of which are contained in a letter of June 2, 1915, to the Builders' Brick & Supply Company, for $6 per day, without a scowman. An employee of the respondent agreed with the captain of the tug that a man from the tug would dump the scow.

The defense to the libel is that the scow was unseaworthy. Engineer Brush, of the respondent, testified as follows:

"Q. Now, the first load was placed where, or unloaded where? A. We unloaded above on the bank over across on the land over there.

"Q. Was the scow moved on that occas. ' A. Only that I moved over there with the lines.

"Q. Was the scow moved, or the dredge, oth? A. The dredge and scow, both; I moved them.

"Q. When you started to put on the second load? A. Well, I did put on a second load after I patched the lining of the s w. She was leaking around the seams, and I got canvas and a plank and pa ed some of the seams, and loaded her again, and she looked all right.

"Q. Had she been leaking through the lining. A. Through the inside lining; the lining on the inside of the boat was, seemed to me, very weak; and the stuff that we had to put in there was brick, and it didn't make a very good—it is kind of filter, and the water ran through; it is not like solid mud.

"Q. The pressure of the boat in the pockets has some effect on the lining of the boat? A. Yes, sir.

"Q. And that was where the boat was leaking? A. Yes, sir.

"Q. And that was where there was broken plank? A. Yes, sir; broken plank.

"Q. And that you patched? A. Yes, sir.

"Q. By putting the canvas and a piece of board over it? A. Yes, sir."

The same witness later in his testimony, on cross-examination, stated that:

"It was quite a bit leaky. With the heft of the load on the inside, the seams opened up; and, of course, when you took the load off, she would go back, spring back again; but it was weak; if not, it probably wouldn't open up; and I had to move the load on the inside, and by putting on canvas and a heavy plank, made a good job of it."

This was after the scow was loaded for the first time. He further testified:

"Q. How far did she have to be moved from where you loaded her the first time, on the first occasion, to the place where she was dumped upon some land? A. Oh, a thousand feet, probably.

"Q. And then how long, about, did it take you to unload her? A. We didn't take long. I took a few buckets full out of the top, and knocked the box off, and she jumped out of the water. Just how long, I don't know. I didn't time her.

"Q. You didn't dump her by putting the dredge or bucket in and digging the dirt out? A. No, sir.

"Q. But by opening the boards and letting her dump right through? A. Yes; let the mud fly out.

"Q. What did you observe about her at that time with regard to leaks, if anything? A. That is when I fixed those two leaks, in the planking. There were two places where they were leaking quite a bit. You could look down

through in the inside as she was loaded, and the seams had opened up, and I put canvas and planks, and loaded her again; and there was nothing out of the ordinary, out of the way with her, that I could see.

"Q. Was there anything, any indication, to show what caused these particular leaks? A. Weakness in the planks; that is all.

"Q. Any signs of anything else? A. She looked like a weak old thing, if you looked her over."

It was necessary to siphon her out after he unloaded her the first time, and before he made the repairs. He stated that she leaked like "an old sieve." After the repairs, he stated that there were small leaks through seams, but not what he called dangerously bad leaks. The difficulty was that there was some strain upon her, such as usually follows when dumping takes place. This permitted the mud and brick to slide out through her bottom. The canvas and board gave way, and the water poured in the open seams and the broken plank, causing her to fill with water and sink. The deckhand, who went aboard and dumped her, says that she commenced to settle down slowly right after he dumped the last pocket. There is no other cause apparent for her sinking.

The conclusion of the District Judge was the only reasonable one to draw from the evidence. The evidence indicates that there was no time to siphon her out, or to save her, for she sank shortly after she was dumped. The burden was upon the libelant to prove fault on the part of the tug. This it has not done. The claim of negligence has failed of proof. The tug was not an insurer, and so the mere sinking while in her custody does not establish the case. The Winnie, 149 Fed. 725, 79 C. C. A. 431; Aldrich v. Penn. R. R. Co., 255 Fed. 330, 166 C. C. A. 500.

The evidence here stands uncontradicted that the tow was made up in the usual way. There was plenty of water in which to navigate; the scow met with no mishap by collision or improper navigation. It was only when she was dumped that damage occurred. It was undoubtedly due to the scow's inability to withstand the jar and jolt of the strain of dumping. She was leaking before, and leaked worse afterward; all of which demonstrates conclusively that she was unseaworthy. The Loyal, 204 Fed. 930, 123 C. C. A. 252; The Willie (D. C.) 134 Fed. 759.

[2] Nor can liability be imposed upon the charterer. The obligation of the charterer was that of a bailee. In Mulvaney v. King Paint Mfg. Co. 256 Fed. 621, 167 C. C. A. 642, this court said:

"Where, by contract of bailment, the hirer has either expressly or by fair implication assumed the absolute obligation to return, even although the thing hired has been lost or destroyed without his fault, the contract embracing such liability is controlling, and must be enforced according to its terms. A bailee who assumes by the common-law liability is exempt from liability for loss of the consigned goods arising from inevitable accident. But the bailee may, however, enlarge his responsibility by contract, express or fairly implied, and render himself liable for the loss by destruction of the goods committed to his care. The bailment or compensation to be received therefor being a sufficient consideration for such an undertaking. * * *

"It would therefore appear that the charterers here are liable only to the extent of the stipulations of the contract, and in construing the contract, since the terms merely declare the liability which the common law would impose,

the liability of the bailee is neither increased nor changed, and the charterer undertook merely to return the barge after six months in the same condition as received, with the usual wear and tear. There is no obligation to do more."

The provision of the contract to return the scow in as good condition as when received, wear and tear excepted, was waived by counsel for the libelant at the commencement of the trial. The obligation of the charterer was that of bailee, and as we have found that the scow was unseaworthy, which resulted in loss, we cannot sustain the libel as against the respondent appellee.

The decree is affirmed.

BETSCH et al. v. UMPHREY et al.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921.)

No. 3490.

Statutes ⇐55—Alaska law, forfeiting mining claims for failure to file affidavit of labor, held void.

Laws Alaska 1915, c. 10, § 7, making failure to file affidavit of assessment work on a mining claim an abandonment, subjecting the claim to relocation, is inconsistent with Rev. St. § 2322 (Comp. St. § 4618), recognizing rights to claims so long as the actual labor is performed, and with Act Cong. March 2, 1907 (Comp. St. § 5051), providing that failure to file an affidavit of labor performed places the burden of proving such labor on the claimant, and it is therefore void under Enabling Act Aug. 24, 1912, § 9 (Comp. St. § 3536), prohibiting laws interfering with the primary disposition of the soil, and not authorized by Rev. St. § 2324 (Comp. St. § 4620), or Act June 6, 1900, § 16 (Comp. St. § 5050), authorizing local mining regulations not in conflict with the laws of United States.

Appeal from the District Court of the United States for the Second Division of the Territory of Alaska; Wm. A. Holzheimer, Judge.

Suit to quiet title by F. Umphrey and another against Chris Betsch and another. From a decree quieting the title of the plaintiffs, defendants appeal. Reversed and remanded, with instructions to enter a decree for the defendants.

William A. Gilmore, of Seattle, Wash., and O. D. Cochran, of Nome, Alaska, for appellants.

Lyons & Orton, of Seattle, Wash., and Fred Harrison, of Nome, Alaska, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The court below entered a decree quieting the appellees' title to a certain placer mining claim. The claim was originally located on July 4, 1914, and from that time until the relocation of the claim by the appellees on April 1, 1917, the annual assessment work was duly performed. The assessment work for 1916 had been duly performed by the appellants, but they had failed to file within 90 days from the close of that year the affidavit required by section 7, c. 10, of the 1915 Session Laws of the Territory of Alaska,

which requires in substance that, in order to hold a claim after the annual assessment work has been done, an affidavit containing certain specified statements must be filed with the recorder of the district not later than 90 days after the close of the calendar year, and further provides that the failure to file the same—

"shall be deemed an abandonment of the location and the claim shall be subject to relocation by any other person; provided, however, that a compliance with the provisions of this section before any relocation, shall operate to save the rights of the original locator."

In the present case the affidavit was filed 3 days after the relocation, and 4 days after the expiration of the 90 days prescribed by the statute.

The appeal presents the question of the validity of the territorial statute. In the Enabling Act of August 24, 1912, creating the territorial government (37 Stat. 514 [Comp. St. § 3536]), it was provided that—

"No law shall be passed interfering with the primary disposa of the soil." Section 9.

Section 2322, Rev. Stat. (Comp. St. § 4618), recognizes the rights of locators of mining claims so long as they comply with the laws of the United States—

"and with state, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title."

Section 2324 (Comp. St. § 4620) recognizes the right of miners of each mining district to make regulations not in conflict with the laws of the United States—

"governing the location, manner of recording, amount of work necessary to hold possession of a mining claim."

It will be observed that in none of the statutes of the United States is authority granted to Legislatures or to mining districts to provide for forfeiture of a mining claim properly located and recorded and upon which the annual assessment work has been performed. By Act of Congress of June 6, 1900, § 16, providing additional mining laws for Alaska (31 Stat. 328 [Comp. St. § 5050]), it was enacted that—

"Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims * * * and affidavits of labor, not in conflict with this act or the general laws of the United States."

And in the same act (31 Stat. p. 329, § 26 [Comp. St. § 5047]) it was provided further:

"That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States."

Decision in the court below was influenced mainly by the provision which permits an organized mining district to make rules and regulations governing the recording of affidavits of labor. At the time of the enactment of this law, provision had been made by the Legislatures of several of the Western states for recording within a prescribed time affidavits showing the performance of the annual assessment work for the previous year, and making such affidavits prima facie evidence of

the performance of such work. In some of the states, as in Utah, the failure to file the affidavit was expressly made ground for forfeiture of the location. The provision adopted in that state was this:

"The owner of a quartz lode or placer mining claim who shall do or perform, or cause to be done or performed, the annual labor or improvements required by the laws of the United States in order to prevent a forfeiture of the claim, must, * * * within thirty days after the completion of such work or improvements, * * * file in the office of the county recorder," etc. Rev. St. 1898, § 1500.

In Murray Hill M. & M. Co. v. Havenor, 24 Utah, 73, 66 Pac. 762, the Supreme Court of that state held that a claim upon which the required improvements have been made and labor performed is not rendered open to relocation by failure to file the affidavit required by the statute. This was held in view of the provisions of section 2324, Rev. Stat., after quoting which the court said:

"From the foregoing declarations it is as clear as if it had been explicitly stated that, after a mining claim has been located in conformity with the mining laws and regulations, it is not subject to relocation as long as the locator or his successor in interest continues to perform the labor or make the improvements upon the same required by the United States mining law, and that such a locator or his successor in interest has a vested right in such a claim which can only be forfeited by a failure to comply with the conditions mentioned."

Of statutes which make failure to file and record proof a forfeiture of the claim the following is said in 1 Snyder on Mines, § 496:

"The authorities are united to the effect that such legislation as this is at most only directory, any attempt at providing for a forfeiture being beyond the powers of state legislation, and that proof of such labor or improvements may be made the same as any other facts in the case, and this must be the rule. It is the labor and not the proof of it that is required by the Act of Congress. * * * And there is nothing in the section delegating the power to state legislatures and miners of the district which authorizes the enactment of rules or regulations making the filing of proof of annual labor obligatory."

On March 2, 1907 (34 Stat. 1243 [Comp. St. § 5051]) Congress amended the laws governing labor on mining claims in Alaska and provided that there might be made and filed—

"an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars. * * * Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this act, the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act as to performance of work and improvements, such claim shall become forfeited and open to location," etc.

This is the latest expression of the will of Congress on the subject of the forfeiture of mining claims in Alaska, and we think it is the law by which the present case must be governed, and that there is nothing in the Act of June 6, 1900, which warrants a different conclusion. That act gave authority to any organized mining district to make rules and regulations governing the recording of notices of location and affidavits of labor "not in conflict with this act or the general laws of the

United States." The act of the territorial Legislature of 1915 is in conflict with the general law of the United States, which gives to the owner of a located mining claim the right to hold and occupy the same so long as he shall perform the requisite annual assessment work thereon, and Congress reaffirmed that law as applicable to the territory of Alaska by the act of 1907, adding thereto only the provision above quoted. That act permits the filing of affidavits which shall be prima facie proof of the performance of annual work. But it makes provision for forfeiture only upon failure to perform the work. The act of the Alaskan Legislature set that provision aside, and declared that performance of the work shall not be sufficient, that forfeiture shall follow the failure to file an affidavit. To legislate thus was to transcend the authority conferred by the Enabling Act, was to interfere with the right of Congress to dispose of the public domain, was to destroy an estate which Congress grants in public lands, and was to exercise a power which Congress never intended to delegate, the power to declare the forfeiture of mining claims.

The judgment is reversed, and the cause is remanded to the court below, with instructions to enter a decree for the appellants.

EDGINGTON et al. v. TAYLOR.

(Circuit Court of Appeals, Eighth Circuit. December 20, 1920.)

No. 207.

1. **Bankruptcy ⟸396(1)—Courts ⟸366(19)—Right to homestead exemption governed by laws of state and decisions thereon.**
   A homestead exemption under the Bankruptcy Act [1] can be claimed only where given by the laws of the state, and in interpreting such laws the decisions of the highest court of the state are controlling.

2. **Bankruptcy ⟸396(5)—Homestead exemption must have been claimed under Colorado statute.**
   Under Rev. St. Colo. 1908, §§ 2950, 2951, as construed by the Supreme Court of the state to entitle the head of a family to a homestead exemption the word "homestead" must have been entered by either husband or wife on the margin of the record title to the property, and a bankrupt cannot claim property exempt as a homestead unless such entry was made prior to the filing of the petition in bankruptcy, as of which time title to the property vests in his trustee.

3. **Bankruptcy ⟸396(5)—Failure to claim statutory homestead not excused by negligence of attorney.**
   Bankrupts *held* not entitled to a homestead exemption which had not been claimed on the record of title, as required by the laws of the state, because the failure to enter such claim was due to the negligence of the attorney employed by them in the bankruptcy proceedings.

Petition to Revise Order of the District Court of the United States for the District of Colorado.

In the matter of Charles C. Edgington and Ida M. Edgington, bankrupts; French L. Taylor, trustee. On petition by bankrupts to revise order of District Court. Petition denied.

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

[1] Comp. St. §§ 9585-9656.

Harry P. Vories, of Pueblo, Colo., for petitioners.
William B. Vates, of Pueblo, Colo., for respondent.

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

CARLAND, Circuit Judge. This proceeding presents the question as to whether petitioners can lawfully claim lots 17 and 18, block 1, North Boone addition, Pueblo county, Colo., as a homestead exemption to the extent and value of $2,000. The trustee, referee, and District Court disallowed the claim. The material facts as stipulated are as follows:

"Said bankrupts, Charles C. Edgington and Ida M. Edgington, copartners doing business under the firm name and style of the Boone Trading Company, filed their partnership and individual petition in bankruptcy on the 10th day of January, A. D. 1920, in the clerk's office of the United States District Court at Pueblo, Colo. They were adjudicated bankrupts on the 13th day of January, A. D. 1920, and the matter referred to S. R. Durham, Esq., referee in bankruptcy, at Pueblo, Colo., who called the first meeting of creditors for January 30, A. D. 1920.

"At the time of filing their partnership and individual petition in bankruptcy by said bankrupts, the bankrupt Charles C. Edgington owned lots 17 and 18 in block 1, North Boone addition, second filing, Pueblo county, Colo., having thereon erected a brick building and barn, which brick building and premises were occupied by and used by the said bankrupts as a store building and dwelling house.

"At the time of filing the said partnership and individual petition in bankruptcy, the said bankrupts did not have the said premises 'homesteaded' as required by the laws of the state of Colorado, but on Friday, January 30, A. D. 1920 at 11:30 o'clock a. m., and before any trustee in bankruptcy was appointed herein, Ida M. Edgington, one of the said bankrupts, made a 'homestead' filing on the margin of the deed to Charles C. Edgington, the said deed being recorded in the clerk and recorder's office of Pueblo county, Colo., in Deed Book 455, page 251, and at the time of making the said homestead entry she, the said Ida M. Edgington, resided with the said Charles C. Edgington, her husband, in the said building, and at the time of filing their said bankruptcy proceeding she resided with her husband in the said building on the said premises.

"On February 13, A. D. 1920, the said bankrupt, Charles C. Edgington, also filed on the marginal entry of his said deed recorded as above his homestead entry. The said bankrupts in their schedules (see Schedule B) claimed the said property as exempt as follows: 'Also lots 17 and 18 in block 1, second filing town of North Boone, Pueblo, Colo., listed in Schedule B-1 herein as a homestead to said petitioners, Charles C. Edgington and Ida M. Edgington, under the provisions of section 2950 of the Revised Statutes of Colorado of 1908; said real estate being now used by petitioners for a home and for store purposes ($2000).'

"At the time of making said claim in their schedules the said bankrupts had not complied with section 2950 of the Revised Statutes of Colorado of 1908, by making a marginal entry on the margin of his record title to the said real estate, in the office of the county clerk and recorder of Pueblo county, Colo."

It also appears from the record, although not in the stipulation of facts:

"That before said petition was filed the petitioners employed R. H. Arnold, an attorney at law at Colorado Springs, Colo., to assist and advise them in regard to preparing and filing said petition and claiming their exemption. That they requested said R. H. Arnold to protect them, as regards their

homestead, in every way necessary, and that the said R. H. Arnold advised them that all that was necessary for their claim of homestead was to claim the same under 'Schedule B,' which was done by them."

Sections 2950 and 2951 of chapter 63 of the Revised Statutes of Colorado of 1908, read as follows:

"2950. *Homestead Exemption of Two Thousand Dollars.*

"Section 1. Every householder in the state of Colorado, being the head of a family, shall be entitled to a homestead not exceeding in value of the sum of $2,000.00, exempt from execution and attachment, arising from any debt, contract or civil obligation, entered into or incurred after the first day of February, A. D. 1868."

"2951. *Marginal Entry—When Wife or Husband may Cause Same to be Made.*

"Section 2. To entitle any person to the benefit of this act, he shall cause the word 'Homestead' to be entered in the margin of his record title to the same, which marginal entry shall be signed by the owner making such entry and attested by the clerk and recorder of the county in which the premises in question are situated, together with the date and time of day on which said marginal entry, is so made: Provided, that in case the husband is the owner of said homestead, the wife may cause such entry to be made and recorded, and the signature of the said entry by the wife shall have the same effect as if entered by the husband, the owner of the property. And, in case the wife is the owner of the homestead, and shall fail to make such homestead entry, the husband may cause the homestead entry to be made, and the signature thereof by him shall have the same effect as if the entry had been made by the wife, the owner of the property."

[1, 2] If the word "homestead" is not entered in the margin of the record of the title as required by section 2 above mentioned, the claimant is not entitled to the benefit of its provisions. Drake v. Root, 2 Colo. 685; Wells v. Caywood, 3 Colo. 487; Barnett v. Knight, 7 Colo. 365, 3 Pac. 747; Jones v. Olson, 17 Colo. App. 144, 67 Pac. 349; Runyan v. Snyder, 45 Colo. 155, 161, 100 Pac. 420; Leppel v. Kus, 38 Colo. 292, 88 Pac. 448; Harrison Goodwin v. Colorado Mortgage & Inv. Co., 110 U. S. 1, 3 Sup. Ct. 473, 28 L. Ed. 47. The right to a homestead exemption is not given by the Bankruptcy Law, but exists, if at all, by virtue of state laws. The bankruptcy court will allow whatever exemption the state law allows. Brandenburg on Bankruptcy (4th Ed.) § 1001. The decisions of the highest court of a state construing its laws in relation to homesteads are controlling. In re Nye, 133 Fed. 35, 66 C. C. A. 139 (8th Circuit); 2 Loveland on Bankruptcy, § 419. Whatever might be our conclusion upon the facts as presented by the record in the absence of controlling authority, we feel that we are bound by the decision of this court in the case of In re Youngstrom, 153 Fed. 98, 82 C. C. A. 32. That case cannot be distinguished from the case at bar, and the homestead claim was there denied.

[3] The claim is made in this case that the failure to claim the homestead as provided by the law of Colorado was due to the negligence of counsel. Whether the negligence of counsel could be relied upon in any way to relieve petitioners from compliance with the state statute need not be determined, for, conceding that there was negligence on the part of counsel, he was acting within the scope of his authority, and his negligence must be imputed to his client. Kern v. Strausberger, 71 Ill. 413; Clark v. Ewing, 93 Ill. 572; Clark v.

Stevens, 55 Iowa, 361, 7 N. W. 591; Beale v. Swasey, 106 Me. 35, 75 Atl. 134, 20 Ann. Cas. 396; Parker v. Britton, 133 Mo. App. 270, 113 S. W. 259; Leo v. Green, 52 N. J. Eq. 1, 28 Atl. 904; Morgan v. Joyce, 66 N. H. 476, 30 Atl. 1119; Crim v. Handley, 94 U. S. 659, 24 L. Ed. 216; Cowley v. Northern Pac. Ry. Co. (C. C.) 46 Fed. 325; Celina v. East Port Savings Bank, 68 Fed. 401, 15 C. C. A. 495; Thornton on Attorneys at Law, § 318.

An examination of the stipulation of facts shows that, when the property in question was claimed as a homestead in the voluntary petition in bankruptcy, it was claimed under the provisions of section 2950, Rev. Stats. Colo. 1908. Counsel therefore must have known what the statute required when he drew the petition. Title to the land in question vested in the trustee as of the date of the filing of the voluntary petition in bankruptcy. Sections 47a and 70a, Bankruptcy Law;[2] Brandenburg on Bankruptcy (2d Ed.) vol. 1, § 1117; Collier on Bankruptcy (11th Ed.) pp. 1112, 1115, 1127; J. H. Bailey, Trustee, v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; York Mfg. Co. v. Cassell, 201 U. S. 344, 26 Sup. Ct. 481, 50 L. Ed. 782; Thompson v. Faubau, 196 U. S. 516; Mullinix v. Simon, 196 Fed. 775, 116 C. C. A. 399; Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405.

We are therefore of the opinion that the negligence of counsel cannot help petitioners in the present case, and that upon the authority of In re Youngstrom, supra, the petition to revise must be denied. It is so ordered.

COX v. HART.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921. Rehearing Denied February 14, 1921.)

No. 3526.

1. **Public lands ⊂=41—Evidence establishes taking possession and attempt to reclaim desert land.**
   Where a settler plowed a furrow around desert land and cultivated part of it, but did not reside on the land, she was entitled to a preferential right of entry under Act March 28, 1908 (Comp. St. §§ 4681–4683), giving such preferences to persons who had taken possession of unsurveyed desert land and had reclaimed, or had in good faith commenced the work of reclaiming, the same.

2. **Public lands ⊂=37—Residence on desert land not required.**
   The Desert Land Acts do not require residence on the land; the principal essentials being that the claimant shall file a plat showing the contemplated irrigation, expend a prescribed amount for such irrigation, and cultivate one-eighth of the land.

3. **Public lands ⊂=28—Resurveyed lands considered unsurveyed for purpose of preferential entry.**
   Under Act July 1, 1902, providing for resurvey of certain lands which had been previously surveyed, a person taking possession between the two surveys is entitled to the preferential right of entry conferred by Act March 28, 1908 (Comp. St. §§ 4681–4683), on persons who had, prior

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

[2] Comp. St. §§ 9631, 9654.

to survey, taken possession of unsurveyed desert lands, since the act authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed.

Appeal from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suit by Ethel Hart against Joseph W. Cox. Decree for plaintiff, and defendant appeals. Affirmed.

Appeal is taken from a decree whereby it was adjudged that the appellant herein held title in trust for the appellee to 160 acres of land. The land is situated in the Imperial Valley, in San Diego county, Cal., the lands whereof were originally surveyed in 1856. Settlement did not begin until nearly half a century later. It was then found that the marks of the survey had so far been obliterated that it was practically impossible to locate the lines thereof. On July 1, 1902, Congress passed an act (32 Stat. 728) providing for the resurvey of lands in the Imperial Valley, but that survey was not completed until February, 1909. In the meantime entries upon the land under the public land laws were permitted. In February, 1906, the appellee caused a furrow to be plowed around 320 acres, the west 160 acres of which is the land in controversy in the present suit. She posted notices of her claim. In 1906 she raised a crop on 80 acres of the east half of her claim, and sowed grain on 4 or 5 acres of the west half. On that half she plowed furrows for a ditch, and in November, 1906, set stakes for marking out a head ditch along the east line of the land in controversy, and marked out lines for borders thereof and plowed furrows for a ditch on the south line thereof. On November 8, 1906, the appellant moved a tent house onto the northeast corner of the tract in controversy, and laid claim to that 160 acres. He saw the furrows which had been plowed on that land, and he was notified of the appellee's claim thereto. He lived on the land until March, 1909, when he was ejected therefrom as the result of a suit brought by the appellee in the state court.

In July, 1907, the appellant made application for the land in controversy, describing it by metes and bounds. His application was rejected, on account of defective description. Thirteen days later the appellee made an application for the 320 acres which she claimed, and her application was likewise rejected. After the completion of the resurvey, the appellant on March 1, 1909, renewed his application, and on May 15, 1909, the appellee renewed her application; both applications describing the lands in the terms of the resurvey. On a hearing in the local land office decision was rendered in favor of the appellant, and upon appeal to the Commissioner of the General Land Office the decision was reversed, but upon appeal to the Secretary the final decision was in favor of the appellant. The court below, upon the pleadings and proof, reached the conclusion that the Commissioner of the General Land Office was correct in his conclusion, and entered a decree for the appellee.

M. W. Conkling, of El Centro, Cal., for appellant.

George H. P. Shaw, E. W. Britt, and Wm. J. Hunsaker, all of Los Angeles, Cal., for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). Decision of the controversy on the merits, both in the land office and in the court below, turned on the question whether or not the appellee was entitled to the preference right conferred by the act of Congress of March 28, 1908 (Comp. St. § 4681), which provides that entries under the Desert Land Acts—

"shall be restricted to surveyed public lands of the character contemplated by said acts, and no * * * entries of unsurveyed lands shall be allowed or made of record: Provided, however, that any individual qualified to make entry of desert lands under said acts who has, prior to survey, taken possession of the tract of unsurveyed desert land not exceeding in area 320 acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office."

In the proceedings in the land office it was found that the appellee was prior in possession and had in good faith commenced the work of reclaiming the land in controversy, but her preference right to make entry was finally denied by the Assistant Secretary on the ground that the lands were not unsurveyed lands, but were in fact surveyed lands under the survey of 1856, and that the act of March 28, 1908, had no application whatever thereto, and that the appellant was first in right by reason of being the first to file proper application pending the resurvey, and the first to file application after the filing of the resurvey plat.

[1, 2] The appellant contends that the appellee was not a settler on the land in controversy, and that the acts which she performed thereon gave her no right thereto at the time when he made his residence thereon and filed his first application, and that the filing of that application on July 17, 1907, was the first act of any one to create a right to the land. But the land was not then vacant and unoccupied. In the Land Department it was found that the appellee in 1906 in good faith commenced the work of reclaiming the land in dispute before the entrance of the appellant thereon. In the case of Hart v. Cox, 171 Cal. 364, 153 Pac. 391, it was adjudged that the appellee's acts in posting notice, running furrows around the entire tract, cultivating tracts both upon the east half and the west half of her claim, constructing ditches, instituting irrigation, setting stakes, and in laying out lines for future irrigation, were sufficient to prove possessio pedis upon the whole tract whereupon to maintain ejectment, and the court held, in view of those facts, that it was unnecessary that she should have placed improvements upon every acre of the tract; that she had entered upon the land and was adopting the usual means of improving it.

The Desert Land Acts (19 Stat. 377; 26 Stat. 109 [Comp. St. §§ 5029–5035]) do not require residence on the land. The principal requirements are that the claimant shall file a plat showing the mode of contemplated irrigation and shall expend a prescribed amount per acre in making permanent provision for such irrigation, and in addition thereto shall cultivate one-eighth of the land. In the Case of Virgil Patterson, 40 L. D. 264, it was held that the possession and improvement contemplated by the act of March 28, 1908—

"are not such as are required of a settler under the homestead law, but it is sufficient under that act if the possession and improvement conform to the requirements of the Desert Land Law and evidence the party's good faith under that law."

[3] We are of the opinion that the court below properly held that at the time when the claims of the parties hereto were initiated the land was unsurveyed land, and that the act of March 28, 1908, was applicable thereto and conferred a preference right upon the appellee. The act of 1902 authorizing a resurvey was a legislative declaration that the lands were to be regarded as unsurveyed lands, that a new survey was to be substituted for the old, and that by the new survey the future disposition of the lands was to be regulated. By a proviso in that act protection was afforded as to then existing claims of occupants. The inference follows that as to all whose rights were initiated thereafter, the resurvey was intended to be controlling. This was the construction placed upon the act by the Land Department. By an order of the Commissioner of the Land Office of March 31, 1906, all entries in Imperial Valley were suspended after that date. About a year later the Commissioner directed that the order of suspension of said lands from entry be modified, so as to permit "the desert land entry thereof the same as though the lands were unsurveyed." In Nichols v. McCullom, 169 Cal. 611, 614, 147 Pac. 271, 273 (L. R. A. 1915F, 638), the court said:

"The public lands are under the exclusive control of Congress, until title or a right to acquire title has, pursuant to some law, vested in some person or body corporate other than the United States. A person who claims no right in such public lands certainly cannot object to the act of Congress in abandoning a survey already made, and substituting another in its place."

The decree is affirmed.

NATIONAL IMPORTING & TRADING CO., Inc., v. CLARK.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 41.

Sales ⇐1(3)—Contract indefinite as to price not enforceable.

A contract for the sale of ten carloads of sardines, to be shipped during the packing season, at a "price to be fixed by the government," *held* not enforceable, where no price was fixed by the government; the only action taken being a declaration by the Food Administrator that any price above a maximum stated would be deemed unreasonable.

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

Action at law by Andrew Clark, doing business as L. D. Clark & Son, against the National Importing & Trading Company, Incorporated. Judgment for plaintiff, and defendant brings error. Reversed.

Simpson, Thacher & Bartlett, of New York City (Thomas D. Thacher, and Adrian L. Foley, both of New York City, of counsel), for plaintiff in error.

John L. Clark, of New York City (Frederic H. Cowden, of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Plaintiff below was engaged in the business of canning sardines, with a factory at Eastport, Me., and entered into a contract on the 11th of April, 1918, with the defendant below, a New York manufacturer, engaged in the import and export business. The contract provided for the sale of ten carloads of canned goods, one-fourth oil, Keyless sardines, in cotton seed oil. The contract provided:

"Price to be fixed by the government, f. o. b. Eastport, Maine. Shipment to go forward during the packing season, 1918, quantity to be named by the owners, not exceeding two cars for any one shipping month. Shipments on this contract will be made subject to packing."

Under the heading of "Remarks" it is provided:

"It is understood and agreed that whatever price the government deems proper to fix shall be acceptable to the buyer."

This contract was accepted by both litigants. The terms of the contract were, therefore, measured by the packing season of 1918; it was, however, subsequently extended to March 1, 1919. Subsequently the Food Administrator declared that a price above $6.50 would be considered unreasonable. Thereafter, and on May 28th, a conference was held of the sardine packers, where a maximum price of $6.50 was agreed upon by the packers. On the 28th day of May, the United States Food Administrator declared, after this conference with the sardine packers, that any price higher than $6.50 would be considered unreasonable. This price was recommended by 90 per cent. of the sardine packers. Under the contract, a carload was shipped to the plaintiff below about June 7, 1918, was invoiced and paid for at $6 a case. On July 8th, the plaintiff below wrote the defendant below, asking for shipping instructions for five carloads at a price of $6 at Eastport for the 1918 packed sardines. It was there stated:

"This is the price of reliable packers for new packed goods, and we do not have any 1917 packed goods to offer at all."

On July 18, 1918, a second carload was shipped and paid for at $6 a case, and on September 30, 1918, the plaintiff below wrote to the defendant below that it was holding eight carloads for the defendant below "as per contract for ten cars, two of which you have already taken," and, further, "the price is $6.50 Eastport for Keyless one-fourth oils." It will be noted that in this correspondence no reference is made to the government price as fixed, for the fact is that the government never fixed a price and no official action was taken for fixing a price, other than above referred to as the act of the Food Administrator.

On October 2d, the defendant below replied to the plaintiff's letter of September 30th. No price is mentioned therein, but it is stated that the defendant below is overstocked, and contended that, under the contract, it had the privilege of ordering cars up to and including February, 1919. The canning season under the Maine law extended from April 15th to December 1st. On October 5th, the plaintiff below again wrote, making no mention of price, but contending that the packing season ended December 1st, and that the defendant below must

take the remaining eight cars in October and November. On October 11th, in a letter by the defendant below to the plaintiff below requesting the shipment of two cars in October, it was stated:

"It seems to us that you should or could invoice the same somewhat below $6.50. Sardines are being offered in the local market at prices ranging from $6 to $6.25."

On October 14th the plaintiff below wrote the defendant below:

"Your contract with us called for ten carloads of sardines at the government price. * * * We inclose you clipping from the New York Journal of Commerce which states the government price of sardines. * * * For your information, will say the packers have applied to the government to increase the price of sardines to $7 Eastport basis. * * * Our price is $6.50 Eastport, and we have been shipping at this price right along."

Subsequently, about October 31 and November 16, 1918, two cars were delivered to the defendant below. They were invoiced at $6.50 a case, and after some correspondence were paid for at the rate of $6 a case. Although the time of delivery for the remaining six cars was extended to March 1, 1919, no other cars were delivered by the plaintiff below to the defendant below or accepted. On February 26, 1919, the defendant below informed the plaintiff below that the contract was void. On January 10, 1919, the government terminated its control over canned sardines.

It thus appears that the plaintiff below and defendant below agreed upon the purchase and sale of the sardines, but at a price to be fixed by the government at a future time. No price was fixed by the government. At best, the Food Administrator by an order approved the price fixed by the sardine packers, who fixed a maximum price of $6.50. Before the maximum price was withdrawn, four carloads had been delivered. The first two were paid for at the price of $6 per case, and although the last two were invoiced at $6.50 per case, they were paid for by the acceptance by the seller of $6. The court may not enforce the terms of a contract, where the minds of the parties have not met. Nor can the court read into the contract a fixed price, when no price has been fixed by a third party, whom it has been agreed upon should fix the price. Lobenstein v. U. S., 91 U. S., 324, 23 L. Ed. 410. The rights and obligations of the parties to the contract must be found within the terms of the contract, and, when legal responsibility is sought to be imposed, the measure of liability must be that contained in the contract. At best, the government here agreed upon the maximum price which was fixed by the sardine packers, and then issued an order, which was a warning to men engaged in this line of business, that a price above $6.50 per case would be considered unreasonable. With the most liberal construction given to the phrase of the contract, "It is understood and agreed that whatever price the government deems proper to fix shall be acceptable to the buyer," the seller could not impose upon the buyer the approved maximum price. The terms of the contract indicate a future act, a contemplated act, upon the part of the government, for it uses the phrase "to be fixed." The Food Administrator's intention was to enforce the provisions of the Lever Act of August 10, 1917.[1] The phrase above quoted must

[1] Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e-3115⅛kk, 3115⅛l-3115⅛r.

be reconciled, if possible, with the price as stated in the contract, "to be fixed by the government."

When on January 10, 1919, the government terminated its control over food, the plaintiff below was no longer obligated to the maximum price, even if he were theretofore, for the restrictions placed upon the parties by reason of the maximum price approved by the Food Administrator did not prevail. Thereafter the market price prevailed. It is reasonable to suppose that the parties contemplated the contingency that the government might terminate its control over price fixing, but the court cannot read into the contract "maximum price," where the word "price" is used by the parties. The buyer had six weeks longer in which to buy when the government terminated its control. The original contract contemplated delivery of not more than two cars a month during the season, but since there was an extension to the 1st of March to take the remaining cars, which extension omitted the amount of deliveries per month, the buyer still had this time in which to call for deliveries.

We think the court should have directed a verdict for the defendant. Judgment reversed.

UNITED STATES v. WONG LAI.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921.)

No. 3439.

1. **Habeas corpus ⟸1—Erroneous conclusions of fact cannot be corrected.**
A habeas corpus writ cannot be used to correct erroneous conclusions of fact made by those with jurisdiction to ascertain them.

2. **Aliens ⟸32(8)—Chinese ordered deported given fair and nonprejudicial hearing by immigration officers.**
Evidence that immigration authorities gave a Chinaman repeated opportunities to establish that he was entitled to entry, because born in Hawaii, before ordering him deported, *held* not to sustain the trial court's finding that Chinaman was not afforded a fair and nonprejudicial hearing.

3. **Aliens ⟸32(13)—Decision of executive department in proper proceedings deporting Chinaman conclusive.**
A final decision of the Labor Department ordering a Chinaman excluded is conclusive upon the courts, when the proceeding before the department was fairly conducted.

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

Habeas corpus proceeding by Wong Lai against the United States. From an adverse judgment, the United States appeals. Reversed.

James J. Banks, Asst. U. S. Atty., of Honolulu, T. H., and Frank M. Silva, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Edward M. Watson and Charles F. Clemons, both of Honolulu, T. H., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge. The appellee, a Chinese person, made application to enter the United States at Honolulu, Hawaii, having arrived there by ship December 10, 1918, basing his application upon the claim that he was born in Hawaii February 11, 1897, and was taken as a baby to China by his father, where he had ever since remained until his attempted return to his alleged native land. The applicant, presenting affidavits of Wong Hin and Wong Go, was then, with them and one other Chinese witness, examined before the immigration inspector in the effort to establish his alleged right. He stated his age to be then 22 years; that Wong Hin was his father, who, after the death of his mother in Hawaii the year that he was born, took him back to China, where and with whom and his stepmother—his father having again married—he continued to live.

Upon the conclusion of the testimony of the witnesses referred to, and after the government inspector had been informed in answer to his inquiry that there were no more witnesses for the applicant, that officer decided that the testimony was insufficient to show that the applicant was born in Hawaii, and therefore denied him admission. In that first testimony of the applicant occurs the significant statement that during the long years of his residence with his father in China the latter never mentioned to him but twice that he was born in Hawaii. We insert the questions and answers in regard to that matter:

"Q. When did your father first tell you that you were born in Hawaii? A. When I was 6 or 7 years old. Q. Did he mention the fact of your being born in Hawaii very many times? A. Not very many times. Q. More than once? A. Twice. Q. Only twice? A. Only twice. Q. If you were 6 years old when he told you the first time, how old were you when he told you the second time? A. About 10 years old."

The inspector subsequently recalled the applicant and his witnesses Wong Quon and Wong Go for further examination, and they were, according to the record, further examined at length, after which the applicant was notified in writing that the inspector was not satisfied that he was entitled to admission, and informing him that he or his counsel were granted 10 days in which to produce additional evidence; whereupon the testimony of two additional Chinese witnesses—Chin Fook and Chun Moon—was taken before Inspector Farmer, resulting in this decision by the inspector in charge, Halsey:

"The testimony and the record of this case show inconsistencies and indefiniteness; in some places the willingness to change statements which go to affect the credibility of statements as to alleged facts. Every opportunity has been given to the applicant in this case, and I am of the opinion there has been a failure to prove that the applicant was born in Hawaii. Wong Lai is therefore denied admission to the United States as a Chinese person without status entitling him to a landing, and is hereby ordered to be deported to the country whence he came, China."

From that decision an appeal was taken to the Secretary of Labor, which officer subsequently, and, before rendering any decision upon the merits of the appeal, returned the case to the immigration office at Honolulu, with instructions that it be heard before a board of special inquiry to be held under the Act of Congress of February 5, 1917, 39 Stat. 874 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§

4289¼a–4289¼u). That was done, and at such hearing it was stipulated that all the evidence theretofore taken in the matter should be "incorporated into the case and made a part of the record."

In addition to such previous testimony three new witnesses, namely, Chu Gem, Wong How, and Chin Bin, were examined before the board, and the applicant himself was also further examined. Thereafter, and on April 7, 1919, each of the three members of the board of inquiry announced his inability to conclude that the applicant was entitled to admission to the United States, but allowed him 10 days further within which to present additional evidence if he should so desire. The board reconvened April 10th to hear, and did hear, still further evidence in behalf of the applicant, including further testimony of his own, all of which resulted in its final and unanimous opinion, rendered April 19, 1919, to the effect that the evidence did not show the applicant to have been born in Hawaii—he being duly notified that he had the right of appeal to the Secretary of Labor, either with or without the services of an attorney.

Such an appeal was taken from the decision of the board to the Secretary of Labor, who affirmed the decision of the board of inquiry and ordered the applicant's deportation. We find it impossible to sustain the judgment of the court below to the effect that the appellant was entitled to admission to the United States as a native-born citizen thereof; its view of the record, as shown by its opinion being that, because of the manner of questioning the various witnesses by the respective officers of the government, and because of what the court below conceived to be erroneous conclusions drawn by them from the testimony given, prejudice was disclosed on the part of the officers against the appellant, and consequently that he was not afforded a fair hearing.

[1] We are of the opinion that the record does not justify that action of the court below. It hardly needs to be said that a writ of habeas corpus can never be used for the purpose of correcting erroneous conclusions of fact drawn by those charged by the law with the duty of ascertaining the facts.

[2] It is difficult to conceive of a case where greater opportunity could be afforded such an applicant for admission to this country than was given to the applicant in the present one, and we do not think that it can be properly affirmed upon the record that the conduct of any of the executive officers was such as to constitute any valid ground for holding that the applicant was not afforded a fair hearing of his claim to citizenship, or that the conclusions of the officers of the Immigration Service were in any respect based upon prejudice. Speaking of discrepancies in the testimony of witnesses in such cases, this court said in Jeung Bock Hong et al. v. White, Commissioner, 258 Fed. 23, 24, 169 C. C. A. 161, 162:

"If, taking them all together, the executive officers of the department found that the evidence in support of the petitioners' right to land and enter the United States was so impaired as to render it unsatisfactory, the court is not authorized to reverse that conclusion."

[3] It is the law applicable to all cases such as the one we now have before us that the final decision of the executive department

when the proceedings before it are fairly conducted is conclusive upon the courts. White, Commissioner of Immigration, v. Fond Gin Gee (C. C. A.) 265 Fed. 600; Low Wah Suey v. Backus, Commissioner of Immigration, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, and cases there cited.

The judgment is reversed.

THE JOBSHAVEN.

THE IJSELHAVEN.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

Nos. 60, 61.

1. **Contracts ⇐247—Evidence held insufficient to show contract for greater compensation than that first contracted for.**
   Where, after libelant contracted to do stevedoring work for a specified price, its employés struck for higher wages, assuming that a contract to pay a higher price would have been supported by a consideration, evidence *held* insufficient to show any such agreement.
2. **Contracts ⇐247—Party held to have burden of showing agreement to pay a higher price for work than that previously contracted for.**
   Libelant, who contracted with the masters of ships for the doing of stevedoring work for a specified price, had the burden of proving an agreement by the ships to pay a higher price because his employés had struck for higher wages.

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

Suits in admiralty by the C. F. Starita Company, Incorporated, one against the steamship Jobshaven, her engines, etc., claimed by Lambertus Coolen, and the other against the steamship Ijselhaven, her engines, etc., claimed by Tjerk Drajer. From decrees in favor of the libelant (259 Fed. 306), claimants appeal. Reversed, with directions.

These suits in rem are, according to the libels, to recover for "necessary work, labor, and stevedoring services" upon the steamships above named. The libels do not further describe the nature of the work, etc., nor assert any contractual agreement for rate of compensation, but each claims a large sum of money as the "reasonable value" of said "stevedoring services." The answers severally plead an agreement prior to the rendition of any service whereby libelant "agreed to remove from the ship bunker coals and cargo which were then on fire or damaged by fire" at a certain rate, much lower than that (by inference) used by libelant in stating the demands of the libels.

Each answer states the amount admitted to be due according to claimants' versions of the transaction and pleads a written offer of consent to a decree in the case of the Jobshaven of $630.84, and in that of the Ijselhaven of $2,036.25, in each instance with costs to date of offer, viz. May 27, 1918.

All the testimony was taken by depositions. The court below granted decrees for the amounts demanded in the libels. Claimants appealed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. de Grove Potter, George M. Lanning, and Jay T. Cooper, all of New York City, of counsel), for appellants.

Bullowa & Bullowa, of New York City (Emilie M. Bullowa, of New York City, of counsel), for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Decision herein depends upon the view taken of the evidence, measured by the pleading, rather than on debatable points of law.

A definite finding of fact, made by the trial judge, after seeing and hearing witnesses sharply contradicting each other, is rarely disturbed, though even this rule has exceptions (The Albany, 81 Fed. 968, 27 C. C. A. 28); but here all the evidence comes to us, as it did below, without the strengthening or weakening effect of the witnesses' mien and bearing.

Pleading in the admiralty is simple, but absence of technicality renders all the more important a comparison of what a man swears to in his pleading, what he swears to as a witness, and what his counsel advances in argument. Cf. Martin Cantine Co. v. Blackford (C. C. A.) 264 Fed. 100. The party in admiralty can rarely assert that the pleading was beyond his layman's comprehension.

This corporate libelant may for the purposes above stated be said to be one C. F. Starita, who is its president, made whatever arrangements were made with the claimants (the shipmasters), verified the libels, and is the witness without whom libelants have no case at all.

[1] These libels, identical in form, allege services unspecified except that they were of a stevedoring nature. A general contract at reasonable rates is the legal inference. A few days after they were filed the shipmaster's depositions were taken (in advance of answer), and it clearly appeared that, if these men told the truth, Starita, being informed that the bunker coal on both vessels was heated, if not actually on fire, and knowing that the cargoes were oil cake, made the lowest bid to remove this danger, and agreed to charge 50 cents per hour per man, with usual additions for night and Sunday work, supervision, and insurance. Shortly thereafter, and before any substantial amount of work was done, the base rate was by mutual consent advanced to 60 cents, but never was there any reservation or exception for strikes or similar occurrences, and never was any other or further bargain made. The rates subsequently charged were never mentioned until work completed.

Months later Starita testified, and first swore that he agreed to do the work at 50 cents per ton (not per man), yet afterwards, in answer to his own counsel, said that the base rate was 50 cents per man, and admitted that such contract was firmly made before a stroke of work done, nor did he claim any reservation or exception for strikes or the like.

He then stated that, after working about an hour and a half on one of the steamers, his workmen struck, and thereupon he refused to go on with the jobs, unless (as it was phrased in bills rendered long after work completed) the ships paid, "in accordance with rules and regulations of International Longshoremen's Association," amounts which as billed raise the base charge to either $1 per hour per man, or

$1.10, we cannot be sure which, and on this record it is impossible to say certainly why it should be one rather than the other, even according to libelant.

In explanation of this complete change of price, and as proof of a new contract, Starita testified, "When I was informed that the bunkers were on fire, I refused to do the work unless the captain paid me the union rates per hour for each man, which he agreed to do." This is merely false on his own story; for he had just sworn that, when he got the job by underbidding other stevedores, one shipmaster (both saw him together as the ships belong to same owner) said, "Our coal in the bunkers is getting too hot, and we believe that they are on fire." Starita replied, "Are you sure of that?" to which the captains said, "Yes, sir; we have been pumping water in there for 24 hours."

As there is nothing contradicting the statement that Starita's men struck for higher pay and he acceded to the rise, we may believe it, but the attempt to justify a higher charge to the ships by pretending that the fact of fire was only learned after work started wholly discredits him as a witness.

Gauging this story by his libels, it is notable that his whole claim rests on the theory that by reason and as the result of the stevedores' strike a new and very definite contract was made. There never was a general hiring, and there was confessedly an express contract, forbidding any such recovery as is here attempted, unless it terminated. Such pleading is, to put it mildly, disingenuous.

Let it be assumed as law that, if Starita broke his original agreement, and thereby conferred on claimants a lawful demand for damages, there might be in the waiver of such demand consideration for a new agreement to do the same thing at twice the money (Cf. Alaska, etc., Ass'n v. Domenico, 117 Fed. 99, 54 C. C. A. 485), but that question does not arise until it is settled in point of fact whether claimants ever did promise, with or without consideration, to pay the higher rates.

[2] We think that no such promise was ever made; but it is enough for this case to hold, as is plainly true, that the burden of proving such promise is on libelant, and it has not been borne by credible testimony.

The amounts awarded in the court below are unexplainable if not excessive on libelant's own theory. The evidence does not enable us to ascertain satisfactorily just what is due, on the story of the shipmasters, which we adopt. But claimants should and may be held to their offers.

The decrees appealed from are reversed, and the court below directed to enter decree against the Jobshaven for $630.84 with costs to May 27, 1918, and against the Ijselhaven for $2,036.25 with like costs and without interest in either case. The claimants will recover one bill of costs on this appeal, and costs of District Court in each case after May 27, 1918.

Other matters have been argued, but we have disposed of the matter by the foregoing findings, and express no opinion on any other point.

DENVER & R. G. R. CO. v. UNITED STATES.

UNITED STATES v. DENVER & R. G. R. CO.

(Circuit Court of Appeals, Eighth Circuit. December 13, 1920.)

Nos. 5621, 5622.

1. **Master and servant ⟸17—Burden on railroad to show diligence to prevent excessive hours of service.**
   Under Hours of Service Act (Comp. St. §§ 8677–8680), where a train has been delayed through casualty or unavoidable accident, it is the duty of the railroad company to exercise reasonable diligence to prevent excess hours of service by the train crew, and the burden of proving such diligence rests upon the company.
2. **Master and servant ⟸13—Time of unavoidable delay not added to permitted hours of service.**
   Hours of Service Act (Comp. St. §§ 8677–8680) does not authorize a railroad company to add the time during which a train is delayed through casualty or unavoidable accident to the 16 hours of the train crew permitted by the act.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by the United States against the Denver & Rio Grande Railroad Company. From the judgment, both parties bring error. Affirmed on defendant's writ of error, and reversed on that of the United States.

Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C. (Harry B. Tedrow, U. S. Atty., and John A. Gordon, Asst. U. S. Atty., both of Denver, Colo., on the brief), for the United States.

T. R. Woodrow, of Denver, Colo. (E. N. Clark and J. G. McMurry, both of Denver, Colo., on the brief), for Denver & R. G. R. Co.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. [1] This is an action by the United States to recover penalties from the Railroad Company for violations of the Hours of Service Act (34 Stat. 1415 [Comp. St. §§ 8677–8680]). The complaint contained 23 counts. The case was heard by the court on an agreed statement of facts and judgment rendered in favor of the United States on all counts except 11, 12, and 13, which were dismissed. Both parties appeal.

The statement of facts covers 10 printed pages of the record and cannot be set forth here on account of its length. It is admitted by the Railroad Company as to each cause of action that there was excess service. The United States admit as to each cause of action that the original delay of the respective trains was caused by unavoidable accidents or casualties. The only question therefore for decision is as to whether the Railroad Company exercised the diligence required by law after the occurrence of the unavoidable accidents to prevent the excess service of its employees. A., T. & S. F. Ry. Co. v. U. S., 244 U. S. 336, 37 Sup. Ct. 635, 61 L. Ed. 1175, Ann. Cas. 1918C, 794; San

Pedro, L. A. & S. L. Ry. Co. v. U. S., 247 U. S. 307, 38 Sup. Ct. 498, 62 L. Ed. 1129; Denver & Rio Grande Ry. Co. v. U. S., 233 Fed. 62, 147 C. C. A. 132; U. S. v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136; Indiana Harbor Belt Ry. Co. v. U. S., 244 Fed. 943, 157 C. C. A. 293; Baltimore & Ohio Ry. Co. v. U. S., 242 Fed. 1, 154 C. C. A. 593. The burden of proof was on the Railroad Company to show that it exercised the required diligence to relieve the crews and to prevent the excess service of its employees. U. S. v. Kansas City Southern Ry. Co., 202 Fed. 828, 121 C. C. A. 136; Great Northern Ry. Co. v. U. S., 218 Fed. 302, 134 C. C. A. 98, L. R. A. 1915D, 408; Indiana Harbor Belt Ry. Co. v. U. S., supra; U. S. v. Galveston, H. & H. Co., 255 Fed. 755, 167 C. C. A. 101.

[2] Paragraph 7 of the statement of facts reads as follows:

"Defendant never made a practice of tieing up main line trains and relieving the crews for rest at any place when such trains and crews had been delayed by casualty or unavoidable accident, * * * or of sending out relief crews from Minturn or Grand Junction under such circumstances, for the reason that defendant acted upon the theory that it had a legal right to work a crew 16 hours and such time in addition thereto as that crew had been delayed en route by such casualty or unavoidable accident, and for the further reason that it desired to avoid the expense of deadheading relieved crews to a terminal under pay, and of paying substitute crews while deadheading to the relief of such crews, in the event that relief crews were available, or in the alternative, of holding engines and equipment out of service while train and engine crews were tied up between terminals for the purpose of securing rest in accordance with the requirements of the federal act."

The statement of facts therefore shows that the Railroad Company did not give any attention to its duty of using diligence to relieve its employees and thereby prevent an excess service but that it relied wholly upon a false theory of the law as to its duty in the premises. Said false theory was that the Railroad Company had the right to add the time the respective trains were delayed by accident or casualty to the sixteen hours that the employees might be held in service. In A., T. & S. F. Ry. Co. v. U. S., supra, the Supreme Court said:

"It was the duty of the company, after the breakdown, * * * to use all reasonable diligence to avoid the consequences of the unavoidable accidents which had delayed the movement of the train and to relieve the crew by the means practically at hand."

It does not appear from the statement of facts what the extra expense would have been to deadhead the different crews back and forth in making the change of crews, or how much extra expense would have been added by tieing up the trains until the crews could have the necessary rest. If, therefore, expense could ever be an excuse for not using due diligence, it cannot be considered in this case, as it does not appear what the expense would have been. We have examined the statement of facts carefully and conclude that the District Court was right in its judgment against the Railroad Company. We are, however, of the opinion that the same reasons which compelled a judgment against the Railroad Company on all counts except 11, 12, and 13, also compel a judgment against it as to the last-mentioned counts. Paragraph 22 of the statement of facts, which relates to counts 11, 12, and 13, is as follows:

"Several hours before this train left Grand Valley defendant's chief train dispatcher knew that it would be impossible for it to reach Minturn, so that the employees thereon could be relieved within 16 hours from the time they went on duty at Grand Junction. No effort was made by said dispatcher to tie this train up and relieve the engine and train crew for rest at any place; the dispatcher acted upon the theory that the delay at Grand Valley was due to an unavoidable accident, and that he therefore had a right to require the engine and train crew to complete their run to Minturn, provided they were not on duty over 16 hours, in addition to the time the train had been delayed at Grand Valley. For this reason, said dispatcher, at 8:30 a. m., wired the dispatcher at Glenwood Springs to extend the time of this engine and train crew 9 hours and 40 minutes beyond the 16-hour period. Upon the arrival of this train at Glenwood Springs at 11:20 a. m., the engineer and fireman requested the dispatcher that they be relieved, which was done, and a new engine crew was thereupon substituted. Said dispatcher made no effort to deadhead an engine and train crew from Minturn on its passenger train No. 15. No. 15 left Minturn at 9:10 a. m., arriving at Glenwood Springs at 11:20 a. m., New Castle at 11:50 a. m., and at Rifle at 12:15 p. m. (extra and second 52 left Rifle at 8:53 a. m.). Had this action been taken, excess service could either have been avoided or reduced to a minimum, and the employees so relieved could have deadheaded on their own train to Minturn. The reasons of said dispatcher in not sending out a relief engine and train crew are set forth in paragraph 7 hereof. At the time this train was at Glenwood Springs there was no train crew there available for service."

Paragraph 7, referred to in paragraph 22, has heretofore been quoted. We are of the opinion that upon the facts stated the judgment in favor of the Railroad Company on counts 11, 12, and 13, should be reversed, and the court below directed to enter such judgment thereon as in its opinion shall be just.

Otherwise the judgment below is affirmed.

PARIS v. SMITH et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 55.

Fraud ⇐47—Complaint sufficient.

A complaint, which sets forth false representations made by defendant to plaintiffs, on which they relied, and with the result that they parted with their money to their damage, states a cause of action for deceit, and damages necessarily and naturally resulting may be proved, without pleading special facts showing the damage.

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

Action at law by Otto Smith and Boyd Doyle, partners as Smith & Doyle, against Christ Paris. Judgment for plaintiffs, and defendant brings error. Affirmed.

This action was brought by the defendants in error for fraud and deceit, and was submitted to the jury by the District Judge as such action. The plaintiff in error attacks the sufficiency of the complaint, and upon the trial moved for a dismissal thereof, which was denied. No defense was interposed, and the plaintiff in error rested upon the proof offered by the defendants in error.

The defendants in error were copartners engaged in business in California, and contracted with the plaintiff in error, through their agent, for the purchase of 5,000 gallons of imported pure olive oil, packed in cases of 2/5 gallon tins, "quality to be equal to sample submitted, at the price of $4.60 per gallon, ex warehouse in New York, subject to approval of sample and final examination and approval after goods are packed. Terms cash, warehouse order or bill of lading." A sample submitted by registered mail, after test, proved to be olive oil. On June 20th the agent of the defendants in error received notice that the goods were ready for shipment. An examination was then made of a case of the olive oil at the place of business of the plaintiff in error. One of the cans was opened, and part of the contents poured into a long glass. Upon direct inquiry, the plaintiff in error then repeated that the oil was pure, and said, "Yes, it is pure; it looks and tastes like pure olive oil to me." Payment was then made for the merchandise, and the bill of lading was delivered to the bank. In the month of August, 1918, the defendants in error received information that the purity of the oil was questioned and the agent at once saw the plaintiff in error.

An analysis of the olive oil was then made by a chemist, with the result that it showed a negligible quantity of olive oil—"it showed cotton seed flavored with olive." It was testified that in the purchase of olive oil an analysis is not resorted to, but the usual method of testing it is to visualize it, and to visualize it means looking at it through the light, and thus judging whether, by the color and appearance, it is olive oil. The chemist who made the analysis, however, said: "It is an unsaponifiable oil, containing a small amount of cotton seed oil. It is highly refined, with no bad odor or taste, and from these properties I conclude that it was chemically changed by some process, the deduction of which was not within the scope of my analysis; but the presence of cotton seed oil is positively established." It thus appears that the olive oil sold, was not pure olive oil, and it was misbranded. This analysis was made after it was libeled by the government for violation of the Pure Food Laws. The plaintiff in erorr was informed that the oil was libeled by the government because it was not pure. Another witness testified that in the course of the trial of a litigation between the witness and the plaintiff in error, a statement was made by the plaintiff in error in the courtroom that he had sold to the defendants in error a compound, and not pure olive oil.

Celler & Kraushaar, of New York City (Meyer Kraushaar and Emanuel Celler, both of New York City, of counsel), for plaintiff in error.

John B. Johnston, of New York City (Moses Cohen, of New York City, of counsel), for defendants in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge (after stating the facts as above). The District Judge submitted this testimony to the jury, and permitted them to determine as a question of fact whether the defendants in error had sustained the burden of establishing their action for fraud and deceit. He instructed the jury that it must be established by a fair preponderance of proof that the plaintiff in error represented to the defendants in error that he was selling pure olive oil, and that in point of fact the oil so sold was not pure; that these representations so made were relied upon, and that the plaintiff in error, at the time, knew the representations made to be false. The court sharply called to the attention of the jury the necessity of proof that the representations were known to the plaintiff in error to be false when made, and that such false representations were relied upon by the defendants in error in making the purchase. The measure of damages was the difference

between the price agreed to be paid for pure olive oil and the market value of the oil which was sold, which is cotton seed oil. Evidence as to this the court submitted to the jury. We cannot interfere with the finding of the jury on the questions of fact thus submitted.

The plaintiff in error assigns as error the insufficiency of the complaint to state a good and sufficient cause of action in fraud and deceit. The complaint sufficiently states the jurisdictional facts, the making of the contract, and the promise of payment. It sets forth the representations made, which proved to be false, the fact that the oil so shipped "was not as represented and warranted as aforesaid, and was libeled by the officials of the Department of Agriculture at Los Angeles, because it was not as represented and warranted by the defendant, and not as described by the defendant in the bill of lading aforesaid," and further that on the 21st of June, 1918, the plaintiff in error unlawfully and fraudulently delivered to the Irving National Bank, the agent of the defendants in error, a bill of lading covering a shipment represented and warranted to be pure olive oil. It is further alleged that the plaintiff in error unlawfully and fraudulently obtained from the defendants in error the moneys so paid.

The complaint is sufficient, although it does not allege scienter on the part of the plaintiff in error. It does describe the alleged representations and concealments of the plaintiffs in error as falsely and fraudulently made. A pleading in this form is sufficient in the state courts. Thomas v. Beebe, 25 N. Y. 244; Dudley v. Scranton, 57 N. Y. 424; Carr v. Sanger, 138 App. Div. 32, 122 N. Y. Supp. 593.

Agreement to enter into a contract relation implies that the parties will deal with each other in good faith. This is essential to the meeting of the minds. If one of the parties fails to act in good faith, and in fact deceives the other, it is an actionable fraud, and breaches the implied obligation he is under, and he must respond in damages. The aggrieved party may have the remedy to rescind the contract; but he may, at his option, affirm the contract and bring an action for damage, recovering such amount as he may prove. A complaint that, as here, sets forth false representations made to the defendants in error, upon which they relied, and with the result that they parted with their money to their damage, sufficiently sets forth an action for deceit. Any damages that necessarily and naturally flow from such a contractual relation may be proved without pleading special facts showing the damage. Colrick v. Swinburne, 105 N. Y. 503, 12 N. E. 427.

We think the complaint sufficiently sets forth a cause of action, as claimed. The proofs here required the submission to the jury of the question of damages; that is, the loss sustained, due to the difference between the contract price and the market price of the compound which was actually sold. This compound was called cotton seed oil by counsel in his questions. Cotton seed oil was the standard used in determining the market value, so as to determine the loss. But since the term seems to have been descriptive of what was sold defendants in error, we think no error was committed in its use, and therefore the evidence as to damage was sufficiently established.

Finding no error in the result below, the judgment is affirmed.

CONKLIN v. CITY OF NORWALK.

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

No. 50

Navigable waters ⟸20(8)—City liable for failure to open drawbridge.

A city *held* liable for injury to a schooner through collision with a drawbridge maintained by the city over a navigable stream, governed by regulations prescribed by the Secretary of War, caused by the failure of its bridge tender to open the draw on proper signal by the schooner, or to signal his inability as required by the regulations.

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

Suit in admiralty by Charles E. Conklin against the City of Norwalk. Decree for respondent, and libelant appeals. Reversed, and cause remanded.

The respondent municipality maintains a drawbridge over the Norwalk river. It spans what is called (on the chart submitted to us) the "10-foot channel," which to the southerly of the bridge and within about 600 feet thereof is nowhere wider than 200 feet, and in its lower reaches considerably narrower. Libelant's schooner Mary E. Cuff is a vessel of the United States as defined in R. S. § 4311 (Comp. St. § 8057), and on the afternoon of July 27, 1918, approached this bridge, bound in from Long Island Sound, under her own sail. The tide was ebb, and the wind light from the southwest, and the schooner was under shortened sail. The libel alleges that, having given the proper signal, the bridge tender "began to make preparation to open" the draw, but instead of so doing he "deliberately neglected to perform his duty," and kept the draw closed, but gave no "signal of any kind whatsoever that he would not or could not" open the draw; wherefore the schooner ran into the bridge and suffered severe damages.

The District Court dismissed the libel; libelant appealed, and in this court obtained leave to take additional testimony, and he has accordingly examined six witnesses whom the lower court never saw.

William A. Griffin, Jr., of South Norwalk, Conn., and George V. A. McCloskey, of New York City, for appellant.

Edward J. Quinlan, of Norwalk, Conn., and John H. Light, of South Norwalk, Conn., for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Pursuant to section 5 of the River and Harbor Bill of 1894 (28 Stat. p. 362 [Comp. St. § 9973]) the Secretary of War has admittedly regulated the operation of this drawbridge by the following rule:

"Except between the hours of 6:45 a. m. and 7 a. m., and 12 m. and 12:15 p. m., and 12:45 p. m. and 1 p. m., the draw shall be promptly opened for the passage of foreign vessels and of 'vessels of the United States,' as defined by section 4311, Revised Statutes, other than those propelled exclusively by hand, upon a signal to be given by three short blasts of a whistle or horn. In case the draw cannot be immediately operated when a signal is given, a red flag or ball by day, and a red light by night, shall be conspicuously displayed."

The sole questions presented by this appeal are whether those in charge of the city's bridge complied with this rule, and whether the

schooner was guilty of any contributing fault, within the law as laid down in Munroe v. City of Chicago, 194 Fed. 936, 114 C. C. A. 572, where it was held that a vessel, having duly signaled for the draw, may "properly proceed at slow speed on the assumption that the bridge will open, until it appears by proper warning or reasonable view of the situation that it will not." That libelant sounded a horn the requisite number of times is admitted. How often, how near the bridge, and with what kind of a horn the signal was given are in dispute.

The evidence taken in this court is far more important and persuasive than that which the District Judge heard. It would serve no good purpose to discuss it at length; suffice to say that we are satisfied that the horn signal for the bridge was given by the schooner at least three times, beginning at a point more than 3,000 feet from the draw. The bridge tender did not hear these signals until the schooner was approximately 500 feet away, at which time he began preparation for opening the draw. The gates intended to keep traffic off the bridge when the draw was open were out of order, and this caused delay; but no signal to the effect that the bridge would not or could not open in time was given the schooner.

It is urged that the horn used by libelant was insufficient. The word "horn," as used in the rule above quoted, naturally means the kind of horn which approaching vessels are by law required to carry. This matter is regulated by the navigating rules, and while on the testimony we incline to think that this schooner had a mechanical foghorn and used it wherewith to signal this bridge, the point is unimportant, because, although article 15 of the International Rules requires a mechanical foghorn, the corresponding article of the Inland Rules requires only an "efficient foghorn." We are satisfied by the evidence that the Cuff's horn was efficient, because it was heard by so many witnesses who were at a considerable distance.

It is also urged that the Cuff was proceeding at too great speed, and the testimony on this subject is as usual based on estimate. All the conditions were against anything more than steerage way; i. e., the schooner was fully laden, she had small sail set, the wind was light, and she was stemming a strong ebb tide. It appears by satisfying evidence that a tug with a disabled vessel in tow was behind the schooner coming up the channel and had to reduce her speed to about three miles an hour in order not to overhaul her as both craft approached the draw. We think the speed was moderate.

On the whole, we conclude that due warning was given the bridge tender, that he failed to hear until the schooner was between 500 and 600 feet distant, and that if the bridge had been fully in order it could have been opened before the schooner arrived. Whether the temporary displacement of the passenger gates caused much delay is not very clearly shown, but it is plain that it was the duty of the bridge tender to know whether he could or could not open the draw within the time that would elapse between his seeing the schooner and her probable arrival at the draw. If he did not think he could open the draw within that time, he should have hung out a warning signal.

We think respondent was at fault, and perceive no contributing fault

in libelant. We are obliged to reverse this case on the depositions taken in this court. Leave to take this new testimony was obtained on affidavits substantially accusing the original counsel of libelant with failure to produce witnesses who (as now appears from their depositions) could either have been subpœnaed for trial or had their deposition taken de bene esse. We find these witnesses persuasive and their evidence controlling, but respondent should not be mulcted of additional expense incurred by the negligence of the other side.

The decree appealed from is reversed, and the cause remanded, with directions to assess libelant's damages and to enter a decree for the amount ascertained, without the costs of this court or of the District Court, other than costs incident to such reference as may be necessary to assess damages. Interest on damages, however, will not be denied as to those items whereon interest is lawfully allowed.

[illegible] FOUNDRIES v. SIBLEY SOAP CO.

(Circuit Court of Appeals, Third Circuit. January 17, 1921.)

No. 2572.

1. **Easements ⟸17(2)—Estoppel ⟸32(1)—Conveyance of land described as abutting on street creates easement therein concluding grantor.**
Under the law of Pennsylvania, a grantee of land, the boundaries of which were described as beginning at a point in the east side of a 40-foot street, and also as running to such east line, and thence by the east line of such street, etc., acquired an easement or right of way in the street, of which the grantor could not deprive him by a subsequent deed to a third party of the strip of land embraced in the street.

2. **Easements ⟸21—Conveyance held not to charge grantee with notice that agreement with third person prevented implied easement in street.**
A deed describing the boundary of the land as beginning at a point a specified distance from the northeast corner of land bargained to be sold by the grantor to a third person, the said point being the east side of a 40-foot street as agreed on by the third person with the grantor, did not charge the grantee with notice that such agreement in any way avoided his implied easement in the street.

3. **Easements ⟸21—Right determined by reference to deed, when agreement affecting it not in evidence.**
Assuming that a deed charged the grantee with notice that an agreement between the grantor and a third person avoided the implied easement in a street by reference to which the land was described, the right to the easement was to be determined solely by reference to the deed, where the agreement was not in evidence and its contents were not revealed.

4. **Evidence ⟸230(3)—Subsequent declarations of grantor as to nature of agreement not evidence against another grantee.**
Where land was conveyed as abutting on a street, declarations by the grantor in later deeds as to the nature of his agreement with a third person concerning the street were not proof of the contents of the agreement.

5. **Easements ⟸17(2)—Estoppel ⟸32(1)—Implied easement of grantee in street not affected by subsequent deeds of grantor.**
Where a deed described land as abutting on a 40-foot street as agreed on by the grantor with a third person, declarations of the grantor in

later deeds as to the nature of the agreement with such third person could not affect the easement of the grantee under the earlier deed.

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

Suit by the Sibley Soap Company against the American Steel Foundries. From a decree for plaintiff, defendant appeals. Affirmed.

Samuel McClay and Reed, Smith, Shaw & Beal, all of Pittsburgh, Pa., Pam & Hurd, of Chicago, Ill., and J. S. Carmichael, of Franklin, Pa., for appellant.

A. B. Jobson and George S. Criswell, Jr., both of Franklin, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case, the Sibley Soap Company filed a bill in equity in a state court against the American Steel Foundries, to restrain the steel company from obstructing, by building, the soap company's use of a street abutting on its property. On petition of the steel company, alleging it was a corporate citizen of New Jersey and the soap company of Pennsylvania, the case was removed to the court below. On final hearing, that court granted the injunction prayed for, whereupon the steel company took this appeal.

The question involved is one of title and easements vested under certain deeds from a common grantor to both parties, and the determination of that question turns on the application to those deeds of the decisions of the Supreme Court of Pennsylvania. Stated in general terms, the law of Pennsylvania is that, where an owner of lands grants a part of it, and designates as a boundary of the part sold a street on the part of the land which he retains, a right of way or easement to such street or way passes to the grantee by operation of law and the grantor cannot thereafter be heard to say no such street exists. In that connection, it suffices to refer to In re Opening of Brooklyn Street, 118 Pa. 646, 12 Atl. 666, 4 Am. St. Rep. 618, where it is said:

"If the question were one between a grantor and grantee, and involved a right of way over the street upon which the land conveyed bordered, of course the grantor must make good his covenant that there was a street corresponding with the one described in the deed. But that is the law, not upon the theory of a dedication to public use, but upon the implied contract between the parties. As between them, every consideration requires that if the ground conveyed is described as bordering upon a street, the street should be there in compliance with the description."

Such being the law of the state, it is shown that Grimm, the common source of title of both plaintiff and defendant, by deed dated December 16, 1897, conveyed to the predecessors in title of the Sibley Soap Company, a lot of ground:

"Beginning at a point south 85 degrees 10 minutes and 50 seconds east, 25 feet from the northeast corner of land bargained to be sold by Daniel Grimm to the Franklin Steel Casting Company, *the said point being the east side of a 40-foot street as agreed upon* by said company with said Grimm; * * * thence south 86 degrees 15 minutes 10 seconds west 73.9 feet, to the *east line of said 40-foot street;* and thence *by the east line of said 40-foot street,*" etc.

[1] This description located the western line of the lot sold as abutting on the east line of the 40-foot street. This deed the purchaser recorded on December 22, 1897. Under the then adjudged law of Pennsylvania, the grantees of said lot acquired thereby an easement or right of way of which the grantor could not, and did not, deprive them, when, by his deed of November, 1900, he conveyed to the predecessor in title of the American Steel Foundries all his interest and title to a 20-foot strip of land which abutted the western line of the soap company's lot, which strip was the locus in quo from building on which the plaintiff sought, by his bill, to restrain the defendant. On the face of their deeds and under the decisions of Pennsylvania, the court below was right in holding the easement or right of way of the plaintiff to this 20-foot street strip was established and paramount to any subsequent grantee from Grimm. The soap company's deed was prior in time and prior on record, and must therefore prevail, unless the force of such prior deed and record is in some way avoided.

[2] This the defendant seeks to do by charging the plaintiff with notice of an earlier agreement on the part of Grimm, referred to in his deed to the plaintiff's predecessor already quoted, viz.:

"The northeast corner of land bargained to be sold by Daniel Grimm to the Franklin Steel Casting Company; the said point being the east side of a 40-foot street as agreed upon by said company with said Grimm."

We find nothing in this language which in any way warned the grantee that such agreement in any way avoided the implied easement, which the deed was granting. On the contrary, the language in every way supported and assumed the existence of a 40-foot street, and that in bargaining to sell to the Franklin Steel Company land on the western or opposite side, Grimm had left a 40-foot street whose west line abutted *on* the east line of the land sold to the Franklin Steel Company.

[3-5] But, assuming the words quoted gave notice to the grantee of the deed of an earlier and adverse agreement, the agreement itself was not given in evidence or its contents revealed on the trial of the case. Hence the court below had in the end nothing but Grimm's earlier deed before it, and the effect to be given to his own language in a contest between him and his grantee, over the easement claimed. Manifestly, any declarations made by Grimm as to the nature of said agreement in later deeds he made were neither proof of the contents of the agreement nor could such later deeds in any way affect Grimm's earlier grant.

The judgment below is affirmed.

DI PRETA v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 75.

1. **Criminal law ⟸1159(2)—Verdict not reviewed in respect to weight of evidence.**
   The Circuit Court of Appeals cannot review the verdict of a jury in respect to the weight of the evidence.
2. **Criminal law ⟸1050, 1129(1)—Sufficiency of indictment considered on appeal, without exception or assignment of error.**
   Where writ of error brings up the judgment roll, the appellate court is authorized and required to consider the sufficiency of the indictment on its face, although there is no exception or assignment of error.
3. **Indictment and information ⟸110(3)—Indictment in language of Harrison Act sufficient.**
   An indictment substantially in the language of the second section of the Harrison Act (Comp. St. § 6287h) is sufficient.
4. **Indictment and information ⟸111(1)—Information under Harrison Act need not negative exception as to physician's prescription.**
   A count in an indictment under the second section of the Harrison Act (Comp. St. §§ 6287h), charging defendant with aiding and abetting under Criminal Code, § 332 (Comp. St. § 10506), need not negative the exception that drugs may be issued under a prescription.
5. **Criminal law ⟸59(2)—Acts of principal chargeable to accessory under Penal Code.**
   The acts of the principal become the acts of the accessory or aider, and he may be charged as having done the act himself, and be indicted and punished accordingly, under Pen. Code, § 332 (Comp. St. § 10506), making the accessory a principal.

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

Michael A. Di Preta was convicted of a violation of the Harrison Act, and brings error. Affirmed.

William E. Leahy and Harry A. Grant, both of Washington, D. C., for plaintiff in error.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. The plaintiff in error, who is a physician, was convicted upon one count of an indictment charging him with violations of the Harrison Act, 38 Stat. 785 (Comp. St. §§ 6287g-6287q). The court in question charged that on February 2, 1918, one Petraglia did within the jurisdiction of the court—

"knowingly, willfully, unlawfully, and feloniously dispense, distribute, sell, barter, and exchange to Gottlieb Haneke a certain quantity of a derivative of opium, to wit, 60 grains * * * of heroin, not in pursuance of a written order of the said Gottlieb Haneke on a form issued in blank for that purpose by the Commissioner of Internal Revenue."

The count then charged that Di Preta did within the jurisdiction aforesaid and on the said 2d of February, 1918—

"knowingly, willfully, unlawfully, and feloniously aid, abet, counsel, command, induce, and procure the said Petraglia to dispense, sell, distribute, barter, and exchange the aforesaid [heroin] to the said Gottlieb Haneke, not in pursuance of a written order of said Gottlieb Haneke on a form issued in blank for that purpose by the Commissioner of Internal Revenue."

Testimony was ample to the effect that Di Preta sold to all and sundry so-called prescriptions for what are called "habit-forming drugs," and he sometimes suggested (and did suggest to Haneke) that the recipients of these prescriptions should have them filled at Petraglia's drug store. The verdict imports, and the evidence is full to the point, that Di Preta did not issue the prescriptions, nor issue this particular prescription, in good faith.

[1] There were no exceptions worthy of mention taken at the trial, and the assignments of error, though numerous, are but various ways of stating the proposition that the verdict was against the evidence, or the weight of the evidence. That this court cannot review the verdict of the jury in respect of the weight of the evidence has been so often decided as not to justify any citation of authority. That there was no evidence in support of the jury's conclusion is untrue.

[2] The writ, however, does bring up the judgment roll, and we are urged to consider, and without exception or assignment of error we are authorized and required to consider, the sufficiency of the indictment on its face.

[3] It is framed under the second section of the statute known as the Harrison Act, and charges Petraglia with dispensing the drug substantially in the language of the statute. That this is sufficient is not, we think, denied, and is at all events (considering the fullness of the statute) undeniable.

[4] It then charges Di Preta with aiding and abetting under Criminal Code, § 332 (Comp. St. § 10506), which makes a principal of anyone who aids or abets in the commission of "any act constituting an offense defined by any law of the United States." It seems to be thought that the count in question is invalid because it does not negative the exceptions of the statute in favor of physicians, or because it does not give any details as to how or in what manner Di Preta abetted Petraglia.

Subdivision (b) of the second section of the act does except the dispensing of drugs by a dealer to a consumer in pursuance of a written prescription (under certain circumstances not here material). But a prescription issued under the circumstances amply shown in this case is not a prescription at all. Webb v. United States, 249 U. S. 96, 39 Sup. Ct. 217, 63 L. Ed. 497. Consequently it is no exception; nor is it necessary to negative the exceptions under this section of the statute. United States v. Jin Fuey Moy (D. C.) 253 Fed. at page 215, affirmed in United States Supreme Court, 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. —.

Exactly the facts here complained of sustained conviction in Doremus v. United States (C. C. A.) 262 Fed. 849. That plaintiff in error could not have been charged with "dispensing, distributing, or selling" what he gave Haneke a so-called prescription for (Foreman v. United

States, 255 Fed. 621, 166 C. C. A. 655), is not here material. The question is whether anything more is necessary than a charge properly laid against Petraglia and an allegation of aiding and abetting in respect of Di Preta.

[5] At common law Di Preta would have been an accessory before the fact; but the Penal Code makes him a principal. Thus the acts of the principal become the acts of the accessory or aider, and such accessory may be charged as having done the act himself, and be indicted and punished accordingly. Spies v. People, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. And see Vane v. United States, 254 Fed. at page 33, 165 C. C. A. 438. It is at the option of the pleader whether, when the accessory before the fact is by statute made a principal, he be charged as doing the thing directly or through the principal. Bishop, New Crim. Proc. vol. 1, p. 214, citing, especially, People v. Bliven, 112 N. Y. 79, 19 N. E. 638, 8 Am. St. Rep. 70. And generally where the distinction between principals and accessories before the fact has been abolished, such accessory may be indicted as if he were a principal, without setting out the facts by which he aided and abetted or advised and procured the commission of the crime. 22 Cyc. 361.

Judgment affirmed.

TROGLIA v. BUTTE SUPERIOR MINING CO.

(Circuit Court of Appeals, Ninth Circuit. January 17, 1921.)

No. 3515.

1. **Negligence ⟸39—Owner of artificial pool not liable for death of child while swimming, in absence of hidden peril.**
   The degree of care required of one maintaining on his land an artificial pool of water for a useful purpose is no greater than that required of one through whose land flows a natural stream, and he is bound to no special care or precaution for the protection of children in the habit of swimming therein, unless there is in the pool some peculiar danger in the nature of a hidden peril or trap for the unwary, of which he has or ought to have knowledge.

2. **Negligence ⟸39—Artificial pool, not containing hidden peril, not attractive nuisance.**
   An artificial pool maintained by one on his own land for a useful purpose, and not containing any peculiar danger in the nature of a hidden peril or trap for the unwary, but in which children are in the habit of swimming, is not within the attractive nuisance doctrine.

In Error to the District Court of the United States for the District of Montana; George M. Bourqun, Judge.

Action by Martin Troglia against the Butte Superior Mining Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The plaintiff in error brought an action for damages for the loss of his son, a lad 11 years of age, who was drowned while swimming in a pond on the premises of the defendant in error. The pond furnished water to supply a mill, and it had been made by damming a small stream. It was about 100 feet long and 75 feet wide, and varied in depth from 1 to 12 feet. It was not

inclosed in any way. It was situated within 30 feet of a road, which was only occasionally traveled. The defendant in error had taken the precaution to post four or five notices around the pool, containing such warnings as "No trespassing," "Private property," "10 feet deep," "Keep away," and "10 feet deep, dangerous." Boys were in the habit of coming to the pool and swimming there in the summer time. The boy who was drowned was a good swimmer for one of his age. He was "strong and husky," and better developed physically and mentally than most boys of his age. He was in the seventh grade at school, and of course he could read the signs, which were posted about the pool. On the day on which he was drowned, he, with a number of other boys, was playing about the pool and swimming therein two hours or longer. He was drowned while swimming across the pool, under circumstances which indicated that he was seized with cramps. The defendant in error knew that the boys were in the habit of swimming in the pool. It never protested against their using the pool for that purpose. It had in attendance in a pump house near the pool a man who was in charge of a steam pump. Upon the conclusion of the testimony, the court below directed a verdict for the defendant in error.

Walker & Walker and C. S. Wagner, all of Butte, Mont., for plaintiff in error.

Kremer, Sanders & Kremer, of Butte, Mont., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] Error is assigned to the ruling of the court below in directing a verdict for the defendant in error. The degree of care required of one who maintains on his land an artificial pool for a useful purpose is not greater than that required of one through whose land flows a natural stream, and he is bound to no special care or precaution for the protection of children who are in the habit of swimming in the same, unless there is in the pool some peculiar danger, in the nature of a hidden peril or trap for the unwary, of which he has or ought to have knowledge. A peril of that nature was disclosed in Coeur d'Alene Lumber Co. v. Thompson, 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731, where a child of 7 years of age, while wading in a small pool several feet across and apparently a few inches deep, stepped into a well, the presence of which was concealed by floating sawdust and discolored water. In that case we held that the defendant's negligence and the plaintiff's contributory negligence were properly submitted to the jury. A similar case is United Zinc & Chemical Co. v. Britt (C. C. A.) 264 Fed. 785. In 20 R. C. L. 96, it is said:

"Ponds, pools, lakes, streams, and other waters embody perils that are deemed to be obvious to children of the tenderest years, and as a general proposition no liability attaches to the proprietor by reason of death resulting therefrom to children who have come upon the land to bathe, skate, or play. * * * Accordingly, a right of recovery has been denied in the case of children 11, 10, 9, 8, 7, 6, and even 5 years of age. Although a property owner may know of the habit of children to visit waters upon his premises, he is as a rule under no obligation to erect barriers or take other measures to prevent them being injured thereby."

In Barnhart v. Chicago, etc., R. Co., 89 Wash. 304, 154 Pac. 441, L. R. A. 1916D, 443, the court said:

"That a pond of water is attractive to boys, for the purposes of play, swimming, and fishing, no one will deny. But its being an attractive agency is not sufficient to subject the owner to liability. It must be an agency such as is likely to or will result * * * in injury to those attracted to it. That many boys every year lose their lives by drowning is a matter of common knowledge. But the number of deaths in comparison to the total number of boys that visit ponds, lakes, or streams, for purposes of play, swimming, and fishing, is comparatively small. It would be extending the doctrine too far to hold that a pond of water is an attractive nuisance, and therefore comes within the turntable cases."

Cases in point are McCabe v. American Woolen Co. (C. C.) 124 Fed. 283; Great Northern Ry. Co. v. Willard, 238 Fed. 714, 151 C. C. A. 564; Hardy v. Missouri Pac. R. Co. (C. C. A.) 266 Fed. 860; Moran v. Pullman Palace Car Co., 134 Mo. 641, 36 S. W. 659, 33 L. R. A. 755, 56 Am. St. Rep. 543; Peters v. Bowman, 115 Cal. 345, 47 Pac. 113, 598, 56 Am. St. Rep. 106; Riggle v. Lens, 71 Or. 125, 142 Pac. 346, L. R. A. 1915A, 150, Ann. Cas. 1916C, 1083.

[2] The defendant relies upon the doctrine of the turntable case. Sioux City R. Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745. The rule of that case is the extreme expression of the duty of a landowner to keep his premises in a safe condition. It was based on the theory that the turntable was a dangerous machine attractive to children, the consequence of meddling with which was not realized by the mind of a child, which danger might be obviated by the very simple means of locking the machine. It would be both impracticable and unreasonable to extend that doctrine to pools and ponds and running streams.

The defendant cites Price v. Water Co., 58 Kan. 551, 50 Pac. 450, 62 Am. St. Rep. 625; and Franks v. Southern Cotton Oil Co., 78 S. C. 10, 58 S. E. 960, 12 L. R. A. (N. S.) 468; but those cases are believed to be against the weight of authority, and it is to be said, by way of distinguishing them from the case at bar, that they were cases involving accidents to boys while playing about deep reservoirs, the walls of which were so steep that persons falling into them could not get out unaided. But the Supreme Court of Kansas in the later case of Harper v. City of Topeka, 92 Kan. 11, 139 Pac. 1018, 51 L. R. A. (N. S.) 1032, denied liability in a case where a boy of 7 was drowned while sliding on the ice in a pond.

The judgment is affirmed.

DYSART v. UNITED STATES. *

(Circuit Court of Appeals, Fifth Circuit. January 11, 1921.)

No. 3458.

1. Poisons ⇐9—Proof of issuing prescriptions not variance from charge of selling narcotics.

There is no variance between an indictment charging defendant with the unlawful sale of morphine sulphate, in violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), and proof that as a practicing physician he issued prescriptions on which the morphine was sold.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 535, 65 L. Ed. —.

2. **Criminal law ⇐1153(4)—Trial court's discretion in permitting leading question not reviewable.**
A leading question may be permitted by a trial judge, and his discretion therein is not assignable as error.

3. **Criminal law ⇐1169(5)—Subsequent withdrawal held to have cured error in admission of testimony.**
Error, if any, in permitting a witness to answer a question whether the only way to stop a physician writing morphine prescriptions was to put the addicts where they could not get it, or to put the physician where he could not give it, was cured, where the court quickly thereafter corrected his ruling, and instructed the jury not to consider the testimony.

4. **Criminal law ⇐371(1)—Proof of prescription for narcotics admissible to show intent.**
In a prosecution for unlawful sale of narcotics, where the evidence showed the sale was made by prescription, proof that defendant had written numerous other prescriptions for narcotics is admissible to show intent, if properly limited to that issue.

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.

J. C. Dysart was convicted of unlawfully selling narcotics, and he brings error. Affirmed.

William H. Atwell, of Dallas, Tex., Head, Dillard, Smith, Maxey & Head, of Sherman, Tex., Bradley, Burns, Christian & Bradley, of Fort Worth, Tex., and M. W. Stanton, 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. Plaintiff in error was convicted for violating section 2 of the so-called Harrison Anti-Narcotic Act. 38 Statutes at Large, 785 (Comp. St. § 6287h). The indictment contains eight counts, charging unlawful sales of morphine sulphate. The first seven counts are substantially identical, except that the name of the individual to whom the sale was alleged to have been made is different in each of said counts. The eighth count charged sales to a named individual and divers unknown persons. There was a verdict of guilty as charged in the first count, and not guilty as to the other counts.

Plaintiff in error was a practicing physician, registered under the act, and therefore entitled to dispense and distribute morphine "in the course of his professional practice," without making use of the written order on the form prescribed by the Commissioner of Internal Revenue. The evidence shows beyond dispute that plaintiff in error issued within a few months many hundred prescriptions for morphine sulphate to persons addicted to the use of morphine, who came to him, not for medical treatment, but for prescriptions upon which they could secure morphine to satiate their appetites. Usually these prescriptions called for 15 grains of morphine sulphate, and in many instances were issued to the same person almost daily. More than a hundred were filled at one drug store in about a week, and usually, if not always, the drug purported to be prescribed as treatment for consumption. In no single

case did the plaintiff in error himself administer the drug, but left it to each patient to use it "as directed." Plaintiff in error did not deny, but, on the contrary, admitted, that he issued the prescriptions, for which he made a uniform charge of $1 each.

[1] Several errors were assigned, but plaintiff in error relies in argument almost wholly upon the supposed variance between the offense charged in the indictment and the evidence adduced at the trial. In other words, it is claimed that what plaintiff in error did was to issue prescriptions, and not to sell. This contention has been authoritatively settled adversely to plaintiff in error by the Supreme Court of the United States in the case of Jin Fuey Moy v. United States, 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. ——, decided December 6, 1920.

Only three of the remaining assignments need be mentioned:

[2] 1. Plaintiff in error objected to the following question as leading:

"When these addicts are getting 15 grains a day, is it a craving for payment [treatment?], or for morphine? Is it not craving for the drug?"

A leading question may be permitted by a trial judge, and his discretion is not assignable as error.

[3] 2. Plaintiff in error objected to the following question:

"Where a physician persists in writing prescriptions for 15 grains a day, the only thing you can do is to put the addicts where they cannot get it, or put the man where he cannot give it to them; is that a fact?"

While it is true that the court overruled the objection to the question, and that the witness answered, "You have to do something, if you cut down their appetite for it," very quickly thereafter the court changed this ruling and stated:

"I want to make a correction in the ruling I made awhile ago. * * * I did not intend to admit that sort of testimony, and, gentlemen of the jury, you will not consider that testimony [that] the way is to put in the penitentiary the men who gave them these prescriptions. The question was not proper, and the answer was not proper."

If there was error, it was promptly and effectively cured.

[4] 3. Over objection, evidence was admitted to the effect that plaintiff in error had issued prescriptions to a large number of persons other than those described in the indictment. In his charge to the jury, the court limited the effect of such evidence to the intent with which the prescriptions for persons named in the indictment were issued, and distinctly charged the jury that conviction could not be based upon prescriptions for persons not so named. As so limited and explained, the evidence was admissible. It threw light upon the intent of plaintiff in error in respect to the vital question in the case of whether he was lawfully dispensing drugs in the course of his practice, or was using his profession of physician as a cloak to cover up a violation of the law. The admissibility of evidence as to other crimes upon the question of intent is the subject of an elaborate note to the case of People v. Molineux (N. Y.) in 62 L. R. A. 193; and the admissibility of such evidence, if not held, is assumed, in a prosecution

for the same offense as that here under consideration, in the case of Jin Fuey Moy v. United States, supra.

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

WAGNER v. MT. CARMEL IRON WORKS.

(Circuit Court of Appeals, Third Circuit. January 17, 1921.)

No. 2621.

Bankruptcy ⇐217(3)—Sale under execution on decree rendered within four months in patent infringement suit may be restrained.

Under Bankruptcy Act, § 67f (Comp. St. § 9651), making liens obtained by judicial proceedings within four months prior to adjudication null and void, the bankruptcy court was authorized to restrain a sale of the bankrupt's assets under an execution on a money decree rendered on an accounting in a patent infringement suit about two months prior to the adjudication.

Petition to Revise Order from the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Bankruptcy proceeding against the Mt. Carmel Iron Works. On petition of John F. Wagner to revise an order restraining him from selling the bankrupt's assets on execution. Affirmed.

The following is the opinion of Witmer, District Judge, in the Court below:

John F. Wagner obtained a judgment against the Mt. Carmel Iron Works on his bill filed in this court, charging defendant with infringement of a certain patent of which he was the owner. Judgment was entered January 9, 1920, which was certified to the court of common pleas of Northumberland county, whereupon a writ of execution was issued and levy made on defendant's personal property. Within a few days thereafter, March 15, 1920, the defendant filed its petition in bankruptcy and was in due time adjudicated a bankrupt. On petition of certain creditors a restraining order was allowed, which is now sought to be vacated.

The judgment plaintiff, Wagner, insists that his judgment, being founded upon a tort which was characterized by the master, appointed by this court to ascertain the damages for infringement, as "deliberate, wanton, and continuous," will not be discharged by the bankruptcy proceedings; hence he should be allowed to recover his damages from the property of the bankrupt. If the premise is correct, the conclusion does not follow. Whether the bankrupt may be discharged from the obligation of Wagner is not now the important question; the query being: Does the filing of the petition, followed by an adjudication in bankruptcy, discharge and free the bankrupt's property from the levy obtained by Wagner?

The answer will be found in section 67f of the Bankruptcy Act of 1898 (Comp. St. § 9651). This section provides: "That all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such

levy, judgment, attachment, or other lien shall be preserved for the benefit of the estate; and thereupon the same may pass to and shall be preserved by the trustee for the benefit of the estate as aforesaid."

It is apparent that the effect of this provision of the act avoids all liens, created by levy, judgment, attachment, or otherwise, within four months of bankruptcy, and invalidate the same as against the trustee and those claiming under him, so as to allow the bankrupt's property to pass to and be distributed by him among the creditors of the bankrupt. Any number of authorities could be cited to the effect, but the following will suffice: Casady & Co. v. Hartzell, 34 Am. Bankr. R. 236, 171 Iowa, 325, 151 N. W. 97; People's National Bank v. Maxson, 33 Am. Bankr. R. 765, 168 Iowa, 318, 150 N. W. 601; In re Forbes, 26 Am. Bankr. R. 355, 186 Fed. 79, 108 C. C. A. 191; Metcalf v. Barker, 187 U. S. 173, 23 Sup. Ct. 67, 47 L. Ed. 122.

Being of the opinion that the property of the bankrupt passed to the trustee upon the filing of the petition in bankruptcy, as indicated, the restraining order is continued and made permanent, as recommended by the special master.

John O. Ulrich, of Tamaqua, Pa., for petitioner.
William W. Ryon, of Shamokin, Pa., for respondent.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. On March 15, 1920, the Mt. Carmel Iron Works, a manufacturing corporation of Pennsylvania, was adjudged a bankrupt in the court below. Previous thereto John F. Wagner had filed a bill in said court against it, charging it with infringing his patent. The case was so proceeded with that there was a decree of infringement and an accounting (244 Fed. 818), which accounting resulted in a money decree for $26,461 on January 9, 1920. A few days before the adjudication in bankruptcy, Wagner issued process on his decree, levied on the property of the corporation, and after the adjudication attempted to sell the same. Thereupon the bankruptcy court, on petition of the company, restrained Wagner from so selling the assets of the company. The present petition to review calls in question the authority of the court to restrain said process and to prevent the assets of the company from being taken from its grasp thereby. Such authority, pursuant to an opinion printed herewith, the court below held it had.

We find no error in the court's action. Under the facts, there is no doubt that the lien on the corporation's personal property by his execution was obtained against the insolvent debtor within four months prior to the filing of the bankruptcy petition. Such being the case, section 67f of the Bankruptcy Act, quoted in the opinion, enacted that such an intra-four months lien "shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy * * * shall be deemed wholly discharged and released from the same." And rightfully so, for, had Congress enacted other than it did in these plain words, or had courts, by construction, given any supposed limitation to those plain words, and thereby had intra-four months liens been allowed to take away the assets which passed to the bankruptcy court by the filing of the petition in bankruptcy, the power of the court to administer bankrupt estates would have been absolutely defeated.

It is clear, therefore, that the decree below should be affirmed, and the lien creditor be left to again pursue what he originally did when, without objection, he proved his claim as a general creditor, and then, after having thus the opportunity to participate on an equality with all other creditors, he withdrew his claim and sought as an intra-four months creditor to take the bankrupt's assets from bankrupt administration for all and take it wholly for himself.

The decree below will be affirmed, without prejudice to the right of the petitioner to take proper steps to reinstate his lien as a proved claim, which course counsel for the receiver concede he has a right to pursue.

CINCINNATI DISTRIBUTING CO. v. SHERWOOD & SHERWOOD COMMERCIAL CO.

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921.)

No. 3545.

1. **Frauds, statute of ⇐116(1)—Telegram by buyer's agent held not "memorandum" binding seller.**
   A telegram from the buyer's agent, signed by his own name, is not a "memorandum" signed by the party to be charged, sufficient under the statute to bind the seller, even though the seller's agent had requested the buyer's agent to send a telegram confirming the sale.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

2. **Frauds, statute of ⇐144—Party may be estopped to rely on statute as defense.**
   A party to an oral contract may, by acquiescence in acts by the other party on the faith of the contract, estop himself from raising the defense of the statute of frauds.

3. **Frauds, statute of ⇐144—Failure to disaffirm oral contract does not estop party from reliance on statute.**
   Mere silence by a party to an oral contract for the sale of goods, without knowledge that the goods were wanted for immediate resale or had been resold, does not estop the seller from relying on the statute, though in fact the buyer had resold the goods and was compelled to purchase other goods at an increased price to deliver to the subsequent buyer.

In Error to the District Court of the United States for the Second Division of the Northern District of California; Frank H. Rudkin, Judge.

Action by the Cincinnati Distributing Company against the Sherwood & Sherwood Commercial Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Richard S. Goldman and John C. Altman, both of San Francisco, Cal., for plaintiff in error.

Lucius L. Solomons and Fred C. Peterson, both of San Francisco, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error brought an action in the court below to recover damages for breach of contract which it made with the defendant for the sale and delivery of merchandise. The court below granted a nonsuit, on the ground that the contract was within the statute of frauds and no written memorandum thereof was signed by the defendant. This ruling is assigned as error. The evidence was that on March 14, 1918, Hellman, a representative of the plaintiff, had a conversation over the telephone with Lieb, who represented the defendant. Hellman testified that he agreed with Lieb to purchase from the defendant 99 barrels of Old Taylor whisky of the fall of 1913 at $1.32½ and 99 barrels of the spring of 1914 at $1.35 less all charges to date and 2 per cent. commission, and that upon the conclusion of the agreement he said to Lieb, "I wish you would wire confirmation to our Cincinnati office," and that Lieb replied: "I am ready to leave the office. There is somebody waiting for me. I cannot take the time. Will you make this confirmation for me?" And Hellman testified that thereupon he wired to his home office at Cincinnati: "Bought ninety-nine each fall thirteen spring fourteen Taylor one thirty two one half, thirty five less commission." The plaintiff showed that prior to that telegram Hellman had telegraphed to the plaintiff at Cincinnati that the defendant would sell Old Taylor whisky at a price which he named, and that on the following day he received instruction to buy Old Taylor whisky "fall thirteen and spring fourteen at prices your wire or better."

[1] The plaintiff contends that the three telegrams, when taken together, constitute a written memorandum within the statute of frauds; that, inasmuch as the telegrams which Hellman sent after he had made the agreement were sent for and on behalf of the defendant and as its act, the statute of frauds was complied with. The contention cannot be sustained. The final message so sent is upon its face no more than information to the plaintiff that its agent had bought a specified quantity of whisky at a price named. It did not purport to come from the defendant, nor was it signed by or in the presence of or in the name of the defendant, or any officer or agent of the defendant. The direction which the defendant's agent gave to the plaintiff's agent to send a confirmatory dispatch cannot avail the plaintiff, for the statute of California provides that authority to enter into a contract required by law to be in writing can only be given by an instrument in writing. Nason v. Lingle, 143 Cal. 363, 77 Pac. 71.

[2] It was shown that the plaintiff, immediately upon receiving notice of the purchase by Hellman, sold the merchandise to a customer at $1.40 per gallon, and about two weeks after that time received notice that the defendant had repudiated the contract and sold the whisky to another. It was shown, also, that the plaintiff, being unable to deliver the merchandise it had sold, was obliged to buy other whisky at $1.85 per gallon in order to fulfill its obligation, whereby it lost $5,272.75. The plaintiff contends that the facts estop the defendant to avail itself of the statute of frauds; that one is not permitted to dispute a state of facts which he has induced another to believe in and to act upon. It is true that a contract may be within the statute of

frauds, yet if the conduct of the party who relies upon the statute has been such as to raise an equity outside of and independent of the contract, he may be estopped to make that defense. 20 Cyc. 308.

[3] In Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, the court held that to create estoppel against the defense of the statute there must be some change in the condition or position of the party seeking relief, by reason of being induced to enter upon the execution of the agreement, or to do acts upon the faith of it as if it were executed, with the knowledge and acquiescence of the other party, either express or implied. Here there were no acts of acquiescence on the part of the defendant. It received no consideration for the sale. It parted with the possession of none of the goods purchased. It was not advised that the goods were wanted for immediate resale, nor did it know before it repudiated the contract that the goods had been resold. There was nothing except its silence to indicate to the plaintiff that the oral contract would be performed. The mere fact that one acts upon an oral promise, hoping that it will be carried out, does not create estoppel. Miller v. Hart, 122 Ky. 494, 91 S. W. 698; Regan v. Kirk, 140 Iowa, 302, 118 N. W. 317.

The judgment is affirmed.

WILSON v. SIMMONS.

In re LESSER.

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

No. 3514.

1. Partnership ⇐217(3)—Evidence held to show authority to draw on partnership funds to pay individual debts.

Evidence that, during the existence of a plantation partnership, each of the two partners, with the knowledge of the other, drew checks in the firm name on the firm account in a bank to pay individual debts, *held* sufficient to warrant a finding that the partners consented to the creation of a partnership liability to the bank for checks drawn for individual debts by a partner and paid in good faith by the bank, so that an overdraft resulting from such payments was a debt to which the partnership assets could be lawfully applied.

2. Partnership ⇐127, 155—Noncommercial firm may be liable for obligations incurred with consent of both partners; one partner of noncommercial firm may be estopped to dispute other's authority to bind firm.

The fact that a firm composed of two partners was engaged in operating a plantation, and not in a commercial business, does not prevent the firm from being liable on whatever obligations were incurred in its name with the consent of both its members, or one partner being estopped to dispute the authority of the other partner to bind the firm by a transaction not within the scope of the firm business.

Appeal from the District Court of the United States for the Northern District of Mississippi; Edwin R. Holmes, Judge.

Suit by Robert Wilson, as trustee of the estate of Leo Lesser, bankrupt, against A. J. Simmons. From a decree dismissing the bill, the trustee appeals. Affirmed.

St. John Waddell, of Memphis, Tenn., for appellant.

John W. Cutrer and John C. Cutrer, both of Clarksdale, Miss. (Sam C. Cook, Jr., of Clarksdale, Miss., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This is an appeal from a decree dismissing a bill filed by the appellant, suing as trustee of the estate of Leo Lesser, a bankrupt, against the appellee, A. J. Simmons, seeking to charge the latter with the amount of the bankrupt's interest in the assets of a partnership of which the bankrupt and the appellee were the members. That partnership, under the name of A. J. Simmons & Co., was organized and began business in January, 1909, and was in existence from that time until soon after the bankruptcy proceedings were instituted against Lesser in April, 1913. It was organized for the purpose of carrying on a planting business on a plantation in Coahoama county, Miss. By the terms of the partnership, which were not evidenced by any writing, the profits and losses were to be equally divided between the partners. After Lesser, who lived at Memphis, Tenn., disappeared, and bankruptcy proceedings were instituted against him, Simmons applied the partnership assets to the payment of debts which amounted to more than the value of such assets, and from his own individual means paid the balance of such indebtedness. Included in the indebtedness so satisfied was the amount of an overdraft which resulted from the payment by the Mercantile Bank of Clarksdale, Miss., of checks drawn by Lesser in the name of the firm, which continuously from the time it started in business had a deposit and checking account with that bank. The checks so drawn by Lesser, the payment of which caused the overdraft mentioned, were in favor of parties to whom Lesser was individually indebted, and the partnership was not benefited by the payment of either of those checks. At the times of the payment of those checks the bank and the appellee supposed that Lesser was a man of large individual means and entirely solvent. In behalf of the appellant it was contended that the overdraft so caused was not a debt to the satisfaction of which partnership assets were subject to be applied. Unless that contention prevails, there was no surplus of partnership assets subject to be applied to the satisfaction of the individual indebtedness of either of the partners.

[1] The evidence disclosed that from time to time during the several years the partnership was in existence each of the partners, with the knowledge of the other, drew checks in the firm name on the bank mentioned in favor of parties to whom the firm was not indebted, and that the bank uniformly paid such checks and was never notified of any objection to its doing so. In several instances overdrafts so caused were wiped out by deposits made to the firm's credit. This course of conduct was evidence of the consent of each of the partners to the payment by the bank of checks drawn in the firm name by the other, whether the firm was or was not indebted to the payees in such checks, and in favor of the bank estopped the appellee to deny that a partnership obligation was created as a result of the payment by the bank of the checks so drawn by Lesser in the firm name.

[2] The fact that the partnership was a noncommercial one did not stand in the way of its being liable on whatever obligations were incurred in the firm name with the consent of both its members, or of one partner being estopped to dispute the authority of the other partner to bind the partnership by a transaction not within the scope of the partnership business. Dowling v. Exchange Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795; Huiskamp v. Moline Wagon Co., 121 U. S. 310, 7 Sup. Ct. 899, 30 L. Ed. 971. The evidence was such as to warrant a finding that both partners consented to the creation of a partnership liability to the bank as a result of the latter in good faith paying checks drawn on it in the firm name by either partner for his individual purposes. Smith v. Weston, 159 N. Y. 194, 54 N. E. 38; 20 R. C. L. 889.

The action of the court in dismissing the bill was justified by its finding, supported by the evidence adduced, that the partnership assets were exhausted by the defendant, as liquidating partner, properly applying them towards the satisfaction of partnership obligations.

The decree to that effect is affirmed.

ISLESWORTH HOTEL CO. v. WARD.

(Circuit Court of Appeals, Third Circuit. January 17, 1921.)

No. 2594.

1. **Courts ⟸376—State rule as to burden of proof of damage from breach of contract followed.**

In an action brought in the District Court for the District of New Jersey, the rule laid down by the Supreme Court of that state that, where an advertising contract is broken by the advertiser, the damages are prima facie the compensation for the full term, and the burden is on defendant to show any mitigation of damages by reason of what might have been earned from other advertisers, will be followed.

2. **Damages ⟸120(4)—On breach of advertising contract, difference in interest to be deducted from full compensation due under contract.**

On breach of an advertising contract by the advertiser, there should be deducted, from the compensation for the full term for which the advertisement was to run, the difference in interest between payments as they would periodically follow due under the contract and payment in advance by reason of the breach of contract.

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

Action by Artimus Ward, trading as Ward & Gow, against the Islesworth Hotel Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff file remittitur.

Theodore W. Schimpf and Thompson, Schimpf & Hanstein, all of Atlantic City, N. J., for plaintiff in error.

Harry R. Coulomb and Bourgeois & Coulomb, all of Atlantic City, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Artimus Ward, a citizen of New York state, brought suit against the Islesworth Hotel

Company, a corporate citizen of New Jersey, to recover damages for breach of contract. On trial, the jury rendered a verdict for some $7,600, and on entry of judgment thereon the defendant took a writ of error. The question involved is whether the court below should have allowed the case to go to the jury. To that question we now address ourselves.

The proofs in the case tended to show the plaintiff was engaged in the business of outdoor advertising, and for that purpose had acquired the right to place advertising signs at certain subway stations of the Interborough Rapid Transit Company in New York City. The defendant conducted a hotel at Atlantic City. On January 29, 1916, the parties entered into a written contract which, so far as here pertinent, bound Ward to furnish space at such stations to the hotel for 35 months following February 15, 1916, for certain signed advertising signs which the hotel was to furnish and Ward to put in place, "Space to be used February 15th to September 15th of each year." The contract stipulated that the hotel "may cancel this lease September 15, 1917, by giving Artimus Ward written notice before August 31, 1917," and that—

"In consideration of the above, the advertiser (the Hotel Company) hereby agrees to pay you (Ward) as rental the sum of three hundred and fifty dollars ($350.00) per month in advance during the term of this agreement, subject to the terms and conditions stated therein."

The parties acted under and fulfilled the contract for the seven months from February 15 to September 15 of the years 1916 and 1917, and the allegation of defendant is that about June, 1917, the contract was canceled for the balance of the term remaining after the year 1917.

This was denied by the plaintiff, and no proof was given of a cancellation in the form provided by the contract or of any facts relieving the Hotel Company from performance. Moreover, the uncontradicted proof was that the plaintiff had vacant space provided to fulfill the contract, and that the defendant neither furnished the signs for such space, nor paid the monthly sums of $350, and before this suit was brought it stood in the position of breaching the contract.

[1] The plaintiff having given testimony tending to prove these facts or warrant such conclusions, the defendant moved the court for binding instructions on the ground that the plaintiff had shown no damage. This case, as we said, comes from New Jersey, and we see no reason why we should not, and every reason why we should, adopt and follow the rule laid down by the Supreme Court of that state in McDermott v. De Meridor Co., 80 N. J. Law, 67, 76 Atl. 331. Not only will such a course secure uniformity of decision, but the reasoning of that case warrants the adoption of such course. That case involved newspaper advertising, but its principle is equally applicable to outdoor advertising. Without quoting the grounds of the court's opinion, it suffices to say it there held:

"Where a contract for the publication of an advertisement is broken by the advertiser ordering its discontinuance, the damages are prima facie the compensation for the full term for which the advertisement was to run, and the

burden of proof is upon the defendant to show any mitigation of the damages by reason of what might have been earned by the publisher from other advertisers."

[2] Agreeing with that statement, the judgment below is affirmed, with the proviso that, before the mandate go down from this court, the plaintiff file in the court below a remittitur in an amount representing the difference in interest between the receipt of payments as under the contract they would periodically fall due in the future and the receipt of the same in advance by reason of the breach of a contract and the consequent verdict.

TACON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 15, 1921.)

No. 3503.

1. **Intoxicating liquors ⊂=138—Offense complete on purchase for transportation.**
   Under Act March 3, 1917 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), making it an offense to order or purchase intoxicating liquors for the purpose of being transported in interstate commerce, as well as for transporting such liquors into state commerce, the offense of purchasing is complete on purchase for the purpose of transportation, and an indictment therefor need not allege the liquors were actually transported.

2. **Intoxicating liquors ⊂=223(4)—Evidence held not to show a variance.**
   In a prosecution for purchasing intoxicating liquors for transportation to a named town in Alabama, testimony by an Alabama sheriff that he seized the liquor at a town of that name in Louisiana was manifestly a mistake, since the sheriff would not be acting outside of the state, and standard maps showed that town was located in Alabama, so that the testimony does not establish a variance.

3. **Conspiracy ⊂=43(12)—Proof of one overt act is sufficient.**
   In a prosecution for conspiracy, the government need not prove all overt acts alleged in the indictment; but it is sufficient if it established any one of the acts alleged.

4. **Conspiracy ⊂=41, 47—Act of one conspirator is the act of both; evidence held to show joint purchase of liquor as alleged overt act.**
   In a prosecution for conspiracy to purchase intoxicating liquors for transportation in interstate commerce, which alleged as one overt act joint purchase by two defendants, evidence that one of the named defendants gave the order for the liquor, and that the other paid therefor partly with money of each defendant, sufficiently shows a joint purchase, since it connected both defendants with the act, and in any event the act of either in pursuance of the conspiracy would have been the act of both.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Paul Tacon was convicted of unlawfully purchasing intoxicating liquors for transportation in interstate commerce, and he brings error. Affirmed.

Woodford Mabry and John R. Tyson, both of Montgomery, Ala., for plaintiff in error.

Henry Mooney, U. S. Atty., and Nicholas Callan, Asst. U. S. Atty., both of New Orleans, La.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error and another were convicted as charged on two consolidated indictments, each containing a single count, one charging that the defendants unlawfully ordered, transported, and caused to be transported in interstate commerce intoxicating liquors, intended to be transported from New Orleans, La., to Bayou La Batre, Ala., and the other charging a conspiracy to order, purchase, and cause the same liquors to be transported from New Orleans, La., to Mobile, Ala.

[1] It is contended that, until the liquor is carried from one state into another, the offense of ordering or purchasing is not complete, and that the first-mentioned indictment is bad, because it only charges that intoxicating liquors were to be transported, and not that they had been. Both indictments are based upon the Act of March 3, 1917, 39 Stat. 1069 (U. S. Comp. St. 1918, U. S. Comp. St. Ann. Supp. 1919, § 8739a), which punishes persons who order or purchase for the purpose of being transported, as well as for transporting, intoxicating liquors in interstate commerce. It is therefore not necessary for the indictment to charge or the evidence to show an actual transportation in such commerce. Ex parte Westbrook (D. C.) 250 Fed. 636.

[2] An assignment of error is based upon the contention that, while the indictment charges that Bayou La Batre is in Alabama, yet according to the evidence it is in Louisiana. It is true the bill of exceptions states that the sheriff of Mobile county, Ala., seized the liquor "about two miles from Bayou La Batre, La."; but it is quite evident that Alabama is the state intended. Plaintiff in error was in Mobile, and the jury could reasonably have found that he was there for the purpose of receiving the liquor on its arrival in Alabama. It is not contended that the sheriff of Mobile county, Ala., was making arrests in the state of Louisiana. Besides this Bayou La Batre is shown by standard maps to be in Alabama, instead of in Louisiana, which states are separated by the whole Gulf coast of Mississippi.

[3, 4] The only error assigned in connection with the second named, or conspiracy, indictment is that none of the overt acts was proved. Of course, it was not necessary to prove all the overt acts set forth in the indictment. Proof of one was sufficient. The first overt act charged was that the plaintiff in error and R. A. Chrisman, one of his codefendants, ordered and purchased certain described liquors on the date stated, from a named individual. The evidence showed that plaintiff in error gave the order, and that Chrisman made payment of the purchase price, partly with his own money and partly with money of plaintiff in error. The basis of the argument is that there was no joint purchase. It is apparent that both defendants connected themselves with the order, purchase, and shipment, although, if only one of them had done so, it would seem that the act of both would have been unlawful, for that it was done in pursuance of a conspiracy thereto formed.

No error is made to appear, and the judgment is affirmed.

HUGETZ v. COMPANIA TRASATLANTICA.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 70.

1. **Principal and agent ⇐101(2)—Messenger who arranged for shipping libelant's property regarded as libelant's agent.**
   Where a messenger took libelant's property to a vessel and made all arrangements for shipping it, there being no direct dealings between libelant and the shipowner, the messenger was libelant's agent without any known limitation upon his authority.
2. **Shipping ⇐106—Where libelant had option of shipping under two arrangements, it was unnecessary to present alternative contract to him.**
   Where a libelant had option of shipping under a regular bill of lading or under a parcel tariff, but chose the latter course, because the charges were less and the customs requirements were less exacting, it was unnecessary for respondent to present the alternative bill of lading contract.
3. **Appeal and error ⇐227—Translations in record accepted, where not challenged below.**
   Translations in the record must be accepted upon appeal, where their accuracy was not challenged below.
4. **Shipping ⇐140—Limitation of value held valid.**
   Where a libelant had the option of shipping under a regular bill of lading or under a tariff applying to parcels worth not more than $5, and chose the latter course, there was a valid valuation, which precluded libelant from recovering a greater sum, although the actual value of the property exceeded $5.

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

Libel by Edward Hugetz against the Compania Trasatlantica. Decree for respondent, and libelant appeals. Affirmed.

Appeal from a decree in admiralty entered in the District Court for the Southern District of New York. Respondent operated a steamer or steamers between New York and Spanish ports. Libelant shipped on one of said steamers a box containing fountain pens of a value of several hundred dollars. This suit is to recover that value, respondent not having been able to produce the box at the port of destination.

By uncontradicted evidence it appeared that libelant had had no personal dealings with respondent, but had shipped several other similar boxes of pens on previous occasions. His business relations with respondent were carried on through a messenger or agent, who did not testify. This man had been advised that he might ship in the ordinary way under the company's bill of lading (the form of which is not before the court), or he might send such a box as a "small package or parcel," receiving as evidence of the contract of shipment, not the usual bill of lading, but a receipt in the Spanish language containing the following limitation on value: "There shall not be admitted as cargo, nor considered included under this tariff, packages or parcels * * * of greater value than five dollars, or which for any reason require a bill of lading."

The phrase "this tariff" refers to the scale of charges for "small packages or parcels" based upon weight or measurement. Under this tariff the amount paid for the transportation of the box of pens was $6; whereas the minimum charge for the same service under a bill of lading was $15. There was a further advantage in sending the box as a "small package," because the Spanish customs treated such packages as mere samples and exacted no duties. All this was explained, or had been explained, in respect of previous shipments, to libelant's messenger or agent.

The libel merely alleged shipment and nondelivery; the answer set up, and respondent proved, the facts above stated. The trial court awarded libelant $5, and he appealed.

Theodore L. Bailey, of New York City, for appellant.

Hunt, Hill & Betts, of New York City (John W. Crandall, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). Much of the argument offered by libelant is in point of law unexceptionable, but has no application to the facts established by uncontradicted evidence.

[1] The messenger who in effect took this box of libelant's to the wharf and made all the arrangements for shipment was for every present purpose the shipper of the goods; that is, he was libelant's agent without any known limitation upon his authority. Missouri, etc., Co. v. Harper, 201 Fed. 671, 121 C. C. A. 570.

[2] It is plain that this agent had the option of shipping under a regular bill of lading or of patronizing respondent's package room; he chose the latter course, for obvious reasons, and it was not even necessary for respondent to present to him any alternative contract. Cau v. Texas, etc., 194 U. S. 427, 24 Sup. Ct. 663, 48 L. Ed. 1053.

[3, 4] Some criticism is made upon the translation of the Spanish documents put in evidence. No such issue was made in the court below, and we must accept the translation in the record. It seems to us entirely clear that, while the form of words is (in English) unusual, this shipping agreement contains a valid valuation inter partes for purposes of shipment, made on due consideration, as in Pierce Co. v. Wells-Fargo & Co., 236 U. S. 278, 35 Sup. Ct. 351, 59 L. Ed. 576.

Decree affirmed, with costs to appellee.

PROHASKA et al. v. ST. PAUL FIRE & MARINE INS. CO.

(Circuit Court of Appeals, Fifth Circuit. February 9, 1921.)

No. 3618.

1. **Insurance ⊂=404—Loss of vessel on shipways from giving way of fastenings of crib held not within risks insured against.**
Where, after a vessel had been placed on shipways for repairs and planks had been removed, the fastenings holding the crib supporting the boat gave way, and the crib slid into the river, permitting the vessel to sink, the loss was not covered by a policy insuring against unavoidable dangers of rivers, etc., as the giving way of the fastenings was the cause of the loss.

2. **Words and phrases—"Proximate cause" defined.**
The "proximate cause" is the efficient cause, or the one that necessarily sets the other cause or causes in operation.

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

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by Mrs. Addie Prohaska and others against the St. Paul Fire & Marine Insurance Company. From a decree for defendant (265 Fed. 430), plaintiffs appeal. Affirmed.

John D. Grace, of New Orleans, La. (M. A. Grace, of New Orleans, La., on the brief), for appellants.

George H. Terriberry, of New Orleans, La. (Terriberry, Rice & Young, of New Orleans, La., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This is an appeal from a decree sustaining an exception to a libel on a marine insurance policy upon the steamboat Helen Lane, on the ground that it failed to state a cause of action, and dismissing the libel. The risks assumed by the policy sued on were:

"The unavoidable dangers of rivers, or fires, and of jettisons, that shall cause loss or damage to said vessel or any part thereof, excepting," etc.

It is not necessary to set out the enumerated exceptions, as it is not claimed that the alleged loss was attributable to any excepted marine peril. The libel contained allegations to the following effect: Some time after the Helen Lane had been placed on shipways at Berwick, La., to receive needed repairs, and after a number of planks forming part of her hull had been removed, the fastenings holding the crib which supported the boat gave way, the crib with the boat on it slid down the ways into the river, the water rushed in through the hole made in the hull by the removal of the planks, with the result that the boat sank to the bottom, and became a total loss.

[1, 2] In our opinion the loss of the boat is to be attributed, not to any risk or peril insured against, but to the breaking or giving way of the means used to keep it in the proper place while it was undergoing repairs. Though the entry of water operated more immediately in producing the disaster, the loss is to be attributed, not to that cause, but to the one which set it in motion. The proximate cause is the efficient cause; the one that necessarily sets the other cause or causes in operation. Ætna Insurance Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395; The G. R. Booth, 171 U. S. 450, 460, 19 Sup. Ct. 9, 43 L. Ed. 234. The last-cited case involved an explosion of detonators, forming part of a ship's cargo, which burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured another part of the cargo. It was decided that the explosion, not the inflow of sea water, was the predominant cause to which the damage complained of was to be attributed, and that the damage was not caused by a peril of the sea.

That decision is not deprived of controlling effect in this case by the circumstance that the instrument before the court in that case was a bill of lading providing that the carrier "shall not be liable for loss or damage caused by the perils of the sea." Where the question presented is that of determining to what cause a loss or injury is to be attribut-

ed, the circumstance that the question arises in a suit on an insurance policy does not have the effect of making the above stated rule inapplicable. The first above cited case, in which the rule was stated and applied, was a suit on a fire insurance policy.

It was not claimed that the policy sued on insured the sufficiency of the fastenings used by the repairer of the boat to keep in place the crib which supported it, or that the appellee was liable for a loss attributable to the giving way of those fastenings.

The decree is affirmed.

NAUYALIS v. PHILADELPHIA & READING COAL & IRON CO.

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

No. 46.

1. **Judgment ⊂=588—Bar not avoided by alleging additional ground of recovery.**
   Where the cause of action is the same, the bar of a prior judgment is not avoided because in the second action a statute is relied on as an additional ground of recovery.
2. **Judgment ⊂=660—Conclusive as bar, though erroneous in form.**
   Where it appears from the judgment roll that an action was disposed of in the trial court by granting a motion for directed verdict, the judgment is conclusive as a bar, although in form it dismissed the complaint on the merits.

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

Action at law by Matt Nauyalis against the Philadelphia & Reading Coal & Iron Company. Judgment on a directed verdict for defendant, and plaintiff brings error. Affirmed.

Thomas J. O'Neill, John A. Goodwin, and Leonard F. Fish, all of New York City, for plaintiff in error.

Pierre M. Brown, of New York City, for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. [1] Plaintiff sues to recover for personal injuries sustained while in the employment of defendant at a colliery in Pennsylvania. The complaint charges negligence in the operation of a train of cars belonging to defendant, and relies also for recovery upon violation of certain statutes of the state of Pennsylvania.

Before this action, plaintiff sued defendant in the courts of New York to recover for the same injuries and was defeated. Nauyalis v. Philadelphia, etc., Co., 170 App. Div. 500, 156 N. Y. Supp. 357; appeal dismissed 224 N. Y. 547, 120 N. E. 870. The sole question decided below and brought up by this writ is whether the adjudication in the state courts constitutes a bar to the present proceeding.

Some question was made below as to whether the cause of action was the same. The method of statement in the present complaint varies from that in the earlier pleading, in that no effort was made in the

state court to rely upon the Pennsylvania statute. This is merely varying the reasons assigned for recovery, or what Justice Holmes has called the media concludendi. United States v. California, etc., Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476. The cause of action remains the same. Watts v. Weston, 238 Fed. 149, 151 C. C. A. 225. This plaintiff never had, so far as we are informed, but one cause of action. Cf. Payne v. New York, etc., Co., 201 N. Y. 436, 95 N. E. 19.

[2] It is, however, sought to avoid the bar of the state court judgment by a point of New York practice. Nauyalis' Case in the state Supreme Court was tried before a jury, and at the close of the whole evidence the trial judge entertained a motion to direct a verdict for the defendant, and then proceeded to dismiss "the complaint on the merits." On appeal the Appellate Division found that this was "error in form"; but, as this error had not been the subject of objection below and was evidently harmless, the judgment was modified, so as to appear as having been entered on the direction of a verdict, and, as modified, affirmed. 170 App. Div. 500, 156 N. Y. Supp. 357.

It has been held that section 1209, Code Civ. Proc., applies only to actions in equity. Niagara, etc., Co. v. Campbell Stores, 101 App. Div. 400, 92 N. Y. Supp. 208. Cf. Bail v. New York, etc., Co., 201 N. Y. 355, 94 N. E. 863. But these cases show, also, that where the error was in form only the error may be amended.

While we are of opinion, as just indicated, that the disposition of this matter of practice by the New York courts was entirely in accord with ruling decisions, we hold that, since the judgment roll put in evidence shows on its face that the state court disposed of Nauyalis' contention by granting a motion for a directed verdict, we are, on familiar principles, concluded by the judgment.

The New York judgment being a bar, the decision below was right, and is affirmed, with costs.

RAINIER BREWING CO v. GREAT NORTHERN PAC. S. S. CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3520.

Appeal and error ⇐1097(1)—Decision on former appeal controls, if facts are the same.

Where the facts are the same, the judgment on a former appeal has become the law of the case, and is controlling on a subsequent appeal.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the Great Northern Pacific Steamship Company against the Rainier Brewing Company. Judgment for plaintiff, and defendant brings error. Affirmed.

S. J. Wettrick, of Seattle, Wash., for plaintiff in error.

Carey & Kerr and Charles A. Hart, all of Portland, Or., for defendant in error.

Before GILBERT and HUNT, Circuit Judges, and Wolverton, District Judge

WOLVERTON, District Judge. This is the second appeal, and in reality presents nothing new for our consideration. The facts are stipulated, and are, in brief, as follows:

In May, 1917, the brewing company delivered to the steamship company, at San Francisco, two carloads of beer for transportation to Seattle, to be delivered to the American Transfer Company, the consignee named in the bills of lading. The freight charges were prepaid, on the basis of carload rates, in the sum of $425.57.

The shipments consisted of numerous packages of bottled beer, each bearing a permit, and marked in such manner as fully to comply with the laws of the state of Washington, and also with the laws of the United States relating to interstate shipment of intoxicating liquor.

The American Transfer Company, the consignee, was a corporation operating vehicles for the transportation of goods in and about the city of Seattle, and the shipments were consigned to it to enable it to distribute the different packages making up the shipments to the individuals whose names appeared on the permits.

The two carloads of beer were transported as far as Portland, Or., where they were to be delivered by the Spokane, Portland & Seattle Railway Company to the Northern Pacific Railway Company for transportation to Seattle. In view of the Washington statute relating to the shipment of intoxicating liquor into the state, the Northern Pacific Railway Company refused to accept the shipments in carload lots; whereupon they were rebilled in separate packages to the individuals holding the permits, as shown on the packages, thus segregating the carload shipments into 2,565 packages. So segregated, the shipments were accepted by the Northern Pacific Railway Company, and transported to Seattle, where delivery was made to the persons whose names appeared on the permits attached thereto, or upon their order.

At the through carload rate, the freight on the shipments was $425.57, which was prepaid. At less than carload rate, as rebilled, it amounted to $1,927.27. After deducting the prepayment, this leaves $1,501.70, the amount for which plaintiff demands payment.

Judgment was rendered by the court below against the defendant (plaintiff in error) for this sum, from which error is prosecuted to this court.

The situation as disclosed by the stipulated facts is not different from that which appeared from the pleadings when the case was previously here. Great Northern Pac. S. S. Co. v. Rainier Brewing Co., 255 Fed. 762, 167 C. C. A. 106.

After a careful review of the cause, we find no reason for any different conclusion from that reached on the former appeal. Indeed, the facts being the same, the former judgment has become the law of the case, and is controlling on this appeal.

Affirmed.

THE PACIFIC.

McAVOY v. CAMDEN SHIPBUILDING CO.

(Circuit Court of Appeals, Third Circuit. February 3, 1921.)

No. 2613.

Wharves ⇐20(2)—Dock owner held not negligent toward vessel entering without invitation.

A shipbuilding company, owning a dock in which it had a marine railway for the repair of vessels, is not liable for damages to a tug entering the dock, without invitation, to render assistance to a vessel in another dock, and which fouled her propeller on a sunken wire cable used to moor a vessel undergoing repairs, since, in the absence of an invitation to enter the dock, the owner owed no duty to warn the vessel of the presence of the cable.

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

Libel by P. W. McAvoy, owner of the tug Pacific, against the Camden Shipbuilding Company. Decree dismissing the libel (266 Fed. 710), and libelant appeals. Affirmed.

Willard M. Harris, of Philadelphia, Pa., for appellant.

Howard M. Long, of Philadelphia, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. In this case the defendant, a shipbuilding company, had three docks on the Delaware river at Camden, N. J. In these it placed vessels in course of repair. In one of the slips was the steam tug Ogontz, the repairs on which had been completed by defendant. Thereupon the Ogontz engaged the plaintiff's tug Pacific to come and furnish the steam pressure needed in a government inspection. On approaching the slip where the Ogontz was lying, the Pacific found access to her was barred by other craft, and she entered the adjoining slip of the defendant, in which was a marine railway, on which the ferryboat Delaware was then lying for repairs. Having so entered the slip and landed on the side nearest the Ogontz, and having failed in an effort to carry steam by hose over to the Ogontz, the Pacific attempted to leave the dock. In doing so her propeller picked up a sunken wire cable by which the Delaware was moored to the wharf, and thereby suffered the injuries for recovery of which this suit was brought.

The court below found, and our study of the record satisfies us its findings are right, that:

"The tug received no warning or notice of the presence of the cable, and had no previous knowledge of the danger of making the landing. It entered the slip, however, without inquiry of whether it was safe to use. Workmen employed by the respondent were engaged at work at the end of the adjoining slip, and called to the tug to give warning of the danger in using the slip. The warning, however, did not reach the tug. No notice was given by the tug of its intention to use the slip, and the respondent had no knowledge of such intended use."

Its conclusion of law was that:

"In the absence of knowledge that the libelant tug intended to use the slip, there was no legal duty on the part of the respondent to give warning of the presence of the cable."

And it dismissed the bill. In so doing, we find no error. The Pacific knew the dock in question was not used in general navigation, but was a private one; that the dock was equipped with a marine railway, used only for repairs; and that the dock might have obstructions which, while not dangerous to vessels at rest for repairs, might be dangerous to navigating ones.

Without, therefore, making any inquiry as to the possibility or presence of obstructions, without any examination, without any invitation, and in pursuance of its own purposes, the Pacific entered the dock, and in getting out suffered an injury, the direct and immediate cause of which was its own presence in the dock under the circumstances noted. We find no negligence on the part of the defendant. The court found the defendant's workmen tried to signal the Pacific. That the warning was not effective was due to no fault of the defendant, and having given no invitation to the Pacific to enter, and having no reason to expect her to enter, the sunken mooring cable holding the Delaware during the repairs did not constitute negligence toward the Pacific.

Under its findings, the court's decree dismissing the bill was plainly the court's duty. Its decree is therefore affirmed.

BAKER et al. v. HUGHES-EVANS CO. et al. (three cases).

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

Nos. 31–33.

1. **Patents ⇐328—For wall receptacles and designs for same void for lack of invention.**
   The Baker patents, Nos. 1,239,076 and 1,267,353, and Baker design patents, Nos. 50,291 and 51,165, all relating to wall receptacles in bathrooms for soap and toilet articles, *held* void for lack of patentable invention.

2. **Patents ⇐43—For design must show originality and beauty.**
   A mere change in construction, displaying no originality and no added beauty, cannot be the subject of a design patent.

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

Three suits in equity by Stephen D. Baker and the Fairfacts Company, Incorporated, against the Hughes-Evans Company and W. R. Hughes, individually and doing business as W. R. Hughes & Co. Decrees for defendants, and complainants appeal. Affirmed.

All the decrees appealed from were of dismissal, and all the suits in which they were entered were brought upon patents and claimed infringement.

The first suit is upon patent 1,239,076, and design 50,291. The first and most general claim in the mechanical patent is as follows: "A wall re-

ceptacle, including, integrally formed, a pair of spaced upright substantially rectangular sides, and a concavo-convex receiver wall open laterally and joining said sides and forming top, bottom and back walls, and having its top and back wall portions in part substantially flush with the top and back edges of said sides, respectively, and thereupon merging into each other in a curve of relatively large radius." The claim of the design patent is the "ornamental design substantially as shown" for a "wall receptacle for soap and other toilet articles." Both these patents may be conveniently alluded to as covering a "lip receptacle."

The second suit is upon patent 1,267,353, whereof the first claim is as follows: "As an article of manufacture, a one-piece holder for soap or the like article formed with a draining surface sloping downwardly and forwardly clear to the front of the holder, an upstanding back abutment for the article and a plurality of limited contact article supporting projections upstanding from said surface and having their tops sloping rearwardly and downwardly." This patent may be alluded to as covering a "flush receptacle."

The third suit was brought on the design patent 51,165, which claims a "new and ornamental design for a built-in wall receptacle," and this patent may be referred to as covering a "hooded receptacle."

All the above patents were issued to the plaintiff Baker, under whom the corporate plaintiff (of which Mr. Baker is the president) is exclusive licensee. The court below found lack of invention in each case and plaintiffs appealed.

John W. Steward, of Paterson, N. J., and William Houston Kenyon, of New York City, for appellants.

Oscar W. Jeffery, of New York City, for appellees.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Evidence reveals, as the reason for all these patents, that for some years bathrooms have increasingly contained tubs which are "made a part of one or more walls," or the tub is "set up with its rim projecting into the wall." From this it follows that projecting soap holders and similar adjuncts are somewhat in the way. This has led to the insertion in the wall of accessories of many kinds; e. g., soap dishes, toilet rolls, etc.

In respect of the mechanical patent for the lip receptacle, it is particularly insisted that the "pair of spaced upright substantially rectangular sides" disclose (when combined with the "concavo-convex wall") a device not only peculiarly easy to clean, but one well adapted to secure ease in wall insertion and strength when set in the usual cement.

We cannot agree with appellant that these advantages (assuming them to exist) constitute sufficient evidence of invention. Wall recesses filled with integrally constructed drinking fountains, medicine closets, urinals, etc., are confessedly old.[1] To make a soap dish or any other toilet accessory in such shape that it would be convenient for the tile workers' purpose amounted on the evidence to no more than the effort of the "intelligent artisan" referred to in New York, etc., Co. v. Sierer, 158 Fed. 819, 86 C. C. A. 79.

[1] See especially Cassel, Br. 7,939, of 1901, Watson, Br. 2,818, of 1859, and the numerous trade catalogues in evidence.

The flush receptacle patent consists essentially in cutting off the lip of the wall-inserted soap dish and providing backwardly sloping ribs to keep the soap in place and forwardly sloping channels for drainage. When such a device is put up over a "set-in" bath tub the drainage is said to flow into the tub without offending even the neatest housewife. Whether the embodiment of this idea of oppositely sloping ribs and channels constitutes invention is a question not necessary to answer in the abstract; the history of the device provides a rule of decision.

The drawing and specification of the flush receptable patent shows that across the upper portion of the open face is a grip or handle integral with the soap holder itself. This was required by the builder of a large hotel recently completed in New York City, and was intended to insure the safety of one using a shower bath fixed over a set-in tub. The hotel builder knew and declared what he wanted; his architect communicated the requirement (in effect) to plaintiffs and to defendants. On evidence which we can hardly regard as conflicting, we find that the designers of both parties to this litigation promptly and easily produced the same solution of the problem, if it can be called one. This suggests application of the principle announced by Townsend, J., in Thomson-Houston, etc., Co. v. Lorain, etc., Co., 117 Fed. 253, 54 C. C. A. 285, viz.:

"Where a number of workers in a single field, when confronted by an obstacle to the development of a device, naturally, and practically contemporaneously, independently substitute one well-known material for another, * * * the presumption is raised that such workers rightly regarded the substitution as a mere improvement, * * * such as would be adopted or selected by the skilled workman."

The subject-matter of that litigation was different from and far more difficult than that now before us, but the rule is similar. It is not one of law, but of evidential values, and is that, when a matter of no complexity is promptly and easily solved in an obvious way by independent workers, invention can rarely be found in the solution; and we can find none in this patent.

The design patents may be considered together. That for the lip receptacle is open to the criticism that its desirable features are functional rather than ornamental. Weisgerber v. Clowney (C. C.) 131 Fed. 477; William, etc., Co. v. Neverslip, etc., Co. (C. C.) 136 Fed. 210, affirmed 145 Fed. 928, 76 C. C. A. 466. It is true, as pointed out in Bayley, etc., Co. v. Standart, etc., Co., 249 Fed. 478, 161 C. C. A. 436, that the same device or article may exhibit patentable mechanical invention and a patentable design; but it is not true that the design can ever be used to appropriate (per se) the mechanical function. The two inventions must be separable; otherwise, it would be a contradiction in terms to grant two patents for them.

We are, however, unable to discover any excellence meriting the protection of a design patent either in the lip receptacle or the hooded one.

[2] We adhere to the opinion that mere change in construction, displaying no originality and no added beauty, cannot be the subject of

a design patent. Dietz v. Burr, etc., Co., 243 Fed. 592, 156 C. C. A. 290. A subject-matter so utilitarian as the fittings of a bathroom is not far removed from the "sad iron" of Strauss, etc., Co. v. Crane Co., 235 Fed. 130, 148 C. C. A. 620. But, even if a soap dish may with difficulty lend itself to æsthetics, these designs, which involve nothing but a lip in one (obviously to catch drainage) and a hood on the other (obviously to keep out the spatter of a shower bath), make no appeal to the eye, enabling them to escape from rules stated in Bayley v. Standart, supra, and the decisions there cited.

Decrees affirmed, with costs.

BREWER-ELLIOTT OIL & GAS CO. et al. v. UNITED STATES et al.

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

No. 5434.

1. **Navigable waters ⊜1(3)—Test of "navigability" stated.**
   The test of navigability in fact of a stream is whether in its natural condition it is used or capable of use for the ordinary purposes of trade and travel by water and for carrying to market the products of the country through which it runs.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Navigable.]

2. **Courts ⊜367—Where rights are acquired previous to state decision, such decision not binding on federal courts.**
   Where rights have been acquired under contracts, grants, or conveyances which under the then state of the law were valid and enforceable, and the claim is asserted that by subsequent decisions of state tribunals a different rule of property and state of the law have been created which invalidate such contracts or grants and destroy the rights vested under them, the federal courts are not bound by such later rule of property or state of local law, but may and should exercise their judgment as independent tribunals.

3. **Indians ⊜12—Treaty patent to lands including river conveys title to river bed.**
   Under the patent from the United States to the Cherokee Nation of December 1, 1838, made pursuant to prior treaties and conveying land expressly including within its boundaries both banks of the Arkansas river, and Act June 5, 1872, and the deed from the Cherokee Nation made pursuant thereto June 14, 1883, conveying a part of such land to the Osage Tribe, that tribe *held* to have acquired title to that part of the tract under the Arkansas river lying to the north and east of the center of the channel, leaving no right in the United States which passed to the state of Oklahoma on its admission.

4. **Navigable waters ⊜36(1)—United States has power to convey lands under navigable waters in territories.**
   The United States has always been both sovereign and proprietor in its territories, and has always had the right and power to dispose absolutely of any of its public land therein and, while it has held its public lands in its territories below high-water mark under navigable waters in trust for future states, and has not conveyed them by general laws, and has acted upon the policy of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of future states when admitted, nevertheless it has always

possessed and has frequently exercised the absolute power to grant such lands and any interest it had in them irrevocably whenever it became necessary to do so to perform international obligations or to carry out other public purposes appropriate to the objects for which it has held the lands in its territories.

5. **Waters and water courses ⇐89—Lands in territories under nonnavigable waters not held in trust for future states.**

The United States has never held its public lands in the territories under nonnavigable waters under any trust for future states, but has always had and exercised the absolute right to grant and dispose of such lands absolutely as appurtenant to and parts of the property granted or conveyed by it to the riparian owners of the adjacent banks according to the existing law upon the subject of the rights of riparian owners at the times of the respective grants.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by the United States and others against the Brewer-Elliott Oil & Gas Company and others. Decree for complainants, and defendants appeal. Affirmed.

For opinion below, see 249 Fed. 609.

About 1913 oil and gas were discovered in the bed of the Arkansas river north of the thread of the main channel thereof, which was the south boundary of the lands of the Osage Tribe of Indians. Thereupon the state of Oklahoma leased to certain oil corporations parts of the bed of the Arkansas river above the mouth of the Grand river between the high-water mark on the north side of the river and the thread of the main channel, and authorized them to take the oil and gas therefrom in consideration of certain royalties specified in these leases. The defendants in this case are parties claiming under these leases. In 1914 the United States, as trustee for the Osage Tribe, under the Allotment Act of June 28, 1906, 34 Stat. §§ 2, 3, 4, pp. 542, 543, and 544, claimed that these parts of the bed of the river and the oil and gas therein were the property of that tribe under grants thereof made in 1838 and 1872, and brought this suit against those claiming under these leases, for an injunction against the extraction of the oil and gas by them, and for other relief. The defendants answered that the river was navigable, that the title to the leased premises between high-water mark and the thread of the main channel of the river vested in the state of Oklahoma, wherein these lands are situated, on its admission to the Union, and that its leases were valid. The United States insisted that the river was not and never had been navigable. The state of Oklahoma and the Commissioners of its Land Office intervened and asserted the navigability of the river at the places leased and the title of the state to the premises in controversy. The parties stipulated that a receiver be appointed to collect and hold the royalties under the leases for the benefit of the party who should ultimately be adjudged entitled thereto. Such a receiver was appointed, and the lessees proceeded thereafter to extract the oil and gas and pay the royalties to the receiver. The issues were tried, the court below adjudged that the river was not and never had been navigable; that the Osage Tribe was the owner of the land in the bed of the river in controversy and the oil and gas therein under the patent of the United States to the Cherokee Nation of December 1, 1838, and the treaties between them in performance of which that patent was made and delivered, under the Act of June 5, 1872, 17 Stat. 228, 229, and the deed of the Cherokee Nation to the Osage Tribe of June 14, 1883; under the Treaty of July 19, 1866, 14 Stat. 799; under the Treaty between the United States and the Osage Tribe of September 29, 1865, 14 Stat. 687, 690, art. 16; and under the Act of July 15, 1870, 16 Stat. 362, in pursuance of which that deed to the Osage Tribe was made. Thereupon the court rendered a decree in favor of the United States for the benefit of the Osage Tribe for the relief

sought by the United States in its complaint. The defendants and the interveners appealed from this decree.

W. A. Ledbetter and John H. Miley, both of Oklahoma City, Okl. (S. P. Freeling, Atty. Gen., and H. L. Stuart, R. R. Bell, and E. P. Ledbetter, all of Oklahoma City, Okl., on the brief), for appellants other than Arkansas River Bed Oil & Gas Co.

Paul Pinson, Sp. Asst. Atty. Gen. (Herbert M. Peck, U. S. Atty., of Oklahoma City, Okl., on the brief), for appellee United States.

James B. Diggs, of Tulsa, Okl. (Rush Greenslade and William C. Liedtke, both of Tulsa, Okl., R. L. Batts, of Pittsburg, Pa., and D. Edward Greer and John E. Green, both of Houston, Tex., on the brief), for appellee Gypsy Oil Co.

John J. Shea and Thomas F. Shea, both of Tulsa, Okl., and T. Austin Gavin, amici curiæ.

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

SANBORN, Circuit Judge (after stating the facts as above). The appellants assigned 12 alleged errors in the hearing and disposition of this case, but when reduced to their lowest terms they present only two questions that, in the view the court takes of the facts and the law, it is necessary to consider and decide. Those questions are: (1) Did the court below make a mistake of fact in its finding that the Arkansas river was not navigable at the place of the premises in controversy? (2) If it was not mistaken in its finding of fact upon that subject, did it fall into an error of law because, although that river was not and never had been in fact navigable, it did not hold and adjudge as a matter of law that it was navigable, and that the title to its bed below high-water mark and to the oil and gas therein was in the state of Oklahoma, and not in the Osage Tribe, in view of the decision of the Supreme Court of Oklahoma in State v. Nolegs, 40 Okl. 479, 486, 139 Pac. 943, rendered in March, 1914, to that effect.

[1] In determining whether or not the river was navigable in fact, the court below stated the rule by which it measured the evidence upon that subject in these words:

"It will be deemed navigable, when used or susceptible of use, in its ordinary condition, as a highway of trade and travel in the customary modes on water. * * * To meet the test * * * a water course should be susceptible of use for the purposes of commerce or possess a capacity for valuable floatage in the transportation to market of the products of the country through which it runs."

And it cited in support of that rule The Daniel Ball, 10 Wall. 557, 19 L. Ed. 999, The Montello, 20 Wall. 441, 22 L. Ed. 391, United States v. Cress, 243 U. S. 316, 37 Sup. Ct. 380, 61 L. Ed. 746, United States v. Rio Grande Irrigation Co., 174 U. S. 690, 19 Sup. Ct. 770, 43 L. Ed. 1136, and Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447. Counsel for the appellants argue that this rule was erroneous in that it failed to declare that a stream is navigable if it can be so improved as to make it useful as a highway of travel and transportation. But it is obvious

that the modification of the test adopted by the court by the insertion or addition of such a declaration would immediately raise the question whether or not a stream is navigable which was not, but might be made useful for transportation purposes at an expense far above the value of its possible use, and, if not, what the determining limit of such expense should be and thus the test would be rendered indefinite and impracticable. No persuasive reason or authority has been presented or discovered for such a modification of the rule applied by the chancellor below. That rule is sustained by the decisions of the Supreme Court and of this court, and there was no error in its statement or application in the hearing and decision of this case.

Upon the issue of the navigability of the Arkansas river above the mouth of the Grand river and at the place of the leased lands a vast mass of evidence was introduced, consisting, among other items, of the government surveys and meander lines of the river, congressional appropriations for its improvement, congressional grants of the privilege of constructing bridges over it, opinions and decisions of the officials of the Interior Department and of the officials of the War Department at various times with reference to the river's navigability, reports of the engineers of the War Department at various times relevant to this question, testimony of engineers who had been in charge of work on the river and of engineers who had been familiar with it, and the testimony of many other witnesses, many of whom had resided near it for many years, and all of whom were more or less acquainted with the river and its condition at various times in the past at and near the place under consideration and at other places above the mouth of the Grand river. For a more extended portrayal of this evidence reference is made to the opinion below, where the District Judge with enviable patience and clarity has set down the extent and character of this evidence and expressed his opinion of its effect. United States v. Brewer-Elliott Oil & Gas Co. (D. C.) 249 Fed. 609, 617, 624. No purpose would be served by reciting in detail here or by discussing this evidence. Suffice it to say that all the evidence on this issue and all the objections thereto have been exhaustively examined in the light of the arguments and briefs of counsel, and the conclusion is that the competent and relevant evidence on this subject leaves no doubt that the fact is, as the court found it to be, that the Arkansas river above the mouth of Grand river and at the place of the leased premises is not now and never has been a navigable stream.

[2] But counsel for the appellants earnestly maintain that, although the fact is that the river is and always was unnavigable at the locus in quo, the question of its navigability is a question of the local law of the state of Oklahoma, that by the local law of that state, evidenced by the decision of its Supreme Court on March 10, 1914, in State v. Nolegs, 40 Okl. 479, 139 Pac. 943, the Arkansas river at the place of the leased lands in controversy is a navigable stream, and that the court below ought so to have held under the established rule that the decisions of the highest judicial tribunal of the state regarding its Constitution and statutes and local law which established settled rules of property in that state are controlling authority in the courts of the Unit-

ed States where no question of rights under the Constitution or laws of the nation and no question of general or commercial law is involved. Lloyd et al. v. Fulton, 91 U. S. 479, 482, 23 L. Ed. 363; Jaffray v. McGehee, 107 U. S. 361, 364, 365, 2 Sup. Ct. 367, 27 L. Ed. 495; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260; Paine v. Willson, 146 Fed. 488, 489, 77 C. C. A. 44, 45; First Nat. Bank of Humboldt, Neb., v. Glass et al., 79 Fed. 706, 708, 25 C. C. A. 151, 153.

But there is an exception to this rule as just, as salutary, and as firmly established as the rule itself. It is that, when transactions have been had, contracts, grants, or conveyances have been made, and rights have thereby accrued and vested in a state of the laws and under the rules of property under which such rights are valid and enforceable, and the claim is asserted that by decisions of state tribunals subsequent to the accrual of such rights a different rule of property and state of the law has been created, which, if applied to the determination of the effect of such prior transactions, contracts, grants, or conveyances, would invalidate them and destroy the vested rights under them, the federal courts are not bound by such later rule of property or state of local law, the power is conferred and the duty is imposed upon them to hear and determine the claims of the parties in interest as in right and reason they ought to determine them according to the dictates of their own opinions as independent tribunals. Burgess v. Seligman, 107 U. S. 20, 33, 34, 35, 2 Sup. Ct. 10, 27 L. Ed. 359; Great Southern Hotel v. Jones, 193 U. S. 532, 542, 548, 24 Sup. Ct. 576, 48 L. Ed. 778; Kuhn v. Fairmont Coal Co., 215 U. S. 349, 356, 30 Sup. Ct. 140, 54 L. Ed. 228; Kobey v. Hoffman et al., 229 Fed. 486, 488, 143 C. C. A. 554, 556; Pleasant Township v. Ætna Life Ins. Co., 138 U. S. 67, 73, 11 Sup. Ct. 215, 34 L. Ed. 864; Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., 137 Fed. 26, 35, 71 C. C. A. 1, 10; Speer v. Board of County Commissioners, 88 Fed. 749, 760, 32 C. C. A. 101, 112; U. S. Savings & Loan Co. v. Harris (C. C.) 113 Fed. 26, 27, 28, 38, 39; Clapp v. Otoe County, 104 Fed. 473, 476, 45 C. C. A. 579, 582. The case of Kuhn v. Fairmont Coal Co., 215 U. S. 349, 355, 356, 30 Sup. Ct. 140, 54 L. Ed. 228, presented this question under a state of facts analogous so far as this question is concerned, to those in this case, and the Supreme Court said:

"When contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued." Page 360 of 215 U. S., page 143 of 30 Sup. Ct. (54 L. Ed. 228).

[3] Now the right and title of the Osage Tribe to the bed of the river north and east of the thread of its main channel and to the oil and gas therein at the place of the leased premises accrued and vested in its predecessor in interest, the Cherokee Nation, on December 1, 1838, under the patent of the United States of that date and the trea-

ties between the United States and the Cherokee Nation of May 6, 1828 (7 Stat. 311), of February 14, 1833 (7 Stat. 414, 415, 416), and of December 29, 1835 (7 Stat. 478), in execution of which that patent was made and delivered. By its express terms the grant of that patent conveyed a tract of land which included within its boundaries both banks of the Arkansas river and the land under it at the place of the leased premises. This right and title of the Cherokee Nation to the portion of the bed of the river here in controversy which lies north and east of the main channel of the river was conveyed and confirmed to the Osage Tribe by the act of Congress of June 5, 1872 (17 Stat. 228, 229), and by the deed of the Cherokee Nation to that tribe of June 14, 1883, which was made in performance of the treaty between the United States and the Cherokee Nation of July 19, 1866 (articles 15 and 16, 14 Stat. 799), of the treaty between the United States and the Osage Tribe of September, 29, 1865, and of the act of Congress of July 15, 1870 (16 Stat. 362). So it was that the title and rights of the Osage Tribe to the property in controversy accrued and vested in its predecessor in interest more than 70 years before the local rule of property counsel for the state invoke to the effect that the Arkansas river is navigable in law although it is not and has never been navigable in fact was declared in the region where the property in controversy is situated. There was no such rule of law in the region where the leased premises are situated when the right and title claimed by the Osage Tribe accrued and vested in the Cherokee Nation in 1838, or when it was confirmed to and vested in the Osage Tribe in 1872 and 1883. At those times and long after the established and prevailing rules of law were that the navigability of this river was a question of fact determinable by the evidence under the definition of navigability already discussed, and the decision and opinion of the Supreme Court of Oklahoma in the Nolegs Case has not relieved the national courts of the duty to consider and determine the claims to the premises in controversy arising under the patent, the treaties, and the deeds under which the Osage Tribe claims according to their opinions as independent tribunals. The court below so considered and decided them, and the only question remaining is whether or not it fell into an error of law in its conclusion that, in view of the fact that the river was not and never had been navigable in fact, it could not rightly be held to be navigable in law to the destruction or impairment of the rights which accrued and vested in the Osage Tribe under the treaties and conveyances to which reference has been made.

The theory of counsel for the state is that, if this river is navigable, the United States held the title to the bed of the river below high-water mark until the admission of Oklahoma into the Union in 1907, when that title vested in the state, but that, if it was not navigable, the title to the bed in controversy vested in the Osage Tribe. This theory ignores the grave question whether or not the United States did not by the treaties and grants to which reference has been made vest in the Cherokee Nation in 1838, and thereafter in the Osage Tribe, its successor in interest, the title to this property even if the river was navigable. Shively v. Bowlby, 152 U. S. 1, 48, 58, 14 Sup. Ct. 548, 38 L.

Ed. 331; Alaska Pacific Fisheries v. United States, 248 U. S. 78, 87, 90, 39 Sup. Ct. 40, 63 L. Ed. 138; United States v. Romaine et al., 255 Fed. 253, 260, 166 C. C. A. 423, 430; Knight v. U. S. Land Association, 142 U. S. 161, 183, 184, 12 Sup. Ct. 258, 35 L. Ed. 974. As, in the view we take of the evidence and the law in this case, it is not necessary to a disposition of it to discuss and decide this question, we lay it aside without intimating any opinion upon it. Conceding, but not deciding or admitting, that counsels' theory is sound, we consider the question now in hand whether, in the construction and application of the treaties, acts of Congress, and conveyances under which the Osage Tribe holds, the court below erred in deciding that, so far as the navigability of the river conditions that tribe's title, it was not and is not navigable in law while it is not and never was navigable in fact.

In the consideration of this question the facts must be borne in mind that the rights here judicable took their rise and rest, not only in contracts, but in treaties between nations; that they accrued and vested more than half a century ago; that these treaties, acts of Congress, and conveyances must be considered and interpreted in the light of the times and circumstances in which they were made; that the intention of the parties when they were made, if ascertainable from them and the circumstances surrounding them, should be carried into effect unless clearly violative of some established law or public policy, that these treaties, conveyances, and the negotiations and transactions whose results they embody were between a powerful nation of learned and intelligent people, on the one hand, and in their language, and Indian nations or tribes, on the other, unfamiliar with the language and the laws of the United States and largely dependent upon that nation; that these treaties, conveyances, and transactions between the United States and these Indian nations must under these circumstances be construed, applied, and enforced, "not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians" (Jones v. Meehan, 175 U. S. 1, 11, 20 Sup. Ct. 1, 5, 44 L. Ed. 49), "as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care and protection," and "inequality is to be made good by the superior justice, which looks only to the substance of the right without regard to technical rules" (Choctaw Nation v. United States, 119 U. S. 1, 28, 7 Sup. Ct. 75, 30 L. Ed. 306; Seufert Bros. Co. v. United States, 249 U. S. 194, 198, 39 Sup. Ct. 203, 63 L. Ed. 555).

The intention of the parties when the treaties and conveyances under consideration were made is the important element in the determination of the rights of the Osage Tribe under them. In view of the facts that the United States conveyed, pursuant to the agreements in the treaties, to the Cherokee Nation in December, 1838, a tract of land which included the lands on both banks of the Arkansas river and the land under it at the location of the leased premises, that by the act of 1872 the deed of 1883 from the Cherokee Nation to the Osage Tribe, and the treaties and acts of Congress on which they were founded, the United States and the Cherokee Nation confirmed and conveyed to that tribe the land and the premises in controversy bounded on the south by

the act of 1872 by "the main channel of the Arkansas river," that at the time of these conveyances and treaties that river was not and has never since been in fact navigable, that there was no established rule of law at those times in that country to the effect that that river or any other such river, though unnavigable in fact, was navigable in law, it is incredible that it could have been the intention of the United States and these Indian tribes to except from these grants that which by their plain terms they included, the portions of the bed of the Arkansas river below high-water mark. The terms of the treaties and the conveyances, the times and circumstances under which they were made, the objects the parties to them sought to attain thereby, the facts that the Indian tribes took and occupied the lands thus conveyed, all converge with compelling force to persuade that the United States and these Indian tribes intended, by these grants and conveyances and the treaties on which they were founded, to convey to and vest in the Osage Tribe of Indians the right and title to the leased premises here in dispute; that by those treaties, acts of Congress, and conveyances they did so convey and vest that right and title, so that the United States had no right or title thereto as against the Osage Tribe thereafter, and the state of Oklahoma received none when it was admitted into the Union. In opposition to these views counsel for the state cite in support of their contention that the Arkansas river at the locus in quo is navigable in law, although not so in fact, and that the state took the title to the leased premises in controversy on its admission into the Union, and we have read and examined, among others, the following authorities: State v. Nolegs, 40 Okl. 479, 139 Pac. 943; State v. Akers, 92 Kan. 169, 140 Pac. 637, Ann. Cas. 1916B, 543; United States v. Mackey (D. C.) 214 Fed. 137; Wear v. State of Kan., 245 U. S. 154, 38 Sup. Ct. 55, 62 L. Ed. 214, Ann. Cas. 1918B, 586; Dana v. Hurst, 86 Kan. 947, 122 Pac. 1041; State v. Wabash Paper Co., 21 Ind. App. 167, 48 N. E. 653, 51 N. E. 949, 950; Martin v. Waddell, 16 Pet. 367, 368, 10 L. Ed. 997; Ill. Cent. Ry. Co. v. Illinois, 146 U. S. 387, 13 Sup. Ct. 110, 36 L. Ed. 1018; Case v. Toftus (C. C.) 39 Fed. 730, 5 L. R. A. 684; Wood v. Hustis, 17 Wis. 417, 418; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 57, 33 Sup. Ct. 667, 57 L. Ed. 1063; Weber v. Harbor Commissioners, 85 U. S. (18 Wall.) 57, 21 L. Ed. 798; Hinman v. Warren, 6 Or. 409; McGilvra v. Ross, 215 U. S. 70, 30 Sup. Ct. 27, 54 L. Ed. 95; In re Horicon Drainage District, 136 Wis. 227, 116 N. W. 12. In State v. Nolegs, State v. Akers, and United States v. Mackey the claims adverse to those of the state to rights or titles to the bed of the Arkansas river below high-water mark were derived from grants or conveyances made before the respective states were admitted. But it seems to us that in those cases insufficient consideration and weight were given to the existing law, the facts and circumstances surrounding the parties to the original grants by the United States at the times they were made respectively, to the intentions of the parties to those grants at those times evidenced by the grants themselves and the circumstances surrounding the parties, and to the rules for the interpretation and application of treaties, contracts, and transactions between the United States and Indian

tribes. Wear v. Kansas, 245 U. S. 154, 38 Sup. Ct. 55, 62 L. Ed. 214, Ann. Cas. 1918B, 586, upon which much reliance seems to be placed, is not decisive or persuasive upon the real question at issue here, the question whether or not grants by the treaties, the patent thereunder, an act of Congress and a deed from the Cherokee Nation to the Osage Tribe, all made when the law and fact were that the river was unnavigable, must be adjudged void because more than 70 years after the original grant and more than 30 years after the conveyance of the rights thereunder to the Osage Tribe the Supreme Court of a state admitted in 1907 adjudged that river to be navigable at law while it remained unnavigable in fact. There is a wide and radical difference between the construction and effect that ought to be given to such grants conditioned by the navigability of a stream and to the customary patents of the United States so conditioned issued under general laws and the respective states of the law on this subject in later years. In the Wear Case the claimant adverse to the state relied upon the usual patent issued under the general laws by the United States in 1860. The only question really decided by the Supreme Court was that, where the highest tribunal of a state, in that case of the state of Kansas, "takes upon itself to know without evidence whether the principal river of the state is navigable at the capitol of the state, we certainly cannot pronounce it error." In that case the record before the Supreme Court of the United States did not require it to and it did not consider whether or not on all the evidence and the law that eminent counsel could assemble the river was navigable at the time of the grant under the facts and the law then applicable as the court below was required to do in this case and as this court must do. It would be a futile task to review the other authorities which counsel for the state have cited. Most of the claims for title to the beds of rivers below high-water mark adverse to the claims of the states disclosed by them accrued after the admission of the states, under general laws, and have little relevancy to the question in the case at bar. Some of them involve the extent of the jurisdiction of the United States over navigable streams under its power to regulate commerce. In many of them the crucial questions conditioned the rights in beds of rivers concededly navigable, while the grants here involve rights in a stream which was never navigable in fact and whose navigability as a matter of law at the time of the grants conditioned their extent and validity. The study of the question in hand has not been confined to the authorities which have been referred to in this opinion, or to those cited in the briefs and arguments, and the result of our investigation and deliberation is that nothing has been discovered which convinces that the following propositions are not sustained by the evidence in this case, the better reasons and the weight of authority, or that they are not decisive of the questions under discussion and of this case.

[4] The United States has always been both sovereign and proprietor in its territories. As such it has always had the right and power to dispose absolutely of any of its public land therein, high or low, wet or dry. While it has held its public lands in its territories below high-water mark under navigable waters in trust for future states, while it

has not conveyed them by general laws and has acted upon the policy, unless in some case of international duty or public exigency, of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of future states when they should be admitted to the Union, nevertheless it has always possessed and has frequently exercised the absolute power to grant such lands and any interest it had in them irrevocably whenever it became necessary to do so to perform international obligations or to carry out other public purposes appropriate to the objects for which it has held the lands in its territories. Shively v. Bowlby, 152 U. S. 1, 48, 58, 14 Sup. Ct. 548, 38 L. Ed. 331; McGilvra v. Ross, 215 U. S. 70, 79, 30 Sup. Ct. 27, 54 L. Ed. 95; Goodtitle v. Kibbe, 9 How. 471, 478, 13 L. Ed. 220; San Francisco City and County v. Le Roy, 138 U. S. 656, 670, 671, 11 Sup. Ct. 364, 34 L. Ed. 1096; Knight v. U. S. Land Association, 142 U. S. 161, 183, 184, 12 Sup. Ct. 258, 35 L. Ed. 974; Winters v. United States, 207 U. S. 564, 576, 577, 28 Sup. Ct. 207, 52 L. Ed. 340; United States v. Winans, 198 U. S. 371, 381, 25 Sup. Ct. 662, 49 L. Ed. 1089; United States v. Romaine, 255 Fed. 253, 260, 166 C. C. A. 423, 430; Alaska Pacific Fisheries v. United States, 248 U. S. 78, 87, 88, 90, 39 Sup. Ct. 40, 63 L. Ed. 138.

[5] It has never held its public lands in the territories under unnavigable waters under any such trust, but it has always had and exercised the absolute right to grant and dispose of such lands absolutely as appurtenant to and parts of the property granted or conveyed by it to the riparian owners of the banks adjacent thereto according to the existing law upon the subject of the rights of riparian owners at the times of the respective grants. Such riparian grantees and owners under the acts of Congress and under the law applicable in 1838, 1872, and 1883 at the place where these leased premises lie became the owners of the beds of unnavigable streams to the respective threads thereof. R. S. § 2476 (U. S. Comp. Stat. § 4918); Railroad Co. v. Schurmeier, 7 Wall. 272, 287, 19 L. Ed. 74. Such a riparian right of the owner of the bank to the bed of the stream was a valuable one of which, "when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation." Yates v. Milwaukee, 77 U. S. (10 Wall.) 497, 504. The United States by its patent of 1838, in performance of its treaties with the Cherokee Nation, granted and guaranteed to that nation a tract of land which included the banks on both sides of the Arkansas river at the place of the leased property here in controversy, and that grant conveyed the bed of the river between these banks. Donnelly v. United States, 228 U. S. 243, 259, 33 Sup. Ct. 449, 57 L. Ed. 820, Ann. Cas. 1913E, 710. According to the law applicable to the subject and to this grant when it was made, the test of the navigability of the river was its navigability in fact, and it is not now and never has been so navigable. There was not at the time of the original grant in 1838 or when the title thus granted was vested in the Osage Tribe under the act of 1872 and the deed of 1883 any general or local law conditioning these grants to the effect that the Arkansas river at the place of the leased premises, though unnavigable in fact, was

navigable in law. Those grants therefore divested the United States of all right and title to that part of the bed of the Arkansas river here in controversy and vested that right and title in the Osage Tribe. When the state of Oklahoma in 1907 came into the Union the United States had no beneficial right, title, or interest in that portion of the leased premises here in controversy, the state of Oklahoma never received or had any such right or interest, there was no error of law or of fact in the decision of the court below, and its judgment must be affirmed. It is so ordered.

COMMISSIONERS OF LAND OFFICE OF STATE OF OKLAHOMA et al. v. UNITED STATES et al.

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

No. 5435.

1. **Indians ⇐10—Island included in conveyance to tribe.**
   Act June 5, 1872, and the deed of the Cherokee Nation executed pursuant thereto June 14, 1883, conveying to the Osage Tribe lands bounded on the south and west by the main channel of the Arkansas river, *held* to have conveyed title to an island lying north of what was then the main channel of the river, and which was afterward allotted by the land department to one of the Osage Tribe.

2. **Navigable waters ⇐44(1)—Change in main channel of river to opposite side of island does not move boundary.**
   Where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, as by gradually during many years or by occasional floods deepening or enlarging a smaller channel on the other side of an island until it carries the greater part of its waters and becomes the main channel, a boundary which was fixed as the main channel remains in the old channel, subject to such changes in that channel as are wrought by erosion or accretion while it remains a running stream.

Appeal from the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Suit in equity by the United States and others against the Commissioners of the Land Office of the State of Oklahoma and others. Decree for complainants, and defendants appeal. Affirmed.

For opinion below, see United States v. Hutchings, 252 Fed. 841.

W. A. Ledbetter and John H. Miley, both of Oklahoma City, Okl., (S. P. Freeling, Atty. Gen., and H. L. Stuart, R. R. Bell, and E. P. Ledbetter, all of Oklahoma City, Okl., on the brief), for appellants.

Frederick B. Owen, of Oklahoma City, Okl. (Henry E. Asp, Henry G. Snyder, and Walter A. Lybrand, all of Oklahoma City, Okl., on the brief), for riparian owners, Edminston, Thomas, and Mullendore.

Paul Pinson, Sp. Asst. Atty. Gen. (Herbert M. Peck, U. S. Atty., of Oklahoma City, Okl., on the brief), for appellee United States.

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

SANBORN, Circuit Judge. Lot 7 in section 25, township 21 north of range 8 east of Indian meridian, and lot 11 in section 30, township 21 north of range 9 east of the Indian meridian, consist of an island in the Arkansas river above the mouth of Grand river, and lay north of the main channel of that river on June 5, 1872, when the United States by the act of Congress of that date conveyed and confirmed to the Osage Tribe of Indians its lands in what is now the state of Oklahoma, and bounded them on the south by "the north line of the Creek country and the main channel of the Arkansas river for a southern and western boundary." 17 Stat. 228, 229. These lots 7 and 11 were subsequently allotted to Larry Nolegs, a member of the Osage Tribe, in accordance with the provisions of the Osage Allotment Act of June 28, 1906 (34 Stat. §§ 3, 4, pp. 542, 543, 544), so that the United States thereby became the trustee of the oil and gas in the lands so granted to the Osage Tribe and the guardian of the allottee Nolegs and of his title to his allotment. As such trustee and guardian it brought this suit to quiet the title to the oil and gas in this island as trustee for the tribe and as trustee and guardian of Nolegs to quiet the title in the land in him, and to enjoin the defendants below, the appellants here, from interfering therewith. The court below granted the relief prayed for by the United States. The defendants who have appealed from its decree are the Commissioners of the Land Office of the State of Oklahoma, its Attorney General, and its lessee, who claim that the Arkansas river was and is navigable at the location of the island, and that the title to the bed of the river and the island vested in the state of Oklahoma when that state was admitted into the Union. The other appellants claim title to the island as grantees through mesne conveyances under the customary patents of the United States to the lands opposite the island on the south and west bank of the river.

This case and the case of Brewer-Elliott Oil & Gas Co. et al. v. United States et al., 270 Fed. 100, in which the opinion is filed herewith, were heard and decided below and in this court together upon all the arguments and evidence as well as the briefs in both cases. For the reasons stated in the case of Brewer-Elliott Oil & Gas Company the claim of the state of Oklahoma and its officers to any interest in or title to this island and to a reversal of the decree herein cannot be sustained, and as against them that decree must be affirmed on the authority of the decision in that case.

The other appellants are Thomas, Edminston, and Mullendore. Thomas and Edminston owned the lands on the south bank of the river opposite the island and claimed the island as an accretion to their lands. Mullendore claims under an oil lease from Thomas.

[1] The counsel for these appellants write in their briefs that they "complain only of that part of the court's findings of fact and judgment rendered thereon wherein the trial court found that the so-called island was included in the lands granted to the Osage Tribe by the act of June 5, 1872 (17 Stat. 228). This immediate finding was the result of the court's conclusion that the main channel of the Arkansas river was in 1872 south of the so-called island instead of north where admittedly it now is. They argue that the island was not included in

the tract conveyed and confirmed to the Osage Tribe: (1) Because it was not specifically described by government lot, section, or township in the deed of the Cherokee Nation to the United States in trust for the Osage Tribe dated June 14, 1883, which was made in execution of the act of June 5, 1872, and of the treaties between the United States and the Cherokee Nation, and the United States and the Osage Tribe, but that deed conveys the lands by townships and fractional townships and recites "the fractional townships being on the left bank of the Arkansas river"; (2) because no island was shown at the place of the island in question on the plat which accompanied the deed and was made a part thereof; and (3) because the deed specifies the number of acres conveyed by it, and this number is the number of acres in the townships and fractional townships specifically named therein, and does not include the number of acres in the island. But a careful review of the evidence leaves no doubt that in 1872, when the grant of that year was made to the Osage Tribe, there were two channels of the river, one on the north and one on the south of this island, and the channel on the south side was larger and deeper than that on the north side and was the main channel of the river. The act of Congress fixes the boundary at the place of the location of the island in question at "the main channel of the Arkansas river." The deed of the Cherokee Nation of 1883, which was made in performance of the grant of 1872, as the court below well said, citing Jones v. Meehan, 175 U. S. 1, 8, 10, 21, 20 Sup. Ct. 1, 44 L. Ed. 49, Francis v. Francis, 203 U. S. 233, 238, 239, 27 Sup. Ct. 129, 51 L. Ed. 165, and Chase v. United States, 222 Fed. 593, 597, 138 C. C. A. 117, 121, could not and did not revoke this grant or any part of it. The question in every case is what intention of the parties the terms of the treaty and their grants indicated. 175 U. S. 10, 20 Sup. Ct. 1, 44 L. Ed. 49.

While no island is shown on the plat which is a part of the deed, that plat bears this declaration:

"The islands in the Arkansas river opposite to the lands described in the foregoing, except Beaver and Turkey Island in township 23 N. R. 3 E. are a part and parcel of the land set apart for the Osage and Kansas Indians and covered and embraced in this plat and the foregoing deed of conveyance."

And the island here in controversy was opposite to the lands described in this deed and was neither Beaver nor Turkey Island.

The fact that the number of acres stated in the deed was not large enough to include the acreage of the island is far from sufficient to overcome the convincing evidence that the intention of the United States, of the Cherokee Nation, and of the Osage Tribe was to fix, and that they did fix, the southern and western boundary of the grant to the Osage Tribe at the location of this island at the middle thread of the channel south of the island, which is borne in upon our minds by the facts that the main channel in 1872 was the channel south of the island, that the grant is expressly bounded, by the act of 1872, by the main channel of the river, that the notation on the plat in effect declares that this island was within the grant, and that the Commissioners of the Land Office and the Secretary of the Interior, by including this

island in the lands of the Osage Tribe and allotting it to Nolegs, have made known that this was their opinion, so that it is clear that the court below made no mistake in its finding that the boundary of the grant to the Osage Tribe by the act of 1872 was the thread of the channel of the river south of the island which was then the main channel of that river.

[2] Counsel, however, contend that, even if the southwest boundary of the lands of the Osage Tribe at the point in question was the thread of the south channel in the year 1872, that boundary has now become the thread of the north channel because the latter channel is now the main channel of the river, and the old south channel, except in very high water, consists of beds of dry sand with occasional water holes which now lie between the island as it was in 1872 and the lands of Thomas and Edminston on the southwest bank of the river and make their lands on that bank, the filled bed of the south channel, and the island one continuous tract of land, all of which north and east of their lands on the old south bank of the south channel they claim as accretions to those lands. They invoke the familiar rule that the land which by gradual and natural accretion attaches itself to the bank of a river or of an island therein becomes the property of the owner of that bank, and contend that by this process the land in the filled south channel and on the island has become theirs. They concede that, if the southwest boundary of the land of the Osage Tribe was the south channel of the river, as we have found that it was, the middle thread of that channel was the original boundary between their lands and the plaintiff's island, but they insist that this boundary line has been transferred to the thread of the north channel of the river by the fact that by the gradual filling of the south channel and the gradual diversion of the waters of the river to the north channel during the 40 and more years since 1872 that has become the main channel of the river.

The general rule on this subject is: (1) That where the thread of the main channel of the river is the boundary between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; (2) but, where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. Counsel rely upon the first clause of this rule. That clause is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually be-

comes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream. Davis v. Anderson Tully Lumber Co., 252 Fed. 681, 683, 164 C. C. A. 521, 523; Farnham on Waters & Water Rights, p. 2500; Hahn v. Dawson et al., 134 Mo. 581, 591, 36 S. W. 233; City of Victoria v. Schott, 9 Tex. Civ. App. 332, 29 S. W. 681, 687; Glassell et al. v. Ross Hansen et al., 135 Cal. 547, 67 Pac. 964; Indiana v. Kentucky, 136 U. S. 479, 509, 10 Sup. Ct. 1051, 34 L. Ed. 329; Missouri v. Kentucky, 11 Wall. 395, 408, 20 L. Ed. 116; Washington v. Oregon, 211 U. S. 127, 135, 29 Sup. Ct. 47, 53 L. Ed. 118. The evidence in this case has convinced that it falls under this exception: The main channel of the river never gradually crept over the intervening space occupied by the island, but from 1872 to the present time it was on either one side or the other of this island. The main channel passed from the south side of the island to its north side by the swinging during many years of the waters of the river from side to side of that stream, by the gradual increase during many years of the proportion of its waters flowing through the north channel and the gradual decrease of the proportion of its waters flowing through the south channel until the north channel became the main channel and the south channel was gradually filled. The island never became an accretion to the lands of the owners of the south bank of the river, and the decree below must be, and it is, affirmed.

THE CHOCTAW. THE WAHCONDAH. GRAND ISLAND S. S. CO. v. CANADA S. S. LINES, Limited.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1921.)

No. 3405.

1. **Collision ⇐85—Custom not to check speed in fog relevant on issue of due caution.**
   In a collision case, proof that it was a steamer's long-continued custom not to check speed merely for fog is relevant on otherwise doubtful issue whether, under the same management, it checked speed on particular occasion, and trial court did not err in investigating such custom on its own motion.
2. **Collision ⇐85—Evidence held not to sustain finding of undue speed in fog.**
   In a collision case, proof that a boat customarily did not check speed in fog while operated by its captain *held* not to sustain a finding that speed was not checked on the particular occasion involved, when the boat was in charge of a mate, and the direct testimony of witnesses tended to show that he had properly checked its speed.
3. **Collision ⇐77—Steamer liable when lookout maintained 200 feet aft from bow.**
   In a fog collision case, a boat was liable for damages where, instead of maintaining its lookout in the bow, he was posted some 200 feet back,

toward the stern, since the additional distance may have prevented him from properly hearing and locating the signals of the approaching boat.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Libel by the Grand Island Steamship Company, owner of the steamer Choctaw, against the Canada Steamship Lines, Limited, owner of the steamship Wahcondah. From a decree dividing damages, the libelant appeals. Affirmed.

On July 12, 1915, the steamers Choctaw and Wahcondah were in collision in a fog in Lake Huron, near Presque Isle. The Choctaw was sunk; the Wahcondah considerably, though not vitally, damaged. The owners of the Choctaw libeled the Wahcondah, alleging that she was running at excessive speed in fog. The Wahcondah filed answer and cross-libel, not denying the fault alleged, but claiming that the Choctaw also was at fault for lack of lookout, for excessive speed, and for accepting the Wahcondah's two-blast passing signal when she should have sounded an alarm and reversed. Upon the trial, witnesses for the Choctaw agreed in testifying that she entered a dense fog at 4 a. m., immediately slowed to bare steerageway, and continued at that speed carefully until 4:22, when the collision occurred. They further testified that they heard one fog signal from the Choctaw about three minutes before the collision; that this signal was on the port bow and seemed a long way off; that they had been sounding and continued to sound their own fog whistle at intervals of less than a minute; that they heard no more from the Wahcondah until after about 2½ minutes (as the mate estimates), when there came a two-blast passing signal, which also seemed faint and a considerable distance away; that, although this was not the normal passing, and indicated that the vessels would have to cross each other's bows, they thought there was time enough to do so safely, and at once answered by accepting the two-blast signal, and that almost immediately thereupon the Wahcondah came out of the fog and struck the Choctaw at about a right angle, on the port side, 50 feet from the bow. The Wahcondah offered no testimony, but depended on cross-examination of the Choctaw's witnesses to show the faults alleged in the cross-libel.

The trial judge accepted the testimony of the Choctaw's witnesses, and announced his conclusion that the Wahcondah would be held solely at fault. Before the decree was signed, the Choctaw, at the judge's request, furnished him with its logs, kept separately for each trip, for all trips which the Choctaw had so far made that season, and for each trip made during the entire season of 1914 (from Lake Erie to Marquette and return). Upon inspection of these, the judge became convinced that the Choctaw habitually ran at full speed in fog, and that the case ought to be re-examined in the light of this habit. Accordingly it was reopened for further testimony on both sides. All these logs were put in evidence, practically on motion of the court and against the objection and protest of the Choctaw; and, as counsel for the Choctaw declined to examine its officers with regard to the logs, the judge did so. The captain was so examined at length with reference to what the logs showed on this subject for each one of the trips, and was then further examined by counsel for each party as desired. A similar course was followed as to the mate, with reference to the trips since he had been on board. Witnesses for the Wahcondah gave evidence tending to show that, at the time of the collision, the Choctaw was running full speed. As the result of going over the logs, first by himself and then with the witnesses, the judge announced his conviction that, during the one full year and the additional fractional year covered, the Choctaw was shown to have always run at full speed in fog, unless there was some other reason than the fog for checking—as, because of meeting a steamer, or approaching a harbor, or being in a river—and that the testimony of the witnesses that on this particular occasion they had checked, as stated, was incredible. He thereupon directed a decree dividing damages, and from this decree the Choctaw appeals.

Hermon A. Kelley, of Cleveland, Ohio (Kelley & Cottrell, of Cleveland, Ohio, on the brief), for appellant.

Frederick L. Leckie, of Cleveland, Ohio (Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). [1] The contention chiefly urged by the Choctaw is that the trial court had no right to resort to these logs, or to draw from them the inference which he did, or to give to that inference the effect which he gave it, to overturn the direct testimony of the witnesses. We are not prepared to say that there was error in resorting to these logs. It is, of course, to be conceded that, as bearing on the truth of a master's testimony that he had checked in a fog at a particular time, it would be irrelevant to show that he did not check in a certain fog on some certain previous trip, and that a ship cannot be condemned for former reckless speed, if she has been running carefully during the critical period. The Ludvig Holberg, 157 U. S. 61, 15 Sup. Ct. 477, 39 L. Ed. 620). That is quite another question. Whether a boat, when on the open lake and in no apparent danger, should run at full speed in a fog, or should obey the rules by running under check and carefully, admits of no doubt, under the law; but it has a practical aspect, as a matter of economic policy, which is to be determined, in the first instance, by the master, and eventually by the owners.

It is entirely possible, as was stated by the master of the Wahcondah, and as was assumed by the trial judge to be a matter of common knowledge by all familiar with lake traffic, that the masters would be glad to run slowly in fog, were it not that the owner generally expected them to make time, which they could not make if they strictly obeyed the rules. Proof tending to show an established and long-continued custom on the part of a steamer never to check merely for fog, no matter how dense, but to continue at full speed, we think would be distinctly relevant toward determining an otherwise doubtful issue of fact, whether the boat on a particular occasion, while under the same management and the same master, did depart from that custom and for the first time show caution, instead of utter recklessness.

Nor can we say that there was error by the trial court in taking up such an inquest on his own motion. The public danger arising from violation of these navigation rules is so extreme that the court, in the public interest, should be vigilant to visit any violations with due penalty.

[2] However, in the present case, we are compelled to think that the vigilance and earnestness of the trial judge in this respect carried him too far. He assumed that every entry of fog on the log indicated fog of sufficient density so that there should be a check. The captain assumed that no such entry showed a fog thick enough to require checking, unless the engine revolutions showed that he had checked. Very likely neither conclusion is inevitable. For some time before the collision the captain had been below, and as to the speed or checking at that time he was not a witness; the ship was in charge of a mate,

who had been upon the ship only during the previous five trips of this season, and who was sailing only the early part of his second trip as first mate, so as to carry the responsibility of navigating the ship during alternate watches. The effect of the old logs to discredit his testimony could not be convincing, and nothing was shown from the log of the previous trip (his only former one as first mate), save one instance of running without check in a fog when he was apparently in charge. This was in the open lake in Lake Superior. It is denied that the fog was dense enough to require checking, and it seems certain that at least for part of the time it was not, since the entry of fog and the attendant showing of full-speed revolutions cover the time when they were getting out of a harbor, where full speed would have been impossible, unless they could see fairly well.

There is nothing in the record of the ship making it seriously improbable that this mate, just promoted and naturally feeling his responsibility, running into a dense fog bank, should have checked and continued to check for 20 minutes, just as he says he did; nor is the ship's record, in our judgment, sufficient in itself to justify a finding that the several witnesses invented the whole story, including falsification by the acting engineer of his temporary slate record. There was nothing in the appearance or demeanor of the witnesses to discredit them, as the trial judge found upon the first hearing. Their story was confirmed by the conduct of the Wahcondah people, who on that hearing made no proof that the Choctaw maintained undue speed. Such testimony as was given on the second hearing from the Wahcondah, indicating the speed of the Choctaw, is not very forceful, particularly after failure of the same witnesses to testify on the first hearing, although present in court. We conclude, therefore, that the record does not contain sufficient basis for condemning the Choctaw for undue speed.

[3] There remains the matter of lookout. The Choctaw was about 270 feet long on deck, of the whaleback type, and with a standard steamer bow. The deck structure, containing the bridge and upper and lower pilot house, was near the stern, more than 200 feet from the bow. On the deck at the bow was what the witness called a turret, and in smooth weather the lookout might have stood upon this, although in a sea it would be otherwise. After they entered the fog at 4 o'clock, the mate and the wheelsman were in the upper pilot house with the windows open, and the lookout, who was an experienced and competent man, stood on the bridge just outside the lower pilot house.

By way of answer to the complaint that there was no lookout at the proper place on the bow, it is said, first, that in this type of boat it is usual and right to have the lookout where this one was. His absence from the ordinary and proper location at the bow cannot be justified for these reasons. We find no evidence of such custom; nor is the ship's type a sufficient excuse. The sea was smooth, and there would have been no difficulty in standing on the bow turret, and that location, seemingly, would not have been beyond calling distance for making reports. In The Manchioneal (C. C. A. 2) 243 Fed. 801, 156 C. C. A. 313, on a ship 150 feet long, her lookout was standing at the

pilot house because the forecastle head was turtle-backed and was slippery when wet. The court said (243 Fed. 805, 156 C. C. A. 317):

"By the overwhelming weight of authority it is settled that the proper place for a lookout is, under ordinary circumstances, on the bow" (citing cases).

The conditions existing in the present case—a smooth sea and a fog—made it both feasible and especially important that he should be at the conventional station.

By way of further answer as to the lookout's position, it is said that he could see and hear where he was as well or better than at the bow, so that his faulty location could not have made any difference in the result. There is grave doubt whether the absence of a properly posted lookout ought ever to be held inconsequential in a fog case. There is too much inherent uncertainty as to what he might have seen and heard if he had been in the right place.

"The denser the fog and the worse the weather, the greater the cause for vigilance. A ship cannot be heard to say that the lookout was of no use, because the weather was so thick that another ship could not be seen until actually in collision. Marsden on Collisions at Sea (6th Ed.) 472, 474," as quoted in The Sagamore (C. C. A. 1) 247 Fed. 743, 755, 159 C. C. A. 601, 613.

"It was incumbent upon the Columbia [in a fog] to maintain lookouts as far forward and as near the water as possible, and at a height above the water, as well for the purpose of hearing as seeing. * * * No excuse can be found for a failure to have lookouts forward, and there was no reason why they should not have been stationed at the stem, which, besides being so much nearer any approaching object [the lookouts were on the bridge 94 feet from the stem] was about 15 feet closer to the water." Watts v. U. S. (D. C.) 123 Fed. 105, 113. See, also, The Sagamore, supra, and cases cited on pages 754, 755, and The Tillicum (D. C.) 217 Fed. 976, 978.

We do not find that this court has ever held the lack of a bow lookout in a fog collision to be immaterial, because not a contributing cause; but if the rule of liability, as an invariable one, may be too harsh, and if it may be applied in fog cases with as much flexibility as in others, it at least must be made to appear with reasonable certainty that there is no room for any inference of contributing effect. The Roby (C. C. A. 6) 111 Fed. 601, 612, 49 C. C. A. 481; Great Lakes Co. v. Pittsburgh Co. (C. C. A. 6) 222 Fed. 862, 866, 138 C. C. A. 288; Marmet Co. v. Feiger Co. (C. C. A. 6) 259 Fed. 435, 447, 170 C. C. A. 411.

Although it may be true in individual cases, there can be no presumption that a lookout 200 feet back from the bow and higher up can see as well; sometimes he could, and sometimes he could not; but in this case we must agree with the District Court that a lookout at the bow would not have seen anything enough earlier to have made any difference whatever in the result. No one could see further than a boat's length, if so much as that.

A different question arises as to hearing. The lookout should be not only the eyes, but the ears of the ship. This group of three men, close together on the deck structure, might naturally talk together, and the lookout's attention be diverted. The fog whistle blowing three-blast signals at intervals of less than a minute, and therefore blowing

a considerable share of the time, was within a few feet of them, and their ears would resound with the noise for a time after each blast. They were close to the smokestack, and would often get the roaring of the draft and of escaping steam. The ventilators, extending down to the engine room, came up just back of them, and the ventilator mouths were turned forward toward them, so that the shoveling of coal and the noise of the machinery could be heard. It was the noisiest spot on the boat, outside of the engine and boiler rooms. If the lookout had been at the bow, his attention would have been centered wholly upon listening. He would have had no distracting companions, nor confusing noises, except for the effect of the whistle, and that would have been lessened. It is quite clear that a lookout at the bow would be likely to hear whistles and signals from approaching boats which might escape the same man if at the pilot house.

In addition, and in a fog, there would be further advantage in this position. He might hear a signal from the true direction, while 200 feet away, a false impression of direction would be given because of the peculiarities of the fog. In any event, it might be helpful to have two different bearings upon the approaching signal; but we would be reluctant to rest upon these features a conclusion of fact that his absence from the bow might have contributed, because there is no satisfactory evidence [1] that the Wahcondah blew any signals that were not heard, and there was no mistake as to her bearing. We are better satisfied to point out a reasonable theory under which we can see that there would have been a fair probability of escape from collision if the lookout had been rightly stationed, rather than to let the case stand on the mere presumption that his presence might have done good.

Accepting the statements of the Choctaw and the Wahcondah as to their respective speeds, and the Choctaw's testimony that the first fog whistle heard was three minutes before the collision, it follows that the boats were then about 3,600 feet apart. The Choctaw witnesses say they all estimated the distance as more than a mile. A lookout at the bow might well have judged the distance accurately; it is familiar knowledge that there may be no uniformity in the obstruction to sound here and there in a fog. They all appreciated that the whistle was from a boat coming toward them. There is no claim that it could have been anything else. It was the duty of this approaching vessel to blow fog whistles once a minute, but for 2½ minutes nothing was heard. An approaching boat would be expected only from Mackinac or Detour. If the former, it would be on a converging course, and the danger would speedily become imminent; if the latter, the courses would be parallel, and the danger only less probable. On whichever course, the approaching boat was not obeying the law. It would seem that the mate might well have taken alarm, even though thinking that the fog signal they heard had come from a mile away.

If this boat was not blowing the required signals, what inference

[1] On this second hearing, the Wahcondah's captain says he blew two successive two-blast signals; but, in view of his silence on the first hearing, this testimony should be received cautiously.

could there be that she was obeying the law as to speed? If she was running full speed, the two boats would approach each other half a mile in two minutes; but, whatever the measure of prudence appropriate when based on the mistaken idea of "a mile or a mile and a half," it seems certain that, if they had rightly judged the distance at first, and then the time continued passing without any further fog signal, they would all have appreciated that this approaching and unlawfully silent boat might be getting too close, and they would very likely have done what we now see would have been the right thing, viz. to stop and blow an alarm, in effect calling out, "Where are you, and why don't you blow?" If the lookout had been forward, he might not have truly interpreted the fog signal and understood its closeness soon enough to change the result; but, on the other hand, he might have done so, and it is quite within the reasonable probabilities that the collision would not have occurred.

We have, thus far, accepted the estimate of the Choctaw's mate as to time and distance. She can hardly complain if the wheelsman's testimony is considered. He heard the Wahcondah's fog whistle about three minutes before the collision, and heard a two-blast passing signal immediately thereafter. He says the two were as close together as they could be without danger of being misunderstood, as intended for an alarm. If this is true, then so much the greater would have been the probability that a lookout at the bow would have placed these signals at their true distance, instead of thinking that they were twice as far away. In that event, there would have been sufficient time for an alarm and a stop to have avoided the collision.

After we assume that the Choctaw is chargeable with that knowledge of the truth which it might not improbably have obtained through the ears of a bow lookout, we have a case substantially within rule 26, as interpreted and applied by this court in The Roby, supra. Rule 26 (U. S. C. S. § 7936; the White Law, Act Feb. 8, 1895) provides that:

"* * * In every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes * * * the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to barely steerage way, and, if necessary, stop and reverse."

In The Roby, supra, 111 Fed. 609, 49 C. C. A. 489, we thought that this rule, in connection with rule 15 (Comp. St. § 7925), applied imperatively to vessels which had approached within half a mile of each other without having reached a satisfactory passing agreement. Applying that rule here, we find that the vessels had, in fact, approached within half a mile of each other (on the mate's testimony) without any passing agreement; that the pilot of the Choctaw was, or should have been, in doubt as to the course or intention of the approaching boat, and was required by the rule to blow an alarm; that the only excuse for not doing so is that they misjudged the signal, and did not think the approaching steamer was so near; and that, with a lookout prop-

erly posted, there is fair probability that they might have avoided this mistake. See, also, Pittsburgh Co. v. Duluth Co. (C. C. A. 6) 222 Fed. 834, 835, 138 C. C. A. 260.

This view leads to the conclusion that the Choctaw should be condemned for the lack of lookout, and that the damages should be divided.

For this reason, the decree will be affirmed.

MAYES, Internal Revenue Collector, v. PAUL JONES & CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1921.)

No. 3440.

1. **Appeal and error ⟸1071(4)—Separate findings of fact may be considered, though not on paper separate from opinion.**
Where findings of fact are separately stated and numbered, and the entry of judgment expressly states that they are filed and made a part of the record, the objection that they are found in connection with the opinion, and not on a separate paper, is merely technical, and will not avail to prevent their consideration.

2. **Trial ⟸395(5)—Findings held sufficient, and not open to objection as mere recitals of testimony.**
A finding that prior to a specified date the revenue officers had ruled that the use of a particular filter for distilled spirits was not rectification, and that such ruling was acted on by plaintiff and other distillers and dealers, and findings of the facts admitted by the pleadings, the facts agreed on by a stipulation filed, and the facts testified to by a witness "with admitted accuracy," *held* sufficient, under Rev. St. § 649 (Comp. St. § 1587), as against the objection that they were mere recitals of the testimony.

3. **Appeal and error ⟸1071(1)—That paragraphs of finding were not stated as separate findings held immaterial, when not prejudicial.**
That each paragraph of one of the court's findings of fact was not separately numbered as a separate finding, as might have been done, was immaterial, where such failure could not possibly prejudice the rights of the party objecting to consideration of the findings.

4. **Trial ⟸388(5)—Whether findings were made sua sponte or on request is immaterial.**
It is immaterial whether the court made findings sua sponte or on request of counsel.

5. **Appeal and error ⟸934(1)—Exceptions to judgment assumed to be on ground that facts found do not support it.**
In an action in which there was no dispute as to the facts, and the question presented was purely one of law, though the exceptions to the judgment in the entry of judgment do not specifically state the grounds of objection, it will be assumed that they intended to challenge the judgment on the statutory ground that the facts found were not sufficient to support it, especially where the assignments of error aver that the judgment is against the law of the case on the undisputed facts recited therein.

6. **Appeal and error ⟸1008(2)—Findings supported by evidence not subject to revision, when jury waived.**
The court's findings on questions of fact, where a jury was waived, are not subject to revision by a reviewing court, if there was any evidence on which they could be made.

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7. Appeal and error ⊂=877(1)—Plaintiff in error not entitled to challenge sufficiency of special findings.

Plaintiff in error cannot challenge the sufficiency of the special findings, under Rev. St. § 649 (Comp. St. § 1587), where, without such findings, no question would be presented within the authority of the court to review.

8. Statutes ⊂=225¾—Adoption of statute referring to another adopts long-continued executive construction of such other statute.

In adopting Act Oct. 3, 1917, § 304 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 5986c), imposing a tax on distilled spirits, rectified, purified or refined, and referring to Rev. St. § 3244 (Comp. St. § 5971), for a definition of rectification, Congress is presumed to have known the long-continued executive construction given to section 3244, and to have known the rule of construction that the re-enactment of a statute previously construed by executive officers is an adoption of such construction, and the executive construction of section 3244 as to what constitutes rectification was therefore adopted by Congress, and cannot be changed by the Treasury Department or the courts.

9. Constitutional law ⊂=77—Executive officers cannot change erroneous construction of statute, after it has been adopted by later legislation.

While executive officers of the government may change their erroneous construction of a statute, though long followed, they may not do so after such construction has been adopted by Congress in enacting later legislation.

10. Statutes ⊂=181(1)—Intention governs construction, and language controls, if intention can be ascertained therefrom.

In construing a statute, the court must give full force and effect to the intent and purpose of the law-making power, and if this intent and purpose can be ascertained from the language of the statute, such language must control.

11. Statutes ⊂=219—Construction by department charged with execution is of great weight.

Where the meaning of a statute is doubtful, the construction given it by the department of the government charged with its execution should be given great weight, for the reason, among others, that, if such construction does not properly interpret the meaning and intent of Congress, Congress by amendment or re-enactment of the statute can readily correct it.

12. Internal revenue ⊂=12—Executive construction adopted by Congress held not avoided by departmental ruling on somewhat similar matter.

The long-continued executive ruling that the use of filters for distilled spirits, with which no force was used except that of gravitation, was not rectification, within Rev. St. § 3244 (Comp. St. § 5971), which was impliedly adopted by Congress in enacting Act Oct. 3, 1917, § 304 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 5986c), was not avoided by a departmental decision that the use of another filter, consisting in forcing the liquid under pressure through a filter, was rectification.

13. Internal revenue ⊂=12—Use of filter to remove extraneous substances not "rectification," "purifying," or "refining."

The use of a filter which merely removes particles of charcoal and other extraneous substances from distilled spirits, and does not change the constituent elements in any respect whatever, is not "rectification," "purifying," or "refining," within Act Oct. 3, 1917, § 304 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 5986c), imposing a tax on distilled spirits rectified, purified, or refined.

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

14. Internal revenue ⇐12—"Purifying" or "refining" of distilled spirits defined.

"Purifying" or "refining," as used in Act Oct. 3, 1917, § 304 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 5986c), relative to distilled spirits, means the removal, chemical change, or modification of objectionable soluble matter, held in solution in the spirits, united therewith, and forming a constituent and integral part thereof, so that its removal, chemical change, or modification will change or alter in some degree, at least, the character or quality of the entire volume of spirits.

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Action by Paul Jones & Co. against T. Scott Mayes, Collector of Internal Revenue for the Fifth Collection District of Kentucky. Judgment for plaintiff (265 Fed. 365), and defendant brings error. Affirmed.

Miles J. Purcell, of Saginaw, Mich. (W. V. Gregory, U. S. Atty., and S. M. Russell, Asst. U. S. Atty., both of Louisville, Ky., on the brief), for plaintiff in error.

A. J. Carroll, of Louisville, Ky., for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This is a proceeding in error to reverse the judgment of the United States District Court, Western District of Kentucky, in the case of Paul Jones & Co., successor of the firm of Paul Jones & Co., rectifiers and wholesale liquor dealers, to recover rectified spirits taxes assessed against that firm under the provisions of section 304 of the Act of October 3, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 5986c), and paid under protest. By the agreement of counsel the cause was submitted to the court, without the intervention of a jury, upon an agreed statement of facts supplemented by oral evidence taken at the trial. The trial court found on the issues joined for the plaintiff, and entered judgment in its favor for the sum of $2,095.76, with interest thereon and cost of action.

It is insisted upon the part of the defendant in error that, as there were no requests on the part of either party for special findings of fact or rulings of law, and that the only objection in the entire course of the trial was made by plaintiff in error to the judgment, which objection was incorporated in the entry of judgment, that there is nothing for this court to review except errors in the exclusion or admission of evidence, and that, as no such error is claimed, the judgment should be affirmed without further consideration. In addition to the facts agreed upon by stipulation, there was but one witness testified. His testimony is entirely consistent with the agreed statement of facts, so that there is no conflict in the evidence and no dispute as to the facts. The question presented to the trial court was purely a question of law.

[1, 2] The court, however, did make four separate findings of fact, including the admission in the pleadings, and the facts agreed upon by stipulation. While these findings of fact appear under the title "Opinion and Findings of Fact," nevertheless they are not mere narrations

of facts in the opinion, but findings separately stated and numbered, and the entry of judgment expressly states that this "opinion and findings of fact" are filed and made a part of this record. The objection that they are found in connection with the opinion, and not upon a separate paper, is merely technical, and while parties are held to a reasonable strict conformity to the provision of the statute, a mere technical objection will not avail. It is further insisted, however, that even though the findings of fact are separately stated and numbered, and therefore easily distinguishable from and separate from the opinion itself, that nevertheless such findings do not meet the requirements of section 649, Revised Statutes, for the reason that they are mere recitals of the testimony. In support of this contention, counsel have cited Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481, 37 L. Ed. 373; Norris v. Jackson, 76 U. S. (9 Wall.) 125, 19 L. Ed. 608.

This objection, however, cannot possibly apply to the first, second, or third findings of fact. The first finding is certainly a definite finding of an ultimate fact, deduced from the evidence. The second incorporates the facts admitted by the pleadings. The third finding incorporates the facts agreed upon by stipulation of counsel. At first glance, it might appear that this objection is well taken as to that part of the fourth finding based upon the undisputed testimony of the only witness that testified in this case. Upon careful reading, however, it is apparent that this finding is not a mere recital of the testimony of the witness, Miller, but, on the contrary, a finding of specific facts established by his testimony, and which the court found to have been detailed by him "with admitted accuracy."

[3] While it is true that this fourth finding of fact is elaborate in detail, and that each paragraph thereof might have been separately numbered as a separate finding, yet the failure to do this cannot possibly prejudice the rights of the defendant in error, and is therefore of no importance. It also further appears that each and all of these facts so found by the court to be established by the testimony of Miller are essential to a full and complete understanding of the issues joined by the pleading in this case, and particularly the conduct and management of the business to which these issues relate. For the reasons above stated, this finding is not subject to the same objection and criticism as the finding in Lehnen v. Dickson and Norris v. Jackson, supra.

[4] It is of no importance whether the court made these findings sua sponte or upon request of counsel, nor is it important that these findings of fact appear in the opinion, for, notwithstanding that, they are separately stated and numbered, and ordered filed and made part of the record. O'Reilly v. Campbell, 116 U. S. 418–421, 6 Sup. Ct. 421, 29 L. Ed. 669; Philadelphia Casualty Co. v. Fechheimer, 220 Fed. 401–408, 136 C. C. A. 25, Ann. Cas. 1917D, 64.

[5] While the exceptions taken to the judgment, as appears in the entry of judgment, do not specifically state the grounds of objection, yet a reviewing court will assume the exceptions intended to and do sufficiently challenge this judgment on the statutory ground that the facts found were not sufficient to support it. Felker v. Bank, 196

Fed. 200–202, 116 C. C. A. 32; Casualty Co. v. Fechheimer, supra, 220 Fed. 410. This assumption is not only justified, but required by the five separate assignments of error, in which assignments it is averred that the judgment "is against the law of the case" upon the several undisputed facts which are recited in the separate assignments of error.

[6] For these reasons the record in this case does present the question of law as to the sufficiency of the facts found to support the judgment, but the court's findings upon questions of fact, a jury having been waived, are not subject to revision by a reviewing court, if there was any evidence upon which such findings could be made. Dooley v. Pease, 180 U. S. 126, 131, 132, 21 Sup. Ct. 329, 45 L. Ed. 457; Stanley v. Supervisors, 121 U. S. 547, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Hathaway v. National Bank, 134 U. S. 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; St. Louis v. Rutz, 138 U. S. 241, 11 Sup. Ct. 337, 34 L. Ed. 941; Runkle v. Burnham, 153 U. S. 225, 14 Sup. Ct. 837, 38 L. Ed. 694; Chautauqua Institution v. Zimmerman, 233 Fed. 371–375, 147 C. C. A. 307 (C. C. A. 6).

[7] The plaintiff in error, of course, cannot challenge the sufficiency of these special findings to meet the requirements of section 649, R. S. (Comp. St. § 1587), for without these findings there would be no question presented that this court would have authority to review.

An examination of the bill of exceptions, which is substantially the same as the finding of facts of the court, discloses that not only was there "evidence upon which such findings could be made," but also that there is no conflict in the evidence upon which these findings are based. The facts found by the court are as follows:

"(1) That prior to date in the year 1919 the ruling of the revenue officers had been that the use of the Karl Kiefer filter, as plaintiff used it, was not rectification, and that said ruling was acted upon by plaintiff and other distillers and dealers up to the promulgation in 1919 of the new ruling hereinbefore copied." [1]

"(2) What we have shown to have been admitted by the pleadings." [2]

"(3) What we have shown to have been agreed upon by the stipulation filed." [3]

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[1] The new ruling referred to in this finding reads as follows:

"The straining of distilled spirits through cotton, cotton cloth, or any other material for the purpose of removing therefrom particles of charcoal or any other extraneous matter whatsoever in the liquid, on the premises of a wholesale or retail liquor dealer, without payment by such dealer of special taxes as rectifier of distilled spirits, will not be permitted.

"The use of what is commonly known as a 'hat filter' by any such dealer, without payment of special tax as a rectifier of distilled spirits, is hereby prohibited, and all Treasury Decisions or parts of Treasury Decisions in conflict with this ruling are hereby expressly revoked."

[2] The defendant admits in his answer to the petition that the assessment of 15 cents per gallon was made upon 13,971.79 proof gallons of whisky, amounting to $2,095.76, by the Commissioner of Internal Revenue, and certified to this defendant for collection, and that this defendant did collect the same, and that the payment thereof was by the plaintiff made under protest, and a claim for the refund of same was made on form 46, and denied, all in substantially the manner set out in the petition.

[3] The stipulations are as follows:

"First. The plaintiff is the successor of the firm of Paul Jones & Co., and is the owner of all of the assets of said firm, including the claim sued on herein, and is entitled to maintain this action.

"Second: Said firm was authorized to conduct business as a wholesale

"(4) The statement of the witness Samuel C. Miller, who detailed the facts with admitted accuracy as follows: [4]

"Furthermore, it is a matter of common knowledge, and therefore judicially known, that when whisky (all the spirits involved herein being whisky) is distilled it is put into barrels to be kept in warehouses. There it may re-

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liquor dealer and rectifier, and had paid to the United States all stamp and license taxes imposed on wholesale liquor dealers and rectifiers which had been assessed against it.

"Third. Said firm of Paul Jones & Co. owned and had in its possession and on its premises in Louisville, Ky., what is known as a Karl Kiefer multiple perfection single plate pulp filter.

"Fourth. The 13,971.79 gallons of whisky mentioned in the petition was straight whisky taken from a government bonded warehouse in the original barrels in which it had been placed by the distiller, and was removed from said bonded warehouse to the premises of Paul Jones & Co. in Louisville, Ky. Said 13,971.79 gallons of whisky were run through the Karl Kiefer multiple perfection single plate pulp filter mentioned above, directly from the barrels in which it had been originally placed by the distiller; that no other spirits, wine, liquor, materials, or substance of any sort or character were added to said whisky, and all taxes due thereon, except the tax of 15 cents per gallon mentioned in the petition, were paid, and said whisky was labeled and sold as straight whisky.

"Fifth. The identical filter used by Paul Jones & Co. for the purpose of straining the whisky above mentioned has been used for many years by practically every distiller in the United States on the distillery premises for the purpose of straining whisky, and such whisky, after being run through said filter, has been bottled in bond, under the supervision of officers of the United States, as straight whisky, and labeled and sold as such.

Sixth. The tax sought to be recovered herein was paid under protest by Paul Jones & Co., and all necessary procedure was taken, as directed by law, so as to entitle Paul Jones & Co., to recover back said money, in case the same should be decided to have been illegally exacted."

[4] "I was a member of the firm of Paul Jones & Co., and am now vice president and general manager of Paul Jones & Co., a corporation, which is the successor of the firm. I have been actively engaged in the business of wholesale liquor dealer and rectifier for more than 25 years, and in that time I have had a wide experience in the purchase and sale of straight whisky and the rectifying and sale of rectified whisky.

"The 13,971.79 gallons of whisky mentioned in the petition was purchased by Paul Jones & Co., direct from the distiller and was removed from the government bonded warehouse to the premises of Paul Jones & Co., in Louisville, Ky. The whisky was contained in approximately 34 barrels and was all the same whisky. All of said whisky contained in said barrels was strained through a Karl Kiefer filter and the barrels from which the whisky was emptied were on the floor above that on which the filter was located and the only pressure was that of gravity from this weight and height. The whisky was run directly from the barrels into the filter and was bottled directly from the filter when it ran out of same. The whisky flowed through the filter by gravity and no pressure of any sort was applied to force the whisky through the filter. The sole purpose of straining the whisky through the filter was to remove from the whisky the loose particles of charcoal coming from the inside of the charred barrels in which it was originally placed by the distiller.

"When the whisky came out of the filter and was bottled it was precisely the same as when it went into the filter, except that the loose particles of charcoal had been removed. The alcoholic contents of the liquor had not been changed; the chemical quality had not been changed; the quantity had not been changed; the proof had not been changed; the flavor had not been changed; the color had not been changed. The whisky was bottled, labeled, and sold as straight whisky with the full knowledge of the government. In case cloudy whisky is run through a Karl Kiefer filter, the filter will not

main for eight years, largely in order to complete the process of manufacture, but also in order to secure the taxation thereon due to the United States. It may be removed from the warehouse in less time, if the owner elects to remove it, upon payment of the taxes thereon. The barrels used and into which the whisky is put after distillation are charred on the inside by fire applied to the staves. Particles of the charcoal resulting from this process may, during the long period of warehousing, be separated from the staves, and may drop from them into the spirits. The presence of this charcoal in the whisky in no appreciable way adds to the volume of the spirits, and in no way changes the nature or property of the whisky. Equally its presence there adds nothing to the value of the merchandise, and only abnormal quantities would depreciate their value. Nevertheless, without any abnormality, it is desirable that particles of charcoal, if coming into the spirits, should be removed by the filter used by nearly all wholesale dealers for that purpose. The filtering removes this foreign substance, but in no way changes the nature of the spirits or imparts to them any other quality whatever. These facts being perfectly well known to the government and its officers, it became under their supervision and with their knowledge and consent the custom of many years' standing to construe the process of filtering as in no way rectification, if the purpose of it was solely that of removing extraneous substances like charcoal. This contemporaneous construction of the statute, as evidenced by the almost universal custom thereunder, was continued in force until in 1919, when the new ruling hereinbefore referred to was announced by the Commissioner of Internal Revenue."

[8] Section 304 of the Revenue Act of October 3, 1917, imposes a tax of 15 cents on each proof gallon of distilled spirits or wines hereafter rectified, purified, or refined in such manner, and on all mixtures hereafter produced in such manner that the person so rectifying, puri-

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clarify the whisky. At the time the whisky in question was run through the Karl Kiefer filter, Paul Jones & Co. had paid special tax as a wholesaler and rectifier.

"The Karl Kiefer filter is a closed receptacle and contains about 16 separate filtering surfaces. Each of the filtering surfaces consists simply of a pulp about one-fourth inch in thickness through which the whisky runs. The density of this pulp could be regulated and this could not be done in a hat filter. A Karl Kiefer filter and a hat filter will remove any matter in suspension from whisky. The same whisky only runs through one of such filtering surfaces; each of the filtering surfaces being connected with the outlet pipe by a separate tube through which the whisky flows.

"For many years what is known as a hat filter has been used by Paul Jones & Co. and by other wholesale liquor dealers and rectifiers for the purpose of straining whisky. A hat filter consists of a heavy piece of felt, approximately the same as is used in making felt hats, and the felt is made in the shape of a large hat. Whisky is run into this hat and strains through the felt, so as to remove loose particles of charcoal and other matters in suspense from the whisky. The representatives of the government had never objected to the use of a hat filter, and it was never claimed that the use or possession of such a filter subjected the person using same to payment of any license or other tax or to any penalty whatsoever. I do not know whether or not the presence of a Karl Kiefer filter on the premises of a dealer other than a distiller made the dealer liable to tax as a rectifier under the rulings of the department. The hat filter performs precisely the same function as is performed by the Karl Kiefer filter; that is, each of said filtering mediums merely remove from whisky the loose particles of charcoal contained in the whisky, and in no manner changes the form or substance of the whisky.

"The only reason for using a Karl Kiefer filter, instead of a hat filter, is because the former is more convenient. A hat filter being uncovered, some of the whisky is apt to overflow and be lost, making constant watching necessary. In addition, a hat filter sometimes gets clogged by the charcoal re-

fying, refining, or mixing the same is a rectifier within the meaning of section 3244, Revised Statutes (Comp. St. § 5971). It therefore becomes necessary to examine the provisions of section 3244, R. S., in order to determine the exact scope and effect of this section to the Revenue Act of October 3, 1917. The third subsection of that act provides that:

"Every person who rectifies, purifies, or refines distilled spirits or wines by any process other than by original and continuous distillation from mash, wort, or wash, through continuous closed vessels and pipes, until the manufacture thereof is complete, and every wholesale or retail liquor dealer who has in his possession any still or leach tub, or who keeps any other apparatus for the purpose of refining in any manner distilled spirits, and every person who, without rectifying, purifying, or refining distilled spirts, shall, by mixing such spirits, wine, or other liquor with any materials, manufactures any spurious, imitation, or compound liquors for sale, under the name of whisky, brandy, gin, rum, wine, spirits, cordials, or wine bitters, or any other name, shall be regarded as a rectifier, and as being engaged in the business of rectifying: * * * Provided, that nothing in this section shall be held to prohibit the purifying or refining of spirits in the course of original and continuous distillation through any material which will not remain incorporated with such spirits when the manufacture thereof is complete."

This is the only part of section 3244 applicable to the finding of facts in this case. It appears from the findings of fact that—

"Prior to date in the year 1919, the ruling of the revenue officers had been that the use of the Karl Kiefer filter, as plaintiff used it, was not rectifica-

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moved from the whisky and must be cleaned. A Karl Kiefer filter works more rapidly than a hat filter, as it has a number of separate filtering surfaces, each performing the same function as a hat filter, and, having a cover over the top, there is less danger of the whisky overflowing.

"A representative of the government was at all times stationed on the premises of Paul Jones & Co., and all of the acts and transactions of Paul Jones & Co. were done for many years under the direct supervision of a representative of the government.

"When Paul Jones & Co., purchased the 34 barrels of whisky in question from the distiller, a requisition was made upon the government for permission to remove said whisky from the bonded warehouse to the premises of Paul Jones & Co. Said requisition was made by Paul Jones & Co., in their capacity as wholesale liquor dealers, and not as rectifiers, the application having been made on form 92, a copy of which has been filed in the record. When it is the intention to withdraw whisky from a bonded warehouse for the purpose of rectifying same, the requisition is made upon the form also filed in the record, and which shows that the whisky is withdrawn for the purpose of rectification.

"There is marked distinction between straight whisky and rectified whisky. This distinction has been generally and uniformly recognized and understood for many years by all distillers, wholesale and retail liquor dealers, rectifiers, and the public at large.

"Straight whisky, as so generally known and understood, is unmixed spirits, distilled from grain, and aged in charred oak barrels, and without having any other spirits, materials, or substances added thereto; that rectified whisky is manufactured or compounded by adding to straight whisky or neutral spirits other materials or substances, for the purpose of changing the chemical quality, color, flavor, or quantity of same; that rectified whisky is cheaper than straight whisky, and the margin of profit in the sale of rectified whisky is ordinarily much larger than the margin of profit in the sale of straight whisky."

tion, and that said ruling was acted upon by plaintiff and other distillers and dealers up to the promulgation in 1919 of the new ruling."

It has been repeatedly held by the Supreme Court of the United States that, where the meaning of a statute is doubtful, the construction given by the department charged with its execution should be given great weight. Robertson v. Downing, 127 U. S. 607, 8 Sup. Ct. 328, 32 L. Ed. 269; U. S. v. Healey, 160 U. S. 136, 16 Sup. Ct. 247, 40 L. Ed. 369. It has also been held by the Supreme Court that—

"The re-enactment by Congress, without change, of a statute which had previously received long-continued executive construction, is an adoption by Congress of such construction." U. S. v. Hermanos, 209 U. S. 337–339, 28 Sup. Ct. 532, 533 (52 L. Ed. 821); U. S. v. Falk, 204 U. S. 143–152, 27 Sup. Ct. 191, 51 L. Ed. 411.

This rule of interpretation applies with full force to this case, for the reason that section 304 of the Revenue Act of October 3, 1917, provides that the tax shall be levied only upon distilled spirits and mixtures produced in such manner that the person so rectifying, purifying, refining, or mixing the same is a rectifier within the meaning of section 3244, R. S.

Congress is presumed to have known the long-continued executive construction given to paragraph 3 of section 3244, R. S., when it enacted this Revenue Act of October 3, 1917. It is also presumed to have known the rule of construction announced by the Supreme Court in U. S. v. Hermanos and U. S. v. Falk, supra. Buekley v. Stephens, 29 Ohio St. 620–622. The conclusion follows that it intended to adopt this construction as fully and completely as if it had written it into the act itself.

[9] It is contended, however, on the part of the United States government, that it is not precluded from a change in construction by reason of a prior erroneous construction of a statute, although that erroneous construction has long been followed by the executive officers charged with the administration of the law. Undoubtedly that contention is correct as an abstract proposition. If there had been no later legislation upon this subject than the third subsection of section 3244, R. S., the Treasury Department, in the absence of judicial interpretation, would be at liberty to make such change in prior construction from time to time as would seem to it necessary to carry into effect the purpose and intent of the law; but if by the Revenue Act of October 3, 1917, Congress has adopted a long-continued executive construction given to paragraph 3 of section 3244, R. S., the Treasury Department is no longer at liberty to change that construction.

[10] In the construction of a statute it is the duty of the court to give full force and effect to the intent and purpose of the law-making power responsible for its enactment. If this intent and purpose can be ascertained from the language of the statute itself, then that language must control. U. S. v. Alamogordo Lumber Co., 202 Fed. 700, 121 C. C. A. 162; Scheu v. State, 83 Ohio St. 146, 93 N. E. 969; Slingluff v. Weaver, 66 Ohio St. 621, 64 N. E. 574.

[11] But where the meaning of a statute is doubtful, the construction given it by the department charged with its execution should

be given great weight, for the reason, among others, that if such construction does not properly interpret the meaning and intent of Congress, Congress, by amendment or re-enactment of the statute, can readily correct the same. This presumption that the department charged with the execution of the law has properly interpreted it is strengthened in proportion to the length of time such construction has obtained without challenge by the law-making power, so that, where such executive construction has been long continued, a court has a right to presume that Congress is content therewith. This exhausts the full force and effect of such construction, and, while not binding upon a court, nevertheless a court will be slow to depart therefrom, unless the language of the statute itself absolutely requires it to do so.

But, when a court has adopted such construction, it is not in the power or authority of the executive department to change or alter that construction. Congress alone has the power to change that construction by amendment of the statute itself. It follows, therefore, when Congress has adopted an executive construction of a statute, that neither the department charged with its execution nor the courts are at liberty to depart from that construction.

In this case Congress, by the Revenue Act of October 3, 1917, has, by reference thereto, specifically adopted the long-continued executive construction given to paragraph 3 of section 3244, R. S., by the Treasury Department, so that neither that department, nor this court, or any other court, has authority to change or ignore that construction, or to substitute its own purpose and intent for the purpose and intent of the law-making power.

While it does not appear in the finding of fact nor in the bill of exceptions, counsel for both plaintiff and defendant in error discuss in their printed briefs the effect of Treasury Decision 19060, in reference to the Loew filter, and it is contended on the part of plaintiff in error that this decision applies to any mechanical form of filter, including the Karl Kiefer filter.

From this decision it appears that the essential feature of the Loew filter consists in forcing the liquid, under pressure, through a closely packed pulp, and that a wholesale or retail dealer using the same became a rectifier, within the contemplation of the third subsection of amended section 3244, R. S.; that if there is any inconsistency or conflict between this decision and the prior executive construction of the statute in reference to the hat filter, or the Kiefer filter, that this conflict has been resolved by the department subsequent to the passage of the act of 1917, in Treasury Decision 2953, whereby it has treated hat filters in the same way as mechanical filters, and has therefore recognized that both are used in the process of rectifying under Revised Statutes, § 3244.

For the reasons heretofore stated, Treasury Decision 2953, in relation to the hat filter, promulgated subsequent to the passage of the act of 1917, can in no wise affect the construction and interpretation of that act, for if Congress adopted the long-continued executive construction in reference to the hat filter and the Karl Kiefer filter, the Treasury Department must accept that construction as final.

However, it further appears from the finding of facts that this Treasury Decision 19060 applied specifically to the Loew filter, and to other forms of mechanical filters in which the liquid is forced by pressure through a closely packed pulp.

[12] The trial court found as a fact that the Karl Kiefer filter uses no force whatever, except the force of gravitation, the same as in a hat filter; that it performs precisely the same function as a hat filter, and that the only reason for using a Karl Kiefer filter, instead of a hat filter, is because the former is more convenient; that the Karl Kiefer filter has a cover over the top to prevent the whisky from overflowing, and will operate much more rapidly than a hat filter. It also appears from the finding of fact that, notwithstanding Treasury Decision 19060, the use of the Karl Kiefer filter, as plaintiffs used it, was not "rectification," under the ruling of the Revenue Department prior to the year 1919, when the new ruling was promulgated in that year, so that, if Treasury Decision No. 19060 appeared in the bill of exceptions and findings of fact, it could not avoid the effect of long-continued executive ruling in reference to the hat filter and the Karl Kiefer filter prior to and subsequent to the promulgation of that decision and up until the new ruling of 1919.

[13] If, however, it were conceded that Congress, by the Revenue Act of October 3, 1917, had not under the settled rules of construction adopted the long-continued executive construction that obtained prior to that date, the findings of fact by the trial court would necessarily require this court to do so.

It appears from these findings that the use of the hat filter or the Karl Kiefer filter does not change the constituent elements of the whisky in any respect whatever. It is identically the same after the filtering process as before, except that the particles of charcoal and other extraneous substances, if any, have been removed therefrom. It is still "straight," not "rectified," whisky, and is bonded, labeled, and sold as such. In the case of Wampole v. U. S., 191 Fed. 573–678, 112 C. C. A. 633, 636 (C. C. A. 3), it was held that—

"Rectification of distilled spirits, in the legal sense, means any process, exclusive of original and continuous distillation * * * by which the spirits are separated from the substance with which it is mixed or combined. The rectifier may take the raw spirit of the distiller and, by repeated processes of distillation, separate the spirit from the oils and impurities left in it by the distiller; or he may take the refuse material of the manufacturer of ginger or vanilla extract, saturated with alcohol, and by distillation separate the spirit from that material."

This definition taken in connection with the definition in the case of Michel v. Nunn (C. C.) 101 Fed. 423, in reference to mixed or blended whiskys, would seem to cover fully and completely the entire definition of "rectification" and "rectifier," and it necessarily follows therefrom that the use of either a hat filter or Karl Kiefer filter for the sole and only purpose of removing particles of charcoal from straight whisky is not rectification within the meaning of this act.

It is insisted, however, that this revenue act is not directed solely to rectified or blended whisky, but also includes distilled spirits that have been refined or purified by any process other than original and

continuous distillation, and that the removal of this charcoal from the distilled spirits constitutes "purifying" and "refining" within the meaning of the act.

We are of the opinion, however, that the terms "purifying" and "refining," as used in the Revenue Act of October 3, 1917, and in paragraph 3, section 3244, R. S., mean something more than the removal of nonsoluble particles of charcoal that perchance may become loosened and detached from the charred staves of the barrels in which the distilled spirits are aged. The method of removing these particles is not important, provided that method has no further purpose or effect. The larger particles might readily be removed by hand, and perhaps with time and patience all of them, regardless of size, might be so removed. While that method would not be practical, yet the fact that it is possible demonstrates that the removal of these particles of charcoal does not affect the character or the quality of the liquor itself, and that they are no component part thereof.

[14] "Purifying" or "refining," as used in these statutes, undoubtedly means the removal, chemical change, or modification of objectionable soluble matter, held in solution in the distilled spirits, united therewith and forming a constituent and integral part thereof, so that its removal, chemical change, or modification will change or alter, in some degree, at least, the character or quality of the entire volume of the distilled spirits.

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

HINES v. SMITH.*

(Circuit Court of Appeals, Sixth Circuit. January 7, 1921.)

No. 3432.

1. **Railroads ⟸5½, New, vol. 6A Key-No. Series—Substitution of Director General proper.**
   In an action against a railroad company for injuries sustained while the railroad was operated by the Director General of Railroads, an order substituting him as defendant was not erroneous.

2. **Parties ⟸63—Request by substituted defendant for time to plead should have been made immediately on substitution.**
   In an action against a railroad company, where the Director General of Railroads was substituted as defendant before trial, if he required further time for the preparation of his defense, a request therefor should have been made immediately after the order of substitution, and an objection after the case was stated to the jury was too late.

3. **Attorney and client ⟸70—Presumption held warranted that counsel for railroad company represented Director General after substitution.**
   In an action against a railroad company for injuries sustained during the period of federal control, where the railroad company's answer denied negligence on the part of the Director General, his agents or employés, and, after substitution of the Director General, the counsel filing the answer assisted in impaneling the jury and stated the substituted defendant's case to the jury, and on its behalf objected to introduction of any evidence, the court was warranted in presuming that they repre-

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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. 448, 65 L. Ed. —.

sented the Director General, especially where there is no claim to the contrary.

4. **Parties ⇐63—Objection to proceeding because there were no issues between plaintiff and substituted defendant held without merit.**
Where a railroad company's answer in an action for injuries sustained during the period of federal control alleged that the Director General of Railroads should be substituted as a defendant, and denied negligence on the part of company or the Director General of Railroads, and alleged contributory negligence on the part of the plaintiff, and no other possible defense was subsequently suggested, an objection to proceeding with the trial, after the substitution of the Director General, because there were no pleadings and issues between him and plaintiff, was without merit, even if made in time.

5. **Railroads ⇐330(3)—Traveler must take precautions, notwithstanding omission of signals.**
A traveler, approaching a railroad crossing, must take ordinary and reasonable precautions for his own safety before crossing, and the failure of the engineer of an approaching train to give the ordinary crossing signals will not relieve him from using his faculties of sight and hearing for his own protection.

6. **Railroads ⇐327(2)—Traveler, who should have seen and heard train, not permitted to deny that he did.**
A traveler at a highway crossing will not be permitted to say that he did not see a train, which he must have seen, had he looked, and did not hear that which he must have heard, had he listened.

7. **Railroads ⇐331(3)—Open gates and presence of gateman affect question of contributory negligence.**
That a railroad company had maintained gates at a crossing for some time prior to an accident, and that they were open and the gateman in full view as a traveler drove on the crossing, did not relieve him from exercising ordinary and reasonable care for his own safety, but did materially affect the question of contributory negligence.

8. **Railroads ⇐350(17)—Negligence of automobile driver at crossing with open gates held question for jury.**
Though, as an automobile driver approached a crossing at which gates had been maintained, there was nothing to distract his attention, and he could have seen an approaching train, the question of contributory negligence was for the jury, where the gates were open and the gateman in full view.

9. **Witnesses ⇐275(2)—Plaintiff, suing for death, cannot be cross-examined as to amount of deceased's income tax return, for which she was not responsible.**
Conceding that, in an action for death, deceased's income tax returns would have been competent in chief on the question of damages, cross-examination of plaintiff as to such returns was neither competent nor proper, where there was nothing to show that she was responsible for any failure of deceased to make a full and complete return.

10. **Appeal and error ⇐979(5)—Denial of new trial for excessiveness of damages reviewable only for abuse of discretion.**
The overruling of a motion for a new trial on the ground that the verdict is so excessive as to indicate passion or prejudice is addressed to the discretion of the trial court, and not reviewable on writ of error, except for abuse of discretion.

11. **New trial ⇐76(5)—Denial for excessiveness of damages not abuse of discretion, when undisputed evidence supports recovery.**
Where the undisputed evidence as to the earning capacity of deceased in connection with his natural expectation of life would amply sustain the award of damages, the denial of a new trial on the ground that the verdict was excessive was not an abuse of discretion.

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

Action by Kathryn McL. Smith, administratrix of George J. Smith, deceased, against the Erie Railroad Company, in which the Director General of Railroads and later Walker D. Hines, Agent under Designation of the President, were substituted as defendants. Judgment for plaintiff, and the last-named defendant brings error. Affirmed.

This proceeding in error is brought in this court to reverse the judgment of the District Court, Northern District of Ohio, Eastern Division, in an action by Kathryn McL. Smith, administratrix of the estate of George J. Smith, deceased, to recover damages from the Erie Railroad Company, for wrongfully and negligently causing the death of her intestate, George J. Smith, who was struck and killed by a passenger train of the Erie Railroad Company at the Main street crossing of the tracks of that company at Niles, Ohio. Later, and before the trial of this action, Walker D. Hines, Director General of Railroads, was substituted as defendant in the place of the Erie Railroad Company.

The petition averred, among other things, that plaintiff's intestate on the 5th day of February, 1918, was driving a closed Ford car on Main street, in the direction of the center of Niles; that when he had reached and was upon the railway crossing his automobile was struck by a passenger train, owned, operated, and controlled by the defendant company, and traveling from Cleveland, Ohio, to Niles, Ohio, which passenger train was operated at a high and dangerous rate of speed, to wit, 30 to 35 miles an hour, in violation of an ordinance of the city of Niles limiting the speed of trains through that city to 4 miles an hour over street crossings where gates were not operated, and 6 miles an hour where gates were in operation, and without giving adequate warning of its approach by whistle, bell, or otherwise; that for some time prior thereto the railway company had maintained gates at this Main street crossing, but that the watchman in charge of this crossing at the time this train approached negligently failed to lower these gates, or to give warning in any other method of the approach of a train; that the watchman stationed at this crossing was old, inefficient, and incapable of properly performing the duties of a crossing watchman.

The defendant by answer admitted its corporate character; admitted that plaintiff's decedent was riding in a motor car in the city of Niles, along Main street, and while attempting to cross the railway tracks on that street in a negligent and careless manner ran his car in the side of a passing train, thereby receiving certain injuries, and that he has died. For its first defense it denies that it was guilty of any negligence, but, on the contrary, exercised due care and caution.

For a second defense it averred that its railway and trains were under the operation of William G. McAdoo, Director General of Railroads of the United States; that it was not a proper defendant to this action; that it had filed a motion asking the court to substitute the Director General of Railroads as defendant, which motion had been overruled by the court; that for the purpose of retaining and protecting its rights in respect to said motion, it averred as a defense that said William G. McAdoo, Director General of Railroads, should be substituted as a defendant; that said Erie Railroad Company, under the direction and control of the Director General of Railroads, was engaged in interstate commerce; that the train that struck and injured plaintiff's intestate was an interstate train, and that the ordinance of the city of Niles was unconstitutional and void as to said train, for the reason that the speed limit required by the ordinance and the enforcement thereof would constitute "an unreasonable hindrance to, a direct burden on, and an unlawful interference with, interstate commerce."

For a third defense it averred that if it, or the Director General of Railroads, his agents or employés, were at all negligent in the premises, which it expressly denies, then in that event plaintiff's decedent was guilty of negli-

gence, directly and proximately contributing to bring about his injuries, in that he negligently and carelessly failed to have his automobile under control, and was negligently and carelessly operating the same at a high and dangerous rate of speed upon said crossing, and was negligently and carelessly attempting to pass in front of said train, when he knew, or by the exercise of even slight care and caution could have known, of the approach of said train, and that he negligently and carelessly failed to heed the warnings and signals that were given him to apprise him of the approach of said train, and that he negligently and carelessly failed to stop, look, or listen to ascertain if a train were approaching, or to take any precaution whatsoever for his own safety, although he was an experienced driver of automobiles and was thoroughly familiar with this crossing.

The fourth defense more specifically avers the authority and control of the Director General of the United States over defendant's railroad and transportation facilities at the time of the accident resulting in the injuries to plaintiff's decedent.

Upon the issue so joined the jury returned a verdict for the plaintiff, assessing damages at $45,000, upon which verdict judgment was entered for the full amount thereof. A motion for new trial was filed and overruled, and exceptions noted.

Stephen S. Conroy, of Youngstown, Ohio (Hine, Kennedy, Manchester, Conroy & Ford, of Youngstown, Ohio, on the brief), for plaintiff in error.

D. F. Anderson, of Youngstown, Ohio, for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge (after stating the facts as above). [1] It is clear that the order substituting the Director General as defendant was not erroneous. Northern Pacific Railroad Co. et al. v. North Dakota ex rel., 250 U. S. 135, 39 Sup. Ct. 502, 63 L. Ed. 897; Erie Railroad Co. et al. v. Frank Caldwell, 264 Fed. 947 (C. C. A. 6). The claim is now made that, notwithstanding the Director General of Railroads was the proper defendant and should have been substituted, the substitution was made at an improper time, to the surprise and disadvantage of the substituted defendant.

[2] It appears from the bill of exceptions that after the jury had been impaneled and sworn, and the case was stated to the jury by counsel for the respective parties, counsel for the substituted defendant objected "to any testimony or evidence being offered in the trial of this case, because of the substitution of the Director General as party defendant, and because no pleadings or issues are made up as between the parties now in the trial," which objection was overruled, and exceptions noted. This objection came too late. If the substituted defendant required further time for the preparation of his defense, that request should have been made immediately after the order was entered substituting him as defendant.

[3] It is true that the motion to dismiss and the answer was filed on behalf of the Erie Railroad Company, and if counsel had retired from the case when that defendant was dismissed from the action no presumption would arise that they represented the Director General of Railroads in this particular case, regardless of what relation they may have sustained to him as general or local counsel; but the fact that the third defense of the answer prepared and filed by them denied all neg-

ligence on the part of the Director General of Railroads, his agents or employés, taken in connection with the further fact that, after the Erie Railroad Company had been dismissed from the suit, the same counsel assisted in the impaneling of the jury and stated the substituted defendant's case to the jury, and on behalf of the substituted defendant objected to the introduction of any evidence whatever, was sufficient to warrant the court in the presumption that they also represented the Director General of Railroads in this particular case, and no claim is now made to the contrary. This being true, their conduct in permitting the jury to be impaneled and sworn, and stating the case to the jury, evidenced an intent and willingness on their part, as counsel for the substituted defendant, to proceed with the trial of the issues joined, without any alteration or change in the pleadings.

[4] But, even if this objection were made prior to the impaneling of the jury and the statement of the case, as it appears from the opinion of the trial judge on the motion for a new trial may have been done, nevertheless it was without merit. Counsel, not content with the action of the court in overruling the motion to substitute as defendant the Director General of Railroads, perpetuated the object and purpose of that motion in the second defense of its answer, and averred as a defense that said William G. McAdoo, Director General of Railroads, should be substituted as a defendant. This averment was in effect a continuing demand that the court should correct any error it may have made in the overruling of this motion, and order the substitution. It would therefore seem that counsel is hardly in position to complain of the court doing the very thing it was still insisting the court should do.

The third defense of the answer, not only denied negligence on the part of the Erie Railroad Company or the Director General of Railroads, his agents and employés, as heretofore stated, but also averred that Dr. Smith was guilty of specific acts of negligence directly contributing to his own injuries. Counsel, although more than a year has elapsed since the trial, has not suggested, and the court is unable to conjecture, what other defenses might have been available to the substituted defendant. The same counsel that represented the substituted defendant in the trial of this action had then had full and fair opportunity to investigate the facts of this case, and to procure the evidence necessary to establish these defenses. Therefore the substitution of this defendant could in no way apparent, even at this late date, operate to the disadvantage of counsel in the presentation of either the facts or the law pertinent thereto. Missouri, K. & T. Railway Co. v. Wulf, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134; Keystone Coal & Coke Co. v. Fekete (C. C. A. 6) 232 Fed. 72, 146 C. C. A. 264. In Railway Co. v. Wulf, supra, the action was brought in the name of the beneficiary, and the personal representative was substituted. In Keystone Coal & Coke Co., supra, the action was brought in the name of the personal representative, and the beneficiaries were substituted. While the questions determined in these cases are not identical with the question presented in this case, nevertheless the underlying principle is the same.

In this case, the railroad company was still the owner of its own properties, but temporary possession and control of the same had been taken by the President of the United States, through the Director General of Railroads, and the president and directors of this corporation continued the operation of defendant's railroad under the direction and supervision of such Director General, so that the president and directors of this railroad company were acting for and on behalf of the Director of General of Railroads for all purposes connected with the operation of its railroad. A receiver would have occupied practically the same legal relation to this company and its property as did the Director General, and certainly the substitution of a receiver as defendant, or the substitution of the railroad company in place of the receiver, at the termination of the receivership, would not change the issue in any respect, or necessarily require a postponement of the trial, especially where the same counsel represented both. Bainum v. Bridge Co. (C. C.) 141 Fed. 179.

Indeed, it would seem that under the provisions of section 11363, General Code of Ohio, in which state this cause of action arose, and also under the provisions of sections 948 and 954 of the Revised Statutes of the United States (Comp. St. §§ 1580, 1591), this substitution might have been made as well after judgment as before trial. As a matter of fact, in this case the present plaintiff in error was substituted as defendant after judgment, for identically the same reason that the Director General of Railroads was substituted as defendant before the trial of the cause.

At the close of plaintiff's evidence the defendant made a motion for a directed verdict, which motion was overruled and exceptions noted. This motion was renewed at the close of all the evidence. The motion for directed verdict was based upon the claim by defendant that the uncontradicted evidence shows that it was still daylight; that there was no confusion at the crossing; that there were no trains in sight; that there was nothing to distract Dr. Smith's attention from the oncoming train; that he could have seen this approaching train when he was 100 feet or more from the crossing, and therefore the fact that he did not see it conclusively establishes his negligence as a matter of law.

[5, 6] It is undoubtedly the duty of a traveler approaching a railroad crossing to take ordinary and reasonable precaution for his own safety before attempting to cross a railroad track, and the failure of the engineer of an approaching train to give the ordinary crossing signals will not relieve the traveler from using his faculties of sight and hearing for his own protection. Nor will he be permitted to say that he did not see what he must have seen, had he looked, or that he did not hear what he must have heard, had he listened. This principle of the law of negligence is too well established to require the citation of authorities in its support, and if nothing else appeared in this case, except the failure of the engineer to sound the whistle or ring the bell, this judgment would necessarily have to be reversed for error of the court in overruling the motion for directed verdict.

[7] But there is evidence in this case tending to prove that the

defendant was not only guilty of passive negligence in failing to sound the whistle or ring the bell of the approaching train, but was also guilty of such negligence as would amount to an assurance of safety to the traveler, and a direct invitation to the public to use the crossing, notwithstanding the train was in the immediate vicinity and approaching at a high and dangerous rate of speed. The evidence is uncontradicted that the defendant had maintained gates at this crossing for some time prior to the accident, and that at the time Dr. Smith drove upon the crossing the gateman was in full view and the gates were open. While this fact did not relieve the traveler from exercising ordinary and reasonable care for his own safety, yet it does materially affect the question of contributory negligence. Thompson on Negligence, § 1613. In the case of Blount v. Grand Trunk Ry. Co., 61 Fed. 375, 9 C. C. A. 526 (C. C. A. 6), it is said in the opinion:

"It is undoubtedly true that the failure to lower the gates modifies the otherwise imperative duty of travelers, when they reach a railway crossing, to look and listen, and the presence of such a fact in the case generally makes the question of contributory negligence one for the jury, when otherwise the court would be required to give a peremptory instruction for the defendant"—citing Burns v. Rolling Mill Co., 65 Wis. 312, 315, 27 N. W. 43; Stapley v. Railway Co., L. R. 1 Exch. 21; Glushing v. Sharp, 96 N. Y. 676; Cleveland, C., C. & I. Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321.

It is also said in the opinion in the Blount Case, supra, that:

"The fact is much more important where the traveler is driving a horse and vehicle than where he is walking, because in the former case his attention is necessarily divided between the control of the horse and observation of the track, and his reliance upon the gates and the flagman must, in the nature of things, be greater than in the case of a pedestrian."

In the case of Erie R. R. Co. v. Schultz, 183 Fed. 673, 106 C. C. A. 23 (C. C. A. 6), it is said:

"In this court it has been distinctly recognized that the opened gate is in the nature of an invitation to cross, and that the presence of such fact in the case generally makes the question of contributory negligence one for the jury, and that the same degree of watchfulness cannot be expected from the driver of a loaded wagon as from a pedestrian."

In the case of Pennsylvania Co. v. White, 242 Fed. 437, 155 C. C. A. 213 (C. C. A. 6), this court said:

"It is recognized by decisions of this court that the open gate is in the nature of or analogous to an invitation to the traveler to cross, but that it is still incumbent upon him to exercise his senses of sight and hearing for his protection as soon as, and as far as, a man of ordinary prudence would do under similar circumstances. * * * We think it apparent * * * that the court left to the jury the question whether, under all the circumstances, plaintiff was guilty of negligence contributing to the accident."

In the case of Cleveland, C., C. & I. Railway Co. v. Schneider, 45 Ohio St. 678, 17 N. E. 321, the Supreme Court of Ohio held that:

"An open gate, with the gateman in charge, is notice of a clear track and safe crossing, and in the absence of other circumstances, when the gates are open and the gateman present, it is not negligence in persons approaching the crossing with teams to drive at a trot, or pass onto the tracks through the open gates without stopping to listen, though the view of the tracks on either

side of the crossing is obstructed; nor in such case is their failure, when at a distance of 25 feet from the track, to look for locomotives 150 feet or more from the crossing negligence, though they could have been seen."

In the opinion (45 Ohio St. at page 697, 17 N. E. 328), it is said:

"It [the request to charge] assumes that there were no other facts or circumstances in the case which might properly enter into the question of contributory negligence, and in effect excluded from the jury in its consideration of the question the fact that gates were maintained at the crossing, and stood open in the presence of the gateman having control, thus signifying a clear track, and amounting to an invitation to those about to cross over to do so."

[8] It would seem from these authorities that the law is well settled in this jurisdiction, and also in the state of Ohio, where this accident occurred, that, where safety gates maintained at street crossings are open at the time of the accident, contributory negligence is, except in extraordinary cases, a question for the jury. Counsel for plaintiff in error practically concede this, but insists that the facts in this case are practically identical with the facts in the case of Blount v. Grand Trunk Railway Co., supra. In that case, however, the court clearly distinguished between a person on foot and a person driving a horse and vehicle.

This distinction applies with peculiar force in this particular case. Dr. Smith was driving an automobile. An automobile, unless skillfully and carefully driven, is a dangerous instrumentality, not only to the driver and occupants, but also to other persons lawfully upon the highway. Naturally a person driving an automobile must give more attention to its control and operation than would ordinarily be necessary in driving a horse and vehicle, unless the horse has become fractious, or is frightened and difficult to control. If, as is said in the case of Blount v. Grand Trunk Ry., supra, "the fact [that the safety gates are open] is much more important where the traveler is driving a horse and vehicle than where he is walking," certainly there would be like reason for distinguishing between a pedestrian and the driver of an automobile. Therefore the facts in that case, in which recovery was denied a pedestrian who deliberately, on a starlit night, walked directly in front of an approaching train but 75 feet distant from him when he was still 15 feet away from the track are in no sense identical with the facts in the case at bar. The question of contributory negligence under all the facts and circumstances of this case was undoubtedly a question for the jury, and the trial court did not err in refusing to direct a verdict.

What has been said in reference to this motion practically disposes of the exception to that part of the charge of the court in reference to contributory negligence. The court charged the jury that, notwithstanding the safety gates were open, it was the duty of Dr. Smith, in undertaking to cross the tracks of this railroad, to exercise ordinary care for his own safety and protection, and if he failed in so doing, and the collision resulted directly therefrom, as one of the contributing causes, then plaintiff could not recover, and again, in connection with the charge in reference to the open gates, said:

"Now, that does not mean that the decedent must not exercise what we call ordinary care, but the test is what an ordinarily careful and prudent traveler upon a highway is accustomed to do in the presence of a situation of that kind, and it is entirely different from what an ordinarily careful and prudent person is accustomed to do, and would do, and the law would require him to do, if he was approaching a highway crossing at grade, at which no gates had been established, and at which no gateman had been placed in charge."

The defendant also took exceptions to several other specific paragraphs of the charge as given, but it is unnecessary to review these exceptions in detail. In the opinion of this court, the charge, taken as a whole, was not misleading in any particular, and fully and fairly covered all of the issues in this case.

[9] The defendant offered to show by cross-examination of the plaintiff the gross amount of the federal income tax return made by Dr. Smith for 1915, 1916, and 1917, to which the plaintiff objected, and the objection was sustained by the trial court, upon the theory that such evidence would come within the prohibition of section 3167, R. S. (Comp. St. § 5887), and paragraph 6 of the executive order issued by the President, July 28, 1914, which paragraph prescribes the regulations under which income tax returns may be subject to inspection. If it were conceded that the evidence in relation to the income tax returns made by Dr. Smith in the years above mentioned would have been competent in chief, it does not necessarily follow that it would be competent or proper to attempt the introduction of this proof on cross-examination of this witness.

If Dr. Smith had survived his injuries, and had testified in reference to his earnings as a physician during these years, naturally he might be cross-examined in reference to the gross return made by him to the federal authorities, as reflecting upon the credibility of his evidence. But whether he did or did not make a full disclosure of his gross income in the three years immediately preceding his death cannot prejudice the rights of this plaintiff or affect her credibility, for she cannot be held responsible for any neglect or default on his part to make such returns.

The trial judge, in his memorandum opinion on motion for new trial, said that her testimony on cross-examination "tended to show that an income tax return had been made, and that she participated in the making thereof and had knowledge of its contents." We are unable to find any such evidence in the bill of exceptions in this case, which the trial court has certified contains all of the evidence offered and received upon the trial. It is possible that he was confused somewhat by the evidence tending to show that she had kept the books and records of professional services performed by him; but, however that may be, there is nothing in this bill of exceptions tending to show that she was responsible for any failure of Dr. Smith to make a full and complete income tax return. Therefore the objection was properly sustained to her cross-examination on this subject. American Issue Publishing Co. et al. v. Sloan (C. C. A. 6) 248 Fed. 251–254, 160 C. C. A. 329, and cases there cited.

Moreover, even had the proposed cross-examination been competent, it is at least difficult to see that its exclusion could have been harmful. The decedent's books of account (including daybook, book of charges, ledger, cashbook, and all other papers containing charges made and receipts had for services by decedent during the years 1915, 1916, and 1917), which were produced under order of the court made on defendant's motion (full and free opportunity to examine them in detail being given defendant's counsel), showed, in connection with undisputed testimony, bank deposits for professional services aggregating for the year 1915, $7,093; for 1916, $8,595; and for 1917, $10,925. Plaintiff testified with reference to the books and described the manner and method of keeping these accounts and her own services in that connection. There was undisputed evidence that decedent was a successful practitioner of medicine, and that his practice was growing larger each year; his bank deposits during 1917 being nearly $4,000 in excess of those for 1915. The undisputed evidence tended to show that he was earning a much larger income in the aggregate than his bank deposits. He was but 43 years old. If plaintiff's estimate of an approximate earning of $100 per day during the last year preceding decedent's death were to be entirely disregarded, the undisputed evidence of his earning capacity in connection with his natural expectation of life would amply sustain the award of damages.

[10, 11] The overruling of a motion for new trial, upon the ground that the verdict is so excessive as to indicate passion or prejudice on the part of the jury, is addressed to the discretion of the trial court, and therefore not reviewable upon error, except for abuse of discretion. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 627, 116 C. C. A. 294; Pugh v. Bluff City Excursion Co. (C. C. A. 6) 177 Fed. 399, 101 C. C. A. 403. What has just been said in reference to the earning capacity of Dr. Smith clearly demonstrates that the trial court did not abuse its discretion in overruling the motion for a new trial upon the ground that the verdict is excessive.

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

STATE OF OHIO, ex rel. SENEY, Pros. Atty., v. SWIFT & CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 17, 1921.)

No. 3347.

1. Removal of causes ⇐19(1)—Defenses under United States laws do not authorize removal.

A suit in the state court to enforce a penalty and for an injunction and receiver, as authorized by state statute, is not removable under Judicial Code, § 28 (Comp. St. § 1010), though the only controlling or disputed question is whether the state statute violates the United States Constitution or the Interstate Commerce Act, since the entry of a federal question by way of defense does not justify removal.

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

2. **Removal of causes ⇐86(1)—Petition held not sufficient to allege denial of civil rights.**
An allegation in a petition for removal of a cause in the United States court that certain courts of the state have construed the statutes and laws of the state so as to permit the taking of petitioner's property without due process of law, whereby petitioner is unable to enforce its rights under the laws of the United States, comes far short of the full and exact statement of deprivation of civil rights necessary to a petition for removal under Judicial Code, § 31 (Comp. St. § 1013), if that section has any relation to such a controversy.

3. **Removal of causes ⇐41—Suit by state cannot be removed.**
A suit in the state court, brought by the state, cannot be removed to the United States court because of diverse citizenship.

4. **Removal of causes ⇐47—Title does not determine parties.**
The title which is prefixed to the original petition in a suit does not determine who are the parties to the suit, so as to settle the right to remove it to the United States court for diverse citizenship.

5. **Removal of causes ⇐41—Citizen, suing on behalf of state, is the party.**
A citizen, who brings suit on behalf of the state, is, like any other person suing on behalf of others, the party to the suit, for the purpose of determining the right of removal to a United States court.

6. **Removal of causes ⇐89(2)—Record may be referred to, if petition is incomplete.**
The right to remove on the ground of diverse citizenship is usually to be determined by the removal petition, but the record may be referred to, to supplement the petition, where that is incomplete.

7. **Evidence ⇐43(4)—United States court must take judicial notice of relevant state decisions.**
Whenever a decision of the state court becomes relevant in any aspect of a suit in a United States court, the latter must take judicial notice of the state decisions, just as if they were fully pleaded in the record.

8. **Monopolies ⇐24(2)—Prosecuting attorney authorized to institute suit under state sovereign power for violation of Anti-Trust Act.**
Under the Valentine Anti-Trust Act (Gen. Code Ohio, §§ 6390–6402), as construed by the Supreme Court of Ohio, the prosecuting attorney of a county is authorized to bring a suit for violations of that act on behalf of the state, in which suit the state is exercising a part of its sovereign power, and is in truth the party plaintiff.

9. **Removal of causes ⇐41—Suit on behalf of state under invalid act is by prosecuting attorney.**
If the state statute authorizing a prosecuting attorney to bring a suit in its behalf as an exercise of its sovereign powers is contrary to the United States Constitution, a suit begun under such authority by the prosecuting attorney is removable as a suit by him as an individual.

10. **Removal of causes ⇐107(4)—Contention held substantial, authorizing federal court's examination.**
In a suit removed from a state court, the contention of defendant that the Valentine Anti-Trust Act (Gen. Code Ohio, §§ 6390–6402), as construed by the Supreme Court of Ohio, was invalid, as depriving defendant of its property without due process of law, and as interfering with interstate commerce, is sufficiently substantial to give the federal court the initial right to determine whether the authority for suit on behalf of the state given by that statute was invalid, so that the suit was in fact brought by the prosecuting attorney, who instituted it for the state, and could be removed for diversity of citizenship, and, having jurisdiction to determine that question, the United States court also had jurisdiction to determine other questions involved, though the claim of unconstitutionality were unfounded.

11. **Removal of causes ⇐18—Existence of federal question determined by same principles as in original federal suits.**
When the existence of a federal question through a claim of unconstitutionality determines the jurisdiction of the federal court, the same principles apply, whether the jurisdiction is invoked by original pleading or by removal petition.

12. **Removal of causes ⇐18—Whether constitutional question involves only law, or law and fact, immaterial.**
There is no distinction, in determining the jurisdiction of the United States courts, whether the United States constitutional question involves a mere application of legal principles to conceded facts or depends upon disputed facts.

13. **Principal and agent ⇐149(2)—Unauthorized act by agent is his act.**
Though the act of an agent on behalf of the principal and in the principal's name is the act of the principal, if there is due authority, the act is that of the agent, if there is no authority.

14. **Courts ⇐366(2)—State decision held not binding, as affecting question of removal.**
The decision of the state court that in a suit to enforce a state statute the state is the party plaintiff is binding on the federal courts, in so far as it is a construction of the statute or of practice or pleadings, but is not conclusive against the right of removal, where defendant contends the statute violated the United States Constitution, and therefore did not authorize the suit, which was in effect the suit of the officer instituting it.

15. **Removal of causes ⇐42—Suit for injunction and receiver held civil action.**
A suit on behalf of the state, by a prosecuting attorney of a county, for an injunction and receiver to take possession of property held in storage in violation of the Valentine Anti-Trust Act (Gen. Code Ohio, §§ 6390–6402), is a civil action, if the authority to institute it is invalid, so that it is in effect a suit by the prosecuting attorney.

16. **Removal of causes ⇐97—Order dismissing suit against petitioner after bond was filed is void.**
In a suit in a state court against two defendants, one of whom was a nonresident of the state, an order dismissing the suit as against the nonresident, entered after the nonresident had filed a sufficient petition and bond for removal of the separable controversy against it to the United States court, was void, because entered after the state court had lost jurisdiction.

17. **Courts ⇐405(5)—Jurisdiction not being sole question, Circuit Court of Appeals has jurisdiction.**
Where plaintiff in a suit in the state court, after the removal to the United States court, refused to offer proof, and the latter court dismissed the original petition, not solely for plaintiff's refusal to acknowledge its jurisdiction, but also on the merits, after hearing proofs offered by defendant, the jurisdiction of the District Court was not the sole question in controversy on appeal from the decree dismissing the petition, so that the Circuit Court of Appeals had jurisdiction over an appeal therefrom.

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

Suit by the State of Ohio, on the relation of Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio, against Swift & Co. and another, begun in the state court, and removed by the named defendant into the United States District Court. From a decree dismissing the original petition, relator appeals. Affirmed.

Sections 6390–6402 of the Ohio General Code constitute what is known as the Valentine Anti-Trust Act. It was originally passed in 1898. Section 6391 defines a trust, among other definitions, as a combination to create or to carry out restrictions in trade or commerce, or to increase the price of a commodity, or to prevent competition in the sale of a commodity. Such a trust as is defined therein is said to be against public policy and void. Except as indicated by this declaration of invalidity and by section 6393, which declares that contracts in violation of the law are void, there is no prohibition of participation in a "trust"; but it is provided by section 6395 that one who violates any provision of the law shall forfeit certain penalties, to be recovered in the name of the state, and by section 6396, that a violation of any provision is a conspiracy against trade, and any participant shall be fined or imprisoned. Section 6400 directs that the several courts of common pleas (being the ordinary trial courts of the counties) are invested with jurisdiction to restrain and enjoin violations of the law, and that the Attorney General or prosecuting attorney of the proper county shall institute proper proceedings, in quo warranto, injunction, or otherwise, by way of petition, setting forth the case, and praying that such violation shall be enjoined or otherwise prohibited.

By the so-called Smith Cold Storage Act approved March 30, 1910 (107 Ohio Laws, p. 594), it was provided (referring only to the parts now important) that no person shall sell, or offer or expose for sale, any pork which has been held in a cold storage house for a longer period of time than six months. Section 19 says that whoever violates any provision of the act shall be guilty of a misdemeanor, and for the first offense shall be fined, and for later offenses be fined and imprisoned.

In the summer of 1919, proceedings were commenced against the Columbus Packing Company, by which it appeared that it had kept a quantity of pork in cold storage more than six months. Without allegation or claim that there had been any sale or attempted sale of this article, so as to make an express violation of the Cold Storage Act, or that there had been any contract or arrangement between the Packing Company and the Cold Storage Company, except for the storage which had taken place, and without any trial or opportunity for trial as to whether the owner intended to sell the product in express violation of the Cold Storage Act, or intended any restriction in trade or other violation of the Anti-Trust Act, or as to whether such storage would be in fact injurious to any public interest under existing conditions, summary orders were made that a receiver be appointed to take possession of the property, that he sell the same forthwith at retail in the city markets of Columbus, and that the proceeds of such sale, less the expense of the proceedings, be paid to the owner of the pork. Upon eventual review by the Supreme Court of Ohio, these orders were, on August 27, 1919, affirmed. Columbus Packing Co. v. State ex rel. Schlesinger, 100 Ohio St. 285, 126 N. E. 291.

On the same day, August 27, 1919, a petition was filed in the common pleas court of Lucas county, Ohio, which was entitled, "State of Ohio ex rel. Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio, Plaintiff, v. Swift & Company and the Northern Refrigerating Company, Defendants." This petition alleged that Swift & Co. had placed with the Refrigerating Company, in cold storage, a large quantity of pork carcasses, which had then been in storage for more than six months; that Swift & Co. and the Refrigerating Company had agreed to hold this in cold storage for more than six months for the purpose of increasing the price of the property stored, and that thereby they had created and carried out restrictions in trade and commerce, and had caused the property to be withdrawn from the usual and proper channels of trade, and had caused prices of similar products to be unlawfully increased. In this petition, the relator further alleged that Swift & Co., unless restrained, would take the property from cold storage, and sell it or offer it for sale, within the county of Lucas or elsewhere, contrary to law. He further alleged that, unless an injunction be issued, the parties would remove the property from the jurisdiction of the court and would continue to disregard the law, unless a receiver was appointed to carry out the restraining

order and take charge of and control the property which had been so held for more than six months. Thereupon the petition prayed that the Refrigerating Company be enjoined from delivering, and that Swift & Co. be enjoined from receiving or obtaining possession of, the property, and that the court appoint a receiver to take charge of the property and keep it until the final order be made, and that the defendants be enjoined from any further acts or crimes in restriction of trade and commerce. Upon the filing of this petition, and without notice, the Refrigerating Company was enjoined from delivering to Swift & Co., and Swift & Co. was enjoined from receiving, any of the property in question, and a receiver was appointed "to seize said property and take charge of and keep" the same "until further order of the court."

On August 30th the relator filed a motion, asking an order that the receiver sell the property "at the earliest possible date and in such manner as the court may prescribe." Notice was given to Swift & Co. that this motion would be heard September 3d. On September 2d Swift & Co. filed in the common pleas court its petition for the removal of its separable controversy in this cause to the United States District Court for the Northern District of Ohio. What seems to have been regarded as a sufficient bond on removal was filed at the same time. Notice was given that this petition and bond would be presented to the judge on September 3d. This was done, and the relator then asked delay on both matters until September 5th. Without entering any order, the court delayed accordingly. On September 5th the relator applied for an order—and the court entered the same—dismissing Swift & Co. without prejudice, from the action, and the hearing of the motion for an order of sale was passed until September 8th. On September 11th, Swift & Co. filed in the court below a certified copy of the proceedings in the court of common pleas, and on September 12th filed its answer and cross-petition in the cause so removed. Thereupon the relator moved to remand, and Swift & Co. moved to have the receiver discharged and the property returned to it, and for final judgment on the pleadings, and because relator declined to proceed further. The court below denied the motion to remand, and upon the hearing of defendant's motion proofs were taken on behalf of Swift & Co. The relator declined to take any proofs as against this motion or in support of his petition. Thereupon, on October 8th, the court ordered the receiver to be discharged, the property to be returned to Swift & Co., and the order, after reciting that relator declined to take any proofs or proceed in the cause, and finding that the property was in transit in interstate commerce, finally dismissed the original petition. Upon application made to this court for a stay of this order pending appeal, we directed a stay, unless Swift & Co. should give a certain bond, the conditions of which are hereafter stated. This bond was given and the property returned to Swift & Co., subject to its duties fixed by this bond.

Upon the hearing below (as is shown by the recitals of the opinion and by concessions of counsel [in part] as well as by the testimony printed), it was made to appear that the property consisted of certain parts of the carcasses of hogs which had been slaughtered by Swift & Co., at Cleveland, from six to eight months before the relator's petition was filed; that they were and had been intended only for manufacture into bacon at Swift & Co.'s factory, in Chicago, for which purpose they were material of great value, and that in their existing condition they were of comparatively little value for retail sale; that Swift & Co. had been engaged in supplying bacon to the government, and especially to the American Expeditionary Force, in great quantities, and did not have sufficient storage facilities in Chicago; that in the summer of 1919 this situation had not yet been relieved; and that the carcasses in question had all been shipped from Cleveland to Chicago, and had been held in Toledo in cold storage pending their further shipment to Chicago. Relator expressly conceded that he had no proof of any intent to sell in Ohio. A tariff, duly approved by the Interstate Commerce Commission, expressly permitted stoppage in transit for cold storage in such cases for a period of nine months, and this storage of this pork at Toledo had been within and covered by this transit privilege. The privilege would soon expire, and, unless the shippers could have prompt possession and proceed with

shipment to Chicago, they would not only lose the advantage of their through rate, but the property might lose its character as being in the process of interstate shipment.

Allen J. Seney and Nolan Boggs, both of Toledo, Ohio, for appellant.

Harold W. Fraser and E. J. Marshall, both of Toledo, Ohio (A. L. Boylan, of Sioux City, Iowa, and Marshall & Fraser, of Toledo, Ohio, on the brief), for appellees.

Before KNAPPEN, DENISON, and WARRINGTON, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). Upon this statement of facts, it is too clear for doubt that these Ohio laws could have no application to this property, which had remained in cold storage in the state only as an incident to its lawful interstate transportation, and that Swift & Co. was entitled to its immediate return. Indeed, relator now and here makes no contention to the contrary, but accepts the consequences of his deliberate election to stand upon the question of jurisdiction of the court below, and to refuse to file a reply or to litigate the merits of the case made by Swift & Co. If the relator had been able to and had seen fit to make it appear to the court below that the property was not in good faith merely stopped as incidental to an interstate trip, but was really Ohio property, kept in storage in violation of Ohio law, this case would have a different aspect; but we must take the record as we find it. The only question preserved and now in controversy in this court is whether the court below acquired jurisdiction by the petition for removal.

Removal is sought to be upheld because: (1) The controversy is controlled by, and necessarily involves, the Constitution or laws of the United States; (2) defendant cannot enforce, in the judicial tribunals of Ohio, its equal, civil rights as a citizen of the United States; (3) the parties are citizens of different states.

[1] 1. *The laws of the United States.* It is said that these are involved in three ways: (a) The property was in transit in interstate commerce, pursuant to and under the authority of the methods sanctioned by the Interstate Commerce Commission, and hence was not subject to seizure in the Ohio courts; (b) the procedure initiated by petition was a step in the taking of plaintiff's property without due process of law, in violation of the Fourteenth Amendment; (c) the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛r), so called, had, for the time of the war, superseded the Smith Cold Storage Act, and the case, therefore, called for application and construction of the Lever Act.

It is enough to say of all these contentions that they present matters of defense, and that the suit or proceeding commenced by the petition plainly did not arise under the Interstate Commerce Act (24 Stat. 379), or the Fourteenth Amendment, or the Lever Act. It is well settled that the entry of a federal question into a case by way of defense, although it may present the controlling or the only disputed question, does not justify removal under section 28 of the Judicial Code (Comp.

St. § 1010). In re Winn, 213 U. S. 458, 29 Sup. Ct. 515, 53 L. Ed. 873.*

[2] 2. *Denial of Civil Rights.* Whether the situation, which defendant, by argument, undertakes to present on this subject, could in any event justify removal under section 31 of the Judicial Code (section 1013), we need not consider. The effort to support removal under this section is an afterthought. The removal petition has only one allegation which is now claimed to be pertinent on this point. It is to the effect that "certain courts" of the state of Ohio have construed the statutes and laws of Ohio so as to permit the seizure and taking of plaintiff's property without due process of law, whereby "petitioner will be unable to enforce its rights under the laws of the United States." This comes very far short of the full and exact statement of deprivation of civil rights which would be necessary, if it could be thought that section 31 has any reference to such a controversy as this. See Iron Mountain Co. v. Memphis, 96 Fed. 113, 122, 37 C. C. A. 410; Kentucky v. Powers, 210 U. S. 1, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692.

[3] 3. *Diverse Citizenship.* Whether this gives ground of removal depends upon the question whether the suit in the state court should be treated by us as brought by the state of Ohio or by Mr. Seney. In the former case it is too plain for discussion that there could be no removal, because the court below would not have had jurisdiction of such a suit brought originally in that court, as well as for other reasons, and in the latter case the right to removal is too clear to be doubted; but the solution of the question as to who should, for the purpose of removal, be considered as the plaintiff, is full of complication and difficulty.

[4] The original petition does not make this clear. The title which is prefixed to the complaint names the state of Ohio as plaintiff, and Mr. Seney as relator; but a case has no existence, so as to have a title, until it has been commenced, and a purported title, unnecessarily indorsed upon a complaint, could hardly have any serious effect upon the question of who were the parties specified in the complaint. Plainly, an indorsement of title, giving the names of parties who were citizens of different states, would not make the cause removable, if the essential facts did not appear in the complaint; and the converse seems equally true. Pennoyer v. McConnaughy, 140 U. S. 1, 11 Sup. Ct. 699, 35 L. Ed. 363.

The complaint itself is not clear. It begins:

"Plaintiff, for his cause of action herein, says that he is the duly elected, qualified, and acting prosecuting attorney of Lucas county, Ohio, and that he brings this action in his official capacity on behalf of the state of Ohio."

All the further allegations and prayers of the complaint are introduced by "plaintiff says" or "plaintiff prays." The complaint is signed, "Allen J. Seney, Prosecuting Attorney of Lucas County, Ohio," and is verified by "Allen J. Seney." He does not allege that any law authoriz-

*But see Smith v. Kansas City Title & Trust Co. (Feb. 28, 1921) 254 U. S. —, 41 Sup. Ct. 243, 65 L. Ed. —

es him to cause the state to sue or to be sued. The consent of the state to be a party is essential, and it can be given only by those authorized. Ordinarily, the state sues by the Attorney General, and even he should point out his authority to implead the state.

[5] Citizens may often bring suit on behalf of a state, and the citizen may be and continue the plaintiff of record. The naming of the plaintiff's office may well be that mere description of the person which does not affect plaintiff's identity. In the general common-law suit by A., "for the use and benefit of B.," A. is the party; B. is not. Would Mr. Seney be personally liable for the costs of this action; and, if so, does that indicate that he is plaintiff? In any event, we think it right to say that it is not clear upon the face of the petition that it is a suit by the state of Ohio. It is not necessary to go farther in this direction, and we therefore omit any discussion of the common-law practice, the Ohio Code, and the Ohio decisions as to the real party in such a case.

[6] It is well settled that the right to remove on the ground of diverse citizenship is usually to be determined by the removal petition, but the record may be referred to to supplement the petition, where that is incomplete. Bondurant v. Watson, 103 U. S. 281, 286, 26 L. Ed. 447, McAllister v. Chesapeake, 243 U. S. 302, 305, 37 Sup. Ct. 274, 61 L. Ed. 735.[1] Certainly the petition to remove prevails, unless distinctly inconsistent with the record. Here we find the petition for removal distinctly and clearly alleging that the plaintiff is Allen J. Seney, who was and is a citizen of Ohio, and the defendant petitioner is Swift & Co., which was and is a citizen of Illinois, and that the controversy is between citizens of different states. If we should look no farther, we would be inclined to think that the removal petition, standing as an interpretation of a doubtful complaint, makes out a case of diverse citizenship; but this conclusion is not very important, because we must look farther.

[7] Whenever they become relevant from any aspect, we must take judicial notice of the decisions of the Supreme Court of Ohio,[2] and thus we have before us, just as if it were fully pleaded in the record, the decision of that court in the Columbus Packing Co. Case, and the whole situation with reference thereto which we have recited in the statement of facts.

[1] The cases which confine us to the complaint in determining the right of removal (Bankers' Co. v. Railway, 192 U. S. 371, 383, 24 Sup. Ct. 325, 48 L. Ed. 484) are those involving only the question whether the suit was one "arising under the laws of the United States." It seems obvious enough that the means by which an action takes on form and substance and thus comes into existence must be the sole criterion of how it "arises." Not so when other characteristics of the action—as the citizenship of the parties—are to be determined.

[2] True it was said in Mountainview Co. v. McFadden, 180 U. S. 533, 535, 21 Sup. Ct. 488, 45 L. Ed. 656, that the court will not take judicial notice of an act of Congress, in order to ascertain that the suit was really one arising under the laws of the United States, when the plaintiff's pleadings made no such claim. Plainly, this is not to say that we cannot take notice of the laws and decisions of a state to aid us in determining whether diverse citizenship exists.

[8] The complaint in this case is, with only the necessary changes, copied from that in the Columbus Case; it seeks the same relief, and it is in the same form as to the party plaintiff. While the matter of parties was not there expressly considered by the Ohio Supreme Court, its decision undoubtedly involves and affirms the proposition that the laws of Ohio authorize the prosecuting attorney to bring such a suit on behalf of the state; that in such a suit the state is exercising a part of its sovereign power; and hence that the state is, in truth, the party plaintiff. So, if we stopped here, we must conclude that the action was not removable.

[9] However, we cannot stop here any more than we could stop when we had seen the face of the pleadings. We cannot take judicial notice of a part of the situation created by the Columbus Case to supplement the deficiency of the complaint in showing that the state was a party, and refuse to take notice of the remainder to supplement the imperfections of the removal petition as entitling defendant to claim that the state is not truly a party. When considered in connection with the Columbus decision, the removal petition clearly shows the facts upon which defendant now stands in supporting the removal on the ground of diverse citizenship. This position is that the Ohio Anti-Trust and Cold Storage Acts, when interpreted as they have been by the Ohio court, and when applied as is sought by this complaint, lead to a taking of property without due process of law, and are in so far in violation of the federal constitution, and hence that a suit by the prosecuting attorney, even if it purports to be in enforcement of the state law, is not justified by such law, but is his personal act, so that he, and not the state, is the plaintiff. We therefore feel compelled to consider this proposition, just as if it were more formally and artificially set out in the removal petition.

We have the less hesitation in passing by matters of form and coming to this substantial issue, because the only ultimately important matter is whether this question—the effect of the Columbus decision to work a violation of the Fourteenth Amendment—should be initially decided by the state or federal trial court, and so, ultimately, reach the court of last resort through one or another channel, and this matter is practically removed from controversy by the existence in the court below of an equity suit, begun by Swift & Co. against Seney. In that case, the equity jurisdiction of the court below is invoked to enjoin this same action, brought by Mr. Seney in the state court, and it is fully and formally alleged that he is proceeding under color of an unconstitutional law. So far as we see (the point has not been argued), the jurisdiction of the court below to decide in that case this vital question of constitutionality is unassailable, and it would be a matter of little importance to any one to order remand of this case to the state court, and yet to leave the jurisdiction of the court below over the same controversy in the companion equity case unimpaired. Our hesitation is still less because, under the present statutes, the petition to remove might be amended, even in this court, so as to clear up all matters of form that now embarrass. Judicial Code, § 274c, as amended March 3, 1915 (Comp. St. § 1251c).

[10] Upon the issue of unconstitutionality, defendant's argument is this: The construction of state statutes by the state court is binding upon this court, and the acts must be read as if they contained express provisions and declarations that their force and effect are as declared in the Columbus Case. Even if that case is not merely a construction of statutes, but declares the common law, or general principles analogous to the common law, if the result is to deprive defendant of its property, that result is the action of the state, no less than if it were by express statute. The law of the state, under which defendant's property is being taken, is therefore that one who has stored pork for more than six months is conclusively presumed to have done so for the purpose of restraining trade, and may not be heard in any court to deny this unlawful purpose or effect,[3] and that his property shall be thereupon taken over into the possession of the state, and put upon the retail market and sold, returning to him the net proceeds of the sale. This is the law, without regard to the quantity stored or its actual effect, or whether it has any effect, upon the market, without regard to the wholesomeness of the article at the end of the storage, without regard to the amount in existence or in storage by others, without regard to whether the property is in a condition which makes it incapable of public retail sale without practical confiscation, and without regard to the fact that the owner has not violated any provision found in the statutes (which do not forbid storage for more than six months, but only a sale—presumably in Ohio—after such period).

We do not intend either to adopt or deny any of these statements or inferences by reciting them. We have no need to do so. They certainly are sufficient to support and justify the conclusion that defendant is in good faith, and not merely formally, asserting the unconstitutionality of the Ohio laws in this respect, and hence asserting that Mr. Seney is not authorized under those laws to proceed by his complaint on behalf of the state, and hence that he is himself the party. Ex parte Young, 209 U. S. 123, 159, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Western Union v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Home Co. v. Los Angeles, 227 U. S. 278, 33 Sup. Ct. 312, 57 L. Ed. 510; Truax v. Raich, 239 U. S. 33, 37, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Cavanaugh v. Looney, 248 U. S. 453, 456, 39 Sup. Ct. 142, 63 L. Ed. 354; Greene v. Louisville, 244 U. S. 507, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88.

The good faith assertion of the unconstitutionality of the state law gives jurisdiction to a federal court, and this jurisdiction continues, both to decide the constitutional question, and to decide all other, even nonfederal, questions involved, and even though the court may conclude that the claim of unconstitutionality is unfounded, or may pass it without decision (Siler v. Louisville Co., 213 U. S. 175, 191, 29 Sup. Ct. 451, 53 L. Ed. 753); and if this same good faith assertion operates to determine that the state is not a party, it must likewise continue to have that effect, regardless of how it may be decided.

[3] See McFarland v. American Co., 241 U. S. 79, 36 Sup. Ct. 498, 60 L. Ed. 899.

[11] When the existence of a federal question through a claim of unconstitutionality determines the jurisdiction of the federal court, the same principles must apply—so far as we can see—whether the jurisdiction is invoked by original pleading or by removal petition. In either case, the prima facie jurisdiction of the state court is to be ousted by that of another tribunal which, for this purpose and to this extent, is dominant. The application of the same principles to both these situations was approved in Missouri Ry. v. Missouri Commissioners, 183 U. S. 53, 59, 22 Sup. Ct. 18, 46 L. Ed. 78.

[12] Whether the application of the laws of Ohio, proposed by Mr. Seney's complaint, would work a violation of the Fourteenth Amendment, may depend in part upon questions of fact—e. g., whether the proposed sale would bring confiscation; whether the property involved was so impressed with an interstate character as to be beyond the declared policy of Ohio, etc. But if we were to pass this view, and assume that such violation depended wholly upon matters of law arising upon the undisputed facts, and upon the view to be taken of the state laws and the Columbus case, the result would be the same. It might be thought that, since every one is bound to know the law, a claim of unconstitutionality which was based upon mere application of legal principles to the conceded facts, would not support the federal jurisdiction after the claim had been found to be erroneous; but the cases seem to recognize no distinction between questions of constitutionality dependent on disputed facts and those dependent on mere observation of the state laws. See Caldwell v. Sioux Falls Co., 242 U. S. 559, 564, 37 Sup. Ct. 224, 61 L. Ed. 493 ("Blue Sky" Case); Tanner v. Little, 240 U. S. 369, 36 Sup. Ct. 379, 60 L. Ed. 691 ("Trading Stamp" Case).

[13] Principles analogous to those we have referred to—if not the identical ones—have been applied by the Supreme Court to develop a sufficient case of diverse citizenship in a removal petition (Missouri Ry. v. Missouri Commissioners, supra), and, if the question remains open to us after that decision, we see no escape from their due application there as elsewhere. The question which has been involved in numerous cases (e. g., Ex parte Young) is whether the real party defendant was the state, or was an officer of the state, who must be considered as acting in his personal capacity, because his claimed authority to act for the state failed. The principle is the familiar one of agency. An act done by the agent, on behalf of the principal and in the name of the principal, is the act of the principal, if there is due authority; otherwise, the act is that of the agent. The same rule must apply to a party plaintiff as to a party defendant, and when we find that because the constitutionality of the state law is at stake, the party is the individual, and not the state, this finding supports the conclusion of diverse citizenship equally well as it does the conclusion that the Eleventh Amendment does not protect.

[14] The decision of the state court to the effect that the state is the party plaintiff would bind the federal courts in so far as it was a construction of the statutes or of practice or pleadings, but its conclusion rests on the premise that the law is valid; and it is this very premise which Swift & Co. had a right to challenge in the federal courts

through invoking the Fourteenth Amendment, and when this is done the conclusion fails. To say that the state court decision binds us as to who should, for the purposes of this suit, be considered the party, would be to say that the state court's finding or assumption of constitutionality would forbid the kind of contest in the federal courts expressly sanctioned by Ex parte Young, and that line of cases.

We therefore conclude that the petition for removal stated a good case therefor on the ground of diverse citizenship.

[15] The plaintiff further contests the removal because he says the action commenced by his complaint was not a civil action, but was rather one based upon and for the enforcement of the Ohio penal statutes. So far as concerns the form of the matter, this is plainly a civil action. It is not brought to cause imprisonment or to collect a penalty, but it is a proceeding in a court of equity, commenced by proper pleading, having a plaintiff and having defendants, seeking an injunction and a receiver, and, further, practically final relief through the receivership. This answers every description of a civil action, rather than of the criminal or penal actions with which those of a civil nature must be contrasted. Cases like those in which a city, which is a branch of the state government is undertaking to enforce its ordinances by injunction and at the same time to collect the tax and the penalty secured by the ordinance (City of Montgomery v. Postal Co. [D. C.] 218 Fed. 471) are distinguishable, as soon as stated.

So far as concerns the substance of the matter, the question on this objection is the same as on the matter of diverse citizenship. If the action were one by the state of Ohio, it would have the color of, and it might be considered as, a proceeding in execution of its sovereignty rather than a mere civil action; but since the validity of the Ohio law is forcefully challenged under the Fourteenth Amendment, Mr. Seney cannot be heard to say that the action is by the state rather than by him.

[16] The plaintiff next contends that the removal was ineffective because the state court had granted plaintiff's request to dismiss the action as against Swift & Co., and so there was nothing left to remove. It is not easy to see how an action in equity can rightly be dismissed as against that defendant who is the sole party substantially interested on the side of the defense; but that does not concern us. If the dismissal was effective, removal was not Swift & Co.'s remedy.

The petition and bond for removal (theretofore duly filed) were presented to the judge of the state court on September 3d, pursuant to notice theretofore given by plaintiff. The sufficiency of the bond has never been questioned, nor has that of the notice. The state court did not then, or ever, make any order of removal, but continued until September 5th the question as to whether it would make such order and the question whether it would grant plaintiff's motion that the receiver be ordered to sell the property. Under these circumstances, the jurisdiction of the state court over Swift & Co. terminated not later than September 3d, and the order of dismissal made September 5th was void. Traction Co. v. Mining Co., 196 U. S. 239, and cases cited on page 244, 25 Sup. Ct. 251, 49 L. Ed. 462; Remington v. Central Co., 198 U. S.

95, 99, 25 Sup. Ct. 577, 49 L. Ed. 959; Chesapeake v. McCabe, 213 U. S. 207, 217, 29 Sup. Ct. 430, 53 L. Ed. 765; Chesapeake v. Cockrell, 232 U. S. 146, 154, 34 Sup. Ct. 278, 58 L. Ed. 544; Iowa v. Bacon, 236 U. S. 305, 310, 35 Sup. Ct. 357, 59 L. Ed. 591; Bank of Fritzlen (C. C. A. 8) 135 Fed. 650, 653, 68 C. C. A. 288; Donovan v. Wells Fargo (C. C. A. 8) 169 Fed. 363, 365, 94 C. C. A. 609, 22 L. R. A. (N. S.) 1250.

[17] We observe no defect in the jurisdiction of this court. If the final decree of the court below dismissing plaintiff's petition had been based solely on the plaintiff's refusal to acknowledge the jurisdiction of the court and refusal to proceed with his case in that court below, there would have been no question, except that of jurisdiction; the situation would have been somewhat analogous to that in McAllister v. Chesapeake Co., 243 U. S. 302, 305, 37 Sup. Ct. 274, 61 L. Ed. 735, and it would have been necessary to consider whether the exclusive jurisdiction to review was vested in the Supreme Court. This was not what occurred. After the refusal of the plaintiff to proceed, the court, on its own motion, took testimony to satisfy it as to what the right of the matter was. By this testimony it prima facie appeared that the property was in process of interstate transportation, resting under a storage in transit privilege, and never had been intended for sale in Ohio, and hence that, in the opinion of the court, the complaint should be dismissed, even if the Columbus Case were to be accepted as beyond criticism. The plaintiff might have contested these claims. It did not; and the final action of the court rested, in part, upon these findings of a sufficient affirmative defense. The failure of the plaintiff, on his appeal to this court, to assign error against or to contest these further findings of fact and conclusions of law, does not show that the final decree of which he complains involved only a question of jurisdiction; he might have raised these questions without prejudice to his insistence against the jurisdiction.

One further matter requires mention: When we were asked to suspend the decree of the court below in order that the appeal might be effective, we thought that the interests of all would be best protected by allowing Swift & Co. to take its property and finish the manufacture before the material spoiled, but on condition that, if it failed in its contentions, it would restore the status quo by turning over equivalent property to the custody of the state court, and that it secure such restoration by a bond; and since it might not be apparent that the state would have any interest which would permit it to receive the penalty of the bond, we devised a special form of condition which we thought would meet the situation, and which is quoted in the margin.[4] So far

[4] "If it shall finally be determined either that the action commenced in the common pleas court of Lucas county, Ohio, on August 27, 1919, by Allen J. Seney, purporting to act for and on behalf of the state of Ohio, against Swift & Company and the Northern Refrigerating Company, was not duly removed to the District Court of the United States for the Northern District of Ohio, Western Division, and should be remanded, or be finally determined that the petitioner in that action, or the state of Ohio, has a right to the substantial relief sought by the petition, then, and in that event, Swift & Company shall, within thirty days, return to the receiver in said action, or otherwise to the custody of the court where such action then pends, either the

as this penalty was made to become payable upon the adverse termination of the controversy over the right to remove this case, we made an error in accomplishing our intent. Our purpose was to require this action by Swift & Co., if it should ultimately be determined that the state court, rather than the court below, had the initial right to determine whether Swift & Co.'s property was being taken unlawfully, and we omitted to observe that perhaps this controversy was as effectually removed from the state to the federal court by Swift & Co.'s bill in equity as by the removal petition. Since our present decision is subject to review, and resort to that bond may yet be necessary, it should be corrected, if the obligor desires, and should be, by the court below, surrendered up to be canceled on the presentation and filing of a bond the same in all respects, except that the condition, in place of the words "if it shall finally," to and including the words "or be finally," and, at the end of the condition, shall contain the words specified in margin.[5] The period of 30 days may also be changed to 90 days.

The decree and order below are affirmed, but the order of affirmance will include a direction for substitution of bond in accordance herewith.

same property which is to be delivered to it by the receiver upon the filing of this bond, or else the equivalent thereof in the same form, or in its further completed form of manufacture (without regard to additional value by reason of further treatment). The property so to be returned is to stand in place of that now taken from the receiver, and is to be disposed of as the court then in charge of such action shall direct.

"In case of default in such delivery, Swift & Company shall pay to the state of Ohio the sum of the penalty of this bond, as liquidated damages, such sum to be subject to such disposition as the present or future laws of Ohio may direct.

"It is definitely understood that this is a voluntary bond given by Swift & Company and the surety, pursuant to the offer of Swift & Company and as a condition of obtaining discretionary court action, and that the question of the right of the state to receive the money, if the bond is forfeited, cannot be raised in any court."

[5] "If it shall finally be determined that on the 8th day of October, 1919, the court of common pleas of Lucas county, Ohio, rather than the District Court of the United States, at law or in equity, for the Northern District of Ohio, was vested with the dominant jurisdiction to determine initially whether the property of Swift & Co. was rightly subject to seizure, as demanded by the petition of Allen J. Seney, purporting to act for and on behalf of the state of Ohio, filed in the common pleas court on August 27, 1919, against Swift & Co. and the Northern Refrigerating Company, or shall be finally."

At the end of the condition, the words "This bond is given nunc pro tunc in substitution for one filed ———, 1919, and speaks as of that date."

LOS ANGELES LIME CO. et al. v. NYE.

SAME v. CERIAT.

(Circuit Court of Appeals, Ninth Circuit. January 17, 1921. Rehearing Denied March 9, 1921.)

No. 3532.

1. **Patents ⇐244—Changing order of steps does not avoid infringement.**
   Merely changing the order of steps designated in a patent does not avoid a charge of infringement, even in combination patents, unless the particular form, location, or sequence is essential to the result or novelty of the claim.
2. **Patents ⇐328—1,212,331 for manufacture of artificial travertin held valid and infringed.**
   The Denivelle patent, No. 1,212,331, for process for the manufacture of artificial travertin, *held* valid and infringed.
3. **Patents ⇐75—Use of artificial travertin in railroad station not a "public use."**
   The use of artificial travertin in a railroad station more than two years before applying for letters patent is not a "public use" which precludes issuing a patent, since a public use is entirely different from a use by the public.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Use.]
4. **Patents ⇐58—Parties asserting public use for two years prior to patent application have the burden of proof.**
   In a patent infringement suit, defendants have the burden of showing that the patented article was in public use for two years prior to the patent application.

Appeals from the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Suits by Paul E. Denivelle and the Los Angeles Lime Company against C. L. Nye and against E. Ceriat, individually and doing business under the firm name and style of E. Ceriat & Co. Decrees for defendants, and plaintiffs appeal. Reversed and remanded, with instructions.

Chas. E. Townsend, of San Francisco, Cal., and A. P. Thomson, of Los Angeles, Cal., for appellants.

Ford & Bodkin, of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. These suits were consolidated and tried as one in the court below, and were argued and submitted together here. From both suits the Lime Company was eliminated in the trial court. The suits were for alleged infringements of a patent issued to Denivelle for the manufacture of artificial travertin, and the defense in each case was lack of invention, prior use, and noninfringement. The trial resulted in decrees dismissing the bills, with costs to the defendants thereto.

If the patent is valid and the alleged prior use not sustained, there can, we think, be no doubt that in each case there was clear infringement.

Travertin is a natural rock of Italy, concerning which the Century Dictionary says:

"It is a soft, porous, straw-colored rock, easily wrought when freshly quarried, and afterward hardening, and seeming, under the climate of Italy, to be very durable. The exterior walls of the Coliseum and of St. Peter's are built of this material."

In the patent, which was issued January 16, 1917, the patentee declares:

"This invention comprehends a process to be used in the manufacture of an artificial stone simulating travertin stone or marble and adapted to be used especially for its architectural and decorative surface effect.

"The embodiment of the invention may be considered in two aspects: (A) Representing the method as practiced for casting separate articles, such as columns, capitals, figures, etc., later to be set in place; (B) representing the method as practiced for surfacing and finishing structures already in place such as walls, cornices, etc.

"The first method embraces the application of colored plastic material or ingredients, such as Portland cement, plaster of paris, Keene's cement, magnesite and water or other liquid substance with or without aggregates to an upturned negative form, or mold of existing type, of wood, plaster, cement, etc., wherein these colored materials are so applied before the final set or crystallization of the mass, in a variety of progressive steps consecutively, as to produce in the cast or positive taken from said mold, form, etc., automatically as a result of the progressive steps and special application, a certain striated form of texture porousness in simulation of a stone known as 'travertin' or 'Roman travertin.' This process has to do mainly with producing or obtaining a surface especially desirable for reproducing in architectural and decorative effect; this method of use and effect being an innovation.

"The second method involves the use of the above colored materials in a certain definite and novel manner during their direct application to a wall or ceiling, or similar surface, and before the set or crystallization is complete, in order that the resulting surface may have a colored striated or porous surface in simulation of travertin or Roman travertin texture or stone of similar striated porousness; this form of use and effect being an innovation."

The present case involved the method as practiced for surfacing and finishing structures already in place, concerning which the patentee said in his specifications:

"In proceeding by process (B), as in the case of walls, ceilings, etc., already erected into position, I employ the following steps: The plastic materials or ingredients, such as Portland cement, Keene's cement, magnesite, plaster of paris, or a combination of the ingredients, are applied to walls or ceilings, interior or exterior, whereby the resulting surface obtains a striated porosity of the nature and for the purpose of producing a simulation or imitation of the surface that obtains in Roman travertin stone commonly known as 'travertin'; the object being to incorporate several or all of the following steps in accordance with the degree or perfection in imitation or simulation required in the finished surface from the architect's viewpoint:

"1. To a concrete, brick, metal or wood lath, or any similar form of construction B, one or two coats of plastic material or mortar, as *10*, composed of plaster of paris, Portland cement, or Keene's cement and sand or aggregate, is applied and straightened to a fair surface. This application may be varied in method and result; the object being to form a foundation for the steps which follow.

"2. Next, a colored mixture, as *11*, composed of white Portland cement, Keene's cement, magnesite, plaster of paris, or similar materials, with or without a percentage of aggregate or sand added is reduced to a consistency of a soft paste in semiliquid form, by the addition of water or other agency, and applied to the wall in that state by means of a trowel, float or similar device to a varying thickness, in accordance with the depth of porosity required in the finished result. This application is immediately straightened roughly by means of a rule or straightedge. The foregoing coat *2* is for the purpose of producing a background coating of the general color form required, of sufficient thickness to permit of the next operation.

"3. One or several mixtures of different colors of the foregoing ingredients, or reduced with water or other liquid to a soft pasty consistency, is applied in a series of horizontal veins *12*, of varying length, with a narrow, long, soft brush, or other device immersed in the one or several colored mixtures successively and applied to the coating *11* of operation B2 above by stippling in while the material of coat *11* is very soft. A light horizontal trowel action is repeatedly applied. This is for the purpose of providing light, horizontally striated veins or lines of different colors or tones of color in the finished result.

"4. While the foregoing coats *11* and *12* are still very soft, a sharp stipple is produced to the full depth of coatings *11* and *12* by means of a slender or narrow brush of stiff bristles held horizontally and applied in a series of sharp jabs and pressure, said stippled jabs being placed staggered, with varying sequence between the colored veins *12* described heretofore.

"5. A light horizontal trowel application follows. This is for the purpose of producing the greater porosity in texture markings required in the finished result; the form and nature of the bristles producing a jagged series of depressions, horizontally striated formation, and the trowel's pressure reducing the width of these depressions, together with providing an undercut quality to the stippling it would not otherwise have.

"6. While the coating *11* is still soft, but in an advanced stage approaching set or crystallization, a smaller series of jabs is applied in a horizontal rotation by means of a stiff wire brush enough to penetrate the surface, gradually hardening, and applied between the grosser markings and veins described in operations B2 and B3. This is for the purpose of producing the refinements of texture or horizontal strata of porous quality not provided or possible by prior operations described.

"7. The surface mixture *11*, with its added veining mixture *12*, is now finished by the application of vigorous troweling. This is for the purpose of removing all imperfections or unevenness that may accrue during operations B2, B3, B4, B5, B6, and B7, and to leave a straight smooth surface of different color tones produced by the variegated striated veins and the shadows of the depressions, such as are characteristic of Roman travertin or stone commonly known as 'travertin.'

"8. In such moldings, cornices, panel moldings, or forms of ornamentation as may require it, the same methods are applied in forming the same as described in operations B2, B3, B4, B5, B6, and B7, except that following the last step a knife mold that has the form or outline of the object required will be used in addition to the foregoing methods of B2, B3, B4, B5, B6, and B7 and run over the surface of the object its full length to retain perfection of contour."

The claims alleged to be infringed are as follows:

"1. A process for the manufacture of striated artificial stone structures which comprises depositing upon a prepared surface of desired form a series of narrow layers of plastic material, depositing upon said layers and upon the exposed surfaces therebetween a suitable material of such texture and consistency as will leave numerous small portions of said exposed surfaces out of contact with said material, binding together said layers and said material with a fluid cement, and allowing the mass to set.

"2. A process for the manufacture of striated artificial stone structures which comprises depositing upon a prepared surface of desired form a series of

narrow layers of plastic material of a certain color, depositing upon said layers and upon the exposed surfaces therebetween a suitable material of a different color and of such texture and consistency as will leave numerous small portions of said exposed surfaces out of contact with said material, binding together said layers and said material with a fluid cement, and allowing the mass to set."

"5. A process for the manufacture of striated artificial stone structures, which consists in preparing a mold of suitable outline with an isolator, forming veins of plastic material over this prepared surface, depositing loose, lumpy material over the veining to provide pockets, binding the pocket-forming material with the veining material, and leaving certain pockets exposed on the surface adjacent to the mold surface."

"9. A cementitious structure suitable for decorative purposes comprising a mass of cementitious material at least one surface of which is shaped and striated and formed with small irregularly spaced depressions, the striæ constituting the exposed portions of shallow inlays of uniformly colored cement."

"10. A cementitious combination for decorative use such as a finish for exterior or interior building walls and ceilings, which combination is formed of differently toned thin layers or strata, the said layers only partly connected one to the other in such manner as to leave serrated voids in stratified formation between said layers, said layers and voids existing only adjacent to the surface, but giving an appearance, when erected, of extending through the depth of the mass, the resulting decorative surface simulating that of a natural stone structure of sedimentary origin."

[1] The view taken by the trial court respecting the question of infringement as stated in the record was that any change in the order of the steps as designated in the patent operated an avoidance of infringement; but we do not so understand the law.

In the thoroughly considered case of Tilghman v. Proctor, 102 U. S. 707, 26 L. Ed. 279 (overruling its previous decision in Mitchell v. Tilghman, 19 Wall. 287, 22 L. Ed. 125), the Supreme Court, after showing that the patent law extends to any new and useful art or manufacture, and that in a patent for a process the inventor is not required to point out all the forms of apparatus by which the process may be applied, having pointed out a particular method by which it could be practically and usefully applied, said, at pages 728 and 729 of 102 U. S. (26 L. Ed. 279), among other things:

"The mixing of certain substances together, or the heating of a substance to a certain temperature, is a process. If the mode of doing it, or the apparatus in or by which it may be done, is sufficiently obvious to suggest itself to a person skilled in the particular art, it is enough, in the patent, to point out the process to be performed, without giving supererogatory directions as to the apparatus or method to be employed. If the mode of applying the process is not obvious, then a description of a particular mode by which it may be applied is sufficient. There is, then, a description of the process and of one practical mode in which it may be applied. Perhaps the process is susceptible of being applied in many modes and by the use of many forms of apparatus. The inventor is not bound to describe them all in order to secure to himself the exclusive right to the process, if he is really its inventor or discoverer. But he must describe some particular mode, or some apparatus, by which the process can be applied with at least some beneficial result, in order to show that it is capable of being exhibited and performed in actual experience."

And upon the subject of infringement, at pages 730 and 731 of 102 U. S. (26 L. Ed. 279), proceeded as follows:

"It only remains that we should express our views on the question of infringement. The defendants advance several reasons for the purpose of

showing that their process does not conflict with that of Tilghman. First, because they do not use the apparatus described in the complainant's patent, but use a boiler in which the charge of fat and other materials is placed and heated, and do not mix the fat and water in the manner pointed out in the specification of the patent, but, on the contrary, have inserted in the boiler a pump which forces the water as it settles to the bottom upwards to the top of the mass and pours it upon the upper surface, whence it again finds its way down through the fat, thus keeping up a constant mixture. It is unnecessary to add anything further on the subject of the form of the apparatus used. The patentee is not confined to a metallic coil of pipe heated in a furnace; but his patent extends to and embraces any convenient vessel for holding the mixture, which is strong enough to sustain the pressure necessary to prevent the water from being converted into steam. The defendants use such a vessel, and use it for the purpose indicated and pointed out in the patent. The vessel which they use has the requisite strength to prevent the water from being converted into steam, and does effect that object. And as to the defendants' using a different method from that suggested in the patent for keeping up the mixture of fat and water, that is of no consequence. The keeping up of the mixture is the important thing. That is a necessary part of the process. They employ such a device for effecting this as is adapted to the form of vessel in which they heat the material. Using a boiler instead of a coil of pipe for this purpose, they are obliged to employ an additional or modified means for keeping up the mixture. They only employ such means as, in view of the change adopted in the form of the heating apparatus, and of the known appliances in use in analogous processes, would naturally suggest themselves to a mechanic skilled in the art. Or, if the mode of effecting the continued mixture adopted by the defendants should be deemed a new and useful improvement, they might perhaps have a patent for that peculiar device without being entitled to use Tilghman's process, on which it is but an improvement."

In Walker on Patents (3d Ed.) that case, as well as the decisions of the same court in Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860, and Cochrane v. Deener, 94 U. S. 787, 24 L. Ed. 139, are referred to; and (sections 335, 336, 337, 338) he states the law to be that a patent for a process is infringed by one who, without ownership or license, uses substantially the process which the patent claims, identity, whether of apparatus or materials, not being necessary to constitute infringement, but that no process patent is infringed where any one of the series of acts which constitute the process is omitted, unless some equivalent act is substituted; reason seeming to indicate that one act is the equivalent of another when it works in substantially the same way to accomplish the same result.

In Hammerschlag Mfg. Co. v. Bancroft (C. C.) 32 Fed. 585, 589, where the reissued patent sued on was for a process for waxing paper in machinery, Judge Gresham said:

"One of the reasons urged against the identity of the two processes and against infringement of the fifth claim is that the defendant passes the paper under a roller submerged in a bath of paraffine, thus applying the wax on both surfaces of the paper and then passing it through two squeeze-rollers located over the vat. The defendant may not observe the same order in the various steps of the process that we find described in the reissued patent, but it does not follow that the processes are different because the various steps do not succeed each other in precisely the same order. The invention being for a process or an art, the inventor was not restricted to the particular means described in his patent for carrying out his process."

The case of Asbestos Shingle, Slate & Sheathing Co. et al. v. Rock Fiber Mfg. Co. (D. C.) 217 Fed. 66, was based upon a reissue patent for a process for producing artificial stone plates or slabs by mix-

ing asbestos fibers and hydraulic cement in a large bulk of water until the cement is reduced to a colloidal condition and a pulp is formed which can be worked in a cardboard machine, then pressing the same and allowing the material to set or harden, and also for the product of such process. The defendant's method of producing asbestos shingles did not embody the step of pressing the plates or layers of fibrous material other than such pressure as might be applied to them by the cardboard machine which formed the layers or plates, and it was therefore contended that they had omitted one of the steps of the claimed process and consequently did not infringe. In holding against that contention the court said:

"The object of the patent law is to protect the inventor, not in some paper ideal, but in his actual contribution to the useful arts. And here the contribution is of the highest order. This is not an improvement in an art; it is the foundation of a new art. No process of this kind, no manufacture like the complainant's, was known prior to Hatschek's time, and it is now known only by reason of Hatschek's genius and his disclosure to the world of the result of his labors. And so, while I realize that a strictly literal reading of claims 2, 3, 4, and 5 might lead to an enlargement of this defendant from the charge of infringement, yet I believe that, when the nature of this invention is borne in mind, when it is further remembered that, although a process claim is a description of the step by step means by which a particular result is achieved, yet it is possible for two steps to be taken concurrently instead of their always being required to go successively, the pressure specified in claims, 2, 3, 4, and 5 should be held to include not only that pressure which is given to the Hatschek pulp independently and subsequently to its treatment upon the accumulator roll, but that, inasmuch as for many practical purposes no pressure is needed beyond the pressure that is exerted by the rolls of the machine, the pressure mentioned in these claims 2, 3, 4, and 5 likewise covers the pressure that is exerted by the pressure means of the cardboard machine. This is true in spite of the fact that no new pressure means are added to those present in the old paper-making art, because the old means of pressure were not used to bring about the necessary new kind of pressure, the pressure having a result upon this Hatschek pulp which the pressure of the cardboard-making machines never wrought upon the paper pulp."

Even in combination patents a change in the form or the location or sequence of the elements of the patent will not avoid infringement where they are all employed to perform the same functions, unless form, location, or sequence is essential to the result or to the novelty of the claim. Adam v. Folger, 120 Fed. 260, 56 C. C. A. 540. See, also, Malignani v. Hill-Wright Electric Co. (C. C.) 177 Fed. 430; Rodman v. Deeds Commercial Laboratories (C. C. A.) 261 Fed. 190, 191; Pedersen v. Dundon, 220 Fed. 309, 136 C. C. A. 143; Bliss v. Spangler, 217 Fed. 399, 132 C. C. A. 210; Williams v. Kaufmann, 259 Fed. 859, 170 C. C. A. 659.

[2] That both the process and the product of the appellant were patentable we entertain no doubt. While the record shows that various kinds of artificial stone had been theretofore made, it is not pretended that before Denivelle's manufacture any artificial travertin had been successfully made.

It appears that the appellant, while endeavoring to induce the architects of the Pennsylvania Railroad Station in New York—McKim, Mead & White—to use in its construction a certain cement of which he

was the selling agent, was shown by Mr. Mead a piece of natural travertin and told in effect that if he could make a similar artificial stone they might consider its use. We insert the appellant's reply, as well as a little more of his testimony, which is uncontradicted:

"'Well, Mr. Mead, I don't like to say that I cannot do it, but,' I said, 'this certainly does look like a stickler.' I said, 'How much time have I to experiment?' 'Oh,' he said, 'this won't be ready for consideration for six months.' He said, 'You have got six months to think it over.' 'Well,' I said, 'I will work on it, and when I have something good to show, why, I will see you again.' And the first piece of travertin, or so called, that I made, was a little piece about that long (indicating in the neighborhood of a foot long) and eight inches wide, and I showed it to him. It was very poor, in my estimation, as far as representing the natural was concerned, but nevertheless it showed a porosity of a certain character, and certain series of laminations, and I submitted that to him with apologies, and he said, 'Well, this is even better than I thought might be done.' 'Well,' I said, 'I am satisfied.' 'Oh,' he said, 'you may have made a sample, but' he said, 'could such a system be developed to really do any kind of work?' He said, 'Could you, through other minds, do it?' 'Well,' I said, 'invariably, Mr. Mead, in making experiments of that or any nature I always try to work along the line that I can produce the result by training others to do it.' And that was the evolution of it. We then discussed the plans, and he said, 'Well, let us assume that we may be able to do it, and could you show me on the plans where the natural should leave off and where the artificial should begin?' And we went over them and made mutual suggestions. The plans were then at a very incomplete state. And it simply arose out of the clear sky, really, because they could not afford to use natural travertin. As he explained it to me, it was Mr. McKim's dream to use natural Roman travertin on a big monumental building, and it had not been done, and they did not have money enough to do it. Now, that was the way the thing started. Later, I helped them by suggestions in drawing up specifications so that the Pennsylvania Railroad might receive bids, and these specifications were eventually whipped into shape, and the plans likewise, and it was placed in it."

The witness further testified that up to that time he had never heard of artificial travertin, although he had made other kinds of artificial stone, and that in his endeavor to make artificial travertin he practiced the process secretly, excluding from the shops any but his own employees, and that that was a part of his contract, and that when his work was completed, about the latter part of 1912, and in place, it continued to require supervision, and was not proved to be a success until its durability was established by reasonable time. The witness further testified that "the conditions—the materials were new, had never been used before," and that neither the architects nor the Pennsylvania Railroad were satisfied that the work would stand up, and that "it was regarded as an experiment from the very beginning."

The record shows that the appellant brought his process for making artificial travertin to the attention of the authorities of the San Francisco International Exposition December 12, 1912. At that time the appellant's process and product were not only in an experimental state according to his testimony, but is also shown by one of the exhibits in this case containing an article on the subject by the assistant director of works and chief of construction of the Exposition, Mr. A. H. Markwart, in which he says:

"But there was a difference between the use of a few tons of colored cement plaster cast blocks over the comparatively limited interior wall area in the

Pennsylvania Station and the use of a gypsum product on the wood-sheathed exterior area of all the buildings upon the Exposition grounds. When 25,000 to 30,000 tons of material were to be used, a widely different problem was presented. Experienced exposition contractors pronounced the textured and colored exterior as impossible of accomplishment, and many of the Western gypsum mills looked unfavorably upon the proposal, so for a time the artistic success of the Exposition was threatened by the attitude of both of these necessary factors. However, Mr. Denivelle, fortified with the knowledge obtained by the solution of a similar problem, believed that the Exposition plastic scheme might be made successful if the plaster manufacturers could be interested."

Denivelle was engaged and his work was done upon the Exposition buildings in the years 1913 and 1914, the result of which is thus spoken of in the article contained in the exhibit above referred to:

"Able critics have judged the exterior appearance of the entire Exposition from a color and texture standpoint to be one of great beauty. In adopting for the wall surfaces a treatment to give the effect of the famous Roman travertin, that peculiarly beautiful stone found near the River Tiber, there was, as far as expositions are concerned, a unique and original departure from the usual dazzling white plaster effects.

"Consequently the entire exterior of the Exposition, instead of suggesting plaster and stucco, conveyed an impression of rare marble, soft in tone and color, and the stratified texture of its surface produced repose for the eye by day and by night. It had no distinct, sharp color, but may be described as having several warm tones of gray and pink blended together, all an integral part of the mixture.

"While the architecture of the Exposition has many admirable features and has been the subject of favorable comment by all, it undoubtedly would not have created the impression which it did had it not been a color exposition. It must be conceded that the Exposition was interesting not only from the architectural viewpoint, but also from the texture and color of the exterior plaster."

We think nothing more need be said to show the novelty, as well as utility, of the appellant's process and product.

[3, 4] There remains for consideration the contention that both process and product were in public use more than two years before application for patent therefor was made. If that be true, the patent is, of course, conceded to be void, for such is the statute.

As the Exposition was not opened to the public until during the month of February, 1915, and the application upon which the patent was issued was filed October 20th of the same year, it is obvious that the alleged public use relied on by the appellees can relate only to the use of the process and product in the appellant's work on the Pennsylvania Railroad Station.

That "public use," within the meaning of the statute, is a very different thing from "use by the public," is well settled. In the leading case of Elizabeth v. Pavement Co., 97 U. S. 126, 24 L. Ed. 1000, known as the Nicholson Pavement Case, where the patented pavement had been in use on one of the streets of Boston for more than six years before application for the patent was filed, the Supreme Court, in discussing the subject, said, among other things:

"In this case it becomes important to inquire what is such a public use as will have the effect referred to. That the use of the pavement in question was public in one sense cannot be disputed. But can it be said that the in-

vention was in public use? The use of an invention by the inventor himself, or of any other person under his direction, by way of experiment, and in order to bring the invention to perfection, has never been regarded as such a use. Curtis, Patents, § 381; Shaw v. Cooper, 7 Pet. 292. * * * When the subject of invention is a machine, it may be tested and tried in a building, either with or without closed doors. In either case such use is not a public use, within the meaning of the statute, so long as the inventor is engaged, in good faith, in testing its operation. He may see cause to alter it and improve it, or not. His experiments will reveal the fact whether any and what alterations may be necessary. If durability is one of the qualities to be attained, a long period, perhaps years, may be necessary to enable the inventor to discover whether his purpose is accomplished. And though, during all that period, he may not find that any changes are necessary, yet he may be justly said to be using his machine only by way of experiment; and no one would say that such a use, pursued with a bona fide intent of testing the qualities of the machine, would be a public use, within the meaning of the statute. So long as he does not voluntarily allow others to make it and use it, and so long as it is not on sale for general use, he keeps the invention under his own control, and does not lose his title to a patent. * * * It is sometimes said that an inventor acquires an undue advantage over the public by delaying to take out a patent, inasmuch as he thereby preserves the monopoly to himself for a longer period than is allowed by the policy of the law; but this cannot be said with justice when the delay is occasioned by a bona fide effort to bring his invention to perfection, or to ascertain whether it will answer the purpose intended. His monopoly only continues for the allotted period in any event; and it is the interest of the public, as well as himself, that the invention should be perfect and properly tested, before a patent is granted for it. Any attempt to use it for a profit, and not by way of experiment, for a longer period than two years before the application, would deprive the inventor of his right to a patent."

See, also, Warren Bros. Co. v. City of Owosso, 166 Fed. 309, 317, 318, 92 C. C. A. 227; Pacific Cable Ry. Co. v. Butte City Street Ry. Co. (C. C.) 55 Fed. 760; Railway Register Mfg. Co. v. Broadway & Seventh Ave. (C. C.) 26 Fed. 536; Harmon et al. v. Struthers et al. (C. C.) 57 Fed. 637, and authorities cited in those cases.

We are of the opinion that neither the process nor product of the appellant were shown to have been in public use within the meaning of the statute for two years prior to the filing of his application for patent, the burden of showing which was upon the appellees. San Francisco Cornice Co. v. Beyrle, 195 Fed. 516, 115 C. C. A. 426, and cases there cited.

The decrees are reversed, and the cases remanded to the court below for further proceedings in accordance with the views above expressed.

HANSEN v. BARNARD.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 59.

1. Principal and agent ⇐84—Agent forfeits right to compensation by fraud on principal.

An agent must act with entire good faith and loyalty in all his dealings affecting the subject-matter of his agency, and if he is guilty of fraud on his principal in the transaction of the agency, he is not entitled to compensation for his services.

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2. **Shipping ⟸69—Rule that fraud of agent defeats right to compensation applies in maritime law.**
The rule of common-law agency, that fraud by the agent in the transaction of the agency defeats the agent's right to compensation, applies in the maritime law.

3. **Shipping ⟸69—Master fraudulently injuring ship is guilty of "barratry," forfeiting compensation.**
The master of a ship, who commits in his character of master an act for an unlawful or fraudulent purpose, to the injury of the owner of the ship, is guilty of the offense of "barratry," for the commission of which the maritime law prescribes as a penalty the forfeiture of compensation.

[Ed. Note.—For other definitions, see Words and Phrases, Barratry (In Maritime Law).]

4. **Shipping ⟸69—Misconduct of master does not require forfeiture of all compensation.**
Under the maritime law, a forfeiture of the whole amount of the wages due an officer or seaman does not necessarily follow in all cases of misconduct which involve a forfeiture, but the court may in some cases decree a partial forfeiture.

5. **Shipping ⟸69—Entire compensation of master forfeited for fraudulent acts.**
The master of a ship, who rendered fraudulent accounts to the owner, is guilty of criminal misconduct, in breach of his duty to the owner, which works a forfeiture of his entire compensation.

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

Libel by Hans Revne Hansen against William B. Barnard. Decree for libelant, and respondent appeals. Reversed, with directions to dismiss the libel.

The libelant is a master of steam vessels holding an unlimited license. On June 25, 1916, he became master of the steamer Sagamore under a contract of employment with the Mannes Fishing Company, at that time the charterer of the vessel. The boat left New York under his command on a voyage to Iceland and Norway. The vessel, owing to stress of weather and leakage, put into Bay Bull Harbor, Newfoundland. After a short delay she again started on her voyage, but was compelled by renewed leakage to put into St. Johns, Newfoundland, on August 12, 1916. For several months she remained there and underwent repairs. On September 15, 1916, the charter of the vessel to the Mannes Fishing Company was canceled. The libelant, however, at the respondent's request, continued to act as master from September 15, 1916, to May 18, 1917.

The libelant claims that the respondent agreed to pay him for his services in the performance of his ordinary duties of master of the steamer $250 a month from that date to May 18, 1917, together with $3.00 a day for board and expense money during the entire period from September 15, 1916, to May 18, 1917, amounting in all to the sum of $2,579. He admits that he has been paid $1,200 on account, and claims that there is due him a balance of $1,379. In addition the libelant claims that between September 15, 1916, and March 15, 1917, at the special request of the respondent and his agents, he performed services in watching and pumping the vessel, which services were outside the scope of his duties as master, and were of the reasonable value of $4 per day, amounting to the further sum of $720.

The respondent, who during all the times mentioned herein has been and is the owner of the Sagamore, alleged in his answer upon information and belief that during the times mentioned in the libel the libelant presented to respondent's agents at St. Johns fraudulent and untrue bills and vouchers for labor claimed to have been employed and materials purchased by the libelant,

and that by means of such fraudulent bills and vouchers he obtained from respondent's agents not less than $478. It is also alleged that the libelant took from the steamship various brass and metal fittings and accessories, as well as the mainmasts, booms, and other portions and parts of the vessel, and converted the same to his own use; the value not being less than $1,000.

The District Judge found that the libelant was employed at the rate of $200 a month for the entire period to May 18, 1917, declining to hold that he was to be paid $250 from January 1, 1917. He also found that he was not entitled to $3 a day for his maintenance, but allowed him at the rate of $1.50 a day, which he thought was a reasonable allowance for the kind of living which the libelant, according to his own testimony, had. The claim for $4 a day for watching and pumping was disallowed. The District Judge also found that the libelant had "padded" his accounts. He rendered bills which were on their face frauds. "Bills aggregating," said the Judge, "$260.50 are in my judgment proven to have been fraudulent. * * *" The amount of the fraudulent bills was deducted, and a decree was entered for $662.25.

Louis Boehm, of New York City (Samuel Zeiger, 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, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The respondent has appealed from the decree, alleging that the District Court fell into certain errors, the most important of which is that a master is not entitled to recover his wages, if it appears that he has been guilty of fraud in the accounts which he has rendered.

The testimony in the record discloses, and the libelant himself admits, that his accounts were padded. A witness, who on cross-examination was being questioned as to the alleged frauds, said the libelant had admitted the fraud to him saying:

"Yes, it is true that some of the bills that I presented to Mr. Benedict were not correct, but everybody else does it, and why shouldn't I?"

[1] The relation of an agent to his principal is regarded as that of a fiduciary. He must act with entire good faith and loyalty in all the agent's dealings affecting the subject-matter of his agency. We understand the law to be that an agent who is guilty of fraud upon his principal in the transaction of his agency is not entitled to compensation for his services. Shaeffer v. Blair, 149 U. S. 248, 13 Sup. Ct. 856, 37 L. Ed. 721; Beatty v. Guggenheim Exploration Co., 223 N. Y. 294, 304, 119 N. E. 575; Little v. Phipps, 208 Mass. 331, 94 N. E. 260, 34 L. R. A. (N. S.) 1046. In Mechem on Agency, §§ 1588 and 1589, after stating the rule to be that the first duty of an agent is to be loyal to his trust, and to render to the principal a disinterested and loyal service, it is said that—

"Among the other measures designed to secure the performance of this duty is the denial of compensation where the duty has not been observed. It is often said that a loyal performance is a condition precedent to the right to recover compensation, and it has been held in many cases that, where the agent is unfaithful to his trust and abuses the confidence reposed in him, he will not be entitled to any compensation for his services. * * * It may often operate to give to the principal the benefit of the agent's service without any compensation, but the agent has only himself to blame if that result en-

sues. The rule rests, not upon injury to the principal, but upon the paramount policy of removing the danger of temptation from the pathway of the agent."

In Labatt's Master and Servant (2d Ed.) vol. 2, § 696, it is said:

"What breaches of duty will entail a total forfeiture of wages is a question which the cases, as they stand, can scarcely be said to have settled definitely; but there would seem to be ample warrant for assuming that a court would not permit an employee to recover if he had been guilty of willful fraud, or had performed his work so negligently or unskillfully that it was either without any value, or a source of absolute loss to his employer. The rationale of the disability under the latter of these heads is sufficiently clear. But if, as the decisions seem to indicate, fraud is to be treated as a ground of forfeiture, whatever may be the extent of the resulting injury to the employer, the absolute quality of the defense in this instance must apparently be viewed as resting upon the consideration that dishonesty should be visited with consequences of a penal nature."

And the same writer in section 698 declares that—

"The doctrine of the maritime law would seem to be essentially the same as that adopted by the common law tribunals. * * *"

[2] We are not aware that the doctrine of the maritime law differs in this respect from that of the common law. It is essentially the same. In The Thos. Worthington, 3 Robinson's Reports, 128, which was an action by a master for wages, the English court, after stating that mere error of judgment in the management of the concerns of the vessel, unaccompanied by corrupt intention or willful disobedience of orders, would not of itself entail a forfeiture of his wages, added that, if circumtsances of fraud and collusion had been alleged, it would have decreed a forfeiture of his wages in toto.

[3] The master of a ship, who commits, in his character of master, an act for an unlawful or fraudulent purpose, to the injury of the owner of the ship, is guilty of the offense of barratry; and for the commission of such an offense the maritime law prescribes as a penalty the forfeiture of all compensation due. Kay's Law Relating to Shipmasters and Seamen, 51. In 1799 Lord Stowell said, in The Exeter, 2 C. Rob. 261, that—

"Any acts which will justify a master in discharging a seaman during the voyage will also deprive the seaman of his wages."

But in 1839 Dr. Lushington, in The Blake, 1 W. Rob., 73, 75, took exception to this statement of the rule, and stated that the wages might be forfeited—

"not in cases of discharge for mere misconduct alone, but where the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship, and the due preservation of discipline."

In The Florence, 9 Fed. Cas. 295, No. 4,881, a chief mate, having a dispute with the master about the rate of his wages, took away the ship's chronometer, not with any intention of stealing it, but intending to hold it as security for his wages. In that case Judge Benedict did not decree a total forfeiture of wages, but allowed him one-third of the amount due him. The forfeiture was not based upon the ground of compensation to the owner for any loss sustained, but upon

the theory of a warning penalty upon seamen for misconduct. Judge Benedict said:

"I prefer, however, to place my decision upon the ground that the act was one of gross misconduct in a chief officer; a method of procedure calculated, if encouraged, to put every owner at the mercy of the crews to which he is obliged to intrust his property; an offense to be classed with the offenses of insubordination, insolence, theft, and the like, and like them to be visited with the maritime penalty of forfeiture."

In Cloutman v. Tunison, 5 Fed. Cas. 1091, No. 2,907, Judge Story, in 1833, decreed a partial forfeiture of wages, because of the absence of an officer without leave, stating that he did so as a just admonition to officers having such high and responsible duties devolved upon them and designedly departing from them. He declared that desertion during a voyage worked a forfeiture of all the wages antecedently due under the maritime code of every commercial nation. To amount to desertion there must be the act of quitting the ship animo non revertendi. The case was heard in the Circuit Court on appeal from the District Court. The District Judge had inflicted the penalty of a forfeiture of one month's pay. Justice Story said:

"If this were the case of a common seaman, I should do the same. But in the case of an officer I think the good of the merchant service requires a somewhat higher forfeiture."

He therefore decreed a forfeiture of two months' pay.

[4] These cases indicate that under the maritime law a forfeiture of the whole amount of the wages due does not necessarily follow in all cases of misconduct which involve a forfeiture. In what cases there is a complete forfeiture, and in what cases there may be a partial forfeiture, we need not now decide.

[5] Whatever doubt may exist as to what kind of misconduct works a forfeiture of a seaman's wages, and as to the circumstances under which the forfeiture must be total, or may be partial, we entertain no doubt that, where the master of a ship is guilty of fraud in rendering his accounts to the owner, he is guilty of such breach of duty as works a forfeiture of wages. There is criminal misconduct and a breach of the duty of a fiduciary, and it is all the more reprehensible because done by an officer of the ship, who knows that his conduct is wrong and that he owes the highest fidelity to his principal the owner.

The decree is reversed, with directions that a decree be entered in favor of the respondent, dismissing the libel, with costs.

JOHNSON v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 58.

Criminal law ⇐762(2)—Error to argue case against defendant in charge.

While a federal judge is not a mere moderator, and may express his own opinion of the facts to the jury, if in doing so he puts the case argumentatively, he must put both sides; the defendant's as well as the government's theory.

Hough, Circuit Judge, dissenting.

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

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

Thomas Downs, of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Charles W. Atwater, Sp. Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. The defendant was indicted for knowingly, willfully, and feloniously receiving and having in his possession, with intent to convert to his own use, on May 27, 1918, six automobile outer tires, knowing that they had been stolen while part of an interstate shipment of freight, contrary to the form of the statute of the United States in such case made and provided. 37 Stat. c. 50 (Comp. St. §§ 8603, 8604).

While we discover no merit in any error excepted to and assigned, we think there was a plain error, not excepted to nor assigned, which we may consider under our rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii). It was an essential element of the offense that the defendant knew the tires in question had been stolen. Whether his conduct was more consistent with innocence than with guilt was for the jury to determine. The defendant's theory of innocence is as follows: That on May, 27, 1918, he was asked by a railroad brakeman named Schuyler to go with him in the defendant's automobile to get some goods down the road; that he did go that day in the daylight with Schuyler, who threw some tires out of bushes near the railroad track, which they brought to Schuyler's house in Maybrook, and he helped Schuyler put them in his cellar; that within a day or two Schuyler met him in his (the defendant's) automobile with his wife, and asked him where he was going; he replied, "To Newburgh;" Schuyler said, "Can I go with you to take the tires for the purpose of delivering them to the railroad detectives?" that he did go to Newburgh, and then Schuyler asked him to go to Poughkeepsie, which he refused to do, and Schuyler went to the fire house to leave the tires there, but the firemen would not take them; then he did consent to go to Poughkeepsie, where Schuyler

left him, to return, but, not reappearing for an hour, the defendant and his wife returned to Maybrook without Schuyler, and put the tires in the chicken house on his sister's place; that within a few days, having misgivings about Schuyler, he went to the chief of police at Newburgh, told him he had the tires, and wanted to turn them over to him; that the chief told him to keep them till he sent for them; that he had never disturbed the tags, wrappings, or serial marks of the tires; that he had never made any attempt to dispose of them.

We quite agree that a federal judge is not a mere moderator. He has a right to express his own opinion of the facts to the jury. If, however, in addition to doing so, he puts the case argumentatively, he must put both sides, the defendant's as well as the government's theory. Oppenheim v. United States, 241 Fed. 625, 154 C. C. A. 383. In this case the court intervened in the cross-examination of the defendant by the United States Attorney as follows:

"The Court: Where was it you went down the bushes and found these lying in the bushes? Alongside of the track?
"The Witness: Yes, sir.
"The Court: How did Schuyler tell you they got there?
"The Witness: He said he saw them there from the top of a box car.
"The Court: When did he say he had seen them?
"The Witness: He said he saw them that afternoon as he came in the yard.
"The Court: You accepted his statement on that?
"The Witness: Yes, sir.
"The Court: When you took these tires down to Newburgh, why did you understand Schuyler wanted to leave them at the fire house?
"The Witness: Because I didn't want to take them on into Poughkeepsie.
"The Court: What did you say to Schuyler about that?
"The Witness: I told him to leave them in Newburgh somewhere; if he wanted to take the tires further, to get somebody else; I didn't want to take them further, because I wanted to get to work.
"The Court: How far is it from Newburgh to Poughkeepsie?
"The Witness: About 15 miles.
"The Court: But you went on?
"The Witness: Yes; he kept coaxing me, and finally I said, 'All right; I will go there with you.'
"The Court: When you got to Poughkeepsie, Schuyler left you standing on the street?
"The Witness: Yes, sir.
"The Court: How long did you wait there?
"The Witness: I should judge an hour; maybe more; I didn't time myself.
"The Court: Where did you understand Schuyler had gone?
"The Witness: Schuyler said he was going down the street to see if he could find Pitney or some of the detectives.
"The Court: Did he tell you where that office was?
"The Witness: No; he didn't say.
"The Court: Did you look in the telephone book, or make any inquiry as to where the railroad detective's office was?
"The Witness: No.
"The Court: You just sat on the seat?
"The Witness: Yes, that is all; I sat in the car all the time.
"The Court: And then you came back to your home?
"The Witness: Yes.
"The Court: And placed these tires where?
"The Witness: In the garage or chicken coop.
"The Court: How far is this from your house?

"The Witness: Perhaps three or four blocks from where I lived at that time.
"The Court: Why didn't you take them down to your house?
"The Witness: I had no place to put them, unless I put them in the house.
"The Court: You made no effort to sell these tires?
"The Witness: No, sir.
"The Court: When did you begin to get a suspicion that these tires were stolen?
"The Witness: Well, a few days after I put them in the garage; I had not seen Schuyler any more, so I thought I had better advise somebody what to do about them, because I didn't want them to find the tires in my possession without notifying somebody; so with that I went to Newburgh and asked my lawyer what to do, and he advised me to go and tell Chief Brown, which I done.
"The Court: When was it that Schuyler told you he had talked to the call boy?
"The Witness: I think he told me that the day I went to Newburgh.
"The Court: That is, a week after you got the tires?
"The Witness: Oh, no.
"The Court: How long after you got the tires?
"The Witness: Why, I think it was the next day, or day after; it was shortly after I took the tires to his house, he asked me to take them to Newburgh for him.
"The Court: Did you ask him why it was necessary to cart these tires all over Rockland, Ulster, and Orange counties?
"The Witness: I did.
"The Court: What did he say?
"The Witness: He said he wanted to turn them into the detective's office at Poughkeepsie.
"The Court: There is a station at your place, isn't there?
"The Witness: Yes, sir.
"The Court: There is an agent there, isn't there?
"The Witness: Not in the station; no, sir.
"The Court: Isn't there a railroad agent there?
"The Witness: No, sir.
"The Court: No freight agent?
"The Witness: Way down the big office there is.
"The Court: How far is that from Maybrook?
"The Witness: Oh, a mile and a half.
"The Court: Did you suggest to Schuyler that that was the logical place to turn those in?
"The Witness: No; I didn't say anything to him at all.
"The Court: You made no inquiry as to why you should go on to Poughkeepsie, to Newburgh, to deliver those tires, when there was a railroad agent within a mile and a half?"

Though the foregoing indicated what the judge's opinion concededly was, namely, that the defendant had guilty knowledge, it would not be enough to hold the trial unfair because prejudicial to the defendant. But it was followed by a charge which, saying little or nothing about the defendant's theory of innocence, elaborated the government's theory of guilt:

"Finally the train goes into the yard. Some time thereafter, according to the testimony in the case, the brakeman, Schuyler, goes to this defendant and tells him that there are some automobile tires lying in the bushes alongside of the track whereon this long freight train of 80 cars had previously been standing, and with the automobile of the defendant they proceed to this point in the bushes, and there they pick up those tires. Then they take them to Schuyler's house and put them in the cellar of the house. In this operation they ignore, so far as the testimony is concerned, the railroad office, which is approximately a quarter of a mile, perhaps, from where they may pass in

their automobile. It is suggested that they did not want to drive over to the office, because it was difficult. But why, if Schuyler was acting with good purpose in the first instance, should he not have notified the railroad people in the yard at the office, even by walking, that the tires were lying in the bushes, and to send some one to get them, rather than that he should become their conservator or salver, and come into Maybrook, and go to this man, and get his automobile, and then go after the tires, and then, having got the tires, why should they be kept in his house a day or two, and then driven over to Newburgh and from Newburgh to Poughkeepsie, and an attempt made to leave them at the fire house on a Sunday, as I recall the testimony? Those are matters which go to the good faith of this transaction, the good faith of Schuyler and of the defendant. The defendant asks you to say that this is all consistent with innocence and an evidence of his good faith, and the government asks you to draw the inference that it is an inference of bad faith, and shows an intent and a purpose upon the part of both Schuyler and the defendant here to attempt to utilize these tires for their own purposes and for their own uses.

"It is quite true that Schuyler has been tried for stealing the tires, and the jury disagreed. You should eliminate that absolutely from your mind. The question is for you to determine upon this evidence what are the facts in this particular case; and if, for some reason, be that reason what it may, a jury in a previous case has reached a disagreement, it should have absolutely no bearing upon your determination and should be given no consideration by you.

"This case has to be passed upon from the evidence before you and your verdict is to be rendered according to your judgment as to what the facts justify.

"Now, I may say, with reference to the information which this defendant gave to the police department in Newburgh after he had consulted with his attorney, that that need not necessarily acquit him of bad faith and a dishonest purpose, if you find that, prior to his consultation with his attorney and his disclosure to the police department, he had an evil felonious intent. I mean to say that if I steal something, and have the purpose to apply what I steal to my own use, and thereafter I get frightened, or have a revulsion of conscience, or what not, and go and return, and say, 'Here is what I have stolen,' that does not wipe out my original crime. It may be something to appeal to the person who passes judgment upon the transaction, as to what judgment should be pronounced. If the original evil purpose was present, he is not excused, nor is the crime wiped out, by a revulsion of conscience or a desire to get in safety."

It appears plainly that the jury notwithstanding the court's attitude, entertained considerable doubt about the defendant's guilty knowledge:

"The Clerk: Mr. Foreman, have you agreed upon a verdict?

"The Foreman: We have.

"The Clerk: How say you, sir?

"The Foreman: Guilty, with a strong recommendation of clemency.

"The Clerk: Gentlemen of the jury, listen to your verdict as it shall be recorded; you say you find the defendant guilty, and recommend him to the mercy of the court.

"The Foreman: Yes.

"The Court: All right, gentlemen; I shall bear your recommendation in mind when sentencing this defendant. I think there is no doubt of his guilt; but I think the other man who was tried before him was also guilty, and I think it very regrettable that he was not convicted at that time, and I shall bear that in mind in sentencing him.

"Juror No. 9: The jury for some time could not agree. We finally agreed, and we make an appeal to you to be as merciful as possible to this man.

"The Court: Very well.

"Juror No. 9: We earnestly, every one of us, ask you to do so.

"The Court: I shall. The situatiou, gentlemen, as I view this thing, is this: I have no doubt as to this man's guilt; I do not think, however, that

I should sentence him nearly as severely as I could, in view of the fact the other man is out of jail, when he ought to be in jail. And the government, and all of us, know it is a very serious situation with respect to these peculations from railroad companies; they are simply astounding in the amount and character. I shall, however, give this man a very light sentence, in view of all the facts in the case. I will sentence him now."

The sentence of 30 days in the City Prison was a very lenient one, and the defendant was admitted to bail pending appeal in the sum of $2,500; but as we are of opinion that he is entitled to a new trial, the judgment is reversed.

MANTON, Circuit Judge (concurring). I concur with Judge WARD in reversing the conviction of the plaintiff in error, but wish to place the reversal upon an additional ground. It is incumbent upon the government to prove beyond a reasonable doubt that the plaintiff in error had guilty knowledge of the theft of the automobile tires. He was entitled to the protection of the elementary rule of the presumption of innocence and the necessity of proof of his guilt beyond a reasonable doubt. He cannot be convicted upon mere suspicion, nor should a jury be permitted to speculate as to guilty knowledge, in the absence of some evidence indicating such knowledge. The undisputed testimony in the case is consistent with his innocence. What he did in endeavoring to assist Schuyler does not indicate knowledge that the tires were stolen from the railroad company's possession.

I think error was committed in refusing to grant the motion for the direction of an acquittal.

HOUGH, Circuit Judge (dissenting). By one of the majority opinions this conviction is reversed, because the trial judge asked the accused pertinent and skillfully framed questions, and showed in his charge a lack of belief in that gentleman's veracity. I feel obliged still to dissent from that method of disciplining the judiciary, considering that it confounds the difference between legal error and what the reviewing authority does not personally like. Oppenheim v. United States, 241 Fed. at page 630, 154 C. C. A. 383.

Whether the accused had guilty knowledge was for the jury; the reasonable doubt of the criminal law being the jury's doubt, and not that of the court, and, in my opinion, especially not that of an appellate court, which has nothing before it but cold type.

The intimations of the other majority opinion would leave nothing to the jury but certainties; therefore from that also I dissent.

MANUFACTURERS' LIFE INS. CO. v. BRENNAN et al.

(Circuit Court of Appeals, First Circuit. January 21, 1921.)

No. 1426.

1. **Witnesses ⇐211(3)—Testimony of physician as to cause of death held inadmissible.**
   In an action on a life policy, where doctor testified that he attended insured as physician seven or eight times, and during his last sickness, and that he had certified that the cause of death was pulmonary tuberculosis, the court properly excluded the question, "What were the symptoms that you noticed in Mr. B., in order to arrive at the conclusion that he died from tuberculosis?" there being no showing that plaintiffs had waived their rights under Rev. St. Porto Rico, par. 1408, subd. 4, and paragraph 1409, subd. 4, since the physician's testimony would have been grounded in large part on information acquired in attending insured as his patient.
2. **Witnesses ⇐185—Statute as to privilege between physician and patient to be liberally construed.**
   Rev. St. Porto Rico, par. 1408, subd. 4, providing that physicians cannot be examined as to information acquired in attending a patient, is remedial, and is to be given a liberal construction.
3. **Appeal and error ⇐994(2), 995—Credibility and weight of testimony for jury.**
   Credibility and weight of testimony is a matter for the jury, and not an appellate court, to deal with.

Johnson, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Porto Rico; Peter J. Hamilton, Judge.

Action by Sofia Brennan y Grau and others against the Manufacturers' Life Insurance Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

Manuel Rodriguez Serra, of San Juan, Porto Rico, for plaintiff in error.

Asa P. French, of Boston, Mass. (Frank Antonsanti, of San Juan, Porto Rico, on the brief), for defendants in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. The defendants in error (hereafter called plaintiffs) recovered judgment in the District Court of the United States for Porto Rico in an action brought by them as designated beneficiaries upon a life insurance policy, issued upon the life of James F. Brennan. The Insurance Company brought this writ of error, assigning as errors the exclusion of certain evidence offered by it and also the refusal of the District Judge to direct a verdict in its favor.

The principal defense set up by the Insurance Company was that Brennan in his application for insurance in answer to the inquiry whether he had ever had asthma, bronchitis, shortness of breath, coughing or spitting blood, answered, "No;" and also that in answer to the question, "Has there ever been anything to your knowledge or belief, in your condition or family, or personal history, occupation or habits, which renders a risk on your life more than usually hazardous, or

that tends to impair your constitution or to shorten your life?" again answered "No;" when, as is alleged, Brennan was at that time suffering from pulmonary tuberculosis, and had knowledge of his condition.

The application was dated October 31, 1916; the medical examiner's report, November 1, 1916; the policy, November 24, 1916, although it was not delivered until some days later. Brennan died on December 8, 1916. The policy contains the following provision:

"This policy, with the application therefor, constitutes the entire contract, and is based upon statements made by the insured which shall, in the absence of fraud, be deemed representations and not warranties."

Brennan was in his thirty-seventh year. The medical examiner certified that his chest was normal, the respiratory murmur clear and normal on both sides, the respiration at the rate of 17 per minute; that auscultation and percussion of the chest revealed no evidence of present or past disease in either lung or the pleura; that the examiner examined the naked chest and back; that the rate of his pulse was, sitting, 75, standing, 77, good, normal; that from the physical examination the examiner considered the risk first-class. There is no charge of fraud against the medical examiner.

The chief questions raised by the Insurance Company's assignments of error grow out of rulings made by the District Court under Revised Statutes of Porto Rico, pars. 1408, 1409, §§ 40, 41, the relevant portions of which are as follows:

"A person cannot be examined as a witness in the following cases: * * *

"4. A physician or surgeon or the assistant of either of them cannot, without the consent of the patients, be examined in a civil action as to any information acquired in attending the patient, which was necessary to enable the physician or surgeon to prescribe or act for the patient; but this subdivision does not apply in an action between a physician or surgeon and his patients in which the treatment of the patient by the physician or surgeon is in issue: And provided, that a physician or surgeon is competent to testify as to the cause of the death of any person."

Section 41 provides:

"Consent to the giving of such testimony as is mentioned in section forty is conclusively implied in the following cases: * * *

"4. In an action brought by the beneficiary to recover on a policy of life insurance, taken out by the person whose life was insured, a physician or surgeon may, with the consent of the beneficiary, testify as to any information acquired by him in attending the deceased, but must not be compelled to so testify.

"Nothing in this section contained affects the right of the court to admit any of the testimony mentioned in section forty-nine, when no objection is seasonably interposed thereto, or when the court finds, as an inference from proper evidence, that the consent mentioned in that section has been given or implied."

[1] The first assignment is that the court erred in not allowing Dr. Glines to testify at length and fully as to the cause of Brennan's death. Dr. Glines testified that he had been a practicing physician for 13 years, 10 of which have been spent in Porto Rico; that he had seen Brennan familiarly often since 1911, and had attended him as physician seven or eight times, including two or three times during his last sickness; also,

without objection, that he had certified that the cause of Brennan's death was pulmonary tuberculosis.

Counsel for the insurance company then addressed to Dr. Glines as an expert a series of questions intended to bring out the reasons for his opinion that Brennan died of pulmonary tuberculosis. The following will serve as a fair type of these questions:

"Doctor, what were the symptoms that you noticed in Mr. Brennan, in order to arrive at the conclusion that he died from tuberculosis?"

On plaintiff's objection, this question was excluded, and the defendant duly excepted. We think the ruling was right.

Plainly there was no evidence warranting the court in finding or ruling that the beneficiaries had waived their rights under the statute. It is equally plain that, if Dr. Glines had been permitted to answer this question, and, as the assignment of error sets forth, "to testify at the trial at length and fully as to the cause of death of James F. Brennan," he would have grounded his testimony in large part, if not entirely, upon information acquired by him in attending Brennan as his patient, and presumably necessary to enable him to prescribe for that patient.

The defendant's main contention is that the language at the end of section 40, paragraph 4, supra, "And provided, that a physician or surgeon is competent to testify as to the cause of the death of any person," is to be construed as admitting evidence, not only of the cause of death, but of all the reasons which led the attending physician to the conclusion stated.

To sustain this contention would be to disregard and to nullify the necessary import of section 41, paragraph 4, supra. The two provisions must be construed together. The later provision, to the effect that in suits like this, brought upon a life insurance policy, the attending physician "may with the consent of the beneficiary testify as to any information acquired by him in attending the deceased, but must not be compelled to so testify," would be nullified if the language quoted above, at the end of section 40, paragraph 4, is to be given the broad construction now contended for. If Dr. Glines was, under section 40, paragraph 4, competent to testify as to the reasons which led him to believe that Brennan died of tuberculosis. including information obtained from Brennan's statements, or from his examination of Brennan's person, the right of waiver contemplated by section 41, paragraph 4, as accruing to the beneficiaries, would be utterly destroyed; they would have no right left to waive.

[2] A brief consideration of the history and construction of similar legislation in the United States confirms us in the view that no such broad construction can be given to the proviso at the end of section 40, paragraph 4. Statutes similar or analogous to the above quoted statute of Porto Rico have, beginning with New York in 1828, been enacted in many of our states. The history of this innovation upon the common law of evidence, with a reference to many of the statutes, is set forth in 4 Wigmore's Evidence, §§ 2380–2391. Mr. Wigmore criticizes the legislative policy underlying this exception to the common law rules of admitting evidence. But the exception is firmly established. Moreover, the statute is held a remedial statute and hence to be given

a liberal construction. Compare Buffalo, etc., Co. v. Knight Templars', etc., Association, 126 N. Y. 450, 455, 27 N. E. 942, 943 (22 Am. St. Rep. 839), where Judge Andrews said as to the analogous statute in New York:

"The statute should have a broad and liberal construction to carry out its policy. By reasonable construction it excludes a physician from giving testimony in a judicial proceeding in any form, whether by affidavit or oral examination, involving a disclosure of confidential information acquired in attending a patient, unless the seal of secrecy is removed by the patient himself."

See, also, Edington v. Insurance Co., 67 N. Y. 185, where the policy of the statute was discussed at considerable length. It was there held that the statute, "being remedial, should receive a liberal interpretation, and not be restricted by any technical rule."

But when these statutes, intended for the benefit of the patient, were, by the death of the patient under suspicious circumstances, sought to be invoked to prevent the disclosure of evidence perhaps proving crime, embarrassing questions were presented. Literally interpreted and broadly applied, the physician, attending a person dying of poison administered by a third party, could not be permitted to testify to facts indicating the cause of death. This problem was presented to the court in the Carlyle Harris Case, 136 N. Y. 423, 448, 33 N. E. 65, where it was invoked in the trial of a defendant, charged with murder by poison. The court there held, following Pierson v. People, 79 N. Y. 424, 432, 35 Am. Rep. 524, that the statute should not be so construed as to prevent a physician attending the deceased in his last illness to testify to information and circumstances tending to show the commission of crime, or that the death was caused by murder. It is there pointed out that, if the statute were to be construed as contended for in that case by the prisoner's counsel, it would be—

"extremely difficult, if not impossible, in most cases of murder by poison to convict the murderer. Undoubtedly such evidence has been generally received in this class of cases, and it has not been understood among lawyers and judges to be within the prohibition of the statute."

To the same general effect is People v. Lane, 101 Cal. 513, 516, 36 Pac. 16, 17, where the court said:

"The statutory privilege was not conferred to shield a person charged with the murder of another."

The same construction was adopted by the Iowa court in State v. Grimmell, 116 Iowa, 596, 600, 88 N. W. 342. It is there also pointed out that difficult questions have arisen out of the construction of these statutes in cases where it has been sought to introduce the evidence of attending physicians as to the mental capacity of deceased patients in will cases, and in proceedings on policies of insurance, or in prosecutions for killing by poison or by abortion.

Compare Shuman v. Sup. L. K. of H., 110 Iowa, 480, 483, 81 N. W. 717; Winters v. Winters, 102 Iowa, 53, 56, 71 N. W. 184, 63 Am. St. Rep. 428; Denning v. Butcher, 91 Iowa, 425, 59 N. W. 69; Westover v. Insurance Co., 99 N. Y. 57, 1 N. E. 104, 52 Am. Rep. 1; Mor-

ris v. Morris, 119 Ind. 341, 343, 21 N. E. 918; In re Flint, 100 Cal. 391, 34 Pac. 863; Harrison v. Railway Co., 116 Cal. 156, 47 Pac. 1019.

In Olson v. Court of Honor, 100 Minn. 117, 110 N. W. 374, 8 L. R. A. (N. S.) 521, 117 Am. St. Rep. 676, 16 Ann. Cas. 622, the court dealt with the application of a similar statute in an insurance case, where the insured was alleged to have committed suicide while under treatment for insanity. The policy covered cases of unintentional self-destruction, while insane. The Minnesota statute (Gen. St. 1894, § 5662, subd. 4) provided that a regular physician cannot, without the consent of his patient, be examined in a civil case as to any information acquired in attending the patient which was necessary to enable him to prescribe or act for the patient. The insurance company invoked this statute to exclude evidence of the attending physician tending to show that the insured was insane. But the court rejected this construction as unreasonable and unjust. The court said:

"The adjudged cases, however, relevant to this question, are not in entire harmony, due, perhaps, to a difference in the wording of the several statutes construed."

Some of these conflicting authorities are cited in that case.

In Davis v. Supreme Lodge Knights of Honor, 165 N. Y. 159, 58 N. E. 891, the court held that the certificate of an attending physician, filed with the city board of health, as to the cause of death of certain relatives of the insured, is inadmissible under the New York Statute (Code Civ. Proc. § 834) in an action upon a policy of life insurance defended upon the ground of a breach of warranty that such relatives had not died of consumption.

In Buffalo, etc., Co. v. Knights Templar, 126 N. Y. 450, 27 N. E. 942, 22 Am. St. Rep. 839, the court said this statute should have a liberal construction and that—

"By reasonable construction it excludes a physician from giving testimony in a judicial proceeding in any form, whether by affidavit or oral examination, involving a disclosure of confidential information acquired in attending a patient, unless the seal of secrecy is removed by the patient himself."

In civil cases, with few, if any, exceptions, the statute has been construed as protecting the privilege. The Porto Rico statute is in terms limited to civil proceedings.

In Renihan v. Dennin, 103 N. Y. 573, 580, 9 N. E. 320, 322 (57 Am. Rep. 770), the court by Earl, J., said:

"It is probably true that the statute, as we feel obliged to construe it, will work considerable mischief. * * * In actions upon policies of life insurance where the inquiry relates to the health and physical condition of the insured, it will exclude the most reliable and vital evidence which is absolutely needed for the ends of justice. But the remedy is with the Legislature, and not with the courts."

Compare, also, Edington v. Insurance Co., 67 N. Y. supra.

In the light of this brief sketch of analogous legislation and the difficulties arising in its construction, we can have no doubt that the proviso at the end of section 40, paragraph 4, was not intended to open the door to evidence of information acquired by a physician in attending a deceased policy holder.

The Porto Rican statute was obviously intended to be so framed as to avoid the doubts and difficulties encountered by various courts in the United States, in construing and applying earlier analogous enactments, while protecting in all essential particulars the privilege grounded on the confidential relation of physician and patient. Whether perfection in that regard has been attained may well be doubted. But it is enough now to hold, as we do, that, construed in the light of experience elsewhere and in connection with section 41, paragraph 4, the proviso at the end of section 40, paragraph 4, cannot be given the broad scope and meaning required in order to admit Dr. Glines' evidence sought to be elicited by the questions excluded.

It is not necessary on the record before us to undertake to determine the exact meaning to be given to the words "cause of death." Whether "cause of death," as used in the statute, is to be construed as opening the door for the admission of evidence as to the specific disease causing death, or whether it should be more narrowly limited—as, for instance, that the deceased died a natural death, or by poison, or by drowning, or by violence, self-inflicted or by a third party—is not now before this court. The Insurance Company, at least, was not prejudiced by the admission of Dr. Glines' testimony that Brennan died of tuberculosis. Evidence as to his reasons for this opinion was properly excluded.

The other assignments of error may be briefly disposed of as covered nearly, if not quite, by what has already been said.

Error is assigned because the evidence of Dr. Honorio Carrasquillo was on the plaintiff's motion struck out. Dr. Carrasquillo's testimony in effect, was that he was a bacteriologist, employed in laboratory work as an interne in the Presbyterian Hospital in San Juan, where in late August or early September, 1915, Brennan called on him to make an examination of his sputum. Brennan was brought to him by Dr. Hildreth, the medical director of the hospital; but Carrasquillo did not know whether Brennan was or was not a patient of Dr. Hildreth. His evidence tending to show that Brennan's sputum at that time indicated tuberculosis was, after Dr. Hildreth testified that Dr. Carrasquillo was an assistant under his direction, as to any patient coming to the hospital, on the plaintiff's motion struck from the record.

The statute supra covers in terms, not only the attending physician, but the assistant of the attending physician. While the record is possibly somewhat obscure, we think the trial court was correct in holding that the objection to the assistant's testimony had not been waived, and also that when, on Dr. Hildreth's testimony, it plainly appeared that Dr. Carrasquillo was an assistant of Dr. Hildreth, and that Brennan had consulted Dr. Hildreth as a physician, the statute required the exclusion of Dr. Carrasquillo's evidence.

[3] The defendant's contention that the court should have ordered a verdict in its favor is clearly without merit. The issue here grows out of representations, not warranties, as to Brennan's health and knowledge concerning it. On such an issue, only an extraordinary state of the evidence would warrant the court in ordering a verdict. In the present case, the record discloses a sharp conflict as to Brennan's

previous state of health and his knowledge concerning it. His wife and at least two other witnesses gave evidence strongly tending to show that he neither had nor supposed that he had tuberculosis. It was for the jury to deal with the credibility and weight of this testimony.

We have examined the other assignment of error, but find therein no reversible error.

The judgment of the District Court is affirmed, with costs to the defendants in error.

JOHNSON, Circuit Judge (dissenting). I cannot concur in the construction placed upon the statute of Porto Rico, because I think it completely nullifies the plain, unambiguous language of the last provision of paragraph 4 of section 40, and also any conceivable intent which the Legislature may have had in enacting it.

In terms the statute applies only to civil actions, and by it a physician or surgeon is not prohibited from testifying in a criminal case as to any information acquired by him in treating a patient.

The analogous statutes which were construed by the court in Pierson v. People and People v. Harris, cited in the majority opinion, did not in terms apply to civil actions alone, and the court, in them, had before it the question whether, in a criminal action, a physician who had attended the accused could testify from any information received by him while the relation of physician and patient existed, and held that he could.

The Legislature of Porto Rico, having provided that the statute enacted by it should apply only to civil actions, could not have added the last provision of paragraph 4 for the purpose of making a physician or surgeon who had viewed a dead body or performed an autopsy, competent to testify in a civil action, because only the physician or surgeon who had acquired information "in attending the patient which was necessary to enable the physician or surgeon to prescribe or act for the patient" is prohibited from testifying. Harrison v. Sutter Street Railway Co., 116 Cal. 156, 167, 47 Pac. 1019.

Clearly, without the concluding provision of paragraph 4, a physician who had examined a dead body could testify as to information obtained from such examination and state his opinion as to how death was caused, for there could be no relation of physician and patient between him and the dead.

The statute of Porto Rico was evidently copied from section 1881, paragraph 4, of the Code of Civil Procedure of California, after its amendment in 1901 (St. 1901, p. 242), and before its amendment in 1911 (St. 1911, p. 1135), and is practically identical with it, except in the last provision. This, in the California statute, was as follows:

"And provided, that in an action brought under sections 376 and 377 [for death by wrongful act], a physician or surgeon is competent to testify as to the cause of the death of the deceased."

It is evident that the Legislature of Porto Rico, by changing this provision, gave the exception, which would make a physician competent to testify as to the cause of death, careful consideration, and was unwilling to limit it to suits to recover for death by wrongful act, but

intended it to apply to any action where it became material to prove the cause of death of "any person."

If this provision was not necessary to make a physician or surgeon competent to testify in a criminal action, or in a civil action, where the information upon which his testimony was based was obtained by viewing a dead body or performing an autopsy, or in any case where the the relation of physician and patient had not existed, it must have been the legislative intent to make a physician or surgeon competent to testify as to the cause of death of one who was his patient, and whom he attended in his last illness, and the cause of whose death it was his duty to report to the proper health officer.

The language of the provision is easily understood, and if this section stood alone it would not seem to admit of any doubt that it should be construed in accordance with this plain intent. But it must be construed in connection with section 41, enacted at the same time, as a part of the same statute, and effect given, if possible, to every part of each section.

Section 41 was copied bodily from section 1882 of the California statute, and is identical with it in all of its paragraphs. This section of the California statute was enacted in 1901 as an amendment to its statute relating to privileged communications, and the obvious reason for its enactment was that the Supreme Court of that state had held in Flint's Estate, 100 Cal. 391, 395, 34 Pac. 863, and in Harrison v. Sutter Street Railway Co., 116 Cal. 156, 47 Pac. 1019, following the decision of the Supreme Court of New York in Westover v. Ætna Life Insurance Co., 99 N. Y. 56, 1 N. E. 104, 52 Am. Rep. 1, that, when the patient had died, no one, not even a personal representative or heir, could waive the privilege; so that the beneficiary in a life insurance policy, in a suit upon the policy, could not show, by testimony of the physician who attended the insured, what his physical or mental condition was at any time.

Cases had arisen, as in Westover v. Ætna Life Insurance Co., supra, where, in a suit upon a life insurance policy, the company had defended upon the ground that the insured had voluntarily taken his own life, and the beneficiary attempted to show by a physician who had attended the insured that he was insane at the time of self-destruction; but it was held that the privilege "died with the patient," and could not be waived by the beneficiary, and the physician was not allowed to testify.

To prevent this injustice, section 1882 of the California statute was enacted. It was evidently adopted by the Legislature of Porto Rico for the same purpose, and could not have been intended to limit the broad, unqualified provision of the preceding section.

Very little assistance is afforded by decisions of the courts of New York or other states which have an analogous statute, because in none of them is there a provison like that in the statute of Porto Rico, which makes the physician or surgeon competent to testify as to the cause of death without any qualification.

If paragraph 4 of section 41 stood alone, it might be construed to prohibit a physician or surgeon who attended the insured in his last illness from testifying as to the cause of his death from any information

received in his treatment of him; but, when considered in connection with paragraph 4 of section 40, this construction would, I think, completely nullify the only purpose for which that provision could have been enacted.

To construe paragraph 4 of section 40 so narrowly as to restrict a physician, who had attended in his last illness a patient who had died from disease, to testifying as to the cause of death, solely from information received from the appearance of his dead body, uninfluenced by any symptom he had observed in the patient while living, would amount to its practical nullification, for it would require of the physician the impossible mental operation of separating all knowledge gained from symptoms observed in the patient while living from that which he acquired from the appearance of his dead body, before reaching a conclusion.

If paragraph 4, section 40, is construed in accordance with the plain, ordinary meaning of its language, to mean that a physician or surgeon is competent to testify as to the cause of death, whether he attended the deceased in his life time or not, and paragraph 4 of section 41 is construed as conferring upon the beneficiary the right to waive the privilege, so that a physician may testify as to the physical or mental condition of the insured at any time, but that his consent is not necessary to make the physician competent to testify as to the cause of death, effect can be given to both provisions. I think this is the construction that should be placed upon them, and that Dr. Glines not only was competent to testify as to the cause of death of Brennan, the insured, but also to give his reasons for the conclusion which he reached. Obviously he must have reached his conclusion from observation of symptoms of the disease which he testified caused Brennan's death, during the two or three days in which he attended him in his last illness and in his previous treatment of him; and having testified, without objection, that Brennan died from pulmonary tuberculosis, and what were the usual and most common symptoms of that disease, I think it was reversible error not to have allowed him to answer the question:

"Doctor, what were the symptoms that you noticed in Mr. Brennan, in order to arrive at the conclusion that he died from tuberculosis?"

In re GRAVES. In re LAYNE. In re CROWLEY.

(Circuit Court of Appeals, First Circuit. December 21, 1920.)

1. Courts ⇐405(3)—Appeal authorized to Circuit Court of Appeals in all cases in which direct appeal to Supreme Court not authorized.

Act March 3, 1891, §§ 5, 6 (Judicial Code, §§ 238, 128 [Comp. St. §§ 1215, 1120]), provides for an appeal to the Circuit Courts of Appeals from final decisions of the District Courts in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court.

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2. **Habeas corpus ⇐113(3)—Appeal is matter of right, and may not be denied by court or Circuit Judge.**
Under Rev. St. § 763, and section 764, as amended by Act March 3, 1885, relative to appeals in habeas corpus cases, and Judicial Code, §§ 128, 238 (Comp. St. §§ 1120, 1215), relative to appeals to the Circuit Courts of Appeals, an appeal from an order dismissing a petition for a writ of habeas corpus is a matter of right, and may not be denied by the District Court or by a Circuit Judge on application for leave to appeal, under Judicial Code, § 132 (Comp. St. § 1124).

3. **Habeas corpus ⇐113(1)—Reviewable by appeal, and not by writ of error.**
Habeas corpus is a civil proceeding, reviewable by appeal, and not by writ of error.

Habeas corpus proceedings by one Graves, one Layne, and James D. Crowley. The petitions were dismissed (268 Fed. 1016; 269 Fed. 463; 269 Fed. 461), and petitioners apply, under section 123 of the Judicial Code to a judge of the Circuit Court of Appeals for leave to appeal. Appeals allowed.

Frederick W. Mansfield, of Boston, Mass., for petitioner Graves.

Thomas D. Lavelle, of Boston, Mass., for petitioners Crowley and Layne.

Maynard C. Teall, of Boston, Mass., for respondent Keating.

BINGHAM, Circuit Judge. These proceedings are petitions for writs of habeas corpus, brought in the District Court for the District of Massachusetts, which were heard on their merits, and in each of which an order of dismissal was entered. At the time of entering the order the judge of the District Court stated to the petitioners that he would not allow an appeal in any of the cases, either to the United States Supreme Court or to the Circuit Court of Appeals, as he regarded the petitions as without merit. He at the same time stated that he would withhold his order remanding the petitioners for a limited time, during which, if the petitioners saw fit, they might apply to a Justice of the Supreme Court or a Circuit Judge for permission to appeal.

Acting on these suggestions, application was made to me under section 132 of the Judicial Code (Comp. St. § 1124), which reads as follows:

"Sec. 132. Any judge of a Circuit Court of Appeals, in respect of cases brought or to be brought before that court, shall have the same powers and duties as to allowances of appeals and writs of error, and the conditions of such allowances, as by law belong to the justices or judges in respect of other courts of the United States, respectively."

The question presented is whether a judge of the District Court or a Circuit Judge to whom application is made under section 132 for the allowance of an appeal can decline to allow it if, in his judgment, the petition for the writ is without merit.

In Ex parte Thomas Kaine, 3 Blatchf. 1, 5, Fed. Cas. No. 7,597 (C. C. 2d Cir.), Judge Nelson, in discussing the law relating to writs of habeas corpus, said:

"But * * * the proceedings upon this writ in the federal courts are not governed by the laws and regulations of the states on the subject, but by the common law of England, as it stood at the adoption of the Constitution, subject to such alterations as Congress may see fit to prescribe (Ex parte Watkins, 3 Pet. 193; Ex parte Randolph, 2 Brock C. C. R. 447); that, according to that system of laws, so guarded is it in favor of the liberty of the subject, the decision of one court or magistrate, upon the return to the writ, refusing to discharge the prisoner, is no bar to the issuing of a second or third or more writs, by any other court or magistrate having jurisdiction of the case; and that such court or magistrate may remand or discharge the prisoner, in the exercise of an independent judgment upon the same matters."

In Ex parte Cuddy, 40 Fed. 62, 65, Mr. Justice Field, sitting in the Circuit Court for the Southern District of California, said:

"The writ of habeas corpus, it is true, is the writ of freedom, and is so highly esteemed that by the common law of England applications can be made for its issue by one illegally restrained of his liberty to every justice of the kingdom having the right to grant such writs. No appeal or writ of error was allowed there from a judgment refusing a writ of habeas corpus; nor, indeed, could there have been any occasion for such an appeal or writ of error, as a renewed application could be made to every other justice of the realm. The doctrine of res judicata was not held applicable to a decision of one court or justice thereon; the entire judicial power of the country could thus be exhausted. Ex parte Kaine, 3 Blatchf. 5, and cases there cited. The same doctrine formerly prevailed in the several states of the Union, and, in the absence of statutory provisions, is the doctrine prevailing now. In many instances great abuses have attended this privilege, which have led in some of the states to legislation on the subject."

As early as August, 1842, Congress passed an act providing for the allowance of appeals in habeas corpus proceedings. Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 816. This statute was amended from time to time, and, as amended, on the adoption of the Revised Statutes of the United States in 1878, permitted appeals in such proceedings in the following cases:

"Sec. 763. From the final decision of any court, justice, or judge inferior to the Circuit Court, upon an application for a writ of habeas corpus or upon such writ when issued, an appeal may be taken to the Circuit Court for the district in which the cause is heard:

"1. In the case of any person alleged to be restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States.

"2. In the case of any prisoner who, being a subject or citizen of a foreign state, and domiciled therein, is committed or confined, or in the custody by or under the authority or law of the United States, or of any state, or process founded thereon, for or on account of any act done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, order, or sanction of any foreign state or sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof.

"Sec. 764. From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the last clause of the preceding section."

March 3, 1885, section 764 was amended to read as follows (23 Stat. 437):

"From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the preceding section."

By the act of March 3, 1891 (26 Stat. 826), Circuit Courts of Appeals were established, and by section 4 of that act (Comp. St. § 1646)

the appellate jurisdiction of the then existing Circuit Courts was taken away, and all appeals from the District or Circuit Courts were required to be taken to the Supreme Court and the Circuit Courts of Appeals in the manner provided in sections 5 and 6 of the act.

Section 5 of the act of 1891, as found in the Judicial Code (Comp. St. § 1215), reads as follows:

"Sec. 238. Appeals and writs of error may be taken from the District Courts, including the United States District Court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; from the final sentences and decrees in prize causes; in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority is drawn in question; and in any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States."

Section 6 of the act of 1891, as found in the Judicial Code (Comp. St. § 1120), reads as follows:

"Sec. 128. The Circuit Courts of Appeals shall exercise appellate jurisdiction to review by appeal or writ of error final decisions in the District Courts, including the United States District Court for Hawaii, in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court, as provided in section two hundred and thirty-eight, unless otherwise provided by law; and, except as provided in sections two hundred and thirty-nine and two hundred and forty, the judgments and decrees of the Circuit Courts of Appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different states; also in all cases arising under the patent laws, under the copyright laws, under the revenue laws, and under the criminal laws, and in admiralty cases."

[1] It thus appears that the act of 1891 preserved the right to a direct appeal to the Supreme Court from the District Courts in cases in which the construction or application of the Constitution, or in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority, was drawn in question, and provided for an appeal from the final decisions of the District Courts to the Circuit Courts of Appeals in all cases other than those in which appeals and writs of error may be taken direct to the Supreme Court. See Horn v. Mitchell, 243 U. S. 247, 250, 37 Sup. Ct. 293, 61 L. Ed. 700; Fisher v. Baker, 203 U. S. 174, 27 Sup. Ct. 135, 51 L. Ed. 142, 7 Ann. Cas. 1018.

[2] The question remains whether the right of appeal given by the foregoing statutes is absolute in case a petition for appeal, assignments of error, and a suitable bond are presented and filed within the time provided by law, or whether, notwithstanding these requirements are complied with, the court in which the petition is heard and final judgment entered may, in its discretion, decline to allow an appeal.

Judge Sawyer, sitting in the Circuit Court for the District of California, in passing upon this question as applied to section 764 of the Revised Statutes as amended by the act of March 3, 1885, held that the right of appeal to the Supreme Court of the United States in habeas

corpus cases was absolute, and not dependent upon the discretion of the judge to allow or refuse the appeal. In re Sun Hung (C. C.) 24 Fed. 723. This matter has been also considered in the Second and Third Circuits, both as applied to section 764 of the Revised Statutes as amended by the act of March 3, 1885, and to the act of 1891, and the conclusion there reached was that the appeal given is an absolute statutory right. In re Marmo (D. C.) 138 Fed. 201.

In the case of In re Storti (C. C.) 109 Fed. 107, decided in this circuit in 1889, it appeared that the petitioner had filed a previous application for a writ of habeas corpus, that it had been denied, that an appeal had been allowed to the Supreme Court, and that it was pending there at the time the second petition for a writ of habeas corpus was presented. The second petition was denied for want of jurisdiction, and an application for an appeal to the Supreme Court was refused on the ground that it was without merit. This was done on the authority of a decision in the Circuit Court for the Southern District of California. In re Durrant, 84 Fed. 315, 317. Subsequently an application was made to Mr. Justice Gray, and the appeal was allowed. Whether the allowance was on the ground that the right of appeal was absolute, or because the appeal, in the judgment of that justice, was meritorious, is conjectural, as no reason was given.

In the Durrant Case an application for a writ of habeas corpus was dismissed in the lower court, and the judgment of dismissal was afterward affirmed by the Supreme Court of the United States. After the judgment of affirmance was entered a second application for a writ of habeas corpus was made in the Circuit Court, an order of dismissal was entered, and the judge, in his discretion, refused to allow an appeal to the Supreme Court, for the reason that the only ground for the application was an alleged irregularity of the state court in fixing a date for the petitioner's execution, and the only result would be to obstruct the execution of state laws.

In the case of McCourt v. Singers-Bigger, 150 Fed. 102, 80 C. C. A. 56, the Circuit Court for the District of Colorado entered a decree against the defendants, who appealed and gave a supersedeas bond, which was approved. The judge, however, ruled that the bond should operate as a supersedeas to stay the execution only of a part of the decree, and decreed the payment to the complainant of $24,931 out of moneys in the court, notwithstanding the appeal bond. The appellants applied to the Court of Appeals for an order restraining this payment. Judge Sanborn, speaking for the Court of Appeals for the Eighth Circuit, said:

"An appeal is a matter of right. Its allowance does not rest in the discretion of the court or judge. It may be lawfully denied only in cases in which no appeal whatever is permitted by the law. The Douro, 3 Wall. 564, 565, 18 L. Ed. 168. * * * A supersedeas, like an appeal, is a matter of right, and its allowance does not rest in the discretion of court or judge. 'It follows, as a matter of law, from a compliance by the appellant with the provisions of the act of Congress in that behalf.' Goddard v. Ordway, 94 U. S. 672, 24 L. Ed. 237; 1 U. S. Comp. St. 1901, pp. 712, 714, 716, §§ 1000, 1007, 1012. Section 1007, which provides that the defeated party may obtain the supersedeas and may give the security required by law, confers upon him the right so to do, and leaves no lawful power in the judge to refuse or dis-

regard the supersedeas when the case is appealable, the required security is given, and the other provisions of the statute in this regard are complied with. Section 1000, which directs that the justice or judge signing a citation shall take good and sufficient security that the plaintiff in error or appellant 'shall answer all damages and costs where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas, as aforesaid,' imposes upon the justice or judge the duty to take adequate security, but it leaves to the defeated litigant the option to give such security for damages and costs, and in that way to obtain a supersedeas, or to give security for costs only, and thus to permit the judgment or decree to be executed immediately. The cases in which the writ or the appeal, as the case may be, is a supersedeas and stays execution, are determined by the provisions of the acts of Congress, and not by the opinion or discretion of the judge or justice. His only function is to determine whether or not the security offered is good and sufficient. If it is, it is his duty to take it, and upon his acceptance of it the execution of the judgment or decree is stayed. Where adequate security for damages and costs is presented in the time and manner prescribed by the statutes, the duty of the court to accept it is plain and imperative, and the law itself works the supersedeas."

In The Douro, 3 Wall. 564, 18 L. Ed. 168, Chief Justice Chase, delivering the opinion of the court, said:

"We cannot approve the conduct of the counsel who advised this appeal. An appeal is a matter of right, and, if prayed, must be allowed, but should never be prayed without some expectation of reversal. We impose penalties when writs of error merely for delay are sued out, in cases of judgments at law for damages; and if the rule were applicable to the case before us we should apply it."

In United States v. Adams, 6 Wall. 101, 18 L. Ed. 792, the court had under consideration the fifth section of the act of March 3, 1863, with reference to appeals from the Court of Claims, in which it was provided that—

"Either party may appeal to the Supreme Court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court wherein the amount in controversy exceeds three thousand dollars, under such regulations as said Supreme Court may direct: Provided, that such appeal shall be taken within ninety days after the rendition of such judgment."

In considering this statute Mr. Justice Miller said:

"This language implies that taking an appeal is a matter of right, and is something which the party as distinguished from court may do. When the court has rendered its judgment 'either party may appeal'; that is, has the right to appeal, and may exercise that right by his own volition. The court cannot prevent it, nor is the right dependent upon any judicial discretion."

In Simpson v. First National Bank, 129 Fed. 257, 259, 63 C. C. A. 371, 373 (8th Circuit), Sanborn, Circuit Judge, speaking for the Court of Appeals, said:

"The right to appeal is an absolute right granted to the defeated party by the acts of Congress. No court or judge has any jurisdiction or power to condition the allowance of an appeal upon his consideration or determination of the question whether or not the applicant presents alleged errors which form reasonable grounds for the review of the decision below. That question is reserved for the consideration of the appellate court exclusively. The petitioner has the same right to the allowance of his appeal, in the absence of error or of the appearance of it, as when he presents the most conclusive reason for the belief that the decision against him was erroneous. The only question for the consideration of the court or of the judge to whom an appli-

cation for an appeal is made is the sufficiency of the security offered for the costs and damages, or for the costs alone; and if the petitioner presents satisfactory security, and prays an appeal in accordance with the statute and the rules of the courts, the duty of the court or judge to whom he presents his application is imperative to allow it. Brown v. McConnell, 124 U. S. 489, 490, 8 Sup. Ct. 559, 31 L. Ed. 495; Pullman's Palace Car Co. v. Central Transp. Co. (C. C.) 71 Fed. 809."

See, also, Randall Co. v. Foglesong Mach. Co. (C. C. A. 6th Circuit) 200 Fed. 741, 742, 119 C. C. A. 185; Southern Building & Loan Ass'n v. Carey (C. C. 1902) 117 Fed. 325, 326.

No decision of the Supreme Court or of a Circuit Court of Appeals has come to my attention in which it has been held that where the right of review in a civil cause is by appeal its allowance is subject to the discretion of the judge or court from which the appeal is taken.

[3] Habeas corpus is a civil proceeding, reviewable by appeal, and not by writ of error. Fisher v. Baker, 203 U. S. 174, 181, 182, 27 Sup. Ct. 135, 51 L. Ed. 142, 7 Ann. Cas. 1018.

If the allowance of an appeal in civil proceedings, where only property or contract rights are involved, is not subject to the discretion of the court or judge from whose decision the appeal is taken, as shown in the foregoing cases, it would seem that it could not reasonably be said that the allowance of an appeal in a habeas corpus case, where personal liberty is at stake, is subject to the discretion of the court, the right of appeal in both cases being given by the same statutory provisions. If in habeas corpus cases the right of appeal may be open to abuses, and discretionary authority vested in the court called upon to allow an appeal might in some instances be beneficial, the same would be true of the right of appeal in cases involving property rights. But in either class of cases it might, on the other hand, be said that if the right were discretionary with the court the resultant harm might be greater than the benefit.

The alleged abuse of the right of appeal in habeas corpus proceedings has been under discussion at various times in the federal courts, and must long before now have come to the attention of Congress; but down to the present time that body has manifested no disposition to limit the right of appeal in such cases except where "the detention complained of is by virtue of process issued out of a State court," in which case "no appeal to the Supreme Court shall be allowed unless the United States court by which the final decision was rendered or a justice of the Supreme Court shall be of opinion that there exists probable cause for an appeal" (Act of March 10, 1908, 35 Stat. c. 76 [Comp. St. § 1293]), and until Congress takes such action the courts should enforce the statutes as they stand without undertaking to limit them by judicial construction.

The act of March 10, 1908, has no application to these cases, as the petitioners are not detained by virtue of process issued out of a state court and the appeals sought are not to the Supreme Court of the United States.

The appeals in these cases will be allowed, upon the filing of petitions, assignments of error, and suitable bonds.[1]

[1] The appeals were abandoned after allowance.

SRERE et al. v. GOTTESMAN et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 38.

Judgment ⇐622(2)—Bars second action, although different evidence is relied on.

Where defendants, in an action for the price of a commodity sold and delivered under a continuing contract, pleaded a counterclaim for damages for an alleged anticipatory breach by refusal of plaintiffs to make further deliveries, an adverse judgment on such counterclaim *held* a bar to a second action by the purchaser on the same cause of action, based on different evidence to establish the breach, but which might have been produced in the first action.

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

Action at law by Alfred A. Srere and another, partners, etc., against Mendel Gottesman and another, partners, etc. Judgment for defendants, and plaintiffs bring error. Affirmed.

For opinion below, see 254 Fed. 217.

Holmes, Rogers & Carpenter, of New York City (C. P. Rogers and Vincente K. Smith, both of New York City, of counsel), for plaintiffs in error.

Leventritt, Cook, Nathan & Lehman, of New York City (H. Nathan and I. Howard Lehman, both of New York City, of counsel), for defendants in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Srere Bros. & Co. seek to recover damages in this action in the sum of $200,000 because of the refusal of Mendel Gottesman & Son to make deliveries of sulphite pulp in the year 1917 under a contract beginning April 15, 1915, and ending December 31, 1917. They rely particularly on a letter dated February 3, 1916, reading as follows:

"New York, February 3, 1916.

"Registered.

"Messrs. Srere Bros. & Co., Franklin, Ohio—Gentlemen: We have repeatedly written you within the last few months regarding your account, which is in a deplorably overdue condition. We now wish to serve notice on you that, unless settlement is in our hand not later than February 8th, we will cancel the balance of your contract in accordance with clause 10.

"Yours very truly, M. Gottesman & Son,

"Per D. S. Gottesman."

The defense is that a judgment in favor of M. Gottesman & Son in a prior action instituted May 22, 1916, wherein they were plaintiffs and Srere Bros. & Co. were defendants is res adjudicata, estopping Srere Bros. & Co. from maintaining this action. In that action M. Gottesman & Son sued Srere Bros. & Co. for moneys claimed to be due them under the contract upon a settlement of disputes between September 27 and December 31, 1916.

July 18, 1916, Srere Bros. & Co. filed an answer denying the allegations of the complaint as to their own indebtedness and pleading a counterclaim for damages in the sum of $200,000 on the ground that M. Gottesman & Son had in the month of October, 1915, wrongfully declared the contract terminated and had refused to perform it further. July 25, 1916, M. Gottesman & Son filed a replication denying each and every allegation of the counterclaim.

September 13, 1916, Srere Bros. & Co. filed a bill of particulars of their counterclaim in the form of correspondence between September 28, 1915, and January 18, 1916, and not including the letter of February 3, 1916. Srere Bros. & Co. treated the refusal set up in their counterclaim in the first action, the wrongful cancellation of the contract by M. Gottesman & Son, as an anticipatory breach of an executory contract or contracts entitling them to a present recovery for all damages down to the date of complete performance. This was quite proper under Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953. The counterclaim was never withdrawn.

Judgment was entered on the verdict of the jury in the first action in favor of M. Gottesman & Son for a part of the amount claimed by them to be due from Srere Bros. & Co. in 1915, nothing being allowed on their counterclaim. In the present case, both parties having moved for the direction of a verdict, Judge Learned Hand directed judgment in favor of the defendants.

Srere Bros. & Co. contend that because their counterclaim set up a wrongful cancellation as of October, 1915, and the evidence contained in their bill of particulars referred to transaction in 1915, and particularly because the letter of February 3, 1916, now relied on, was not included in it, they have, notwithstanding they were defeated on their counterclaim, a right to sue for damages, and that the judgment in the first action is not res adjudicata. But the counterclaim in the first action and the claim in the present action are for exactly the same thing, viz. damages sustained by Srere Bros. & Co. because of M. Gottesman & Son's refusal to carry out the contract. They cannot, having the letter of February 3, 1916, in their hands, restrict their counterclaim to October, 1915, and subsequently assert it as of February, 1916. They could have proved in the original action everything known to them in support of their counterclaim, and are estopped not only as to what they did prove, but as to what they could have proved. Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; United States v. California Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; Watts v. Weston, 238 Fed. 149, 151 C. C. A. 225; Lorillard v. Clyde, 122 N. Y. 41, 25 N. E. 292, 19 Am. St. Rep. 470.

We are not required to determine whether the letter of February 3, 1916, now relied on, was or was not an effective cancellation of the contract, because the judgment in favor of M. Gottesman & Son is an absolute adjudication that they did not refuse to perform the contract, and that Srere Bros. & Co. have sustained no damages.

The judgment is affirmed.

OWENS v. BREITUNG.

(Circuit Court of Appeals, Second Circuit. December 8, 1920.)

No. 6.

1. **Shipping ⟸152—Shipper may recover prepaid freight for nondelivery.**
If the goods shipped are not delivered, no freight is earned, and the shipper may recover the freight, if it was prepaid.

2. **Shipping ⟸152—Carrier held to have rendered carriage after capture impossible.**
On a libel to recover prepaid freight because of the shipper's failure to deliver the cargo at the port of destination after capture of the vessel, where libelant had voluntarily accepted the cargo at the port in which the captured vessel was taken, and had sold it there for the full price at destination, thereby preventing the carrier from keeping his contract, if he had been able to do so, there can be no recovery of the freight.

3. **Shipping ⟸146—Carrier held entitled to full freight after capture.**
A shipowner, who was prevented from keeping his contract of carriage after capture of the ship by the shipper's sale of the cargo at the port of capture, is entitled to retain the entire freight prepaid for the voyage, not merely freight pro rata itineris.

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

Libel by Tom B. Owens, trading as Tom B. Owens & Co., against Edward N. Breitung. Decree for respondent, and libelant appeals. Affirmed.

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

Katz & Sommerich, of New York City (Marvell C. Katz and O. C. Sommerich, both of New York City, and Edwin M. Borchard, of New Haven, Conn., of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. [1] The libelant's case is quite without equity. Concededly the general rule in this country is that, if goods are not delivered, no freight is earned, and the shipper may recover the same, if prepaid. National Steam Navigation Co. v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563.

[2] In the present case it was known to all concerned before the voyage began that, though the steamer was to be seized as enemy property, there would be no condemnation of the cargo, which was to be bought or forwarded to destination by the seizing government. Before the voyage to Rotterdam was completed, the steamer was seized by a French cruiser and brought into the port of Brest. There the libelant voluntarily accepted the cargo and sold it to the French government for the full price he would have received, had it been delivered by the steamer at Rotterdam and from there forwarded to Bremen, which price included the prepaid freight. The sum and substance of the mat-

ter is that the libelant agreed to substitute the port of Brest for the port of Rotterdam, and by so doing made it impossible for the respondent to deliver at Rotterdam, as the bill of lading entitled him to do by transshipment, if the steamer for any cause were prevented from proceeding in the ordinary course of her voyage.

[3] The only debatable question is whether the respondent was entitled to retain anything more than freight pro rata itineris; but upon all the facts in the case we think he was rightly awarded full freight. Carver on Carriage of Freight by Sea, § 307. Judge Hand's opinion will be found below.

The decree is affirmed.

Opinion of Learned Hand, District Judge.

This is a libel in personam for the recovery of freight paid in advance, under the following circumstances:

On December 9, 1914, the libelant entered into a contract with E. V. Novelly & Co., New York, acting on behalf of the respondent, by which Novelly & Co. agreed to tender the steamer Dacia, then the Martha and under the German flag, but to be changed to American registry, for the shipment of 11,000 bales of cotton from Galveston, Tex., to Bremen, Germany. The steamer was to be tendered at Galveston in the month of December, 1914, and was guaranteed to sail on or before January 15, 1915. It was provided that the vessel need not be insured with the United States government as to war risk, except for the excess of $750,000 for which the United States had already quoted war risk on the cargo. The freight to be paid was 3 cents a pound.

The Dacia started loading about January 7, 1915, and by the 10th or 11th had lifted 4,000 of the 11,000 bales. Meanwhile, however, difficulties had arisen in connection with the cargo's war risk insurance, because the British government had indicated a purpose not to permit her transfer, as a German ship, to neutral registry pending the war. On the 10th or 11th the loading was stopped, and on the 16th one Parker, assistant director of the War Risk Bureau, wired to Lamar, the libelant's agent, that the British government had decided not to allow the Dacia to go either to Rotterdam or Bremen, and would doubtless seize the ship, though it would protect the owner of the cotton against loss. Upon this news, representatives of both parties had an interview in New York on the 17th, at which it was agreed that the port of delivery should be changed from Bremen to Rotterdam and the freight from $3 to $2.90 per 100 pounds, the respondent declining to release the libelant from the contract and insisting upon making the voyage. He threatened to libel so much of the cotton as had already been laden for the whole freight, unless these terms were accepted. The loading then proceeded, and a bill of lading in the usual form was delivered to the libelant on January 22d; the cargo having been meanwhile insured on January 21st.

On that day the British ambassador wired the respondent's agents that the British government was prepared to arrange for the transfer of cotton at Rotterdam, loading and unloading at their expense, so as to guarantee the owners of the cargo, if consisting solely of cotton, against loss, but that the question of the transfer of flag must be tried out before a prize court. He asked what kind of guarantee the respondent would give if the Dacia was released as requested. The ship refused to sail before the payment of freight, which was made on the 1st day of February. On February 2d the Secretary of State wrote to the libelant, saying that he was laying his (the libelant's) preference regarding the disposition of the cargo before the British ambassador, but what that preference was does not appear. On the same day the libelant's agent wrote to his lawyer, saying that it did not make much difference to what English port the Dacia proceeded, as the cargo was quite content to let England select the port, if that government so desired.

The Dacia was seized by a French cruiser on February 27th off the coast of France and was taken to Brest as prize. Her crew were put ashore and sent back to America, and she was later condemned by a French court and sold.

On March 3d, after news of the capture had been confirmed, the libelant's agent wrote to the War Risk Insurance Bureau that they were prepared to let France have the cargo at the Bremen price without prize court proceedings, because they especially wished to avoid the delay, "and we prefer that the cargo be not forwarded at the expense of the War Risk Bureau at Rotterdam, because we would have to provide transportation and pay freight from Rotterdam to Bremen. Of course, we know you have the right so to forward the cargo, if you elect to do so. If it went forward, we would also have to pay damages for late sailing from United States."

Apparently in answer to this, the Secretary of State wired the libelant that he was inquiring of the British government regarding the disposition of the cargo. On March 5th the respondent telegraphed the Secretary of State, asking him to request the French government to release the Dacia on bond, the prize proceedings to continue, but, if France meant to detain the cargo he could see no objection to its being undelivered at France's expense and allowing the Dacia to return direct home.

On the same day the libelant wrote again to the War Risk Insurance, saying: "We at your request some time ago advised State Department that we preferred and would accept from England Bremen sale contract price, and not request forwarding the cargo, and having made all our arrangements accordingly we would be seriously embarrassed if the cargo were not forwarded to destination."

On the 8th the Secretary of State wired the respondent that the French government was not disposed to examine closely the possibility of enemy ownership of cargo, and that probably the shipper would be given a chance of sending the cargo to destination or receiving payment in France, and asked whether, in view of the above, the respondent wished his request transmitted to the French government that the Dacia be released in bond and be allowed to return to the United States. On the 9th the respondent said that he did wish his request transmitted, but no answer arrived till April 7th, saying that it was a matter for the prize court. Later, on April 22d, came a categorical refusal.

On March 8th, the War Risk Bureau wired the libelant's agent and wrote the libelant that the French government would follow the understanding of the British government and either purchase or forward the cargo. The Secretary of State on March 10th advised the French government that the cargo was willing to accept the offer of purchase at the full Bremen price, to which the French government assented before the 13th. The sale was later completed, the bills of lading, invoices and the insurance policy being all turned over by the Guaranty Trust Company, which had advanced money on the same.

The suit was brought on the theory that the voyage was not completed, the freight was never earned, and that it might therefore be recovered in accordance with the well-established rule under the American and continental authorities.

The libel does not very definitely declare the theory of law upon which it rests, but to be within the admiralty jurisdiction of this court I suppose it will hardly be contended that it can depend upon anything else than the breach of the contract of December 9, 1914, and of the bill of lading. The respondent promised to carry the cotton to Rotterdam and failed to do so, but this was not a breach, because the fifth exception in the bill of lading excused performance upon capture. The case might, therefore, be thought to depend upon whether this excuse went further than a mere suspension, and whether the refusal amounted to a final termination of the respondent's obligations. However, he does not sue for breach of the obligation to complete the voyage, and indeed alleges it was necessarily at an end by the capture. Clearly he must so allege, since by his sale of the cargo he terminated the respondent's opportunity, reserved under the third exception of the bill of lading, to transship and to complete the voyage, if it remained practically open for him to do so. His claim rests upon the assumption that the capture completely dissolved the contract and that his right to recover the whole freight arose at once.

Whether that right arose from any breach of the maritime contracts between the parties might indeed have more than an academic interest, had the respondent raised the question of jurisdiction; but after U. S. v. James W. Elwell & Co., 250 Fed. 939, 163 C. C. A. 189, that question is not important, where there is independent jurisdiction over the subject-matter and the parties are content to allow the cause to proceed. It is true that there is here no allegation of diverse citizenship, but only of residence, yet the record contains evidence that the parties are citizens of different states and it would not, therefore, be necessary to dismiss the libel, whether it be at law on a quantum meruit for money paid, or in the admiralty on a maritime obligation. Possibly it is not necessary, therefore, to decide which of the two this should be deemed, except so far as to observe that to say that the law implies a stipulation in the contract to repay the freight is to state a fiction, and to disregard the rule in its origin. Watson v. Duykinck, 3 Johns. (N. Y.) 335; Griggs v. Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175. The law, of course, does impute an obligation to the carrier, but not because of any promise. It presupposes that the contract does not cover the case, and yet that the mutual relations of the parties are so unjust as to require some relief.

Coming, then, to the merits of the case, it must first appear, upon the libelant's theory, that he is not himself in default under the contract, since, if so, he cannot sue either upon the maritime contract or on a quantum meruit. This raised the question whether, when he sold his cargo to the French Republic, the respondent's right to earn his freight was at an end, because by that sale the respondent was not only excused, but finally prevented, from further performance. If at an end, it was, of course, an idle ceremony to give him further opportunity.

The capture of the Dacia was not, in fact, necessarily a termination, even of her own power to complete the voyage. As early as January 21st the respondent had asked the British ambassador whether, in the event of the capture, which all knew would occur, he might be allowed to continue the voyage under guaranty, and the ambassador had not only assured him that the cargo would be forwarded, but had inquired as to the kind of guaranty he intended. He had, therefore, some reason to suppose that his proposal was not wholly unwelcome, and on March 5th, four days after he heard of the capture, he repeated it. If France meant to detain the cargo as well, he asked, would it not be possible at least to release the Dacia. This wire our Secretary of State answered on the 8th, repeating the willingness of the French authorities to forward the cargo, and asking if, in view of this, whether the respondent still wished the request to go forward that the vessel would be allowed to proceed. He answered on the 9th that he did, and the request went forward on the 10th, and was apparently answered on April 7, 1915, by the statement that the release must be taken before the prize court. Later, on April 22d, or some six weeks after his request was forwarded, the respondent for the first time got a definite refusal to his cable. During all this time his master remained in France.

Now, all this shows, it is true, that the respondent could not have completed the voyage with the Dacia; but it also shows that he was apparently trying to get his vessel released for that purpose, in case France did not mean to hold the cargo. At least that is a tenable interpretation, and the libelant is very far from showing, as he must, that the owner had abandoned or ought to have abandoned the voyage. Capture, says Mr. Justice Story in The Nathaniel Hooper, 17 Fed. Cas. 1191, No. 10,032, never dissolves the contract of affreightment, but only suspends it till restitution or condemnation. All this effort was made, so far as appears, without any knowledge on the part of the respondent of the libelant's negotiations with the French authorities. I have no right to say that it was in bad faith.

Granting, however, that all such efforts were bound to prove abortive, does that concession free the libelant from default? I think not. The respondent's rights did not end with the Dacia; as I have already observed, he had the express right to transship, and it must never be forgotten that no trouble had arisen over the cargo, but only over the bottom. Furthermore, both the

British and French authorities had repeatedly from the outset assured both parties that the cotton could go forward. If, therefore, the respondent was sure to fail in getting the Dacia released, what reason have we to suppose that he would not have tried, and would not have succeeded, in forwarding the cargo by another bottom? He had much at stake in avoiding a breach of his contract, and was acting under legal advice. It is answered that the Order in Council of March 1, 1915, forbade the shipment, but that is not wholly clear. The language is: "Sailed from her port of departure after the 1st of March, 1915."

Whether this would apply to the continuation of a voyage begun in January is not at all certain. But the answer would be quite irrelevant, because both powers were acting in concert, and had most unequivocally made an exception in this case. It seems to me not in the lease improbable that they would have allowed the respondent, in view of his interest in the freight, to act as the carrier in completing the voyage in case the libelant had wished the cargo forwarded. It would have saved them the expense of the voyage, and would not have added any complications that I can see. Indeed, the respondent's connection need only have been formal to make the performance his. At least, he had the right to attempt that course, after they refused to release the Dacia.

In answer the libelant refers to Lamar's testimony and Parker's. All that Lamar says is that Cone Johnson had told him that the cotton would not be allowed to go "to Germany," which is quite possible, but irrelevant to a suit about carriage to Rotterdam. Parker says that M. Jusserand told him on the 18th that the cotton would not be "forwarded." If this means "forwarded to Germany," it is irrelevant; if it means "forwarded to Rotterdam," it must be a mistake, or else the whole contemporaneous documentary evidence is wrong, of which there is so much. It was the obvious purpose of both powers to protect the cargo, not only by paying its value, but, if the shipper wanted it, by forwarding it to Rotterdam.

It appears to me, therefore, that the respondent's right to save his freight by completing his performance was by no means at an end, and that he had in no sense given any evidence of abandoning the cargo. It is quite idle to speculate on what he would have done after he learned that he could not get the vessel released. We do not know when he learned of the sale, which information, when he did, excused all further performance, but do know that he got no definite answer about the release for nearly a month. During that time he had the right to hold the cargo, if acting in good faith. Thereafter he had a reasonable time to transship it.

Those being the facts, what did libelant do? On the 3d, two days after hearing of the capture, Lamar wrote the War Risk Bureau, asking that the cargo should not be forwarded by the Bureau. On March 5th he wrote again, showing that some time before he had asked the British not to forward it in case of its capture by them. On the 8th his agents got word that the French authorities gave him the option of purchase or forwarding, and on the same day he was sent notice by the Bureau that his preference for purchase would be communicated to those authorities. On March 10th our Secretary of State did so advise both the French ambassador and our own ambassador in France. The bargain had been struck some time before the 13th.

Now, if the rule were that the shipper might recover, unless the owner could show that he would and could have completed the voyage, the libelant here might recover; but it is not so. On the contrary, it is he who must show that the contract is at an end, either by the owner's voluntary abandonment of the voyage, or, what is regarded as the equivalent, by such circumstances as make it inevitable that he must abandon it in the future. In short, while the owner has any reasonable chance to perform, as in any other contract, he must be allowed to do so, and the risk of terminating that chance must fall upon the shipper who chooses to withdraw the cargo. The Eliza Lines, 199 U. S. 119, 26 Sup. Ct. 8, 50 L. Ed. 115, 4 Ann. Cas. 406; Case v. Baltimore Ins. Co., 7 Cranch, 358, 3 L. Ed. 370; The Appam (D. C.) 243 Fed. 230; Sampayo v. Salter, 21 Fed. Cas. 286, No. 12,277; Hunter v. Prinsep, 10 East, 373; Dunnett v. Tomhagen, 3 Johns. (N. Y.) 154; Lutwidge v. Grey

(reported in Luke v. Lyde, 2 Burr. 882). Indeed, in Luke v. Lyde, 2 Burr. 882, 888, Lord Mansfield went so far as to say that the master should have his freight pro rata itineris, unless the shipper asked him to provide a new ship to complete. A fortiori, when the shipper withdraws the cargo while the master is still negotiating to secure the release of his vessel.

Of course it is easy to say that the efforts of the respondent were not in good faith, that everybody knew that the Dacia would never be allowed to reach Rotterdam, and that the respondent cared nothing about the cargo because he knew it would be protected. All this is probably quite true; the affair was designed by everybody to be a test case, and probably all knew before the vessel sailed that the cargo would be purchased by the captors. However, the libelant, who must insist upon the letter of the contract, cannot afford to suggest such considerations, because they militate equally against him. If the respondent did not expect the delivery to be made at Rotterdam, neither did he; indeed, he wanted anything but that, as he confessed. He was much better content to get his whole Bremen price at Brest, free of the costs of transit from Rotterdam and from the difficulties arising from a late delivery. If the consideration of his payment was transportation to a place where he could receive the full price he had bargained to get, he has got that consideration. He must therefore be content to treat the facts as though both sides actually intended to go to Rotterdam—as perhaps the respondent did, and as certainly he did not.

I find, therefore, that the libelant sold the cargo before the respondent had either abandoned the voyage or it had definitely appeared that he could not complete it under his rights in the bill of lading. The libelant is therefore in no position to sue. It becomes on this account unnecessary to consider whether, if the voyage had been wholly frustrated before the libelant sold the cargo, the libelant could have recovered the whole freight or any part.

The libel is dismissed, with costs.

In re TOOLE et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 37.

1. **Bankruptcy ⇐440—Reclamation order reviewable by appeal.**
   An order made on the petition of a third party to reclaim property in the hands of a trustee is reviewable by appeal, under Bankruptcy Act, § 24a (Comp. St. § 9608), and not by petition to revise, under Bankruptcy Act, § 24b.

2. **Bankruptcy ⇐140(½)—Maker of check to bankrupt without consideration entitled to reclaim proceeds.**
   Bankrupts, who were brokers, borrowed a certificate of stock from another brokerage firm, giving as collateral security their check for its agreed value. On the next day they repaid the loan by delivery of a different certificate, which they bought from a third firm, but had not paid for; and the lender, supposing the collateral check had been paid, gave their own check in repayment, which was collected by bankrupts' receiver appointed in the meantime. The collateral check was not paid, owing to the intervening bankruptcy. *Held*, that the lending firm was entitled to reclaim the proceeds of their check as having been given without consideration, and that the firm which sold the second certificate of stock had no claim on such fund.

Petition to Revise and Appeal from the District Court of the United States for the Southern District of New York.

In the matter of Charles B. Toole and others, bankrupts. On appeal from and petition to revise order of District Court by Logan & Bryan. Petition dismissed, and affirmed on appeal.

Wollman & Wollman, of New York City (H. Wollman, of New York City, of counsel), for appellants.

Zalkin & Cohen and Taylor, Knowles & Hack, all of New York City (R. T. Knowles, of New York City, of counsel), for bankrupts.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Logan & Bryan and Stout & Co., both members of the New York Stock Exchange, each claim a fund of $7,701.08, proceeds of a check of Stout & Co. to the order of Toole, Henry & Co., now in the hands of the trustee in bankruptcy of Toole, Henry & Co., also members of the New York Stock Exchange, as a separate fund awaiting the decision of the controversy between the rival claimants.

[1] Judge A. N. Hand dismissed the petition of Logan & Bryan, and directed the trustee to pay over the fund to Stout & Co. Logan & Bryan have taken both a petition to revise and an appeal from this order. The claim, being a reclamation by a third party of his own property in the hands of the trustee, is a controversy arising in bankruptcy proceedings, and the proper remedy is appeal under section 24a, and not a petition to revise under section 24b of the Bankruptcy Act (Comp. St. § 9608).

[2] April 2, 1919, Logan & Bryan delivered to Toole, Henry & Co. certificate No. C40667 for 100 shares of Central Leather stock, indorsed in blank, together with a bill for the purchase price $7,537.50. This was a cash transaction, and the messenger, in accordance with the usual practice of stockbrokers, left the certificate and bill with Toole, Henry & Co., and subsequently returned for their check, which was refused, because in the meantime a receiver in bankruptcy of that firm had been appointed.

April 1, 1919, Stout & Co. had loaned Toole, Henry & Co. certificate No. 40436 for 100 shares of Central Leather stock, with interest at 4 per cent., to be returned the next day, and to be secured in the meantime by deposit of collateral in the amount of $7,702, which was the agreed value of the stock plus the price of the stock transfer stamps. After banking hours on that day Toole, Henry & Co. sent as collateral to Stout & Co. their check for $7,702, which Stout & Co. deposited in their bank; it then being too late for certification.

April 2, Toole, Henry & Co. delivered the certificate No. C40667 to Stout & Co. in return for the certificate they had borrowed the day before, and Stout & Co., supposing that the collateral check of Toole, Henry & Co. for $7,702 had been paid, and not knowing of their insolvency, nor of the appointment of a receiver, sent them their check, dated April 2, for $7,701.08, the amount of the collateral with interest at 4 per cent. In point of fact, the check of Toole, Henry & Co. was returned, "Payment stopped by receiver." The receiver collected the check of Stout & Co. for $7,701.08.

As between Logan & Bryan, on the one hand, and Toole, Henry & Co. and their receiver, on the other, certificate No. C40667 was Logan & Bryan's. Toole, Henry & Co. never had any title to it, and fraudulently delivered it to Stout & Co. In re T. A. McIntyre & Co., Appeal of Pippey, 181 Fed. 955, 104 C. C. A. 419; In re Perpall, 256 Fed. 758, 168 C. C. A. 104.

On the other hand, Stout & Co. were purchasers of the certificate for value in good faith without notice, and between them and Toole, Henry & Co. and their receiver they were the owners of it, subject only to the duty of returning Toole, Henry & Co.'s collateral. Personal Property Law of the State of New York, §§ 167, 168 (chapter 600, Laws 1913).

If Stout & Co. had not sent their check for $7,701.08, all Toole, Henry & Co. or their receiver would have been entitled to would have been the unpaid check for $7,702. The fact that Stout & Co. sent their check to Toole, Henry & Co., supposing that they had received the collateral from Toole, Henry & Co., does not impair their rights. They are entitled to a return of their money in the hands of the trustee as paid without consideration.

Logan & Bryan are not connected with the collateral of the loan at all. If it had been paid to Stout & Co., and by them returned to Toole, Henry & Co., Logan & Bryan would have had no right to it as being their property in the hands of the trustee.

The order is affirmed.

CONNETT et al. v. CITY OF NEW YORK.*

(Circuit Court of Appeals, Second Circuit. December 22, 1920.)

No. 86.

Bankruptcy ⟸318(2)—Shipping ⟸50—Owner of scows chartered to bankrupt, who removed city rubbish, held entitled to damages from city for cost of unloading.

Where, on bankruptcy of firm having contract for disposing of street sweepings of city, city took possession of scows and plant of such firm under its contract, and ordered owner of certain scows, chartered to the bankrupt and loaded by it, to unload such scows at some other place than the plant of the bankrupt, the city was liable to such owner for the cost of such unloading, and the city, in proving its damages against the bankrupt, could not recover such cost; neither the bankrupt nor the owner of such scows being under any obligation to discharge the cargoes anywhere except at the bankrupt's dumps.

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

Suit by Lydon R. Connett and John B. Allen, copartners doing business under the firm name and style of L. R. Connett & Co., against the City of New York. From the decree, the plaintiffs appeal. Reversed, with directions.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 535, 65 L. Ed. —.

Henry M. Stevenson, of New York City, for appellants.

John P. O'Brien, of New York City (John F. O'Brien, of New York City, and Charles J. Carroll, of Brooklyn, N. Y., of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. L. R. Connett & Co. chartered 12 deck scows to Dailey & Ivins, who had a contract with the city of New York, dated August 13, 1913, for the final disposition of all ashes, street sweepings, and refuse collected by the department of street cleaning. March 2, 1918, receivers in bankruptcy were appointed of Dailey & Ivins, and between 11 and 11:30 a. m. on that day the street cleaning commissioner served the following notice on Dailey & Ivins:

"March 2, 1918.

"Messrs. Dailey & Ivins, New York—Dear Sirs: Under and by virtue of the powers and provisions contained in your contract dated August 13, 1913, the street cleaning commissioner hereby 'takes possession of the plant, scows, and other means of transportation and final disposition of the ashes, the street sweepings and rubbish, etc., belonging to or heretofore used by you.'

"Very truly yours, A. B. MacStay, Commissioner."

At the time of the service of this notice the 12 scows which the libelants had chartered to Dailey & Ivins had been loaded by the street cleaning department at various dumps in the city and were to be discharged at the plants of Dailey & Ivins at Rikers Island, Hunts Point, and Staten Island. Seven of the scows were lying at the Dailey & Ivins plant at Hunts Point, where they had been taken to be unloaded, four were lying loaded at various dumping places of the city on the North, East, and Harlem Rivers, and one was lying partially loaded at the city's dump at 107th street and East River, the loading of which the department finished on the afternoon of March 2, subsequent to the service of the foregoing notice.

The city, under its contract with Dailey & Ivins, took possession of all their scows and plants, but not of scows chartered by them, and notified the libelants to move their scows from Hunts Point and from the city dumps and discharge them somewhere else. Thereupon the libelants with great difficulty did obtain tugs to tow the scows to places where they could be unloaded at an expense, including damages for delay, amounting to $8,513, to recover which this libel was filed.

The city answered that it had nothing to do with unloading the libelants' scows; the duty lying upon Dailey & Ivins to do so. March 5, the libelants wrote to the department a letter as follows:

"Department of Street Cleaning of the City of New York, Municipal Bldg., New York, N. Y.—Gentlemen: This will advise you that the undersigned is the owner of twelve scows which are now in the possession of Dailey & Ivins, of #15 Park Row, this city. Annexed hereto is a description of these scows and a statement as to their present locality. These scows are all loaded with ashes, street sweepings, etc., of the city, and for that reason cannot be delivered to the undersigned by Dailey & Ivins. We hereby notify you that we are entitled to the immediate possession of these scows, and demand that they be unloaded forthwith, so that they can be delivered to us without delay. You are further advised that we shall hold the city of New York re-

sponsible for any damages which result to us in case the scows are not promptly unloaded, so that they may be delivered.

"Yours truly, L. R. Connett & Co."

March 9 the commissioner answered as follows:

"L. R. Connett & Company, 30 Church Street, New York City—Gentlemen: Receipt is acknowledged of your letter of March 5, 1918, concerning twelve (12) scows which, you state, are now in the possession of Dailey & Ivins of No. 13 Park Row, New York City. * * * These scows were loaded with ashes, street sweepings, and rubbish in accordance with a contract which the said firm of Dailey & Ivins had with the city for the removal and disposal of the same. The city of New York is not in any way involved with your arrangement with Dailey & Ivins for the hire or charter of these vessels, and you are hereby directed to immediately remove them from the water front dumps and unloading points where they are now moored.

"The matter of unloading their cargo should be adjusted with the firm of Dailey & Ivins. You are therefore advised that the city of New York hereby disclaims responsibility for the care and custody of these vessels, for the unloading of the same, and for any damage which may occur to them or for wharfage.

"Yours truly, A. B. MacStay, Commissioner."

Shortly afterwards the libelants offered to pay the city the expense of unloading the scows. At the trial the city made the following admission:

"It is conceded that at the time in question, namely, March 2, 1918, to April 16, 1918, the possession and operation of the Dailey & Ivins plant at Hunts Point and Rikers Island was absolutely necessary to the city of New York for the final disposition of ashes, street sweepings, and rubbish which are collected in the boroughs of Manhattan and the Bronx, and that without this plant the city would have been unable to unload the scows and to dispose of the material; that it was impossible at that time to obtain other machinery and plant necessary to a proper disposition of the material."

The District Judge, holding that the city had nothing to do with the 11 loaded scows and that the libelants must look for their remedy to Dailey & Ivins, entered a decree for the libelants for the cost of discharging the twelfth scow, the loading of which was begun by Dailey & Ivins and completed by the city, in the sum of $572. From this decree the libelants appeal.

The receivers in bankruptcy never assumed the charters of the libelants' scows; the city was not in possession of them, and the libelants were. But the city owned the cargo, and was bound to let the libelants discharge it in the same way that Dailey & Ivins were under the duty of doing, to wit, at the Dailey & Ivins dumps, to which the scows were bound. Instead of this, its conduct was in the highest degree inequitable. It ordered the libelants to discharge its cargo somewhere or anywhere else. This was an entirely new departure. No such order could have been given under the contract with Dailey & Ivins, and the city, in proving its damages against them, cannot recover the cost of it. Neither Dailey & Ivins, as charterers, nor the libelants, as owners, of the scows, nor the scows themselves, were under any obligation to discharge the city's cargo anywhere except at the Dailey & Ivins dumps, which were in possession of the city. The libelants, by unloading them there at their own expense, would have performed the engagement of Dailey & Ivins and of the scows. The city, having or-

dered delivery of its property on the libelants' scows at a new and different destination, must pay for the expense of doing so.

The decree is reversed, and the court below directed to enter a decree in favor of the libelants for damages in connection with all their scows.

NEW YORK & CUBA MAIL S. S. CO. v. GUAYAQUIL & Q. R. CO.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 90.

1. **Contracts ⟸211—Time generally of essence in commercial contracts.**
   In commercial contracts, time is generally of the essence of the contract.
2. **Shipping ⟸105—Notice of readiness to load about certain date held definite notice.**
   Where the shipping contract provided the steamship company should give the shipper notice of readiness to load, a notice that the vessel would sail for the loading port about a certain date, and be ready to load on the stated date thereafter, bound the steamship company to have the vessel ready to load on the stated date.
3. **Shipping ⟸104—Contract made with reference to rules at port of loading.**
   A contract for the shipment of coal from a specified port must be understood as having been made in view of the custom of the port with reference to loading.
4. **Shipping ⟸105—Cargo need be furnished only in reasonable time after ship's delay in readiness to load.**
   Where the shipper had a cargo ready for the vessel on the date he was notified she would be ready to load, but the vessel was not ready at that time, the shipper is only bound thereafter to furnish a cargo for the vessel within a reasonable time after she is ready to load.
5. **Shipping ⟸145—Dead freight allowed, where shipper's agent required sailing without full cargo.**
   A vessel which was ordered by the fuel company, which sold a cargo of coal to the shipper, into her berth at a time when a full cargo was not available, and when she could not wait therein for the rest of the cargo, or return for more, is entitled to recover from the shipper dead freight on the amount of cargo not furnished, less any expense saved by not carrying that part.

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

Libel by the New York & Cuba Mail Steamship Company against the Guayaquil & Quito Railroad Company to recover damages for delay in loading and dead freight on shortage of cargo. Decree for respondent, and libelant appeals. Modified and affirmed.

Burlingham, Veeder, Masten & Fearey, of New York City (Van Vechten Veeder and J. L. Galey, both of New York City, of counsel), for appellant.

John Thomas Smith, of New York City (F. A. Gaynor, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

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

WARD, Circuit Judge. The Guayaquil & Quito Railroad Company and the New York & Cuba Mail Steamship Company, through the International Shipping Corporation, as brokers, entered into a contract as follows:

"The Guayaquil & Quito Railroad Company,

"25 Broad Street, New York, March 2, 1917.

"Joseph C. Quirk, Esq., Sec'y & Mgr., International Shipping Corp'n., No. 11 Broadway, New York City—Dear Sir: We are in receipt of your letter of the 1st instant, offering us space for up to 2,000 tons of coal for late March or early April loading, the freight rate to be $13.00 per ton to Guayaquil, Ecuador, the coal to be loaded either at Norfolk or Newport News, at our option.

"We hereby accept your offer for the full 2,000 tons, it being our understanding that you are to give us two weeks' notice of the name of the vessel and of the date she will be ready to start loading.

"Yours very truly, E. H. Norton, President."

"March 2, 1917.

"The Guayaquil & Quito R. R. Co., 25 Broad Street, New York City—Gentlemen: Attention of Mr. Norton. We thank you for your letter of March 2d, accepting our offer to carry 2,000 tons of coal at $13.00 a ton from Hampton Roads to Guayaquil.

"It is understood that we will give you two weeks' notice of the date the boat will be ready to start loading, but not necessarily the name of the vessel.

"Yours very truly, Secretary & Manager."

The steamer subsequently named for the contract was the Manzanillo, but the parties later substituted the Jalisco for a cargo of 2,500 tons. March 30 the Steamship Company gave notice of readiness to load as follows:

"New York, March 30, 1917.

"Quayaquil & Quito Railroad, No. 25 Broad Street, New York City. Attention of Mr. Norton—Gentlemen: Confirming 'phone conversation of this morning, asking if you could deliver to us 2,500 tons of coal, instead of 2,000 tons, as originally contracted for: This is to advise that we will have the S. S. Jalisco sailing from this port about April 14th ready to receive the coal in Hampton Roads April 16th. * * *

"Yours truly, Joseph Hodgson, Freight Traffic Manager."

The Railroad Company answered this letter as follows:

"New York, April 2, 1917.

"N. Y. & Cuba Mail S/S Co., Pier 14, E. R., New York City. Attention of Mr. Hodgson, Gen'l Frt. Agt. Gentlemen: Referring to your letter of March 30th, and confirming our telephone conversation of this morning, we would advise you that we have made arrangements with the Clinchfield Fuel Company to deliver 2,500 tons of coal, instead of 2,000 tons, as originally contracted for—same to be delivered to the S/S Jalisco, which we understand will be ready to receive this coal at Hampton Roads about April 16th. It is our understanding that the freight rate on this coal is to be $13.00 per ton of 2,240 lbs.

"Very truly yours, The Guayaquil & Quito Railway Company,
"By Geo. O. Houston, Purchasing Agent."

[1, 2] In commercial contracts time is generally of the essence of the contract, and we think the Steamship Company was bound by her engagement to be ready to load April 16th. The use of the word "about" in this letter did not alter the contract previously entered into.

[3] All coal is brought to the piers at Lambert's Point, Norfolk, by the Norfolk & Western Railroad Company, and is loaded by that com-

pany by chutes from trestles to the steamers calling for it, in accordance with its own rules and regulations. This was the custom of the port, and the contract must be understood as having been made in view of it. The material regulations in this case are:

"5. Vessels shall be berthed according to their respective classes and in order of register at the pier office, as between themselves, provided cargo is available. * * *

"7. A vessel agent, having two or more vessels ready to load, may direct reversal of turn at piers as among his own vessels, except that a vessel of greater tonnage than the one to be displaced shall not be run around a vessel of another agent or shipper standing ahead of it. Vessel agents may give directions verbally or in writing. If given verbally, they must be confirmed in writing."

The Railroad Company had a contract with the Clinchfield Fuel Company for delivery of from 20,000 to 25,000 gross tons of standard grade of Clinchfield screened locomotive coal, screened over not less than one-inch screens to the Railroad Company's steamers, which were to load in turn in accordance with the rules and regulations of the Norfolk & Western Railroad Company.

The Clinchfield Fuel Company had at Lambert's Point much more coal than the Jalisco called for April 16, 17, 18, and 19 up to 3:45 p. m., and had she registered with the Norfolk & Western Railroad Company as ready to load during that time she would have received a full cargo. But the steamer Middlesex, with which neither the Steamship Company nor the Railroad Company had anything whatever to do, registered April 19 at 3:45 p. m. and completed loading a cargo of 7,548½ tons of the same coal April 23 at 2 a. m. There were then left on hand only 742 tons.

The Jalisco registered ready to load Sunday, April 22, a 8 a. m., but as no work is done on Sunday she could not have begun loading, even if coal had been there, before April 23 at 7 a. m. It will therefore be seen that the Middlesex was entitled to be loaded before the Jalisco under the rules of the Norfolk & Western Railroad Company. But if this were a readiness to load in conformity with the contract the shipper would have been bound to furnish cargo then.

The claim of the Steamship Company is, first, for damages in the nature of demurrage for delay between April 22 at 8 a. m. and April 26 at 8 p. m., and, second, for dead freight on 306 tons, which was not at the pier when the steamer left with a cargo of 2,194 tons.

[4] The duty of the shipper is to have his cargo ready when the ship arrives in accordance with his contract, and any delay until he furnishes it is at his risk. Where, however, as in this case, the ship arrives after the agreed time, and in the meantime, by the rules and regulations under which the steamer is to load, the cargo intended for her has been delivered to another steamer entitled to load in turn before her, the delay must be charged to the steamer's breach of her contract as to readiness to load. The shipper in such case is only bound to furnish a cargo within a reasonable time thereafter, in view of all the circumstances of the case. The Steamship Company has not shown that the Railroad Company failed to do so.

[5] Whether the steamer is entitled to dead freight depends upon

whether she was ordered into her berth by the Steamship Company or by the Railroad Company. She was ordered in by the Fuel Company, which was the agent of the Railroad Company in furnishing the cargo. She could not have occupied the berth awaiting the arrival of more coal, nor could she leave and come back again. Therefore the District Judge should have allowed the libelant freight on 306 tons, less any expenses saved by the steamer because of not carrying it.

As so modified, the decree is affirmed.

STANDARD PORTLAND CEMENT CO. v. FOLEY.*

(Circuit Court of Appeals, Fifth Circuit. January 27, 1921. Rehearing Denied February 17, 1921.)

No. 3475.

1. **Master and servant ⟸286(22)—Negligence in maintaining projecting set screw question for jury.**
   Under Code Alabama 1907, § 3910, making an employer liable for injuries caused by a defect in the plant, as construed by the Supreme Court of Alabama, it was a question for the jury whether a projecting set screw on a revolving collar, near the small platform on which the employé was required to work, was a defect for which the employer was liable.

2. **Master and servant ⟸235(4)—Employé need not inspect for defects in place of work.**
   An employé may rely on employer to furnish him a safe place to work, and need not show that he exercised reasonable care to discover a hidden defect, consisting of projecting set screw on a revolving shaft near his working place.

3. **Appeal and error ⟸699(2)—Rulings on instructions not reviewable without entire charge.**
   The giving or refusal of charges cannot be assigned as error, if the transcript does not contain the charge of the court to the jury.

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 by J. R. Foley against the Standard Portland Cement Company to recover damages for personal injuries. Judgment for plaintiff, and defendant brings error. Affirmed.

Percy, Benners & Burr, of Birmingham, Ala., for plaintiff in error.
Erle Pettus, of Birmingham, Ala., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Defendant in error (herein called plaintiff) obtained judgment against plaintiff in error (herein called defendant) in an action to recover damages for personal injuries, alleged to be due to defendant's negligence.

Plaintiff was employed as an electrician by defendant at its cement plant. A large crane at this plant was operated by an electric motor. It became necessary for plaintiff, in the discharge of his duties, to

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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. 534, 65 L. Ed. —.

get upon a small elevated platform about 3 feet wide by 7 feet long in order to examine this motor, and, if necessary, to repair it. On this platform were a tool box, about 18 inches wide, 12 inches deep, and 30 inches long, and an exposed breaker coil, charged with a current of about 500 volts of electricity. A revolving steel shaft was in immediate proximity to the platform, and on this shaft at this particular point was a collar. A projecting set screw, which was unguarded and unprotected, held or fastened the collar to the shaft. The shaft was 3 inches in diameter, the collar 6 inches in diameter, and the set screw extended out from the collar from 1⅛ to 2 inches.

Plaintiff had no duty with respect to the shaft or the collar; his sole duty on this platform was in connection with the motor, which it was proper, and perhaps necessary, for him to examine while the machinery was in motion. Plaintiff worked on the motor from about 3 o'clock in the afternoon until about 9:30 the next morning, during which time he had taken it down, and had just put it back in its place, and, in order to test it, had the machinery running and the shaft revolving, and, while looking into the motor and examining it, plaintiff's right arm was caught by the set screw, wound around the shaft, and seriously injured.

There was testimony that the set screw was hidden from plaintiff's view by a gear box. Plaintiff testified that he did not know the set screw was projecting or exposed, but admitted that he knew there were set screws in the plant, and testified that some of them were countersunk or flush with the collar, while some in other parts of the building were allowed to remain exposed and projecting. It was also shown by the evidence that this particular set screw by which plaintiff was injured had been in the condition described more than four years, or ever since the crane had been installed in defendant's plant. Several witnesses testified that in well-regulated plants set screws were countersunk or made flush with the collar.

This action is based upon the Employers' Liability Act of Alabama, which provides in substance that, when a personal injury is received by an employé, the employer is liable as if the employé were a stranger, if the injury is caused by a defect in the condition of the ways, works, machinery, or plant of the employer. Section 3910, Civil Code of Alabama of 1907. The projecting set screw was the defect plaintiff relied on at the trial.

[1] Error is assigned upon the refusal of the court to direct a verdict for defendant. To sustain this assignment it is argued that a projecting set screw is not a defect, but that it merely enhances the risk of injury in an employment that is inherently dangerous. While this view seems to prevail in some jurisdictions, it has been rejected by the Supreme Court of Alabama, which, in construing the act above cited, has held that it cannot be asserted as a matter of law that an employer is not liable for injury to an employé caused by a projecting set screw on a revolving shaft, and the question of liability of the employer was properly left to the jury. Prattville Cotton Mills Co. v. McKinney, 178 Ala. 554, 59 South. 498.

The trial court allowed the jury to determine whether the projecting

set screw constituted a defect. The place of work provided for plaintiff was dangerous at best. The platform was small, a goodly portion of it was taken up by the tool box, and the breaker coil, heavily charged with electricity, further contracted the space available. It appears to us that there was evidence to support the verdict that it was negligence upon the part of the defendant to leave the set screw exposed and projecting at this point.

[2] It is further contended that defendant was entitled to a peremptory instruction in its favor, because plaintiff failed to show that he had exercised reasonable care to discover the defect complained of. Plaintiff had the right to rely upon defendant to furnish him a safe place to work, and was under no duty to make an investigation. In Texas & Pacific Railway Co. v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188, a case which originated in the then Circuit Court for the Eastern District of Texas, and which was affirmed by this court in 75 Fed. 802, 21 C. C. A. 520, the trial court was requested to charge that if the plaintiff, an employé, knew "or by the exercise of ordinary care could have known" of negligence on the part of the defendant in failing to inspect or repair railroad cars, there could be no recovery. The court gave the charge requested only after striking out the words above quoted, and the Supreme Court in approving that action said:

"The court was clearly right in striking the words from the requests. The elementary rule is that it is the duty of the employer to furnish appliances free from defects discoverable by the exercise of ordinary care, and that the employé has a right to rely upon this duty being performed, and that whilst in entering the employment he assumes the ordinary risks incident to the business, he does not assume the risk arising from the neglect of the employer to perform the positive duty owing to the employé with respect to appliances furnished. An exception to this general rule is well established, which holds that where an employé receives for use a defective appliance, and with knowledge of the defect continues to use it without notice to the employer, he cannot recover for an injury resulting from the defective appliance thus voluntarily and negligently used."

This opinion also holds that the failure to discover a defect is not chargeable to an employé, unless it is so obvious that knowledge of it may be presumed. To the same effect is Choctaw, Oklahoma & Gulf R. R. Co. v. McDade, 191 U. S. 64, 24 Sup. Ct. 24, 48 L. Ed. 96. In Gila Valley, Globe & Northern Railway Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521, the rule is stated as follows:

"An employé assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employé has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and suitable and safe appliances for the work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence, until the employé becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employé with the assumption of the risk attributable to a defect due to the employer's negligence, it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety, or else such danger must have been so obvious that an ordinarily prudent person under the circumstances would have appreciated it."

Clearly, under these decisions, the court did not err in submitting the case to the jury.

[3] Of the remaining assignments of error, some are based upon the refusal of requests to charge, while others challenge the correctness of charges which were given. In so far as they seek to raise questions other than those already discussed, these additional assignments are not supported by the transcript of record. It is elementary that, if the transcript does not contain the entire charge of the court to the jury, error is not well assigned upon charges given or refused. The bill of exceptions in this case does not purport to contain all of the court's charge, and therefore it is impossible to ascertain whether charges refused were elsewhere given, or whether charges given were not so qualified as to obviate the objections urged against them.

The judgment is affirmed.

On Petition for Rehearing.

Plaintiff in error insists that the exceptions taken to the charge of the trial court complied with rule 10 of this court (150 Fed. xxvii, 79 C. C. A. xxvii). It appears that these exceptions were properly taken; but the assignments relied upon in the petition relate only to questions already considered and discussed.

A rehearing is therefore denied.

THE CONISCLIFF.

ANDERSON v. WHITNEY-BODDEN SHIPPING CO., Inc.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1921.)

No. 3609.

1. **Seamen ⇐11—Act imposing hospital expenses of immigrant on vessel does does not apply to alien officer.**

   Immigration Act, § 32 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼r), imposing on a vessel liability for hospital expenses of alien not entitled to admission, who is afflicted with a contagious disease and is temporarily admitted for treatment, does not make the vessel liable for medical treatment of an alien employed on board the vessel as mate.

2. **Seamen ⇐11—American vessel held not liable for hospital expenses of alien mate.**

   Immigration Act, § 35 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ss), making it unlawful for a vessel carrying passengers from a foreign port to have employed on board one afflicted with contagious disease which could have been discovered before sailing, does not impose liability on a vessel of American register not engaged in carrying passengers for the hospital expenses of its alien mate, made necessary by a contagious disease which manifested itself after the vessel left Porto Rico for a United States port.

3. **Seamen ⇐20—Hospital expenses voluntarily paid by vessel cannot be deducted from wages.**

   The amount paid by a vessel for the expense of treatment of its mate for a contagious disease contracted by his misconduct ashore, for which payments the vessel was not legally liable, and which were not made under compulsion, do not constitute a valid claim, which the vessel can set off against the mate's claim for wages.

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

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Ervin, Judge.

Libel by Ernest Anderson against the schooner Coniscliff; the Whitney-Bodden Shipping Company, Incorporated, claimant. Decree for claimant (266 Fed. 959), and libelant appeals. Reversed.

Alex T. Howard, of Mobile, Ala., for appellant.
David B. Goode, of Mobile, Ala., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The appellant libeled the schooner Coniscliff, a vessel registered under the laws of the United States, for $88 claimed to be due on his wages as mate of that vessel. The claimant (appellee here) admitted that the amount stated was due, but successfully resisted the demand on the ground that the vessel was required to pay, and did pay, more than that amount to the United States Marine Hospital at Mobile for and on account of treatment of the appellant for syphilis. After the appellant, who is an alien, was employed and entered upon service as mate, he contracted the loathsome and contagious disease mentioned through his own fault while ashore in Porto Rico during the vessel's stop there. When the vessel arrived at Mobile, the disease had manifested itself, and the medical officer who examined the appellant ordered him to be sent to the Marine Hospital for treatment. This was done over appellant's protest. He remained at that hospital some time and was cured. In consequence of a lack of funds to maintain the Marine Hospital Service, due to a failure of Congress to pass an urgent deficiency bill, a charge was made for the treatment given the appellant, and demand was made that the vessel pay the amount of such charge, which it did.

[1] In behalf of the appellee it is contended that the vessel was legally bound for the expense incurred for the treatment of the appellant under the circumstances mentioned, and that, that expense having been occasioned by the wrongful conduct of the appellant, the amount due to him for wages was subject to be applied towards repayment to the vessel or its owner for such outlay. It may be assumed, without being decided, that the amount of an expense to which a vessel is subjected in consequence of wrongful conduct of a seaman while ashore may be set off against the seaman's demand for wages due him. The claim that the vessel was liable for the expense of the medical treatment of the appellant is based on section 32 of the Immigration Act of 1917 (39 Stat. 874, 895 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼r]), which reads as follows:

"Sec. 32. That no alien excluded from admission into the United States by any law, convention, or treaty of the United States regulating the immigration of aliens, and employed on board any vessel arriving in the United States from any foreign port or place, shall be permitted to land in the United States, except temporarily for medical treatment, or pursuant to regulations prescribed by the Secretary of Labor providing for the ultimate removal or deportation of such alien from the United States, and the negligent failure of the owner, agent, consignee, or master of such vessel to detain on board any such alien after notice in writing by the immigration officer in charge at the port of arrival, and to deport such alien, if required by

such immigration officer or by the Secretary of Labor, shall render such owner, agent, consignee, or master liable to a penalty not exceeding $1,000, for which sum the said vessel shall be liable and may be seized and proceeded against by way of libel in any district court of the United States having jurisdiction of the offense."

[2] Nothing in the language of the just quoted section indicates an intention to make a vessel liable for the medical treatment of an alien employed on board who is excluded from admission into the United States. From the fact that a temporary landing for medical treatment is excepted from the prohibition of the landing of an excluded alien, it is not to be implied that such landing and treatment are subject to be made compulsory and at the expense of the vessel on board which such alien was employed. Provision for treatment of certain such aliens at the expense of a vessel is made by section 35 of the act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ss), which reads as follows:

"Sec. 35. That it shall be unlawful for any vessel carrying passengers between a port of the United States and a port of a foreign country, upon arrival in the United States, to have on board employed thereon any alien afflicted with idiocy, imbecility, insanity, epilepsy, tuberculosis in any form, or a loathsome or dangerous contagious disease, if it appears to the satisfaction of the Secretary of Labor from an examination made by a medical officer of the United States Public Health Service, and is so certified by such officer, that any such alien was so afflicted at the time he was shipped or engaged and taken on board such vessel and that the existence of such affliction might have been detected by means of a competent medical examination at such time; and for every such alien so afflicted on board any such vessel at the time of arrival the owner, agent, consignee, or master thereof shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of $50, and pending departure of the vessel the alien shall be detained and treated in hospital under supervision of immigration officials at the expense of the vessel; and no vessel shall be granted clearance pending the determination of the question of the liability to the payment of such fine and while it remains unpaid: Provided, that clearance may be granted prior to the determination of such question upon the deposit of a sum sufficient to cover such fine: Provided further, that such fine may, in the discretion of the Secretary of Labor, be mitigated or remitted."

Under the last-quoted provision a finding that the vessel, or one acting in its behalf, was at fault in the respect stated when the excluded alien was shipped or engaged and taken on board is made a prerequisite to the enforced treatment in a hospital of such alien at the expense of the vessel. It is not thought that a statute which makes provision, in stated circumstances, for the medical treatment of an excluded alien at the expense of the vessel which brought such alien to this country, properly can be given the effect of authorizing immigration officials to subject a vessel to such an expense in a case not provided for by statute. The circumstance that the right to exercise the power granted was made subject to specified conditions indicates the absence of intention to confer the power unconditionally and without qualification, or in respect of a vessel not shown to be within the terms of section 35, to wit:

"Any vessel carrying passengers between a port of the United States and a port of a foreign country."

We have not been referred to, and are not aware of, any statutory provision which purports to authorize the enforced medical treatment at the expense of the vessel of an alien seaman employed on an American registered vessel which is not shown to be a carrier of passengers.

[3] It seems that the appellant, being a seaman of an American registered vessel, would have been entitled to free medical treatment in a Marine Hospital, but, for the exhaustion of the appropriated funds available for such purpose. U. S. Comp. Statutes 1918, §§ 9128, 9192, p. 1495, note. Whether that is or is not true, the law has not undertaken to give to such a seaman's inability to obtain treatment on the usual terms, due to the circumstance mentioned, the effect of making him involuntarily subject to be medically treated at the expense of the vessel employing him. It was not made to appear that the payment, by or in behalf of the vessel, of the expense of the appellant's treatment in the hospital was made under legal compulsion or was involuntary. The conclusion is that a valid claim against the appellant was not acquired as a result of a payment not made at his instance or request, and not by law required to be made by the vessel or its owner. It follows that his demand for wages was not subject to be defeated by the counterclaim which prevailed.

Because of the error committed by sustaining that counterclaim or defense, the decree is reversed.

SABUTIS v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

No. 2872.

Intoxicating liquors ⇐236(11)—Evidence establishing unlawful sale.
Evidence *held* to sustain a conviction for unlawful sale of beer and wine.

In Error to the District Court of the United States for the Eastern District of Illinois.

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

Kevin Kane, of East St. Louis, Ill., for plaintiff in error.

A. B. Dennis, of Danville, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Frank Sabutis was convicted and sentenced on three counts of an indictment charging him with unlawfully selling (a) beer, (b) wine, (c) gin, and charging that each of the liquors, designated contained "more than 1½ per cent. of alcohol by volume."

Error is assigned, to borrow counsel's language, because:

"The federal prohibition officers in seizing the bottles of beer without a search warrant were guilty of an unlawful seizure within the meaning of

the Fourth Amendment, and the introduction of the beer in evidence was contrary to the Fifth Amendment."

An examination of the evidence convinces us that there was no unlawful seizure, nor was there any demand for the return of the liquor prior to the trial. The witness McCarthy quite accurately tells us what was done in the following language:

"I went out to Mr. Sabutis' place of business in company with R. W. Venters, another revenue man, and we walked into his saloon, and we didn't try to buy anything, and we stepped up to his counter, and I said, 'We are from the Internal Revenue Department and came out to see what you are selling,' and at that time there was three men and one woman standing at the end of the counter and they called for Griesedieck light lager beer, and he slid the beer to the three men, and the woman said she would take wine, and he went down under the counter and brought up a bottle of wine and they drank it and paid for it, and I said, 'I would like to have samples of the stuff you are selling.' He said, 'All right,' and he handed me that there. He had a case of beer in the ice box. I said, 'I would like a sample of that wine.' He said, 'All right.' I said, 'I don't want to take the whole quart, because I don't have any use for it,' and that's the bottle he gave me, and I asked him if that was all, and he said 'No,' he had a bottle of gin. I asked for that, and that's it there."

While defendant's witnesses do not describe the occurrence in the same way their testimony is entirely reconcilable with the foregoing statement.

Complaint is also made because certain witnesses were permitted to give their opinion as to the alcoholic content of the wine. Our examination of the record fails to disclose any objection to this evidence. We might add that the witnesses qualified so as to make the testimony admissible.

The further contention is made that the evidence fails to show a sale of wine. It appears the recipient was defendant's wife, but it also appears that the wine was sold to and paid for by a companion.

The judgment is affirmed.

MOOREHEAD et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 29, 1921.)

No. 3557.

1. **Jury ⇐70(11)—May be summoned by marshal after discharge of regular panel.**

   Notwithstanding Judicial Code, § 276 (Comp. St. § 1253), providing for public drawing from the jury box of all jurors, including those summoned during the session of the court, the jurors for the trial of a criminal case may be selected and summoned by the marshal in the manner prescribed by section 280 (Comp. St. § 1257), after the regular panel was discharged because they had heard the evidence in a prior case involving substantially the same facts.

2. **Criminal law ⇐711—Limiting argument to one hour held not abuse of discretion.**

   On the trial of a criminal case, where counsel for defendants had stated they preferred to finish the case that night, it was not an abuse of discretion for the court to limit the argument to one hour to the side, after which it was nearly midnight when the case went to the jury.

3. **Criminal law ⇐200(6)—Acquittal of crime does not bar prosecution for conspiracy to commit it.**
An acquittal of the charge of stealing goods in an interstate shipment does not bar a subsequent prosecution for conspiracy to commit that offense where the overt act alleged was the taking of the same goods as charged in the preceding indictment, since proof that defendant actually participated in the theft is not essential to conviction for conspiracy, as it was to conviction for the theft.

4. **Criminal law ⇐195(1)—Former acquittal unavailing, unless offenses are identical.**
The plea of former acquittal is unavailing to defendant, unless the offense charged in the previous prosecution was precisely the same in law and in fact as in the present charge.

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

George L. Moorehead and another were convicted of conspiracy, with five other persons, to steal goods which were parts of interstate shipments, and they bring error. Affirmed.

J. A. Teat, of Jackson, Miss., for plaintiffs in error.

Julian P. Alexander, U. S. Atty., of Jackson, Miss.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The two plaintiffs in error, George L. Moorehead and J. P. Shackelford, were convicted on a count of the indictment charging them and five other persons with conspiring, on or about the 15th day of November, 1918, to steal goods and chattels which were parts of interstate shipments of freight, and that, to effect the object of the conspiracy, the seven persons joined in the indictment stole whisky from a certain railway car, to wit, Pennsylvania car No. 50993, alleged to be the property of a named railroad company, then and there moving as and constituting a part of a described interstate shipment of freight.

[1] This case was one of several connected with or growing out of an alleged theft of whisky from a railroad car at Tchula, Miss. After the jury which tried one of those cases had retired on Friday, the court ordered the discharge of the two regular panels of jurors in attendance, and directed the marshal to summon a sufficient number of petit jurors for the following Monday, the day on which this case was to be called for trial. All the jurors constituting the regular panels were present in the courtroom during the trial of the case which went to the jury on Friday, the facts of which were quite similar to those of this case. The defendant challenged the array of jurors returned by the marshal in pursuance of the court's order, moved to quash the special writ of venire facias under which they were brought into court, and that the court direct that a jury be drawn from the jury box. Exceptions were reserved to the action of the court in overruling those motions. Section 2762 of the Judicial Code provides for the public drawing from the jury box of all jurors, grand and petit, including those summoned during the session of the court.

Section 280 of the Judicial Code (Comp. St. § 1257) provides as follows:

"When, from challenges, or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return jurymen from the bystanders sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section."

It is contended that the last-quoted provision is not applicable when, as a result of the discharge of the regular panel of petit jurors summoned, no part of it remains in attendance. That section provides a quick method of supplying jurors when from any cause whatsoever, though jurors had been summoned as provided in section 276 (Comp. St. § 1253), "there is not a petit jury to determine any civil or criminal case." Such lack of a jury is a consequence of the action of the court in discharging the panel or panels regularly summoned. Nothing in the language used indicates an intention to make the provision inapplicable when the lack of a jury is so occasioned. The purpose to prevent inconvenience and delay would be defeated by holding the provision to be inapplicable to such a situation as the one in question. We think the above set out statute authorized the court to have a jury supplied in the manner adopted. Lovejoy v. United States, 128 U. S. 171, 9 Sup. Ct. 57, 32 L. Ed. 389; United States v. Rose (C. C.) 6 Fed. 136.

[2] The action of the court in limiting the time allowed for argument to the jury is assigned as error. It was nearly 12 o'clock at night when the case went to the jury. The counsel in the case had agreed to conclude the case that night, and counsel for the defense had stated that they preferred to finish that night. It is not made to appear that the action of the court, under the circumstances mentioned, in allowing one hour to the side for argument of the case to the jury, was an abuse of discretion.

[3] The court ruled against a plea interposed by the defendant Shackelford, which set up in bar of the offense of which he was convicted in this case his previous acquittal by the verdict of the jury in a trial on an indictment charging him with stealing whisky on or about November 15, 1918, from Pennsylvania car No. 50993. A theft of whisky by the defendants in the instant case from the same car on the same date was the overt act alleged in the count on which the plaintiffs in error were convicted. The offense charged in the instant case is not one of which Shackelford was alleged to have been acquitted.

[4] A plea of former acquittal is unavailing, unless the offense presently charged is precisely the same in law and fact as the former one relied on under the plea. Burton v. United States, 202 U. S. 344, 380, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392; Kelly v. United States, 258 Fed. 392, 169 C. C. A. 408. The test of the identity of offenses is whether the same evidence is required to sustain them. Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153. In United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211, it was decided that a conspiracy, having for its object the commission

of an offense denounced by the Bankruptcy Act, is not in itself an offense arising under that act, within the meaning of section 29a thereof, and the one-year period of limitation prescribed by that section did not apply. The following is an extract from the opinion in that case:

"It is apparent from a reading of section 37, Criminal Code (section 5440, Rev. Stat.), and has been repeatedly declared in decisions of this court, that a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy. Callan v. Wilson, 127 U. S. 540, 555; Clune v. United States, 159 U. S. 590, 595; Williamson v. United States, 207 U. S. 425, 447; United States v. Stevenson (No. 2) 215 U. S. 200, 203. And see Burton v. United States, 202 U. S. 344, 377; Morgan v. Devine, 237 U. S. 632. The conspiracy, however fully formed, may fail of its object, however earnestly pursued; the contemplated crime may never be consummated; yet the conspiracy is none the less punishable. Williamson v. United States, supra. And it is punishable as conspiracy, though the intended crime be accomplished. Heike v. United States, 227 U. S. 131, 144. Nor do we forget that a mere conspiracy, without overt act done in pursuance of it, is not criminally punishable under section 37, Criminal Code. United States v. Hirch, 100 U. S. 33, 34; Hyde v. Shine, 199 U. S. 62, 76; Hyde v. United States, 225 U. S. 347, 359. There must be an overt act, but this need not be of itself a criminal act; still less need it constitute the very crime that is the object of the conspiracy. United States v. Holte, 236 U. S. 140, 144; Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 536. Nor need it appear that all the conspirators joined in the overt act. Bannon v. United States, 156 U. S. 464, 468. A person may be guilty of conspiring although incapable of committing the objective offense. Williamson v. United States, supra; United States v. Holte, supra."

The following was said in the opinion in Joplin Mercantile Co. v. United States, 236 U. S. 531, 535, 35 Sup. Ct. 291, 293 (59 L. Ed. 705):

"It is true, as held in Hyde v. Shine, 199 U. S. 62, 76, and Hyde v. United States, 225 U. S. 347, 359, that a mere conspiracy, without overt act done to effect its object, is not punishable criminally under section 37 of the Criminal Code. But the averment of the making of the unlawful agreement relates to the acts of all the accused, while overt acts may be done by one or more less than the entire number, and although essential to the completion of the crime, are still, in a sense, something apart from the mere conspiracy, being 'an act to effect the object of the conspiracy.'"

To sustain the charge made against Shackelford by the count on which he was convicted, it was not necessary to prove his participation in the theft of which he was acquitted. All that was required to sustain that charge was proof that the defendants conspired as alleged, and that, to effect the object of the conspiracy, any one of them committed or participated in the theft alleged. The plea under consideration amounted to the assertion by the defendant Shackelford that he was not subject to be convicted of the alleged conspiracy because he had been acquitted of another and different offense not necessary to be proved to sustain the conspiracy charge. We are of opinion that that plea was bad because the former acquittal it set up was of an offense other than the one charged in the instant case, the same evidence not being required to sustain both charges. There was not the required identity between the offense presently charged and the one which was the subject of the alleged acquittal. The fact that both charges related to and grew out of one transaction made no difference.

Carter v. McClaughry, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236.

The record does not show any reversible error. The judgment is affirmed.

UNITED STATES v. MARQUETTE et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3594.

Intoxicating liquors ⊂=253—Order for return of intoxicating liquors seized during unlawful search not appealable.

An order requiring the return of intoxicating liquor taken from the home of one of the defendants in a criminal case during an unlawful search of his home was not appealable, where the court did not assume jurisdiction for the purpose of trying the title or right of possession, but merely to prevent the use as evidence of property wrongfully seized.

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

Criminal prosecution by the United States against Edward John Marquette and others. From an order requiring the return to defendants of intoxicating liquor taken from them, the United States appeals. Appeal dismissed.

Frank M. Silva, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco, Cal.

Ed. F. Jared, of San Francisco, Cal., for appellees.

Before MORROW and HUNT, Circuit Judges.

PER CURIAM. On the 8th day of January, 1920, one Powers placed a quantity of intoxicating liquor in the home of one Sloan, in the city and county of San Francisco, for safe-keeping. On the following day certain officers of the government, without warrant or authority of law, forcibly invaded the Sloan home and seized and carried away the intoxicating liquor there stored. On the 13th day of January, 1920, an indictment was returned against Powers, Sloan, and others, charging a conspiracy to sell intoxicating liquor for beverage purposes and not for export, in violation of section 37 of the Penal Code (Comp. St. § 10201).

Later the defendant Powers petitioned the court in the conspiracy case for a return of the intoxicating liquor to him, on the ground that the seizure was unlawful, and that the United States attorney proposed to use it as evidence against the accused on the trial of the conspiracy indictment. Upon a hearing had on a show-cause order the court ordered a return of the liquor to Powers, and from that order an appeal as been prosecuted by the United States.

The appellees have moved to dismiss the appeal, on the ground that the order is not final, and therefore no appeal will lie. This

motion must be granted. It is well settled that interlocutory orders such as this are not appealable. Coastwise Lumber & Supply Co. v. U. S., 259 Fed. 847, 170 C. C. A. 647; U. S. v. Maresca (D. C.) 266 Fed. 713; Crooker v. Knudsen, 232 Fed. 857, 147 C. C. A. 51.

The argument on the part of the government that a plenary suit in replevin or claim and delivery might have been instituted for the recovery of the property, and that an appeal or writ of error would lie from the final judgment is beside the question. The court below did not assume jurisdiction for the purpose of trying title or right of possession, but merely to prevent the use of the property wrongfully seized as evidence upon the trial of the criminal charge, and the order directing a return of the property to avoid that result is no more final or appealable than would be any other order excluding testimony on the trial.

Appeal dismissed.

STANDARD TRANSP. CO. v. GREAT LAKES TOWING CO.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 39.

Towage ⊂⊃11(10)—Tug not liable for injury of tow in gale.

A towing tug *held* not liable for injuries to a barge, which drifted after she was directed by the tug to anchor during a gale on Lake Ontario, until she lost one anchor and went ashore, under the rule that the tug was bound to only ordinary care and skill, there being no evidence of fault in navigation, and the anchoring of the barge, if an error, being one of judgment of the master of the tug.

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

Suit in admiralty by the Standard Transportation Company against the Great Lakes Towing Company. Decree for respondent, and libelant appeals. Affirmed.

For opinion below, see 260 Fed. 327.

Duncan & Mount, of New York City (Oscar D. Duncan, Courtland Palmer, and W. C. Pyne, all of New York City, of counsel), for appellant.

Kelley & Cottrell, of Cleveland, Ohio (G. W. Cottrell, of Cleveland, Ohio, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. The libel claims damages for injuries to barge S. T. Co. No. 82, sustained while in tow of the tug T. C. Lutz under an absolute contract to tow the barge safely from Cleveland, Ohio, to Montreal, Canada, in the month of November, 1916. The contract was evidenced by correspondence, which contains nothing whatever to vary the implied obligations of the tug, except the phrase occurring in the libelant's first inquiry of September 12, 1916, "What would be the rate for towing barge with a special tug?" The Tow-

ing Company answered, "$1,800, plus harbor tow in Cleveland," which was afterwards changed to $1,800, without harbor tow. If the contract be held to require a special tug, what does "special" mean? The Towing Company furnished the best tug it had, and one of the best on the Lakes. She was a new steel tug, substantially built, and abundantly supplied with coal, and we think was such a tug as conformed to the description. The doors of the fire room might have been constructed so as to be more watertight, but the mere fact that a vessel succumbs in extraordinary weather does not prove her to be unseaworthy.

The liability of the Towing Company in respect to navigation is one implied by law, viz. to exercise ordinary care and skill in performing the service. There was nothing to indicate storm down to the time the tow arrived November 23d at 4 p. m. at Main Duck Island, which is about 16 miles from the Narrows at the mouth of the St. Lawrence river. The lake voyage was then nearly completed, but the master concluded that it would be best to anchor there for the night, because it was getting dark and the weather foggy. The wind was light from the south, but during the night it shifted to the southwest, and at 7 a. m., with the wind light from that direction and the weather clear, the tow started out again. The southwest wind was a fair wind on the tow's port quarter until 8:30, when they had made 8 or 9 miles. There the tug hauled a little more to the northward, which is the proper course to enter the Narrows. Then the wind began to blow harder, more to the westward, and therefore more abeam, and the tow drifted with its long heavy towing chain cable off the starboard quarter of the tug.

Under ordinary circumstances the tow would have made the Narrows in about an hour, but the wind increased in the estimation of the witnesses to from 70 to 75 miles an hour—a hurricane from the west. When the tug was heading on her course for the Narrows, the tow would swing over to leeward, and with her heavy towing cable would pull down the tug's starboard side, so that the water entered the fire room through the fire room doors. Then the tug would head into the wind, so as to give the firemen an opportunity to get the water out of the fire room, and, though the barge would then lie astern, the tug could make no headway. After struggling for some two hours, the tug signaled the barge at about 10:30 a. m. to let go her anchors, which she did in 3½ fathoms of water, heading to the west into the wind and tailing towards Grenadier Island at a point about 1½ miles west of the island and about 4 miles south of the entrance to the Narrows. The tug, seeing that the anchors of the barge held her, then proceeded into the river; the barge being in sight for about an hour. The barge drifted astern, and finally her stern pounded on a shoal, and at about 1 o'clock the shackle which connected the ends of the port and starboard anchor chains broke, whereby the starboard anchor was lost and she went ashore.

The District Judge dismissed the libel. The evidence abundantly supports his conclusion that the master exercised the ordinary judgment and skill which the law imposes on him throughout the trip.

The appellant contends that the claimant's defense is inevitable accident, and that therefore it must show that no negligence whatever contributed to it. That defense applies in actions against tort-feasors and against common carriers; they being insurers. The defense here is that the master of the tug exercised ordinary care and skill, and even if he were guilty of errors of judgment the owners would not be liable, which is the well-settled law.

It is said as a matter of navigation that, instead of holding on in the effort to enter the Narrows on a northeasterly course, the master should have turned about on a southeast course for Sacketts Harbor. This was a matter of judgment. Besides, a gale from the west three points forward of the starboard beam on a tow going southeast would be just as dangerous as such gale three points abaft the port beam to a tow going northeast, to which must be added the obvious danger of turning about with the tow on a long hawser in such weather.

The decree is affirmed.

GARVAN, Alien Property Custodian, v. $25,000 CANADA SOUTHERN RY. CO. 5% BONDS et al.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 10.

1. **War ⇐12—Regulations of War Trade Board do not apply to property which has been reported.**
   The regulations of the War Trade Board dated July 14, 1919, as amended July 20, 1919, do not cover property which before July 14, 1919, had been reported to the Alien Property Custodian, or which he had required to be delivered to him.

2. **War ⇐12—Procedure on libel by Alien Property Custodian; "action at law."**
   In view of Rev. St. § 914 (Comp. St. § 1537), while a proceeding by libel by the Alien Property Custodian to recover possession of property under Trading with the Enemy Act, §§ 9, 17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½e, 3115½i), is an action at law, for the determination of questions of law on the pleadings, libelant is as much entitled to avail of admissions in the answer as he would be in admiralty.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action—Action at Law.]

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

Libel by Francis P. Garvan, Alien Property Custodian, against $25,000, par value, Canada Southern Railway Company 5% Bonds; Albert H. Wiggin and others, claimants. From the judgment, claimants appeal. Affirmed.

Rushmore, Bisbee & Stern, of New York City (Henry Root Stern and James F. Sandefur, both of New York City, of counsel), for appellants.

Francis G. Caffey, U. S. Atty., of New York City (Hartwell Cabell and Lucien H. Boggs, Sp. Asst. Attys. Gen., of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. July 9, 1919, the Alien Property Custodian filed this libel against $25,000, par value, of Canada Southern Railway Company bonds and other securities then in the United States Safe Deposit Company of this city, praying the court to enter an order directing the United States marshal to seize and hold the same, and citing all persons having any claim to possession thereof to appear and show cause why the marshal should not deliver them to the libelant, the Alien Property Custodian.

The usual monition issued on the same day, the marshal seized the securities July 15, and before the return day of the monition Albert H. Wiggin, Charles H. Sabin, and Walter T. Rosen appeared and claimed the securities as trustees and owners. Subsequently they filed a verified answer, denying the allegations of the libel and setting up several separate independent defenses. Judge Knox granted the government's motion for judgment on the pleadings in favor of the libelant.

[1] The first objection is that the securities were not seizable July 15 under the regulations of the War Trade Board dated July 14, amended July 20, 1919. These do not cover property which before July 14, 1919, had been reported to the Alien Property Custodian, or which he had required to be delivered to him. These securities fall within the exception.

[2] The next objection is that the libelant cannot help out the allegations of the libel which are denied in the answer by any admissions contained in the separate defenses. Although the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j) provides no specific form of action for enforcing its provisions, section 17 (section 3115½i) does give the United States District Courts power to make and enter "all such orders and decrees and to issue such process as may be necessary and proper in the premises to enforce the provisions of this act." The government proceeded by libel in rem in accordance with the long-established practice in cases of seizure of property on land under the Revenue Acts. Such proceedings are actions at law, in which all issues of fact are triable by a jury; the judgment being reviewable by writ of error. All the same, for the determination of questions of law upon the pleadings, we think the libelant is as entitled to avail of any and all admissions in the answer as he would be in admiralty. Our practice in actions at law is by section 914, U. S. Rev. Stat. (Comp. St. § 1537), only required to conform to the state practice "as near as may be."

Treating this answer and an affidavit of the attorney for the Alien Property Custodian, which by stipulation is a part of it, as we would in admiralty, we think the judgment directing the marshal to deliver the securities in question to the Alien Property Custodian without prejudice to the claimants, or any of them, or any other person or persons, with respect to any claim or claims they may see fit to file with the Alien Property Custodian pursuant to section 9 of the Trading with the Enemy Act (section 3115½e), or any suit or suits, action or actions, proceeding or proceedings they or any of them may see fit to institute thereunder or otherwise was right. See our decisions in Garvan v. Bonds, 265 Fed. 477.

The judgment is affirmed.

VOEGE v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 26.

Criminal law ⊂=1134(3)—Sentence not reviewable.
A sentence is not reviewable by the appellate court because of its severity.

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

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

R. M. Moore, of New York City, for plaintiff in error.

Francis G. Caffey, U. S. Atty., of New York City (Albert C. Rothwell, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. We discover no error in this case. The sentence was a very severe one, but we have no authority in respect to it.

The judgment is affirmed.

NEW DEPARTURE MFG. CO. v. ROCKWELL-DRAKE CORPORATION et al.

(District Court, D. Connecticut. December 7, 1920.)

1. **Patents ⊂=183—Intermediate assignor of invention could not dispute the assignee's title, because first assignor was an infant.**
Where an inventor assigned the application for a patent to one of the defendants, who assigned it to plaintiff, to whom the patent was issued, such defendant and those claiming under him could not attack plaintiff's title on the ground that the inventor was an infant at the time of his assignment, as the assignor of a patentable invention may not deny his own title to the interest transferred.

2. **Corporations ⊂=294—President held removable under contract that he should remain in corporation's employ as long as it should elect.**
Under a contract between an owner of patents and a corporation of which he was president, providing in part that he was to remain in the corporation's employ at a specified salary so long as the company should elect, the corporation had a right to remove him as its general manager.

In Equity. Suit by the New Departure Manufacturing Company against the Rockwell-Drake Corporation and others. Decree for plaintiff.

Gales P. Moore, of Bristol, Conn. (Melville Church, of Washington, D. C., John Thomas Smith, of New York City, and John T. Robinson, of Hartford, Conn., of counsel), for plaintiff.

Edward D. Robbins and Franklin G. Neal, both of New Haven, Conn., and Arthur L. Shipman, of Hartford, Conn., for defendants.

GARVIN, District Judge. This is an action brought to restrain defendants from an infringement of a patent for improvements in antifriction bearings. The issues, however, are not those commonly arising in a patent suit, for the validity of the patent is conceded, plaintiff's legal title is not in dispute, and defendants are admittedly manufacturing bearings covered by the patent in question. Defendants claim that by reason of a contract between plaintiff and the defendant Rockwell certain well-defined equitable rights have arisen to the defendants, which fully justify their manufacture of the articles to which plaintiff objects. For many years defendant Rockwell was connected with the plaintiff, and on and for some time prior to January 1, 1903, was its president. On July 1, 1903, he made this contract with the plaintiff:

"This agreement, made this 1st day of July, 1903, by and between Albert F. Rockwell, of Bristol, in the county of Hartford and state of Connecticut, party of the first part, and the New Departure Manufacturing Company, a corporation created and existing under and by virtue of the laws of the state of Connecticut, and located at Bristol, in the county and state aforesaid, party of the second part, hereinafter called the company, witnesseth:

"That whereas, the said Albert F. Rockwell has invented certain new and useful improvements in driving and braking mechanism for cycles for which he has made application for the grant of letters patent of the United States, as follows, to wit: Application No. 39,700, filed December 13, 1900, for coaster brakes; application No. 114,860, filed July 9, 1902, for driving and brake mechanism for cycles; application No. 126,259, filed October 6, 1902, for lubricating device for vehicle hubs—all of which are applicable to, and designed to be embodied in, driving and braking devices for cycles, generally known as 'coaster brakes'; and

"Whereas, the said Albert F. Rockwell has invented and patented divers other inventions and improvements in bicycles, cyclometers, bells and other articles of manufacture, which patents have from time to time been issued to the company as the assignee of said Albert F. Rockwell; and

"Whereas, the company is engaged in the manufacture and sale of devices embodying and containing the inventions of the said Albert F. Rockwell, as set forth in the patents which have been granted to the company on applications of the said Rockwell, as aforesaid, and also is engaged in the manufacture and sale of coaster brakes embodying the inventions or some of the inventions set forth in the pending applications of the said Albert F. Rockwell, hereinbefore set forth by date and number; and

"Whereas, the said company desires to continue the manufacture and sale of cycle sundries, including coaster brakes, invented by the said Albert F. Rockwell:

"Now, therefore, it is mutually covenanted and agreed by and between the said Albert F. Rockwell, for himself and his legal representatives, and the company, for itself, its successors and assigns, as follows, to wit:

"1. The said Albert F. Rockwell hereby gives and grants unto the company, its successors and assigns, the exclusive leave and license to make, use and sell to others, throughout the United States and foreign countries, brakes and coaster brakes embodying any or all of the inventions set forth in the applications pending in the United States Patent Office as hereinbefore set forth by date and number, and any letters patent of the United States which may be granted thereon, or any division or renewal thereof, and also the exclusive leave and license to make and sell brakes and coaster brakes embodying any or all of such inventions of the said Albert F. Rockwell as may be set forth in any and all applications which are now pending and any and all letters patent which may have been or may hereafter be granted in any and all foreign countries for such inventions of Albert F. Rockwell relating to brakes and coaster brakes, to the full end of the term for which any

letters patent, both of the United States and foreign countries, are or may be granted.

"2. The said Albert F. Rockwell will impart to the company any and all information regarding any inventions or improvements in brakes and coaster brakes, which may hereafter be invented by him, or of which he may hereafter become possessed, immediately upon his inventing or becoming possessed thereof, and will upon the request of the company execute all applications, licenses or other written instruments which may be necessary or desirable to apply for and secure letters patent for the said improvements in brakes and coaster brakes, in the United States and in such foreign countries as may be desired by the company, and to secure to the said company the exclusive leave and license to manufacture and sell all such inventions and improvements in brakes and coaster brakes in the United States and foreign countries, under any and all letters patent which may be granted for the said inventions and improvements in brakes and coaster brakes, in the United States and in foreign countries, to the full end of the term for which any and all such letters patent may be granted.

"3. The said Albert F. Rockwell, for himself and his legal representatives, hereby ratifies and approves the constructive license to the company under which the company has heretofore made and sold brakes and coaster brakes, and also ratifies and approves the license given by the company to the P. & F. Corbin Company, of New Britain, Connecticut, to manufacture brakes and coaster brakes, embodying any or all of the inventions or improvements of the said Albert F. Rockwell, and agrees that the company may extend the term of said license to the P. & F. Corbin Company upon its expiration, and include therein the right and leave to make and sell brakes and coaster brakes embodying any and all inventions or improvements which may hereafter be invented or acquired by the said Albert F. Rockwell; but it is distinctly understood and agreed that nothing herein contained shall permit the company to grant other licenses than to the P. & F. Corbin Company, or to assign, or otherwise dispose of, its rights under this agreement in such manner as to avoid its obligations to the said Albert F. Rockwell or his legal representatives or assigns as hereinafter provided, without having first obtained in writing the consent of the said Albert F. Rockwell or his legal representatives.

"4. The said Albert F. Rockwell will execute and deliver to the company all applications, assignments and other written instruments, which may be necessary or desirable to secure letters patent of the United States and foreign countries, and to vest the absolute title thereto in the company, for the full end of the term for which all said letters patent may be granted, for any and all other inventions or improvements of every description not relating to brakes or coaster brakes now possessed by, or which may be hereafter invented and acquired by, the said Albert F. Rockwell, and that immediately upon so inventing or acquiring any such other inventions or improvements he will impart to the company full information of the manner of using and constructing the same; the assignments to the company to be made in each and every case at the time of filing of each and every application in the United States and foreign countries.

"5. In consideration of the covenants and agreements of the said Albert F. Rockwell, herein contained, the company, for itself, its successors and assigns, hereby covenants and agrees that it will at once ascertain from its books the number of brakes and coaster brakes, which have been manufactured and sold by it during the six months next preceding the date hereof extending from January 1, 1903, to June 30, 1903, embodying or containing any of the inventions in brakes and coaster brakes covered by this agreement, to render a true report of the number thereof to the said Albert F. Rockwell and to pay to him upon the signing of this agreement the sum of five cents for each and every such brake and coaster brake so manufactured and sold during said period of six months, and that it will hereafter keep accurate account of the number of brakes or coaster brakes embodying any of the inventions or improvements in brakes and coaster brakes, included within the terms of this agreement, and during and continuing during the terms of any and all patents for brakes and coaster brakes included with-

in the terms of this agreement, and to render to the said Albert F. Rockwell, upon the 1st of each month hereafter, a statement of the number of brakes and coaster brakes, embodying any of the inventions covered by this agreement, which were made and sold by the company during the next preceding month, and to pay to said Albert F. Rockwell the sum of five cents on each and every brake and coaster brake so made and sold, excepting, and it is hereby mutually understood and agreed, that the payment of five cents each shall continue only so long as the company can sell such brakes and coaster brakes at a price which will show a net profit of seventy-five cents or more, exclusive of depreciation of plant, or new equipment added, on each brake or coaster brake manufactured and sold by the company. Should the profits on each brake and coaster brake fall below seventy-five cents, then and in that event the royalty of five cents each payable to the said Albert F. Rockwell shall be reduced in proportion as such profits as are actually made shall be less than seventy-five cents, and such reduced royalty shall continue until the profits shall again be seventy-five cents on each brake or coaster brake.

"6. Upon all other manufactures of the company which shall embody any of the future inventions of the said Albert F. Rockwell, not relating to brakes and coaster brakes, excepting those lines which the company is now making, the company is to pay no royalty to the said Rockwell, until the manufacture and sale of such other articles by the company embodying any or all of such other inventions of the said Albert F. Rockwell shall in any particular line of such manufacture amount to and show a net profit to the company of fifty thousand dollars ($50,000.00) per annum and a manufacturing profit, exclusive of depreciation of plant, and new equipment added, of at least sixteen and two-thirds per cent. (16⅔%). When such sales of articles embodying any of the future inventions of the said Albert F. Rockwell, other than brakes or coaster brakes, shall show in any particular line of such articles an annual net profit of fifty thousand dollars ($50,000.00) to the company, and which shall not be less than a profit of sixteen and two-thirds per cent. (16⅔%), then and in that event the company shall pay to the said Albert F. Rockwell, in addition to the royalties on brakes and coaster brakes, a sum equaling two per cent. (2%) on the net sales; providing, however, that no payment shall be made on articles other than brakes and coaster brakes, in any year when the net manufacturing profits on such other articles shall be less than twenty-five thousand dollars ($25,000.00) or less than sixteen and two-thirds per cent. (16⅔%) exclusive of depreciation of plant and new equipment added.

"7. Nothing is to be paid to the said Albert F. Rockwell on account of the manufacture and sale of articles other than brakes and coaster brakes by the company prior to the date of this agreement.

"8. All payments made to Albert F. Rockwell under the terms of this agreement are to be figured by the company as a part of the manufacturing cost of such articles on account of which such payments are made, and the amount of such royalties to be determined by the profits to the company appearing after the manufacturing costs are thus determined.

"9. Albert F. Rockwell is to remain in the employ of the company and use his best efforts in the interests of the company so long as the company shall elect, and shall receive a salary for his services, exclusive of any sum or sums which may be paid to him hereunder as royalties, the sum of five thousand dollars ($5,000.00), payable in equal monthly payments. Should the said Albert F. Rockwell voluntarily leave the employment of the company for any other reason than the nonpayment of his royalties and salary as provided herein, then and in that event all payments to him under this agreement whether as royalties or salary shall cease and determine; but said Albert F. Rockwell agrees that the rights of the company to his inventions shall continue, and that he will perfect the title of the company absolute to any and all inventions, improvements and letters patent which he may have invented or acquired or which he shall hereafter invent or acquire.

"10. In the event of the death of Albert F. Rockwell, this agreement is to continue with his heirs and legal representatives, and all payments of royalties to be made and payable to them by the company, in the same manner

and at the same time as payable to the said Albert F. Rockwell, but the payment on account of salary to be discontinued.

"11. The company is to pay all the costs of securing patents, including attorney's fees, also for the preparation of all legal documents in connection therewith; is to assume all risks for infringement in the manufacture and sale of such patented articles, and pay all costs of litigation and damages in connection with suits to maintain said patents or for infringement of other patents.

"In witness whereof, the said Albert F. Rockwell has hereunto set his hand and seal, and the said company has caused its name to be signed and its corporate seal to be attached by an officer having the authority so to do, and each of them to a duplicate original hereof at Bristol, in the county of Hartford and state of Connecticut, this 1st day of July, 1903."

Although only a part of this contract is material, it is set forth in full, in order that the relation of the parties and their attitude toward each other as expressed in the agreement may be understood.

[1] Although plaintiff's legal title to the patent in suit is not denied, the defendants claim, and it is not disputed, that the application for the patent was made by Hugh M. Rockwell, who was the inventor. The latter assigned it to the defendant Rockwell, who in turn assigned it to plaintiff, to whom it was duly issued as assignee. The defendant Rockwell-Drake Corporation, whose entire stock has been acquired by the Marlin-Rockwell Corporation, claims by an assignment from defendant Rockwell. I do not understand that the assignor of a patentable invention may deny his own title to the interest he has transferred. He is estopped from so doing. Hugh M. Rockwell was an infant when he assigned to defendant Rockwell. The defense of his infancy is not available to the defendants. Furthermore the proof shows that the infant not only executed the assignment for a valid consideration, but ratified it when he came of age.

[2] The defendant Rockwell claims that, after operating under the above agreement for a period of years, the plaintiff determined to oust him from the position of influence which he held in the affairs of the plaintiff and to reap the benefits of his valuable assistance and experience without giving him the agreed proportion of the profits arising therefrom; that the plaintiff recognized his unusual inventive ability and knowledge of its policy when the contract was made; and that by reason of its belief that, without his assistance, it would be able to manufacture and profitably market the articles covered by the patent involved, it deliberately decided to force him out, without just cause, with the intention of defrauding him of the benefits of the contract.

The plaintiff had a right to remove defendant Rockwell as its general manager. It appears to the court that the provision of the agreement that he was to remain in the employ of the company "so long as the company shall elect" was not only not violated by the removal, but was inserted to express the intent of the parties that he might be removed at the option of the company.

The issues in this case were presented carefully and at length. The trial was characterized by what appeared to the court a gratifying attempt on the part of all the witnesses to testify truthfully, even where the truth was not beneficial.

The question, it seems, upon which plaintiff's case must stand or fall, is the construction of the contract, and upon this the court's conclusions have been indicated.

Plaintiff may have a decree.

DURYEA MFG. CO. v. AGRIPPA MFG. CORPORATION et al.

(District Court, D. New Jersey. December 31, 1920.)

Patents ⇐328—No. 933,011, for belting, void for anticipation and lack of invention.

The Wooster patent, No. 933,011, for a woven cotton belting saturated with a solution of asphaltum, *held* void for anticipation and lack of invention.

In Equity. Suit by the Duryea Manufacturing Company against the Agrippa Manufacturing Corporation and others. Decree for defendants.

Russell M. Everett, of Newark, N. J., for plaintiff.

Mock & Blum, of New York City, for defendants.

BODINE, District Judge. The plaintiff had been engaged in manufacturing an asphalt paint for some years. After a period of experiments it produced a woven cotton belting, which it saturated with a solution of asphaltum. In 1905, the first year it manufactured this belting, some 7,500 lineal feet were produced. In 1917 the business had increased to the extent that 626,000 lineal feet were sold. United States letters patent No. 933,011 was issued August 31, 1909, to Philip L. Wooster, and covered the belting manufactured by the plaintiff company.

The defendant company began in 1917 or 1918 to manfacture a belting similar in kind and character to that manufactured by the plaintiff. The defendant Ernest H. Lieber had been in the plaintiff's employ for a period of seven years, until September, 1917, having a responsible position in the sales department. He was discharged, and was instrumental in the development of the business of the defendant company after his discharge. Robert M. Ford had been in the export commission business and had had business dealings with the plaintiff's agent in China, one F. E. Davis, who had been instrumental in securing an extensive market for the plaintiff's product in the Orient. Davis' commissions for the year 1917 on the sale of the plaintiff's product amounted to $39,213. The defendant Winchester Britton had been in the plaintiff's employ for some time prior to 1918, when he left that employ and went with the defendant company. Mrs. Davis, the widow of F. E. Davis, was the agent for the defendant in the Orient. She seems to have controlled the sales end of the business, for there is evidence that the plaintiff company, after the formation of the defendant company, did little or no business in the Orient.

The defense is simply that the defendant used the old Pearce & Beardsley patent of September 14, 1886, United States letters patent

No. 348,993, in the manufacture of its product. This contention leads to the consideration of the two patents.

The claim in the Wooster patent is for belting consisting of an absorbent woven fabric body portion, which has been saturated with a solution of asphaltum and dried. The old Pearce & Beardsley patent was for a new article of manufacture of all kinds of cloths and fabrics other than paper, when made of either vegetable fiber, wool, hair, and silk, and treated with a compound of bisulphide of carbon and *maltha,* substantially as described and set forth in the patent. The patent (line 54, first page) speaks of a mixture produced from 50 parts refined maltha and 50 parts bisulphide of carbon as being quite limpid, and by further reference back in the patent to line 50 it would seem that this is regarded as proper for a purpose *"such as saturating cotton belts for driving pulleys in machinery."* The italics are mine.

The proofs show that maltha was a soft asphalt. They also show, if proof be necessary, that the process of saturating as described by Pearce & Beardsley and the saturation under pressure described by Wooster are substantially the same.

Belting manufactured under the Pearce & Beardsley process seems not to have been generally marketed, although the evidence shows quite clearly that some lengths of it were made up shortly after the issuance of the patent and were put in use by the Pariffine Paint Company of California in its plant. There seems also to have been used belting impregnated with asphaltum in a laboratory prior to the issuance of the plaintiff's patent.

The Pearce & Beardsley patent describes the process of manufacture with almost the same degree of exactness as that used by Wooster some 25 years afterward when he was making an application for his patent. The proof of manufacture under this patent, though slight, indicates a disclosure to the world, and makes the statement in the Pearce & Beardsley patent and description of invention much more than a prophetical suggestion, as was urged by plaintiff. The plaintiff's only act beyond Pearce & Beardsley was the creation of a market for its output; but this fact alone, standing by itself, cannot be a ground for sustaining the validity of its patent, which discloses nothing new to the world, except the idea of pressure to obtain "saturation," which is obviously only one of a number of means of accomplishing the results.

An injunction and accounting is denied.

EARLES v. HOWARD.

(District Court, D. Maine. January 10, 1921.)

No. 590.

1. Master and servant ⇐124(4)—Failure to inspect borrowed hoisting rope negligence.

An employer, working on a ship, is liable to his employé for negligent failure to inspect a hoisting rope furnished by the ship, which the employer directed the employé to use, since he is bound to furnish safe instrumentalities, whether they were owned or borrowed by him.

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2. Master and servant ⟸106(1)—Furnishing defective hoisting rope, borrowed from ship, held negligence.

An employer, who directed his employé to use a boatswain's chair furnished by the ship, the hoisting rope of which was so old and frayed that it broke, *held* negligent.

3. Master and servant ⟸218(4), 230(6)—Workman hoisted with defective rope held not chargeable with assumption of risk or contributory negligence.

Evidence that a hoisting rope, which broke, causing injury to an inexperienced workman, was not so obviously defective that it was apparent it would not sustain his weight, *held* not to show that he assumed the risk or was contributorily negligent.

4. Master and servant ⟸217(13)—Risk of defective rope not assumed, unless danger is palpable.

A servant assumes the risk of injury, because of a defective rope furnished by the master for his use, only if the danger was palpable and appreciated, or could have been appreciated by the prudent and reasonable exercise of the senses.

5. Death ⟸95(4)—$2,300 awarded to aged parents for death of 24 year old son.

Evidence that decedent, who was 24 years old, had furnished some support to his parents, and intended, after his marriage, to take charge of his father's farm, *held* to authorize an award of $2,300 damages under Rev. St. Me. c. 92, §§ 9, 10, entitling the parents to a fair and just compensation for the death of a son, not exceeding $5,000, as that statute had been construed by the Supreme Court of the state.

In Admiralty. Libel by Catherine Earles, as administratrix of the estate of George W. Cartledge, deceased, against Frank A. Howard. Decree entered for libelant.

See, also, 268 Fed. 94.

Paul E. Donahue and Nathan W. Thompson, both of Portland, Me., for libelant.

Hinckley & Hinckley, of Portland, Me., for respondent.

HALE, District Judge. This libel is brought by force of the Revised Statutes of Maine, chapter 92, §§ 9 and 10, to recover damages occasioned by negligence of the respondent causing the instantaneous death of George W. Cartledge, the libelant's intestate, while employed by the respondent, and at work on the Italian steamship Mrav. The death is alleged to have been "caused by the wrongful act, negligence or default of the respondent." The case has been before me upon the respondent's motion to dismiss the libel. 268 Fed. 94, 95. I denied the motion, holding that the libelant had stated a maritime case, arising under the statute of Maine, and that it may be enforced in a court of admiralty.

[1] The proofs show that on May 6th the respondent, an electrician, was doing certain electrical work under contract with the steamer, then lying in the Portland harbor, and that he had employed Cartledge as one of his workmen. The work of the respondent, on the day in question, consisted of rigging a range light on the mainmast of the steamship. While doing this work, it became the duty of some workman to go up the mainmast. Cartledge was directed to perform this duty. The range light was to be placed on the mainmast, at a height of

between 40 and 50 feet above the deck, and it became necessary to go up the mast in a boatswain's chair, lifted by a hoisting rope. In accordance with instructions, received from Merrill, the foreman, Cartledge got into the boatswain's chair, which had previously been rigged upon the ship, and, with the aid of the foreman, was hoisted up the mainmast for the purpose of rigging the light. When he had been hoisted a distance of 40 to 45 feet above the deck, the line, running from the chair up through a sheave, near the truck of the mast and back upon the deck of the vessel, broke, causing Cartledge to fall with great force upon the deck of the ship, whereby he was rendered unconscious, and was removed to the hospital, where he shortly died, without recovering consciousness. The boatswain's chair, with the rigging and rope, was furnished by the ship, at the request of the respondent's superintendent, Floyd; the respondent having failed to furnish such chair. It appears from the proofs, however, that, previous to the injury, no inspection had been made of the line, by the respondent or by anybody in his employ. It does not appear that the respondent gave to any of his agents instructions to make examination. The testimony leads to the inevitable conclusion that the rope was old, weak, defective, and unfit to be used in hoisting heavy weights, although it had recently been used in hoisting. It is clear that, if such examination had been made, the imperfect condition of the line would have been discovered. Even though the line was furnished by the ship, and even if it should be found that there was negligence on the part of the ship, such negligence does not excuse the respondent. He was under the duty to exercise the care of a reasonably prudent man in furnishing to his workmen a safe place to work and safe instrumentalities to work with, and in warning them of dangers which they did not know, and to which they would be exposed in working with the instrumentalities furnished by him. Whether he owned such instrumentalities, or borrowed them, is not of vital importance in fixing his responsibility. Vanier v. Swett (D. C.) 243 Fed. 939, 942; Northern Pacific Railroad Co. v. Peterson, 162 U. S. 346, 353, 16 Sup. Ct. 843, 40 L. Ed. 994; Bush v. Cincinnati Traction Co., 192 Fed. 241, 244, 112 C. C. A. 499; Chambers v. American Tin Plate Co., 129 Fed. 561, 562, 64 C. C. A. 129.

[2] Upon the testimony, I can have no doubt that the injury was occasioned by the negligence of the respondent in failure to exercise reasonable care in furnishing a proper hoisting line for use of the libelant's intestate.

[3, 4] 2. The respondent says that Cartledge assumed the risk of using the rope; that it was his duty to inspect it before allowing himself to be hoisted up with it.

The proofs do not sustain this contention. Cartledge had a right to assume that the boatswain's chair, and hoisting line, furnished him by the respondent, were reasonably safe, and that they had been suitably examined by the master. Cartledge was not a man of experience; he was in the use of instrumentalities that, on the outside, appeared to be fit for use. The foreman testified that the rope looked all right to him. There is nothing to indicate that Cartledge had suffi-

cient knowledge of ropes to judge as to the soundness of the rope in question. Unless the danger was palpable and appreciated, and could have been so appreciated by the prudent and reasonable exercise of the senses, there could be no assumption of risk. The testimony fails to show an assumption of risk by Cartledge. The Aurora (D. C.) 178 Fed. 587, 590; Republic Elevator Co. v. Lund, 196 Fed. 745, 749, 116 C. C. A. 373, 45 L. R. A. (N. S.) 707; Texas & Pacific Railway v. Archibald, 170 U. S. 665, 18 Sup. Ct. 777, 42 L. Ed. 1188. The proofs fail, also, to show any contributory negligence, or fault on the part of Cartledge.

[5] 3. The question of damages requires careful consideration. This suit is brought by the personal representative of Cartledge for the exclusive benefit of his father and mother, now living on a small truck farm, near Augusta, Ga., the father being 65 years old, and the mother 63 years old; both are in a somewhat feeble state of health and unable to work all the time they having three other children, all married, and apparently unable to give any material assistance to their parents. The statute creates the sole right of compensation and defines the standard of such compensation. The parents are entitled to "a fair and just compensation not exceeding $5,000, with reference to the pecuniary injuries resulting to them from such death." This statute is evidently derived from the English Statutes of 9 and 10 Vict. c. 93 (1847), known as "Lord Campbell's Act." The leading case in Maine upon the construction of this statute is McKay v. Dredging Co., 92 Me. 454, 458, 459, 43 Atl. 29, 30. In that case Mr. Justice—afterwards Chief Justice—Emery, in speaking for the court, in a clear and enlightening opinion, discusses the statute and observes that—

> "Under this statute pecuniary damages can never be ascertained with exactness nor indeed with any satisfactory degree of approximation. Unlike ordinary questions of the legal measure of damages, this relates wholly to the future. There can never be knowledge. The conclusions arrived at must be based on probabilities, instead of facts. The only facts that can be ascertained are those that occur before or at the time of the death. From such data, what would probably have occurred, had not the wrongful act or negligence of the defendant intervened, must be conjectured as carefully as possible."

It appears from the proofs that Cartledge was a young man, 24 years of age, and in good health. He had left home about 5 years before his death, and had enlisted in the United States army, where he served during the Great War. He left the army at the end of the war, on account of his parents' poor health and their need of his care; he was then intending to return and carry on the farm. In the meantime he sought some remunerative employment, and was set to work by the respondent. Between the dates of April 27th and May 6th he had received the sum of $91.98, having worked overtime. While he was in the army his wages were from $15 to $30 a month; and during these five years he had sent his parents over $700, had furnished them also a mule team said to be worth $350, and had given something to pay his mother's hospital bill. He was engaged to be married to Miss Earles, the administratrix in this case, and

it was their intention, as soon as they should be married, to return to the farm, and run it for his father and mother.

Following the line marked out by Chief Justice Emery, in the McKay Case, it is the duty of the court to weigh the evidence and balance probabilities. The marriage would have brought to the parents some services of the son and his wife. But, on the other hand, it would have deprived them of some of his earnings. So far as I can find, from reported cases, it has been the policy of courts to take care not to allow excessive damages to beneficiaries of the age of the parents in this case. But, so far as their condition was made less favorable pecuniarily by the wrongful act of the respondent, they are entitled to recover enough damages to make them "a fair and just compensation." From a careful estimation of the probabilities, after examination of the evidence, I think $2,300 is the utmost that can be allowed as damages.

A decree may be entered for the libelant in the sum of $2,300. The libelant recovers costs.

MAYER v. GARVAN, Alien Property Custodian, et al.

(District Court, D. Massachusetts. December 10, 1920.)

No. 925.

1. **Absentees ⇐5—Contract for dissolution of German partnership by absence trustee invalid.**
   Under German Civ. Code, §§ 1822, 1911, 1915, providing for appointment of a curator or absence trustee for a person who is absent and whose residence is unknown, or who is prevented from returning to care for his property affairs, that such curator shall be subject to the provisions relating to guardianship, and that a guardian requires ratification by the guardianship court of a contract for alienation of the ward's property or business, such a curator for an absent member of a German partnership, in the absence of specific authority from the guardianship court, *held* without power to contract for the dissolution of the partnership and the disposition of the partner's interest, and without power, even with such authorization, where such partner was a citizen or subject of a foreign country.

2. **Partnership ⇐262—Ratification of dissolution contract cannot affect intervening rights.**
   Ratification by an American partner in a German partnership of a contract made without his authority or knowledge for a dissolution of the partnership and a transfer to him of its property in the United States, to take effect on commencement of war between the United States and Germany, *held* not to relate back under German or American law, so as to affect rights acquired by the Alien Property Custodian by a seizure of such property prior to the ratification.

3. **Partnership ⇐268—Enemy partnership having American business dissolved by war.**
   A German partnership, providing for a branch of the business in the United States to be conducted by an American partner, *held*, under the law of the United States, dissolved by the declaration of war between the United States and Germany, so far as related to the American partner and the business conducted in the United States, although under the German law the war did not effect a dissolution.

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4. War ⊂⊃12—Alien Property Custodian not entitled to possession of property of enemy partnership having American partner.

A German partnership had a branch of its business in the United States, in charge of an American partner; other partners being German subjects. *Held*, that the partnership, as related to the American partner and business, was dissolved by the declaration of war, but that the American partner had an equitable lien on the assets in the United States for the purpose of having them applied to payment of the firm debts and the liquidation of his interest in the partnership, and that under Trading with the Enemy Act, § 8 (a), being Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½dd, he was entitled to retain possession of the property and liquidate the business, being responsible to the Alien Property Custodian only for any surplus remaining which would be the property of the enemy partners.

In equity. Suit by Richard Mayer against Francis P. Garvan, Alien Property Custodian, and others. Decree for complainant.

Guy Murchie, G. W. Cox, Butler, Cox, Murchie & Bacon, and Edward F. McClennen, all of Boston, Mass., for plaintiff.

The United States Attorney, and Elias Field, Sp. Asst. Atty. Gen., both of Boston, Mass., for Alien Property Custodian.

B. Devereux Barker and Harold Williams, Jr., both of Boston, Mass., for defendants Richard Mayer Co. and Anglo-American Cotton Co.

BINGHAM, Circuit Judge. This is a bill in equity under section 9 of the Trading with the Enemy Act (40 Stat. at Large, c. 106, p. 411 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e]), brought against the Alien Property Custodian and the Treasurer of the United States. The Richard Mayer Company and the Anglo-American Cotton Company, Massachusetts corporations, Edwin Reis of Heidelburg, Germany, the estate of Ludwig Reis, late of Mannheim, Germany, and Karl B. Strauss, a naturalized Englishman, but now residing in Germany, are also named as defendants. The plaintiff, Richard Mayer, was born in Germany. He came to the United States in 1898 and since then has resided here. In 1912 he was naturalized as a citizen of the United States. In 1913, while in Germany, he entered into a partnership with Edwin Reis, Ludwig Reis, and Karl B. Strauss. Mrs. William Reis, of Heidelburg, was a special partner.

The partnership had its chief place of business in Germany, but it also had established houses in England and the United States. The partnership agreement provided that the German commercial and civil court laws should determine the rights of the partners and that the German court at Mannheim should be resorted to for the settlement of differences. Mayer contributed to the partnership the business that he had previously conducted in Boston, valued at about $50,000, or 200,000 marks; Edwin Reis and Ludwig Reis contributed property valued at 1,179,845.03 marks and at 1,136,867 marks, respectively; and Karl B. Strauss at 348,313 marks. The partners were to have 4½ per cent. on their capital, and the profits were to be divided 27½ per cent. to each of the Reises, 25 per cent. to Strauss, and 20 per cent. to Mayer. Edwin and Ludwig Reis were to have a salary of 22,-

000 marks each, Strauss 20,000 marks, and Mayer 16,000 marks; and the share of each in the profits of the business was to go to increase his capital in the concern. The partnership was to begin July 1, 1913, and continue until November 30, 1915, and thereafter for periods of two years, unless written notice of termination should be given six months before the expiration of any given period. No notice of termination was ever given.

Mayer managed the partnership business in this country, Strauss that in England, and the Reises the business in Germany. Strauss was in Germany when the war broke out, and has since remained there. The British government seized the property and business in London.

In 1914 the Boston business was incorporated under the name of the Richard Mayer Company. Later the Anglo-American Cotton Company was incorporated. The capital of these companies was paid in from the assets of Reis & Co. in Mayer's hands. The capital stock of the Richard Mayer Company consisted of 2,000 shares, of the par value of $100 each, and by June 8, 1915, 1,995 of these shares had been transferred to Mayer's name. The remaining 5 shares stood in the names of different persons, apparently as nominal holders to quailify them as officers.

The Anglo-American Cotton Company was incorporated July 1, 1915. It had a capital stock of 500 shares, of a par value of $100, of which 498 shares were issued to J. Laible, an employé and manager of the company.

In 1914 and 1915 Reis & Co. remitted money to the Boston house for the purchase of goods for export. The last of these remittances was early in 1915, and the last shipment of goods purchased therewith was in March, 1915.

Mrs. William Reis, the special partner, having died, the heirs of her estate, in 1916, called upon the firm for a declaration that she was no longer a member of the firm. This declaration had to be signed by all the partners, including Mayer. As Mayer could not be reached, the German court required the appointment of an absence trustee, and, purporting to act under the provisions of paragraph 1911 of the German Civil Code, it appointed Karl Mayer, brother of Richard, absence trustee for Richard.

February 7, 1917, Edwin Reis, Ludwig Reis, Karl B. Strauss, and Karl Mayer, as absence trustee for Richard Mayer, entered into an agreement for the dissolution of the partnership of Reis & Co., to take effect on the outbreak of war between the United States and Germany. A copy of the contract is annexed to the bill of complaint as Exhibit B. Under this agreement the European partners were to have all the assets of the firm in Europe, and Richard Mayer all the assets in the United States. Mayer, "in case of war," separated himself from the firm, and renounced all claim that he had against the European assets in favor of the European partners; and the European partners did likewise, and renounced their claims against the assets in the United States. When the war broke out between the United States and Germany, the European partners took over all the European assets and treated them as their own, and themselves as the only partners

remaining in Reis & Co. The German government was requiring liquidation of partnerships where the enemy interest exceeded 30 per cent. The interest of Strauss, the British partner, was 25 per cent., and of Mayer 20 per cent., making the total enemy interest 45 per cent. It was to avoid liquidation of the firm by the German government in case of war with the United States that the dissolution arrangement was entered into.

The plaintiff had no knowledge of the appointment of his brother as absence trustee, or of the agreement of February 7, 1917, until the spring of 1919, when, on April 7, 1919, he ratified it by bringing this suit, of which the European partners had notice by registered mail. There is no evidence that the German court specifically authorized the absence trustee to enter into the dissolution agreement, or that it ratified his act.

At the date of the dissolution agreement, February 7, 1917, the American assets, according to the last report known to the German partners—that of November, 1915—were not far from 20 per cent. of the total American and European assets. The books in America were kept in dollars; those in Germany, in marks. The partnership agreement would indicate that the ratio of marks to dollars, used in computing the capital of the firm, was about 4. It is claimed that the agreed ratio of conversion in accounts between the partners was 4.20 marks to the dollar, but I do not think the evidence warrants me in finding that this is so.

May 18, 1918, after investigation and determination as provided in the Trading with the Enemy Act, the Custodian caused the property and capital stock of the Richard Mayer Company and the Anglo-American Cotton Company to be transferred to him, and on September 20, 1918, after like investigation and determination, he took possession of securities held by the plaintiff, but purchased with partnership funds. The property seized was the following:

2,000 shares, Richard Mayer Co.	
500 shares Anglo-American Cotton Co., Cash	$ 2,155.61
Securities taken from Lee, Higginson Co., held on Richard Mayer's account, costing	114,491.52
Securities taken from Mayer's safe deposit box No. 3722, in the First National Bank of Boston, costing	236,900.26
Sundry small notes taken from safe of Richard Mayer Co., costing	1,725.00

All of the property so seized was purchased with partnership assets. The actual value of the American assets has not been proved. The book value of Mayer's interest in the German assets, as of April 6, 1917, according to the report of Price, Waterhouse & Co., leaving out the English and American assets, was 2,149,792.90 marks. The ratio of marks to the dollar on April 6, 1917, has not been proved, and nothing has been shown indicating whether the English business was an asset or a liability. Furthermore, it cannot be determined whether the German assets, as reported by Price, Waterhouse & Co., are accurate, as they state that they were denied access to certain "vital books of account."

In November, 1918, and March, 1919, the plaintiff gave due notice of his claim to the Alien Property Custodian as per Exhibit E attached to the bill of complaint.

According to section 6 and section 7 (c) of the act (sections 3115½cc, 3115½d), the money and property which is to go to the Alien Property Custodian, or he is given the right to take, is:

"Any money or other property * * * owing or belonging to or held for * * * an enemy or ally of enemy * * * which the President after investigation shall determine is so owing or so belongs or is so held."

By section 8 (a), being section 3115½dd, U. S. Comp. St., it is provided:

"That any person not an enemy or ally of enemy holding a lawful * * * lien, or other right in the nature of security in property of an enemy or ally of enemy which, by law or by the terms of the instrument creating such * * * lien, or right, may be disposed of on notice or presentation or demand, * * * may continue to hold said property, and, after default, may dispose of the property in accordance with law * * * and under such rules and regulations as the President shall prescribe: * * * Provided, that no such rule or regulation shall require that notice or presentation or demand shall be served or made in any case in which, by law or by the terms of said instrument or contract, no notice, presentation or demand was, prior to the passage of this Act, required: * * * Provided further, that if, on any such disposition of the property, a surplus shall remain after the satisfaction of the * * * lien, or other right in the nature of security, notice of that fact shall be given to the President pursuant to such rules and regulations as he may prescribe, and such surplus shall be held subject to his further order."

November 4, 1918, Congress amended section 7 (c) of the Trading with the Enemy Act of October 6, 1917, and added the following clause:

"The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this act, and in the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States."

The remedy provided by the act is found in section 9, as amended July 11, 1919, which reads as follows:

"That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian hereunder, and held by him or by the Treasurer of the United States, may file with the said Custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or of the interest therein to which the President shall determine said claimant is entitled. * * * If the President shall not so

order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may, at any time before the expiration of six months after the end of the war institute a suit in equity * * * in the District Court of the United States for the district in which such claimant resides * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if suit shall be so instituted then the money or other property of the enemy, or ally of enemy, against whom such interest, right, or title is asserted, or debt claimed, shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant or by the Alien Property Custodian or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant, or suit otherwise terminated: * * *

"Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court." 41 Stat. 35.

An "enemy," so far as applicable to this case, is defined in section 2 (a) to be:

"(a) Any individual, partnership, or other body of individuals, of any nationality, resident within the territory (including that occupied by the military and naval forces) of any nation with which the United States is at war, or resident outside the United States and doing business within such territory. * * *" Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½aa.

[1] The plaintiff in his bill asks relief on different grounds. One is that he is entitled to have the American property that was seized and its proceeds restored to him, because it was his at the outbreak of the war, April 6, 1917, by virtue of the dissolution agreement of February 7, 1917.

A decision of this question involves a consideration of the power of the German guardianship court to grant authority to Karl Mayer to act as curator or absence trustee for the plaintiff, and, if it had such power, (1) whether he exercised that authority in accordance with the German law governing contracts disposing of interests in property; and (2) if the commission issued by the guardianship court did not confer upon him the required authority, or if it did, and he did not comply with the provisions of German law necessary to the creation of a valid contract, then whether the plaintiff, inasmuch as Karl Mayer undertook to act for the plaintiff and in his behalf, upon becoming aware of the transaction, could ratify it, and whether the ratification would relate back to the time of entering into the contract in disregard of intervening rights, if any.

In the German Civil Code (Wang's translation) it is provided:

"1911. A curator absentis may be appointed for a person of full age, who is absent and whose place of residence is unknown, to take charge of his property affairs so far as is necessary. * * *

"The same rule applies to an absent person whose place of residence is known, but who is prevented from returning to take charge of his property affairs."

"1915. Unless it is otherwise provided by law, the provisions applicable to guardianship apply mutatus mutandis to curatorship."

"1821. A guardian requires the ratification of the guardianship court:

"(1) For disposing of land or of any right over land;

"(2) For disposing of a claim which has for its object the transfer or ownership of land, or the creation or transfer of a right over land, or the discharge of a piece of land from such right;

"(3) For incurring an obligation to do any one of the acts of disposition specified in (1) and (2). * * *

"1822. A guardian requires the ratification of the guardianship court:

"(1) For any juristic act whereby the ward is bound to dispose of his property as a whole; * * *

"(3) For any contract which has for its object the acquisition or alienation of a business for a valuable consideration, and for a contract of partnership entered into for the purpose of carrying on a business. * * *

"1823. Without the ratification of the guardianship court the guardian should not start any new business in the name of the ward, nor discontinue an existing business of the ward."

It is conceded that the plaintiff was an American citizen residing at Boston and that his residence was known, and, if it be assumed that he was prevented from returning to Germany in 1916, due to war conditions, and that the guardianship court had authority to appoint a curator absentis for an adult person not a resident of Germany, I find that the curator or absence trustee, in the absence of specific authorization or subsequent ratification from the guardianship court (of which there is no evidence in this case), could not legally enter into a contract dissolving the partnership and disposing of the plaintiff's interest in the partnership property, even though the contract was duly authenticated. Furthermore, as the plaintiff was a subject of a foreign state, and not a citizen of Germany, I find that the guardianship court was without authority to appoint an absence trustee for him under the provisions of law above set forth.

In the imperial statute introducing the Civil Code, provision is made for the appointment of a curator for a subject of a foreign state, but none of the circumstances authorizing such appointment are to be found in this case. See The Principles of German Civil Law (E. J. Schuster) p. 560.

Then, again, I find that, if the absence trustee was authorized by the guardianship court to enter into a contract for the dissolution of the partnership and a transfer of the plaintiff's interest in the partnership property, it was not executed in accordance with German law and was invalid.

On this subject the German Civil Code contains the following provisions:

"311. A contract whereby one party binds himself to convey his present property or a fractional part of his present property or to charge it with a usufruct, requires judicial or notarial authentication."

"313. A contract whereby one party binds himself to transfer ownership of a piece of land requires judicial or notarial authentication. A contract concluded without observance of this form becomes valid in its entirety if conveyance by agreement and entry in the land register have taken place."

"128. If judicial or notarial authentication of a contract is prescribed by law, it is sufficient if first the offer and later the acceptance of the offer be authenticated by a court or notary."

"125. A juristic act which is not in the form prescribed by law is void. * * *"

The contract of February 7, 1917, required judicial or notarial authentication whether Karl Mayer, as absence trustee, had authority to enter into the contract or whether he was acting without authority and in behalf of the plaintiff.

If, however, it could be said that, although the contract related to the transfer of property or rights in property, both real and personal, it did not require, under German law, judicial or notarial authentication, the question, so far as it concerns German law, would be whether the ratification which the plaintiff made of the unauthorized act of his brother relates back to the time of the making of the contract, and avoids any rights or interest which the government acquired in the American assets that belonged to the German partners before ratification.

(2) The German Civil Code contains the following provision as to this matter:

"184. Subsequent consent [i. e., ratification] operates as from the moment when the juristic act was entered into, unless it is otherwise provided.

"Dispositions affecting the object of the juristic act which before the ratification have been made by the party ratifying, or which have been effected by means of compulsory execution or distraint or by a trustee in bankruptcy, are not invalidated by the retrospective operation of the ratification."

It is contended (1) that on the outbreak of war between the United States and Germany on April 6, 1917, the partnership agreement was terminated by the contract of February 7, 1917, and as a matter of law; and (2) that the above provision of law does not apply in this case, for the reason that it affects only the disposition of property made by the party ratifying, or by compulsory execution or distraint issued against such property; (3) that the government acquired no right or interest by its seizure in that part of the partnership property claimed to be transferred, under the contract, to the German partners, that was located in Germany, for it never seized that property; and (4) that the property seized was the American property, which the German partners transferred to the plaintiff, and that the provision of law above recited does not relate to that. I find, however, that, under the German law, as well as the American law, ratification will not be permitted to relate back, so as to cut off intervening rights acquired by strangers to the contract, either in the property agreed to be transferred by the other party to the party ratifying, or in the property agreed to be transferred by the party ratifying to the other party, and that whatever rights the government acquired by the seizure in the American assets that belonged, at the date of seizure, to the German partners, are not cut off by the ratification. This is the rule in England (Lyell v. Kenedy, 18 Q. B. D. 796), notwithstanding it is there held that the other party has no right to withdraw his offer made to an unauthorized agent before ratification by the principal, if ratification is made within a reasonable time. In re Portuguese Cons. Copper Mines, 45 Ch. D. 16; Bolton v. Lambert, 41 Ch. D. 295; Brown v. Street, 3 Dom. L. R. 291; In re Tiedemann [1899] 2 Q. B. 66; 2

C. J. p. 524; Wharton's Commentaries on Agency & Agents, §§ 77, 78. The American cases on the subject may be found in 2 C. J. 518.

Stoddart v. United States, 4 Ct. Cl. 511, was a case where, on the outbreak of the Civil War, the plaintiff, who had been engaged in business in one of the rebel states, came North, leaving behind him property which his agent sold, and subsequently, without authority, invested in cotton for the plaintiff's benefit. The cotton was confiscated by the government. After confiscation the plaintiff ratified the act of his unauthorized agent and brought suit against the government for the proceeds of the cotton. It was held that the plaintiff's ratification could not relate back, to the prejudice of the rights acquired by the government in the seizure of the cotton.

[3] In case the plaintiff cannot avail himself of the contract of February 7, 1917, for the purpose of establishing an absolute title in the American assets as against the German partners and the intervening rights of the government acquired by its seizure, he contends that he is entitled in this proceeding to have the possession of those assets restored to him; that, on the breaking out of war between the United States and Germany, the partnership was terminated, and that he had a lien on the assets with a right of possession to secure the payment of the firm debts, the payment of any sum due the firm from other members of the firm, and the payment of any sum due him as his interest in the firm on liquidation; that, inasmuch as he had such a lien, he was entitled, under section 8 (a) of the Trading with the Enemy Act, to continue to hold said property and to liquidate the same "in accordance with law and under such rules and regulations as the President might prescribe," and should a surplus remain after satisfaction of the lien that he should notify the President thereof and hold such surplus subject to his further order.

It is conceded to be the settled law of England and of this country that a declaration of war between nations dissolves a partnership, the members of which are subjects of belligerent nations. The William Bagaley, 5 Wall. 377, 407, 18 L. Ed. 583; Hanger v. Abbott, 6 Wall. 582, 18 L. Ed. 939; Anglo-Mexican, 118 L. T. (N. S.) 260; Hugh Stevenson & Co., Ltd., v. Aktiengesellschaft fur Cartonnagen Industrie, (1918) A. C. 239; Mutual Benefit Life Insurance Co. v. Hillyard, 37 N. J. Law, 444, 474, 18 Am. Rep. 741; Griswold v. Waddington, 15 Johns. (N. Y.) 57; Id., 16 Johns. 438, 488. The defendants, however, contend that, inasmuch as the partnership agreement was executed in Germany, and the firm had a place of business there, and it was expressly provided that the German commercial and civil court laws should govern its relations, the partnership contract was a German contract, and that, under the German law, war in and of itself did not dissolve the partnership, even though the partners were subjects of enemy nations.

I find as a fact that according to German law a partnership of this character would not be dissolved by the outbreak of war. But it does not seem to me that this is a controlling circumstance. The parties, on entering into the contract of partnership which provided for the establishment of an American house, must have understood that if

the continuation of the contract, so far as it related to the American partner and the business conducted here, was, in case of war, a violation of the laws of this country, it could not be enforced here as an operative agreement. But whatever they thought about it, and notwithstanding the partnership was not dissolved under the German law by the outbreak of war, it was under the law of the United States, for its laws do not sanction the continuation of business relations between its citizens and citizens of a nation with which it is at war. The Kensington, 183 U. S. 263, 269, 22 Sup. Ct. 102, 46 L. Ed. 190, and cases above cited.

[4] The partnership being dissolved by the outbreak of war, the question is: What were the rights of the plaintiff in the American assets then in his hands? It seems to be well recognized that on the dissolution of a partnership a partner is entitled as against the other partners and all persons claiming through them in respect to their interest as partners, to have the property of the partnership applied to the payment of the debts and liabilities of the firm, and have the surplus assets, after such payment, applied to the payment of what may be due to the partners. And this right constitutes what is known as a partner's lien. In Standish v. Babcock, 52 N. J. Eq. 628, 29 Atl. 327, Vice Chancellor Van Fleet, in discussing this question, said:

"The law regulating the rights of copartners inter sese is well settled. No partner has a right to take any part of the partnership property, either during the existence of the partnership or after it has been dissolved, and say that it is his exclusively. 1 Lindl. Part. (5th Ed. 1888) 339. Each partner has a lien on the partnership property for the payment of the partnership debts, and also on the surplus remaining after the liabilities are discharged, for his share thereof. Lord Justice Lindley decribes this lien or right substantially as follows: Each partner has an equitable lien on the partnership property for the purpose of having it applied in discharge of the debts of the firm; and he has a similar lien on the surplus assets for the purpose of having them applied in payment of what may be due to the partners, respectively, after deducting what may be due from them, as partners, to the firm. This lien does not exist for any practical purpose until the affairs of the partnership have to be wound up; but when the partnership accounts have been taken, and the shares of the partners have been ascertained, then the lien of the partners on the assets of the partnership, and on each other's shares, becomes of the greatest importance. 1 Lindl. Part. 352. Judge Story, both in his Commentaries on the Law of Partnership and on Equity Jurisprudence, gives a similar description of this right. Story, Partn. § 97; 2 Story, Eq. Jur. § 1243. And Mr. Collyer, in speaking of it, says: 'Each partner has a specific lien on the partnership stock, not only for the amount of his share, but for moneys advanced by him beyond that amount for the use of the partnership, as also for moneys abstracted by his copartner beyond the amount of his share.' Colly. Partn. (3d Am. Ed.) p. 109, § 125. This lien was recognized by Chancellor Kent in Nicoll v. Mumford, 4 Johns. Ch. 522, 525, by Chief Justice Shaw in Dyer v. Clark, 5 Metc. (Mass.) 562, 578, and by Mr. Justice Bradley in Hoyt v. Sprague, 103 U. S. 613, 624."

I therefore conclude that on the dissolution of the partnership by the outbreak of the war the plaintiff had a lien on the American assets and their proceeds for what was due him from the firm upon an accounting of the affairs of the partnership and was entitled to retain the American assets in his hands as security. Was his right therein

changed; and, if so, in what respect, by the enactment of the Trading with the Enemy Act of October 6, 1917, and the seizure by the Alien Property Custodian in 1918?

By section 6 of that act, as above pointed out, the thing which is to go to the Alien Property Custodian is something "belonging to an enemy." The firm of Reis & Co. was not an enemy at the time of the passage of the act or at the time of the seizure, for it had been previously dissolved. The enemy or enemies, within section 2 (a) and 6 of the act, were the former German partners, and it was their interest that the Alien Property Custodian was entitled to seize; but his right of seizure did not extend to dispossessing the plaintiff of the American assets, for section 8 (a) of the act entitled the plaintiff to continue to hold the property and to liquidate the same to satisfy his interests, and to pay over the surplus or what belonged to the enemy partners to the custodian. As the only right the Alien Property Custodian had in the American property was through the enemy partners, in whose right he stood, he was entitled to demand and receive from the plaintiff only what they were entitled to receive, which was not the property itself, but their interest in the surplus, if any, after an accounting. Bank v. Carrollton Railroad, 11 Wall. 624, 20 L. Ed. 82; Karrick v. Hannaman, 168 U. S. 328, 18 Sup. Ct. 135, 42 L. Ed. 484.

I therefore find that the plaintiff is entitled to be repossessed of all the property seized and the proceeds arising therefrom, and to hold the same subject to the provisions of section 8 (a).

If an accounting would be advisable at this time, so as finally to conclude the matter, I find that on the present state of the evidence I am unable to state an account. There is no evidence of the actual value of the American property, or of the German or English property. The liabilities of the firm, so far as the evidence disclosed, cannot be ascertained, and the value of the German mark on the date of the dissolution of the firm, or any subsequent date as of which an accounting should be stated, has not been presented. Furthermore, it is doubtful, according to the report of Price, Waterhouse & Co., what the German assets are, as they were denied access to certain vital books of account in making their investigation.

A decree may be drafted on the lines above indicated and submitted for the approval of the court.

THE AQUITANIA.

GASTON, WILLIAM & WIGMORE S. S. CORPORATION v. CUNARD S. S. CO., Limited.

(District Court, S. D. New York. December 6, 1920.)

Collision ⊜114—Time charterer may recover for loss of use of vessel.

A time charterer under a government form of charter has a property interest in the vessel and may recover damages for a collision in which she is injured including his damages for loss of use while she is being repaired.

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

In Admiralty. Suit for collision by Gaston, Williams & Wigmore Steamship Corporation against steamship Aquitania, Cunard Steamship Company, Limited, claimant. On exceptions to libel. Overruled.

Lord, Day & Lord, of New York City (Allan B. A. Bradley, of New York City, of counsel), for claimant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Cletus Keating, of New York City, of counsel), for libelant.

MAYER, District Judge. The question raised by the exceptions is important and interesting. The libel alleges that libelant is a Delaware corporation and the time charterer of the British steamship Lord Dufferin. The charter in question, a copy of which is made part of the libel, was in the usual "government form" and was for a period of "about five years" from April, 1915.

The libel further alleges that on February 28, 1919, the steamship Lord Dufferin, while operating under said charter, after having been loaded by libelant, was lying, securely anchored, off the Statue of Liberty, and that, while so anchored, she was collided with by the Aquitania which cut off her stern, making it necessary to beach the steamer, and inflicting great damage upon her. The libel then sets forth that libelant as time charterer, by reason of the collision, has been "wrongfully deprived of the use of the steamship Lord Dufferin for a long time to come, and has suffered other damages and incidental expenses," the amount claimed being $1,700,000.

The owner of the Lord Dufferin is not before the court on this hearing, but the court will take judicial notice that the owner (Gaston, Williams & Wigmore of Canada, Limited, a Canadian corporation, not this libelant) has filed a libel in this court, to recover the damages sustained by the owner, which are stated in that libel to consist of expense of repairs, "loss of use during the period of repairs, and other incidental losses and expenses," the amount claimed being $1,000,000.

The exceptions to the libel are: (1) That it does not state facts sufficient to constitute a cause of action; (2) that the allegations of the libel do not disclose any maritime claim or lien against the Aquitania; and (3) that it appears on the face of the libel that at the time of the collision libelant was not the owner of the Lord Dufferin.

The consideration of the question involved starts with the impetus that the aim of the admiralty courts is to work out principles which make for justice and seek to avoid the turning away of a suitor without remedy.

An owner, possessing the full estate in a vessel, can, of course, recover for the loss of use of his vessel, damaged in a collision by the fault of another. The question is whether, when an owner, for a consideration, has parted with the use of his vessel to a time charterer, that fact will justify a full release to the claimant of the damages sustained for loss of use of the vessel. The damages are the same, and thus the inquiry is whether the legal position of the time charterer is such as to debar the recovery sought.

There are four cases in which recovery has been had by the time charterer under circumstances which can be justified only on the theory

pressed by libelant in the case at bar. In these cases, however, the question here involved is not precisely discussed, as will appear infra.

(1) In a per curiam opinion of the Vice Admiralty Court of Quebec, in 1883, the view here urged by libelant seems, in effect, to have been taken as matter of course.

(2) In the Beaver litigation, Mr. Keating and Mr. Bradley have carefully prepared for the court an outline of the essential features of the record, and the court, on examination of the record, finds that the digest thus made covers the points relevant here for consideration. This digest is annexed as an appendix hereto for the convenience of those who may have occasion to study the Beaver record. The Beaver (D. C.) 197 Fed. 866; The Beaver, 219 Fed. 134, 135 C. C. A. 32, Id., 219 Fed. 139, 135 C. C. A. 37. In the District Court (197 Fed. 866) the opinion is taken up with the question as to which vessel was at fault.

Appeals were taken to the Circuit Court of Appeals in two of the three cases, in the case brought by the master of the Selja against the Beaver, and in the case brought by the charterer against the owners of the Beaver. The former is reported in 219 Fed. 134, 135 C. C. A. 32, and the latter in 219 Fed. 139, 135 C. C. A. 37. The former case is entirely devoted to the question as to which vessel was at fault. This case was appealed to the Supreme Court of the United States (243 U. S. 291, 37 Sup. Ct. 270, 61 L. Ed. 726), but that court did not have before it the question presented here.

The other appeal (219 Fed. 139, 135 C. C. A. 37) was by the owner of the Beaver from that part of the decree which awarded the charterer of the Selja recovery "for the loss of its bill of lading freight * * * for the value of the bunker coal, flour slings, house flag, and dunnage wood and mats." The court stated the question on appeal as follows (219 Fed. 140, 135 C. C. A. 38):

"The parties to this appeal are agreed as to the value of those respective items, but the appellant contends here, as in the other case, that the disaster was caused by the joint fault of the two ships, and that because of the fault of the Selja the appellee is entitled to recover only subject to the rule of cross-liabilities."

The opinion of the District Judge shows that the same question was the only one discussed in the court below. The right of the charterer to recover as such was not discussed, but the question was whether the negligence of those in charge of the navigation of the Selja could be imputed to her charterer, as it was to her owner, so that the rule of divided damages could be applied in the charterer's case. Both the court below and the court above held that it could not. The court below said:

"The charterer had no control over her navigation and was in no way responsible for the negligence which caused the damages."

The Circuit Court of Appeals said (219 Fed. 142, 135 C. C. A. 40):

"The charterer in the present case, having nothing whatever to do with the navigation of the Selja, upon the most obvious principles of justice cannot be held in any way responsible for the negligence of her master, who, in the matter of her navigation, was the agent of her owner, and not the agent of the charterer."

It thus appears that in the Beaver Case the question argued and decided was whether the negligence of those in charge of the navigation of the Selja could be imputed to her charterer. The question whether the charterer as such could recover was conceded by the pleadings.

It is, nevertheless, a matter of some importance that the charterer had recovery under the decree, and such recovery is, necessarily, consistent with libelant's theory in the case at bar. It is apparent that neither the proctors nor the court, in a case as substantial and important as The Beaver, regarded the libel or the decree as requiring contest in this regard.

(3) In Sibiria S. S. Corporation et al., owner and time charterer of S. S. Sagua, v. S. S. Binghamton, the report of an experienced special commissioner (former Judge Veeder) came up to this court. In correspondence with counsel, the special commissioner stated:

"I find, also, that the item of damages claimed by the Atlantic Fruit Company, as time charterer of the steamer Sagua, should be allowed."

The interlocutory decree had provided, inter alia, that the special commissioner, in addition to taking proof as to the amount and validity of items claimed as damages by the Sibiria Steamship Corporation, as owner of the Sagua, was also—

"to take proof and to report, with his conclusions, as to the amount and validity of the following items claimed as damages by the Atlantic Fruit Company as time charterer of the steamship Sagua:

Loss of hire of steamship Sagua from December 24, 1917, at 5 p. m., to January 26, 1918, 5 p. m., 1 month 3 days, at $31,524.25 per calendar month, hire allowed and paid by the Shipping Board	$35,574.98
Less credit for hire under Sibiria S. S. Corporation charter at $12,500 per month	13,750.00
Total	$20,824.98

and to ascertain and report to the court, with his conclusions, the facts and amount showing the proper apportionment and adjustment of all the collision claims and liabilities, including cargo damages, as between the steamers Sagua and Binghamton, the Sibiria Steamship Corporation, the Atlantic Fruit Company, the Binghamton Steamship Company, Henry C. Siegel, and Phineas W. Sprague, or any one or more of them."

When the report of the special commissioner came on to be heard, this court said:

"The final question is (1) whether the Atlantic Fruit Company, charterer of the Sagua, has the right to recover full damages against the Binghamton; and (2) whether, if it has such right, the Binghamton has a right to recover over against the Sagua one-half of the charterer's damages.

"The Beaver, 219 Fed. 139, is apparently the only opinion which has any relevancy upon the question of the right of the charterer of the Sagua to recover in full. Copies of the interlocutory and final decrees in the Beaver Case have been furnished to me and will be found printed in the transcript of the record of the case in the Supreme Court. As appears by the decrees, the Portland & Asiatic Steamship Company, which was the charterer of the Selja, recovered in full from the Beaver; but it is provided in paragraph 7 of the interlocutory decree that there should be deducted from the amount recovered by the owners of the Selja one-half of all damages to the charterer of the Selja. The right of affirmative relief against the chartered vessel did not arise in the Beaver Case because the Selja was a total loss.

"The commissioner has found that the Binghamton is entitled to recover from the Sagua a moiety of the charterer's damages. This right rests upon principles of contribution between joint tort-feasors, which principles are applied in admiralty, although not at common law. Erie R. R. Co. v. Erie & Western Trans. Co., 204 U. S. 220, 27 Sup. Ct. 246, 51 L. Ed. 450; In re Eastern Dredging Co. (D. C.) 182 Fed. 179.

"In the case at bar the causes have been consolidated, and it will avoid circuity of action to award this affirmative relief. The effort at simplicity, and at the disposition in one decree of all relevant controversies between the parties, is characteristic of the admiralty courts. Wherever, as here, the result does not lead to any injustice, but, on the contrary, makes for a complete and final disposition, such result should be attained if possible.

"I realize that the question is apparently novel (as would appear from the lack of cases on the subject) but there is no reason why the principle cannot be accepted. In this litigation, such procedure will eliminate proceedings which can have only the same result at which the special commissioner has arrived.

"I agree, therefore, with the commissioner that the amount in question is to be paid by the Binghamton to the Atlantic Fruit Company, and then one-half is to be recovered by the Binghamton from the Sagua." Memorandum of Mayer, D. J., filed December 13, 1919.

My recollection is that the point here argued was not discussed. The interlocutory decree prepared by experienced proctors was accepted by the court, in so far as concerned the right of recovery by the time charterer and the right to recover over.

In Hines, Agent, v. Sangstad S. S. Co. et al. (C. C. A.) 266 Fed. 502, a joint libel was filed by the owner and time charterer of the steamship Sangstad for damage to the vessel's mast, caused by being struck by an unloading crane while discharging cargo, together with damages for loss of time during the necessary repairs. From the record, it appears that the damage to the mast did not make the vessel unseaworthy, and that, therefore, the time charterer was not entitled to claim that the vessel was off hire; also that the charterer must pay to the owner full charter hire for the time during the repairs, and that in turn the charterer could recover from the respondent its actual disbursement, namely, the same amount which it paid the owner of the vessel as charter hire during the delay involved in the time occupied in making repairs. The assessor reported $5,625 for demurrage in favor of the time charter.

The charterer thus recovered the actual disbursement which it was obliged to make, that disbursement being time charter hire which it was obliged to pay the owner during the delay during repairs. At page 506 of 266 Fed. the court said:

"In considering this question it is to be borne in mind that the charterer, by claiming demurrage for the 2½ days, is not seeking to make a profit out of the accident, but to be reimbursed for the loss of the use of the ship, due to the libelee's negligence, and that the libelee, by insisting that the 2½ days be deducted, is endeavoring to impose upon the charterer the loss of the use of the ship during that time."

This case, it seems to me, is precisely in point. How far the recovery shall go is one question, but whether there shall be a recovery is another. Claimant contends that the time charterer has no cause of action; but it is apparent that in the Hines v. Sangstad Case, supra, unless there was a cause of action, the time charterer would not have

had any recovery. The award of the disbursement could have only been on the theory that a tort had been committed against the time charterer's property, which could be redressed in rem.

Libelant, according to the statement of its advocate, seeks to recover only for demurrage and other proximate damages and incidental expenses, such as cost of discharging cargo. To this claimant's advocate answers:

"That in general average libelant will recover these expenses from the owners of the cargo and the owner of the Lord Dufferin, and the amounts so paid to the charterer by the owners of the cargo and of the Lord Dufferin will be recoverable in turn by the owners of the Lord Dufferin and the owners of the cargo from the Aquitania, and recovery of this amount in this suit might result in double payment.

But we are not concerned at this time either with the extent or the limits of recovery. If libelant is entitled to recover for the loss of the use of the vessel, it may recover whatever damages the court will find, as matter of fact and law, to be the proximate result of the injury; also there need be no fear of double recovery. and, in any event, courts of admiralty are usually able to accommodate their decrees to the rights involved.

This brings us to the principle which must be applied or rejected, and that is whether the capacity of the vessel for earning freight and freight moneys, and the use of the vessel, master, and crew to that end, constitute property. It is urged that it does not, principally, because under this form of charter there is no demise. But a demise carries with it control of the vessel for all purposes. It makes the demisee (i. e., charterer, where there is a demise) the owner pro hac vice.

But there is not inconsistency nor illogical proposition involved in a holding that, under a charter such as this, while in respect of navigation and care the ship is the owner's, nevertheless, in so far as its capacity to earn freight is concerned, it is the charterer's. As expressed by Judge Hough in The Santona (C. C.) 152 Fed. 516, at page 518:

"The ship is the owner's ship, and the master and crew his servants for all details of navigation and care of the vessel; but for all matters relating to the receipt and delivery of cargo, and to those earnings of the vessel which flow into the pockets of the charterers, the master and crew are the servants of the charterers. There is, in fact (to borrow a simile from another branch of the law), an estate carved out of the ship and handed over for a specified term to the charterers, and that estate consists of the capacity of the vessel for carrying freight and earning freight moneys, and the use of the vessel, master and crew, for the advancement of the charterers' gains."

In all branches of the law, property has not been limited to tangible things. Franchises, rights of action, and other intangibles have been treated as property for one reason or another, and for one purpose or many. This development has been due in part, at least, to the necessity, in civilized communities, of safeguarding those things or agencies which keep trade and commerce moving on land and water, and which thus encourage investment and venture. Any rule of law, which permits a tort-feasor to escape liability, arrests commercial progress. Here it is charged that a wrong was done, from which injury flowed. If time charterers such as this should through no fault of

their own suffer damage, and then be unable to recover, it is plain that such a result will harm the shipowner in the long run. Venturers will be inclined to be timid, and, in normal times, when large profits are not in sight, they will hesitate to undertake engagements which do not carry fair protection against hazards. It is no answer to say that the charterer may insure. He should not be forced by the law to such resort. When the ship starts on her voyage, the insurance which the time charterer should have is that a court of justice will see to it that a wrong which deprives him of his use under his charter will be appropriately redressed.

APPENDIX.

The Beaver Case.

Three libels were brought against the Beaver or her owners: (1) Lie, as master of the Selja, on behalf of her owner, officers, and crew, against the Beaver. (2) Owners of the cargo of the Selja against the Beaver. (3) Portland & Asiatic Steamship Company (charterer of the Selja, the vessel lost) against San Francisco & Portland Steamship Company (owner of the Beaver). The three causes were consolidated for trial. 197 Fed. 866. The relevant portions of the record in the suit by the charterers are digested as follows:

The libel therein (Record, pp. 1456–1464) alleges: That the libelant is an Oregon corporation, the respondent a California corporation and the owner of the steamship Beaver, "and that both libelant and respondent occupy the same offices, both in said city and county of San Francisco and in the city of Portland, in the state of Oregon, and have the same corporate officers, who act in similar capacities in each of said corporations." These allegations are admitted in the answer—Record, p. 1466. That on February 1, 1909, the time charter was made in New York between libelant as charterer and respondent as owner of the steamship Selja, whereby the owners chartered and the charterers hired the steamship for a period of about three years. That in pursuance of said charter party upon one of the voyages duly entered upon thereunder libelant procured to be shipped on board cargo "and that Bs/L were duly issued for said goods, wares, and merchandise by this libelant to the shippers of the same." That by the terms of the Bs/L it was provided that freight should be paid by the libelant at San Francisco and Portland upon delivery of the goods. That while on the voyage from the East to San Francisco and Portland under the above-mentioned charter on the 22d of November, 1910, a collision occurred between the steamship Selja and the steamship Beaver, whereby the Selja became a total loss, with all her cargo. (The foregoing allegation was admitted by the answer—Record, p. 1466.) That the collision was brought about solely by the fault of the Beaver, without any fault on the part of the Selja. (This allegation was denied in the answer—Record, p. 1466.) Paragraph VIII alleges "that by reason of said collision libelant's freight, amounting to the sum of $14,088.36, as hereinbefore described, was totally lost, and it has been damaged by reason of said collision in said amount." (This paragraph of the libel is answered as follows: "Answering unto the VIII article of said libel this respondent admits the loss of freight therein described.")

The libel was later amended by consent (Record, p. 1471), so as to allow the libelant to allege as paragraph VIII–A as follows: "That at the time of said collision libelant had on board said steamship Selja and was the owner of the following articles: [Then follow details, such as bunker coal, flour slings, etc.]"

An interlocutory decree (Record, p. 1400) was entered holding both the Selja and the Beaver at fault for the collision. Paragraph 5 of this interlocutory decree reads as follows: "That the right of the Portland & Asiatic Steamship Company, libelant in case No. 15130, to recover the damages suffered by it for the causes in its libel and the amendments thereto therein mentioned, be left for adjudication till the final decree herein, since further evidence bearing on this right may be adduced by the commissioner."

Thereafter a stipulation as to the damages and facts in the libel of the Portland & Asiatic Steamship Company v. San Francisco & Portland Steamship Company was entered into, which made it unnecessary to go before a commissioner. The relevant portions of the stipulation are as follows (Record, pp. 1409–1413):

"It is hereby stipulated and agreed by and between the parties hereto that the following damages are admitted to have been suffered by the parties represented by Olaf Lie, master of the steamship Selja in his original libel herein in case No. 15099, by the Portland & Asiatic Steamship Company, libelant in case No. 15130, and by the claimant in the case No. 15099.

* * * * * * * * * *

"4. By the Portland & Asiatic S. S. Company, charterer of the steamship Selja, libelant in case No. 15130. The amount of the damages suffered by this libelant are not admitted, but the following facts are to be taken as true:

"(a) That the charter under which said Selja was proceeding was in the form of the instrument hereunto annexed, marked Exhibit A.

"(b) That at the time of the collision herein said libelant had paid the semimonthly charter hire of said vessel from November 16, 1910, to December 1, 1910, amounting to two thousand five hundred ninety-six and 2/100 (2,596.02) dollars, of which there was later returned to libelant the sum of one thousand five hundred seventeen and 36/100 (1,517.36) dollars, being the charter hire from November 22, 1910, to December 1, 1910.

"(c) That it would have taken the Selja four days from said November 22, 1910, to have arrived at San Francisco and to have discharged the 3,365 tons of cargo destined for that port, and four more days to have arrived at Portland and to have discharged the 693 tons of cargo destined for that port.

"(d) That coal would have been consumed in the following amounts and at the following prices to complete the voyage: [Then follow details.]

"(e) That the following additional charges would have been incurred before delivery of the cargo: [Then follow details.]

"(f) That the total collectible freight on the cargo was: [Then follow details.]

"(g) That the prepaid freight was: [Then follow details.]

"(h) That the cost of discharging the collectible freight alone, as distinguished from the prepaid freight, would be as follows: [Then follow details.]

"(i) That the value of the bunker coal owned by libelant and lost in the collision, * * * and of the other articles also lost, as enumerated in the amendment to the libel, was: [Then follow details.]

* * * * * * * * * * *

"6. All of the foregoing damages of all of said parties are exclusive of interest, and interest may be claimed on said damages by all parties.

"7. It is further stipulated and agreed that none of the aforesaid statements of damage is exclusive, and that other damages may be claimed by any of the parties hereto (if warranted by the pleadings) on the evidence adduced herein, or the facts hereby agreed upon; the purpose of this stipulation being to agree on such damages and such facts as can now be agreed upon without the necessity of making proof of the same.

"8. All statements as to damages herein made shall be conclusive in any subsequent proceedings for limitation of liability, but it is not admitted that the claimant in case No. 15099 would be entitled to deduct all its aforesaid damages in such limitation proceedings."

The cause was then by agreement of the parties submitted on final hearing without reference to a commissioner. The District Court's opinion on final hearing is not reported. It is quoted in full from the record, at pages 1428–1432, as follows:

"Memorandum by R. S. Bean, District Judge, on Final Hearing.

"By the interlocutory decree it is adjudged that both the Beaver and the Selja were in fault and that damages should be awarded accordingly; that the Selja's cargo owners and her officers and crew, except her master, are entitled to their damages in full, subject to no offset whatever; that the

damages of the owner of the Selja and her master and that of the Beaver should be apportioned under the usual rule of cross-liabilities and subject to the offsets specified in clause 6 of the interlocutory decree; that the rights of the Portland & Asiatic Steamship Company, the charterer of the Selja and libelant in case No. 15130, to recover damages, be left for adjudication until the final decree. The cause was thereupon referred to a commissioner to ascertain and compute the damages sustained by the respective parties. Thereafter stipulations were entered into fixing the amount of damages or settling the facts from which, in conjunction with the record, such damages can be computed as a matter of law, and the cause has been by agreement of parties submitted on such stipulations and briefs for final decision without reference to a commissioner.

"From the stipulations of facts and admissions made in the briefs filed I find the damages suffered by the respective parties to be as follows:

	Amounts.
1. Cargo owners	* * *
2. Officers and crew of Selja	* * *
3. Damages of Wilhelm Jebsen, owner of the Selja	* * *
Value of the Selja exclusive	* * *
4. Damages of Olaf Lie, Master of the Selja	* * *
5. Damages to the Beaver	* * *
6. Damages of the Portland & Asiatic Steamship Company, charterer of the Selja	* * *
For loss of pending freight	$10,742.21
Bunker coal, flour slings, etc.	3,209.05

"It is admitted that * * * the cargo owners and the officers and crew of the Selja, other than the master, are entitled to a judgment against the Beaver for their full damages without offset; that the damages of the owner and master of the Selja and of the Beaver be apportioned, and subject to the offsets as provided in clause 6 of the interlocutory decree.

"The only controverted question is whether the Portland & Asiatic Steamship Company, charterer of the Selja, is entitled to recover in full for the loss of bill of lading freight, bunker coal, etc., or whether it stands in the same relation to the ship as the owner, and its damages should be awarded accordingly.

"For the libelant it is contended that since the charter was a time charter, and not a demise of the vessel, the charterer is to be regarded and treated as an innocent party to the cause of the collision, and entitled to the same remedies as the cargo owners or the crew; while the position of the San Francisco & Portland Steamship Company, the claimant of the Beaver, is that the Selja was the agency or instrumentality of the charterer in earning the bill of lading freight, and that her negligence affected its right to such freights, the same as it does the owner's right to the charter hire.

"The question seems to be one of first impression, as no authorities directly in point have been cited on either side. In my judgment the weight of the argument is within the libelant. The charter was a mere contract of affreightment, the vessel remaining in the possession, control, and command of the owner so far as her navigation was concerned. Her master and crew were the agents of the owner, and not of the charterer. The charterer had no control over her navigation, and was in no way responsible for the negligence which caused the damages. It seems to me, therefore, that it stands in the same position and entitled to the same rights as the innocent cargo owners. I conclude that the libelant in case No. 15130 should recover of the Beaver damages in full without any offset whatever.

"Costs.—It is provided in the interlocutory decree that the original libelant in case No. 15099 and the claimant therein should divide the costs incurred up to that time, and as to these parties the same provision will be made in the final decree. I take it, however, that the provision as to costs relates to the parties named, and not to the rights of the cargo owner and charterer of the Selja, who are innocent parties and entitled to a judgment for their costs.

"Decrees may be prepared accordingly."

In re SUTTER.

(District Court, E. D. Missouri, E. D. December 29, 1920.)

No. 3337.

Bankruptcy ⇐⇒68—Alleged bankrupt held "person engaged chiefly in farming."

An alleged bankrupt, who for 20 years had resided on a farm of 300 acres, a part owned by him and a part by his wife, during each of which years he cultivated and pastured all or the greater part of the land, and raised cattle and hogs, which he fed and marketed, *held* a "person engaged chiefly in farming," and under Bankruptcy Act, § 4 (Comp. St. § 9588), not subject to adjudication as an involuntary bankrupt, although he sometimes fed cattle which he bought and sometimes bought additional feed.

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

In Bankruptcy. In the matter of John W. Sutter, alleged bankrupt. On involuntary petition. Adjudication denied.

Fry & Fry, of Mexico, Mo., for petitioning creditors.

W. C. Hughes and Emil P. Rosenberger, both of Montgomery City, Mo., for answering defendant.

FARIS, District Judge. The matter before me is a petition in involuntary bankruptcy. Certain technical objections are raised by the creditors of Sutter, as also a question of fact, in opposition to his adjudication as a bankrupt. After carefully considering the evidence adduced upon a hearing before a special commissioner appointed to take the testimony, I have reached the conclusion that no necessity exists for the consideration of the technical objections urged; for I am of the opinion that the question of fact raised will, when decided, dispose of the case. This question of fact turns on the provisions of section 4 of the Act of July 1, 1898, c. 541, as amended by the Acts of February 5, 1903, and June 25, 1910 (Comp. St. § 9588). So much of said section as is apposite to the point urged reads thus:

"Any natural person, except * * * a person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act."

Therefore the question which arises upon the facts, as applied to the language of the statute above quoted, is whether John W. Sutter was, at the time he committed the alleged acts of bankruptcy, a "person engaged chiefly in farming or the tillage of the soil." Sutter himself absconded on the 6th of July, 1920, and his whereabouts up to this hour are unknown. Certain attaching creditors are, however, contesting his adjudication. Since, as stated, I am of opinion that the determination of the question whether Sutter falls into the category excepted by the statute will be decisive, I lay aside for the present any consideration of the technical questions urged by the contesting creditors.

The facts adduced upon the trial were, substantially, that Sutter had for some 20 years resided with his family on a farm containing some 300 acres of tillable and pasture lands, situated about 4 miles north of Wellsville, in Montgomery county, Mo. Of this tract 100 acres belonged to his wife, but during the whole of his residence in Montgomery county the latter tract was used by him just as were the remaining 200 acres. In the year 1919, or in the early part of the year 1920, he sold 80 acres of this land. Before this sale he had either cultivated or pastured the whole of the 300 acres, and after the sale he had either cultivated or pastured the remaining 200 acres thereof, just as if he had owned the whole in fee.

Up to the year 1916 he had himself either cultivated or pastured the tract—the whole 300-acre tract—annually. After 1916, and up to the date that he left the country, he had rented to others, sometimes 40 acres per year, and sometimes 80 acres, and had received as rent thereon a part of the crops raised on the land so rented. On this farm, which is shown to have been rather larger than the ordinary farm in that community, he annually raised crops of corn, oats, and wheat. The wheat he sold, but the corn, the whole of it, and the oats, were fed by him to hogs and cattle, which he sold, when fat, in the markets either at St. Louis or in Kansas City. Some of these cattle and many of the hogs he raised himself. Some of them he purchased from neighboring farmers in the community. Many of the cattle he would buy as "feeders" in St. Louis, and perhaps in Kansas City. He seems to have fed to the stock thus purchased, not only all of the corn and oats raised by him on this farm, but to have bought from neighbors other corn, which he fed to hogs and cattle upon the place. In addition, the evidence shows that between October, 1918, and January, 1919, he purchased six cars of what is known as "commercial feed." A considerable part of this so-called commercial feed was, however, resold by him to his neighbors. Between June, 1918, and March, 1919, the evidence shows that he shipped 4 cars of hogs and 14 cars of cattle to either St. Louis or to the Kansas City markets, mostly to the former. He also shipped in April, 1919, two carloads of sheep; but the evidence shows that these sheep belonged to a neighbor, and were shipped by him in his own name for the purpose of getting some advantage, either in the freight rate or by way of return fare. The evidence shows, as to many of these carloads of hogs and cattle, either that some parts of the same belonged to his neighbors, or that he purchased them merely to fill out the carload.

The record goes no further back as to his financial dealings than the year 1916, in which year, by reason of the impossibility of securing labor for his farming operations, he seems to have been compelled to an extent to modify his farming methods. In 1916 he received from live stock commission companies, so far as the record discloses, only $294.30; in 1917, about $4,700; in 1918 about $4,300; and in 1919, $882. To these receipts, it is inferable, there should be added whatever deductions were made by these companies for money due them from Sutter for "feeders" sold him from time to time, the amounts whereof do not clearly appear from the evidence. His expenditures

for "feeders" bought from live stock commission companies, for hogs and cattle purchased from his neighbors, for corn also purchased from the latter, and for commercial feeds, largely exceeded the sums received by him for the sale of stock, so that he became rather heavily indebted; hence this proceeding in involuntary bankruptcy, and the numerous attachments which have been run upon his property.

The evidence is conclusive that good husbandry in the community in which he lived, the nature of the soil regarded, made it necessary for him to rotate the crops upon his farm, and to feed and pasture cattle thereon, in order that the fertility of the soil might be conserved. The evidence, is also conclusive that in this he followed the custom of other farmers in the community, who owned and operated farms of a similar size and consisting of similar soils. He bought, fed, and sold more cattle and hogs than the majority of his neighbors, but not as many as some of them. He also produced upon this farm fruit, garden vegetables, and poultry, all of which, however, seem to have been consumed by himself and his family. The question of law, therefore, arises upon these facts as to whether Sutter was a person engaged chiefly in farming. I conclude that he was, and that his estate is not subject to an involuntary proceeding in bankruptcy. In re Thompson (D. C.) 102 Fed. 287; In re Mackey (D. C.) 110 Fed. 355; Wulbern v. Drake, 120 Fed. 493, 56 C. C. A. 645; In re Dwyer, 184 Fed. 880, 107 C. C. A. 204; Harris v. Tapp (D. C.) 235 Fed. 918; Rise v. Bordner (D. C.) 140 Fed. 566. In the case of In re Mackey, supra, the court said:

"A person engaged chiefly in farming is one whose chief occupation or business is farming. The chief occupation or business of one, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small. That one may principally devote his physical exertions or his time to a given pursuit, while one of the factors entitled to consideration, is not in all cases determinative of the question whether that pursuit is his chief occupation or business. * * * If such dealing is of principal concern to him and chiefly relied on by him for his subsistence and financial advancement, and if he treats it as of paramount importance to his welfare, he would not be within the category of persons chiefly engaged in farming, even were his farm to yield him some profit. * * * It is evident that it is impracticable, if not impossible, to define with precision the facts which will in all cases determine whether one is engaged chiefly in farming, and that each case must be decided on its own circumstances. It may, however, legitimately be stated, generally, that, if it appears in a given case that one's occupation or business which is of principal concern to him, not ephemeral, but of some degree of permanency, and on which he mainly relies for his livelihood and financial welfare, be other than farming, he is not 'a person engaged chiefly in farming.' No one should be held exempt from the provisions of the bankrupt act on this ground unless it satisfactorily appears that he comes within the exception."

It is likewise said in Wulbern v. Drake, supra,

"It does not matter * * * if the person may have other business or other interests, if his principal occupation is that of an agriculturalist, if that is the business to which he devotes more largely his time and attention, which he relies upon as a source of income for the support of himself and family, or for the accumulation of wealth."

Petitioners urge upon me as conclusive the case of Bank of Dearborn v. Matney (D. C.) 132 Fed. 75. I am constrained to hold upon the facts at bar that Sutter does not fall within the facts, and so not within the rule enunciated, in the Matney Case. In that case Philips, J., said:

"The farmer may cultivate all or a part of his lands. He may be general or special. He may devote his cultivation to the production of corn, or wheat, oats, or rye, or grasses, whichever, in his judgment, may be the more useful or profitable. He may include also with these breeding, feeding, and rearing of live stock, embracing cattle, horses, mules, sheep, and hogs, for domestic use and for market. If he find it more profitable to feed his agricultural products or his grasses to live stock than to rely upon marketing the surplus, he may not be limited to the quantity of live stock for such purpose to what he may breed or rear on his farm. For this purpose he may rely entirely upon the purchase of such live stock from his neighbors or on the market and utilize his farm products in feeding and fattening such 'feeders' for market. Neither, in my opinion, should the act be so construed as to restrict the farmer entirely, under all circumstances, and conditions, to the corn and hay and grasses he may produce for rearing such feeders and preparing them for market. In other words, where he relies largely upon his pasture lands for grazing his cattle, and his crops of corn may not be sufficient to carry them through the particular winter and the feeding season, he may supplement these by purchasing from without sufficient corn, and the like, to meet the requirement. But certainly there should be apparent such relation between his method of farming, and the buying and feeding of cattle, hogs, and the like, for market, as to reasonably indicate that his farming is not made principally subsidiary to the business of buying and selling cattle. So that, if his chief business is that of thus trading in cattle, using his lands as a mere feeding station, relying upon the purchased feed from the market for preparing them for sale much more than on his agricultural products, he may cross the dividing line between farming as his chief business and trading in cattle as his chief source of livelihood. No hard and fast rule can safely be laid down by the courts indifferently applicable to all cases. Each must depend more or less upon its own particular facts."

Applying the facts as I find them to the rule as I gather it from the cases cited above, and distinguishing the case made from the facts in the Matney Case, I conclude that Sutter was a person, prior to his absconding, chiefly engaged in farming, and that he cannot be adjudicated a bankrupt upon an involuntary proceeding, as here sought.

The adjudication of his estate as a bankrupt will therefore be denied.

LIBERTY NAT. BANK OF NEW YORK v. BURR.

(District Court, E. D. Pennsylvania. January 17, 1921.)

No. 7274.

Bills and notes ⇐531—Judgment on bill payable in foreign currency computed on rate of exchange at time of judgment.

A judgment on a bill of exchange, drawn in London and payable there in pounds sterling, which judgment must be expressed in United States money, is to be computed, not by the par of exchange as fixed under the acts of Congress (Comp. St. §§ 6536, 6537), but by the rate of exchange at the time judgment is entered, on the principle, that such sum is the equivalent of the obligation at that time.

At Law. Assumpsit by the Liberty National Bank of New York against Charles H. Burr. On rule for judgment for want of a sufficient affidavit of defense. Judgment order for plaintiff.

A. Allen Woodruff, of Philadelphia, Pa., for plaintiff.
Charles H. Burr, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This controversy suggests many academically interesting questions and raises some of great practical importance. The case concerns itself with bills of exchange drawn and accepted in London and made payable there. The promise was to pay in pounds sterling. The cause of action is based upon what by the acceptance is the equivalent of the promissory note of the defendant, payable in pounds sterling. Any judgment entered must be for a sum expressed in the money of account of the United States. The only controversy is over the fixing of this sum.

The acts of Congress (Comp. St. §§ 6536, 6537) which declare the value of pounds sterling expressed in dollars, cents, and mills, "in the construction of contracts payable in * * * pounds sterling," and imposing the duty upon the Director of the Mint to find, and the Secretary of the Treasury to proclaim, at stated periods, the value of foreign coins, suggest the thought of a translation of the word "pounds" into the dollars and cents thus defined to be its meaning. This purely legal concept of the situation is reflected in a number of the early cases. To thus merely translate pounds into dollars would be to enter judgment on the basis of what is called the par of exchange. We pass this thought by without further comment, because, among other reasons for so doing, neither party is asking that the sum for which judgment is to be entered should be so measured.

There is, however, another concept, reflected in the later cases, which is that the question is not one of translation or definition, but one of the measure of damages. This means the acceptance as a basis of calculation, not the par of exchange, but the rate. A promise to pay in pounds is kept by a payment in pounds, and hence, if there is a default, the promisee should be awarded in dollars the equivalent of that to which he was entitled in pounds. Rates of exchange are, however, so variable that they are not the same at the same place at different times, and ex vi termini they are not the same in different places at the same time. The acceptance of the doctrine that the prevailing rate of exchange controls makes important the question as of what date are we to find the rate of exchange. It is upon this the parties before us differ.

The history of any such transaction discloses several different dates, beginning with the date of the promise, and including that of maturity, demand, action brought, and the date of trial. The adjudged cases deal with transactions which are unlike in some features. These unlike features may affect the place of payment; a promise expressed in our own or a foreign money of account, or other points of difference. There are at least hints of distinction based upon the form and nature of the promise in respect to whether it takes the form of a promissory note or the acceptance of a bill of exchange. There are cases, also, of

a promise to pay in a currency which is what is called depreciated at the time of the making of the promise, or is such at a later date. There are also cases which are sui generis, such as the Confederate money cases.

The English cases must be read with the thought in mind that they are considered from the viewpoint of the fixed idea of the absolute stability of the pound sterling, and that it is an unvarying standard of value. Bills drawn and payable in one state, payment of which is enforced by judgment in another, are foreign bills, and there may be a rate of exchange in favor of one locality and against the other; but such a bill involves no feature of any difference in the subject-matter of the promise in which may be involved the concept of a promise of the delivery of a commodity and damages awarded in money.

The Pennsylvania cases supply us with a very meager discussion of the principles on which the rulings made rest. Lee v. Wilcocks, 5 Serg. & R. (Pa.) 48, is ruled on the ipse dixit of Chief Justice Gibson that, in cases of promises to pay in foreign money, it was the settled rule to base a finding of the sum recoverable upon the rate of exchange prevailing at the trial. Wood v. Kelso, 27 Pa. 241, was the case of a promise made in one state to pay a sum of money in dollars in another state, and an action brought in the state in which the promise to pay was made. The plaintiff was given the benefit of the rate of exchange. The ruling, however, partakes too much of the nature of a rescript to be of much aid to us.

Stewart v. Salamon, 94 U. S. 434, 24 L. Ed. 275, was a proceeding to foreclose a mortgage upon real estate situate in Georgia. The mortgage, however, was given to secure the payment of certain promissory notes which are treated (although there is no direct statement of the fact) as if also made and payable in Georgia. The promise was to pay a sum of money expressed in dollars. The finding was that the note was "originally solvable in Confederate currency." The nominal value of this currency we assume was the same as that of the money of the United States. It had no actual value at the time of suit brought. Any judgment entered must of course be expressed in the money of the United States. It was held that the sum for which judgment was entered should reflect the value in the money of the United States of the sum mentioned in the promise in Confederate currency at the time the promise was made.

We are unable to see that this ruling is of much, if of any, value to us in determining the questions now presented. Rives v. Duke, 105 U. S. 132, 26 L. Ed. 1031, is to the same effect, as is also Effinger v. Kenney, 115 U. S. 566, 6 Sup. Ct. 179, 29 L. Ed. 495. The same comment applies to all of this class of cases.

Counsel have cited a number of other cases ruled in different jurisdictions. These we have had no opportunity to examine. There would seem, however, to be a lack of uniformity among them. We are, in consequence, taken back to Lee v. Wilcocks as the only light judicially shed upon the question. It is to be regretted that we have no statement from Chief Justice Gibson of the principle upon what the terms the "settled rule" is based.

It would seem to logically follow, as already intimated, that if the controlling principle is that of the mere translation of the foreign word, by which the sum to be paid is indicated, into a word in our language which is the equivalent of the foreign word, as with us defined by law, that when the promise is reduced to judgment, that the sum of the judgment should be determined at what is called the par of exchange. It would also seem that, if the controlling principle is to view a promise to pay a sum expressed in words of the money of account of another nation as if it were a promise to deliver a commodity, the sum for which the judgment is rendered should be based upon the rate of exchange prevailing at the time of the breach, or, in other words, the maturity of the note or other obligation containing the promise. If the promise is the payment of a sum expressed in a money of account, which had a meaning at the time the promise was made, but none at the time the judgment was rendered, then the sum expressed in the judgment is to be determined by the sum expressed in the same terms which was in the minds of the parties at the time the promise was made, or, in other words, the rate of exchange prevailing at that time.

It is evident that the rule of which Chief Justice Gibson speaks is one not based on any of the principles of which we have just spoken. It may be based upon the principle, already stated, that a promise to pay a sum of money, expressed in the terms of any money of account, is kept by payment in that money. Putting the same thought in the concrete, a man who promises to pay £1,000 sterling keeps his promise if he pays £1,000 sterling at the maturity of the note or other obligation which he has given, and although he does not keep his promise to pay the note at maturity, if he pays it at a later date, he none the less meets his obligation if he later pays the £1,000, with interest thereon for the delay. If, instead of paying in the same money of account, he pays in a different money, he none the less keeps his promise, if the money in which he pays is the equivalent in value of that which he promised to pay. This means he must pay at the rate of exchange prevailing at the time of payment. Applying this principle to the determination of the sum for which the judgment should be entered, it would be entered in accordance with the ruling in Lee v. Wilcocks. The recovery of judgment for a debt may not always be the practical equivalent of receiving payment of that debt; but it is easy to understand that one may be the legal equivalent of the other, and practically works out the same result if and when the judgment is eventually paid. We say this because the plaintiff in the judgment receives, plus interest, precisely what he would have received, had the promise of the debtor been redeemed at the time the judgment was entered.

This is a rule for judgment for want of a sufficient affidavit of defense. In entering judgment on the basis of the rate of exchange prevailing at the time the judgment is entered, we follow the rule laid down in Lee v. Wilcocks, which we accept as the established rule in Pennsylvania. It meets the test applied in some of the cases in other jurisdictions that the amount of the judgment entered should be the equivalent of what the plaintiff would recover, if suit were brought in the jurisdiction in which the obligation was assumed and in which it was pay-

able. It is open to the criticism, suggested in other cases, that if the rate of exchange prevailing at any other time than the date of maturity is taken, there may be a difference in the amount for which judgment is entered on obligations which differ only in respect to the time the cases are brought to trial. Whatever inequality there is in this is due to the inherent nature of any of the known mediums of exchange. Every such medium varies in purchasing power from time to time and in different places. This variation is crystallized in the rate of exchange. The result is that two debtors, paying the same nominal sum expressed in any money of account, may pay different sums expressed in the purchasing power of that money, if the debts are paid at different times. However regrettable this may be, the result has thus far been found to be practically unavoidable.

We have treated the rule as intended to raise in limine the question of law as to the basis upon which the amount for which judgment should be entered is to be determined. Whether the record is in such shape as that the court can find for what sum judgment should be entered in accordance with this opinion is not clear. To enable the parties to meet whatever difficulty there may be in arriving at the proper sum, leave is granted to the plaintiff to move for judgment in a sum which is based upon the rate of exchange prevailing at the time judgment is entered, if the parties can agree upon the correct amount. If they cannot, the cause is set down for reargument, so that any technical questions, such as we have suggested, may be determined. We have decided for the parties the question which we understand we have been asked to decide. The question is at this time of very great practical importance, owing to the great difference in the rates of exchange prevailing at different times. The changes, even within short periods, have been great.

We wish, also, to express our appreciation of the very helpful oral arguments and briefs submitted in support thereof.

CARPENTER STEEL CO. v. METROPOLITAN-EDISON CO.

(District Court, E. D. Pennsylvania. January 21, 1921.)

No. 2113.

1. **Electricity ⇐11—Consumer has right to day in court on determination of indebtedness.**
   An electric power consumer has a right to its day in court, to have the amount of its indebtedness to the power company, which was in dispute between them, determined before being compelled to pay the amount by the shutting off of its power.

2. **Electricity ⇐11—Agreement to supply power pending determination of dispute is binding.**
   An agreement by an electric power company to supply power during the pendency of any dispute over the correctness of its bills is binding on the power company pending the determination of the reasonableness of its published rates by the state Public Service Commission, on the power company being assured of the payment of the amount due it as soon as the sum is determined.

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

3. **Courts ⊂=493(3)—United States court has jurisdiction to restrain shutting off power pending determination of dispute as to rates.**
The United States District Court has jurisdiction of the subject-matter of the suit to restrain a power company from shutting off the power of a consumer pending determination by the state Public Service Commission of the reasonableness of its published rates, where it has jurisdiction of the cause and of the parties.

4. **Courts ⊂=493(1)—Concurrent jurisdiction of other tribunals, not yet exercised, does not deprive United States court of jurisdiction.**
The fact that other courts, or a state Public Service Commission, have likewise jurisdiction of the subject-matter of a suit, affords no ground for the United States District Court to refuse to grant the relief prayed, if no other tribunal has as yet exercised its jurisdiction.

5. **Electricity ⊂=11—Company cannot make itself sole judge of justice of charges.**
An electric power company, which had agreed not to shut off the power for nonpayment of disputed bills, cannot make itself the sole judge of the justice of its claims, by filing its rate schedules with the state Public Service Commission, which under the state law became the established rates until set aside by the commission, so as to defeat an injunction against the shutting off of the power for refusal to pay the scheduled rates without security for refund pending the decision of the Commission.

6. **Electricity ⊂=11—Construction of published regulation is judicial question.**
The meaning of the published rules and regulations filed with the state Public Service Commission by an electric power company must be judicially found.

In Equity. Suit for injunction by the Carpenter Steel Company against the Metropolitan-Edison Company. On trial hearing on bill, answer, and proofs. Decree for plaintiff.
See, also, 268 Fed. 980.

John A. Keppelman, of Reading, Pa., for plaintiff.
Ralph J. Baker, of Harrisburg, Pa., S. P. Light, of Lebanon, Pa., and H. P. Keiser, of Reading, Pa., for defendant.

DICKINSON, District Judge. The proofs have added nothing to the fact findings which might be made on the admissions of the parties, except possibly one, which we decline to make. The findings made are embraced in the following history of the case:

The plaintiff had an agreement with the defendant by which the latter was to supply the former with power. The refusal or failure to furnish the supply means plain ruin to the plaintiff. The defendant threatens the plaintiff with such ruin. The bill was filed to restrain against this irreparable injury. The refusal of the defendant to supply power is justified by the averred refusal of the plaintiff to pay. The contract to supply fixed the price. The bills rendered largely exceed what they should be at the contract rates. This is explained by the circumstance that after the contract was made the defendant, in accordance with the provisions of the act of assembly which established the Pennsylvania Public Service Commission, published a tariff or schedule of rates, the legal effect of which was to abrogate the contract rate. After the tariff rates became effective, the rate payable by the plaintiff was no longer the contract rate, but the tariff rate until such time as the Public Service Commission, on complaint that the

tariff rates were unreasonable, should so find and establish the lawful rate.

The plaintiff (with other consumers) made this complaint, and the reasonableness of defendant's tariff rate is now before the commission, but as yet undetermined. It is conceded that the law of Pennsylvania is that the published tariff rates are the rates to be paid until the Commission has found them to be unreasonable. Thus far there is no controversy between the parties, other than the one pending before the Commission, and no dispute over the proposition that the rate controversy is one which the Commission, and the Commission alone, can determine.

The defendant continued to supply power after the new tariff rates were established and published as the effective rates. The correctness of the amounts of the bills rendered was disputed by the plaintiff. This dispute was attempted to be adjusted, and for a time was adjusted, through an arrangement reached at a conference of all the counsel concerned, that the bills should be paid as rendered upon the defendant giving a refunding bond for the return of all moneys paid over and above the sum eventually found to be payable. The payments were then made and the bonds given, covering three periods of six months each. The defendant then refused to give bond thereafter, and the plaintiff retorted with a refusal to pay the bills, on the ground that they were in dispute. This position of the plaintiff was met by notice from the defendant that it would shut off the supply unless the disputed bills were paid.

The plaintiff thereupon filed the present bill, basing its cause of action upon the inequity of the defendant's threatened act, in that it had agreed not to use this means to enforce payment of any bills which were in dispute, and had adjusted the dispute by its further agreement to accept payment under an agreement to refund any payments made in excess of the sum found to be justly payable. In answer the defendant sets up that the tariff rate is the rate justly payable, and that in consequence the collection of the sums of money thus indicated is not inequitable; that the contract of the defendant to forego collection by the strong hand until the amount of its just claim was determined had been abrogated (as was its rate contract) by the published schedule of rates and regulations; and that it had not agreed to continue the working arrangement referred to indefinitely, and had the right to withdraw from it at any time.

Inasmuch as the plaintiff, in meeting its obligation, to show its willingness to do equity before asking for equitable relief, has offered to give bond to pay any sum found to be due defendant, to pay the undisputed part of the bill and give bond for the disputed part, to pay the whole bill upon being assured of the return of the part of it found not to be justly payable, and to do anything which might be equitably required of it, we confess to an utter inability to discover anything of any practical, or even academic, importance in the present dispute. At the most, the difference between the respective positions of the parties is that between a remedy which the law affords for the col-

lection of a bill and an extrajudicial remedy which the creditor may have at hand.

We have already indicated the real question involved as we analyze the case, and the proper answer to it. The question and its answer are embraced in these propositions:

[1] (1) The plaintiff has a right to its day in court to have the amount of its indebtedness to the defendant determined.

[2] (2) The defendant, having agreed to supply power during the pendency of any dispute over the correctness of its bills, is, under the facts of this case, bound to do so upon being assured of payment of the sum due to it as soon as the sum is determined.

[3] (3) This court has jurisdiction of the subject-matter and (on the ground of diversity of citizenship) of the cause, and also of the parties by service and appearance.

[4] (4) The fact that other courts have concurrent jurisdiction, or (if that also be the fact) that the Public Service Commission has the like jurisdiction, affords no ground for this court to refuse to grant the relief prayed, no other tribunal having thus far exercised its jurisdiction.

None of these propositions have any interest, because of their novelty or importance in their application. Great importance, however, for some reason, is attached to the case by the parties. It has been very fully and ably discussed by counsel. Because of this we will meet every issue raised.

[5] 1. We find ourselves to be in full accord with the defendant in all the ultimate propositions of law involved. There is, indeed, no dispute concerning them. The defendant, on these propositions, advances very confidently the conclusion that the plaintiff in this proceeding has no defense to the defendant's claim, and that any court will so adjudge. The answer to this presents the whole question in a nutshell. If this be so, why not test this by asking some court to so find? Why resort to a strong-hand extrajudicial remedy, which you agreed to forego? Of course, if the court could so find in this proceeding, there would be no equity in the prayer of the plaintiff that the defendant be restrained from enforcing the collection of a bill which it was found was justly owing. This, however, is a finding which the court, in this proceeding, as the case is presented, cannot make. The defendant, for some reason, refuses to submit the justness of its claim to any court for decision, but insists upon being the sole judge of the sum due. The amount of the debt could have been determined by a simple expedient in this very proceeding. All that was necessary was that the defendant file an answer by way of a cross-bill, averring what the sum due was, and praying for this to be decreed. As the sum due would thus be found, the court would not restrain the defendant from the collection of a debt thus found to be due and payable. The same finding of what was due could be made in an action brought in any court having jurisdiction.

What the defendant is really doing is to ask this court to accept its word for the amount due. However probable it may be that all which the defendant claims is legally due, this court cannot make the find-

ing. We do make the finding that the correctness of the bills is in dispute, and that this dispute is not colorable, but bona fide. We also make the finding that the defendant agreed not to shut off the power because of the nonpayment of the disputed bills. We conclude from these findings that the sum due and payable must be found before the defendant can apply the remedy which it agreed to not sooner apply. We make no finding that the plaintiff has the right of the dispute. but merely that the defendant has not placed it within the power of this or any court to determine the merits of the dispute, and that the plaintiff has the right to have this determined before payment can be enforced by the strong hand.

Counsel for plaintiff, in arguing away from the conclusion that there is no dispute except the one over the reasonableness of the rate, seems to see in the coal consumption something out of which a defense to the claim arises. Upon this we pass no judgment, but confine ourselves, as before stated, to the findings that there is a dispute, and that the plaintiff has the right to have it judicially determined.

[6] 2. We find no merit in the position taken by defendant that the published rules and regulations abrogate the defendant's agreement not to shut off power. Conceding all for which defendant contends, except the meaning of the regulation, this meaning must be judicially found, and the meaning is in accord with its contract that it will not shut off power, except for nonpayment of "money due," or, in other words, bills as to the correctness of which there is no bona fide dispute.

3. Defendant asks us to find that it made no agreement to continue indefinitely the giving of refunding bonds. This we do in the negative form of refusing to find that defendant so agreed. We see nothing to be gained by a finding one way or the other. The plaintiff admittedly holds the promise of the defendant not to assert its power to take the law into its own hands. A second promise, if made, adds nothing. The question is whether the agreement is revoked by the regulation, and, if one is, both are. Inasmuch, however, as the finding affects counsel, we feel justified in making this further finding. There was a working arrangement made. Counsel for the plaintiff and his associates in this conference understood that it was to last throughout the controversy. Counsel, so thinking, so testified. Counsel for defendant, however, had in mind that it would not last indefinitely. So thinking, they have so stated. None of them recall the details with sufficient clearness to enable any one to decide just what actually took place at the conference, to justify the one inference or the other. Lawyerlike, having reached what each thought to be an understanding, they dismissed the details from their minds.

Our conclusion is that the plaintiff is entitled to have its prayer for relief granted upon terms. We have already indicated what these terms should be, so that counsel will doubtless be able to agree upon the form of the decree to be entered. Leave is accordingly given to submit drafts, and we retain jurisdiction for the purposes of entering a decree in form; no decree being now made.

GILMORE v. GILMORE.

(District Court, D. Montana. January 18, 1921.)

No. 299.

1. **Affidavits ⇐12—Jurat controls inconsistent formal venue.**
An affidavit in support of a claim against the executrix in which the formal venue statement was inconsistent with the notary's signature and official description as of another state, and his seal imprint to the same effect, is sufficient, since variance between the formal venue and jurat is not fatal, but will be resolved in favor of the latter in view of the fact that the formal venue is a draftsman's act, while the jurat is an officer's certificate.

2. **Executors and administrators ⇐227(5)—Affidavit of claim is amendable.**
An affidavit in support of a claim against an executrix is subject to amendment and to proof aliunde at trial.

3. **Executors and administrators ⇐437(7)—Second presentation of claim does not remove bar of limitations.**
The rejection of the first sufficient presentation of a claim to an executrix sets in motion the statutory three months' period of limitations against an action thereon, and no subsequent presentation of the claim starts that period running afresh.

4. **Executors and administrators ⇐437(7)—Limitation runs from rejection of second effective presentation of claim.**
Where the first presentation of a claim to an executrix is invalid, and the second presentation is valid, an action commenced within three months after the second rejection is within time.

5. **Limitation of actions ⇐130(5)—Time not extended for second action commenced before dismissal of first.**
Rev. Codes Mont. § 6464, allowing a new action within one year after the termination of the first action by dismissal for want of jurisdiction, does not apply to a second action commenced before, and not after the termination of the first action by such dismissal.

6. **Limitation of actions ⇐130(2)—Extension of time for further action after dismissal applies to action on claim against executrix.**
Rev. Codes Mont. § 6464, authorizing a new action within one year after the termination of the first action, applies to action on claims against executrix, though such actions are limited by section 7530, which is a special probate statute, and are not subject to the general statute of limitations.

7. **Limitations of actions ⇐130(7)—Dismissal for want of jurisdiction does not show action was not in proper court.**
The fact that the first action brought against an executrix after rejection of a claim was dismissed for want of jurisdiction to determine the merits does not establish that the action was not brought in a proper court as required by Rev. Codes Mont. § 7530, and does not prevent a new action within one year after such dismissal under section 6464.

8. **Husband and wife ⇐43—Delivery of money to husband presumed loan or trust.**
Under Rev. Codes Mont. §§ 3694, 3700, 5381, allowing a married woman to retain her separate property, making transactions between her and her husband subject to the rules of confidential relations and trusts, and creating a presumption that transactions between a trustee and a beneficiary are secured by undue influence and without consideration, the law presumes that the delivery by a married woman to her husband of two cashier's checks owned by her, which he cashed, were trusts or loans.

9. Witnesses ⊂⊃182—Wife's testimony of loan held competent to prevent injustice.

In an action against an executrix, the wife of decedent can testify, to prevent injustice, that the delivery by her to her husband of two certified checks was a loan under Laws Mont. 1913, c. 41, § 1, providing that a party cannot be a witness as to direct transactions with deceased unless it appears that without the testimony of the witness injustice will be done.

At Law. Action by Emma Gilmore against Mary Osborne Gilmore, executrix. On trial to the court. Judgment for defendant.

John A. Shelton, of Butte, Mont., for plaintiff.
Nolan & Donovan, of Butte, Mont., for defendant.

BOURQUIN, District Judge. [1] This case tried to the court is the second action herein upon a claim of loan to defendant's testator, thrice presented by plaintiff to defendant in this state, wherein the estate is in administration, and thrice rejected without assigned reason. The issues are the fact of loan and limitations, the latter dependent upon the date of sufficient presentation and timely suit thereafter. The formal venue to the statutory affidavit attached to the first presentation is "State of Montana, County of Silver Bow." There is no statement where executed, but the notary's signature is followed by his official description as of the state of Washington and his seal imprint is likewise. Contrary to plaintiff's contention, it is believed that, in view of the office of the affidavit and in the circumstances, the affidavit is sufficient to render the presentation valid.

Amongst the authorities the better rule appears to be that variance between the formal venue and jurat is not fatal and will be resolved in favor of the latter as the place of execution. The formal venue is but a draftsman's act, perhaps by another than the officer, and long before and at a different place than that of contemplated or actual execution, and for which the officer is not responsible. The jurat, however, is the officer's certificate that the execution was before him and in performance within his jurisdiction of his official duty, for which the officer is responsible. The former easily and often escapes notice and is erroneous. The latter, hardly and seldom. It commands attention and warns at execution. And the seal makes no mistake. As the officer is not responsible for formal venue, but is for jurat, some presumption of official regularity attends the latter. See cases 2 C. Jur. 346, 363; Grafton Hotel Co. v. Walsh, 228 Fed. 11, 142 C. C. A. 461.

[2] Furthermore, such affidavits are subject to amendment and proof aliunde at trial. See 2 C. Jur. 369; 18 Cyc. 485, 491; Herbst, etc., Co. v. Hogan, 16 Mont. 388, 41 Pac. 135; Empire, etc., Co. v. Mitchell, 29 Mont. 59, 74 Pac. 81.

Perhaps, too, the variance, in so far as a defect, is waived by failure to specifically object when rejecting the claim.

The first action not having been commenced within the statutory three months after rejection of the first presentation, it and any action are barred.

[3] The first sufficient presentation rejected sets in motion this three months' limitation, and no subsequent presentation interrupts limitation and starts it afresh.

[4] Assuming, however, that the first presentation is invalid, the second presentation is unquestioned and valid. The first action, commenced within three months after the second rejection, is in time.

[5] But this first action was dismissed herein for want of jurisdictional amount due, and the instant action was commenced more than three months after said second rejection, so out of time and is barred.

Plaintiff seeks to save the situation by appeal to section 6464, R. C. Montana, that when an action is terminated as was said first action, a new action may be commenced "within one year after such termination." Unfortunately her second action was commenced before, and not after, the termination of her first action, and so is not within section 6464. See Missouri, etc., Co. v. Quinn, 172 Mo. 563, 73 S. W. 184. When brought, the second and instant action was barred, and subsequent dismissal of the first action does not change fact or law. The second action is as fatally premature as though brought before due or before claim presented.

[6, 7] In brief note of defendant's contention that the statute of limitations of suits upon rejected claims (section 7530, R. C. Montana) is special probate, and not subject to the general statute (section 6464) authorizing a new action, it is observed they are not inconsistent, the former indicates no sole and exclusive rule, and the reason, intent, and object of the latter is as applicable to suits upon rejected claims as it is to other actions. Likewise, of defendant's further contention that, as the first action was in a court without jurisdiction to determine the merits, it was not "in the proper court" as provided by section 7530, supra, and so affords no basis for a new and the instant action within section 6464. All actions for that matter must be brought "in the proper court," and, though dismissed for want of jurisdiction, a new action timely within section 6464 can be maintained. See cases 25 Cyc. 1319.

In fact, the words "in the proper court" in section 7530 are but a vestigal survival of the same statute in territorial days, when probate courts were separate from District Courts, and were precautionary to the end that suits on rejected claims be not brought in the probate court, but in the District Court, which alone had jurisdiction.

In view of possible proceedings in error, it is proper to note that but for limitations plaintiff would be entitled to recover.

[8] It appears that in 1915 and 1917 plaintiff and deceased were wife and husband. She owned two cashier's checks of $1,000 each, and after her indorsement he received and cashed them. Over objection, she testified the transactions were loans. Defendant is silent thereon. Aside from her testimony, the law presumes the transactions are trusts or loans.

The local statutes (sections 3700, 3694, 5381, R. C.) are that a married woman retains her separate property, that the transactions between her and her husband are subject to the rules of confidential relations and trusts, and that a trustee in transactions with the beneficiary is presumed to have done so by undue influence and without sufficient

consideration. And see Stickney v. Stickney, 131 U. S. 239, 9 Sup. Ct. 677, 33 L. Ed. 136; In re Remmerde (D. C.) 206 Fed. 830.

[9] Her testimony is competent to arrive at the nature of the transaction, whether loan or trust. Section 1, 13th Sess. Montana, p. 57, in exception to qualification of witnesses, provides that a party like plaintiff herein cannot be a witness "as to the facts of direct transactions * * * between the proposed witness and the deceased, excepting * * * when it appears to the court that without the testimony of the witness injustice will be done."

The writer drafted said section when first enacted in 1909, and the last clause was taken from the statutes of New Hampshire. It is so variant otherwise from said statutes that the construction of the latter is not controlling.

At the same time the evidence herein sanctions plaintiff's testimony within said construction. See Howie v. Legro (N. H.) 99 Atl. 650.

It is needless to discuss plaintiff's credibility and the situation if her testimony be rejected for any reason.

For, as before appears, the action is barred, the decision is for defendant, and judgment will be entered accordingly.

GRIFFIN et al. v. UNITED STATES.

(District Court, N. D. Georgia. January 29, 1921.)

1. **Bail ⇐79(1)—Remission of penalty authorized after judgment on rule absolute; "whenever."**
   Under Rev. St. § 1020 (Comp. St. § 1684), providing that, when any recognizance in a criminal cause is forfeited, the court may in its discretion remit the whole or part of the penalty whenever it appears that there has been no willful default, etc., the penalty may be remitted after judgment on rule absolute, especially as the natural meaning of "whenever" is "at whatever time."
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Whenever.]

2. **Bail ⇐77(2)—Judgment on rule absolute for forfeiture only concludes absolute defenses.**
   A judgment on a rule absolute forfeiting a recognizance in a criminal case involves only absolute defenses, such as impossibility of performance, and only such defenses are concluded by the judgment.

3. **Bail ⇐79(1)—Only penalty, and not costs, may be remitted after forfeiture.**
   Under Rev. St. § 1020 (Comp. St. § 1684), relative to the remission of the penalty incurred by forfeiture of a criminal recognizance, the penalty alone may be remitted, and the judgment must always stand as to the costs.

4. **Bail ⇐79(1)—Penalty may be remitted as to surety, though default by principal was willful.**
   Under Rev. St. § 1020 (Comp. St. § 1684), authorizing the remission of the penalty on forfeiture of a criminal recognizance when there has been no willful default of the party, the penalty may be remitted as to the sureties, who are free from willful fault, though the principal's default was willful.

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5. **Bail ⇐79(1)—Statute as to remission of penalties should be liberally construed.**
Rev. St. § 1020 (Comp. St. § 1684), authorizing the remission of penalties incurred by forfeiture of criminal recognizances, is highly remedial, and ought to be liberally construed.

6. **Bail ⇐79(1)—Penalty remitted in part as to sureties, who recaptured principal, who gave new bond, which was also forfeited.**
Where the sureties on a criminal recognizance, after their principal's default, recaptured him and delivered him to the deputy marshal, but he was again admitted to bail with another surety, and the new bond was also forfeited, and the sureties had not been diligent in applying for a remission of the penalty incurred by the forfeiture of the first recognizance, the penalty *held* to be remitted, except to the extent of $100, on the payment of that amount, with costs.

Application by M. Griffin and another for remission of the penalty incurred by forfeiture of a criminal recognizance. Penalty remitted in part.

B. P. Gaillard, Jr., of Gainesville, Ga., for petitioners.
John W. Henley, Asst. U. S. Atty., of Atlanta, Ga.

SIBLEY, District Judge. This is a motion by sureties to remit in whole or in part the penalty incurred by forfeiture of a criminal recognizance adjudged by rule absolute at a prior term of the court. The facts appearing on the hearing are that the principal, S. B. Smith, made bond and forfeited it; the forfeiture being afterwards relieved. He then made the bond involved here, and forfeited that, so far as appears, willfully, but without the connivance of his sureties. They, on learning of the default, at their own expense, recaptured their principal, pending the rule nisi on the forfeiture, and delivered him to the deputy marshal, who took him before a United States commissioner, by whom he was again admitted to bail with another as surety; the movants having no part in the making of this bond. They claim not to have been served with the rule nisi, but, if they were served, affirm that they neglected to answer, because misled by the law of Georgia, which permits sureties to discharge forfeitures by surrendering their principal before rule absolute on payment of costs. The third bond of Smith was also forfeited, and he seems not to have been yet tried.

The law of Georgia is as above stated (Park's Penal Code, § 960), and rules absolute granted after a surrender of the principal thereunder upon a failure to defend are, in practice, freely set aside as having been granted by mistake. Situations such as the present frequently occur in this court, and it seems desirable to approximate the Georgia practice so far as the laws of the United States permit. The objections here made are suggestive of three questions: First, may the penalty be remitted after rule absolute? Second, may it be remitted where the default of the principal was willful? And, third, ought there to be a favorable discretion exercised in this case?

[1-3] 1. The application is under R. S. § 1020 (Comp. St. § 1684), which reads as follows:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

The power here given is a discretion to remit in whole or in part under stated conditions a forfeiture which has really occurred. No doubt the proper time to apply for the remission is on the return of the rule nisi, if the facts exist and are known which are to be relied on, and a failure to apply promptly ought to be considered as an unfavorable circumstance, and if injury has occurred to the public interests by the delay, the application ought to be denied. But the judgment on the rule absolute necessarily involves only the well-known absolute defenses to the recognizance, such as impossibility of performance by the act of God or of the law, and these only are concluded by the judgment. U. S. v. McGlashen (C. C.) 66 Fed. 537. The provision of R. S. § 1020, is not of law, but of grace. An appeal thereunder may consist entirely with the correctness of the judgment absolute, which is not vacated or set aside, or in any wise collaterally attacked. Indeed, it must always stand as to costs; the penalty alone being capable of remission. The remission is but a release in whole or in part of an ascertained obligation to the United States, which was not imposed as a penalty or punishment by any public statute, the remission of which would appertain only to the executive, but arose in a private contract, though regulated by law, the equity of whose enforcement might well be entrusted to the judges.

No question, therefore, exists here of the power to set aside a judgment after the term, nor of conflict with the executive power of pardon. This power of remission came to us from the English law, as asserted by Chief Justice Marshall, in 1813, in United States v. Feely, Fed. Cas. No. 15,082, 1 Brock. 255, and was but redeclared by the statute of February 22, 1839, now R. S. § 1020. The time of its exercise was therein fixed by the broad expression, "whenever it appears to the court." This might mean only "in all cases in which"; but its natural meaning, and the only one given by Webster's International Dictionary, is "at whatever time." The relief may be had thereunder in the discretion of the court as well after as at the term of the rule absolute. U. S. v. Jenkins, 176 Fed. 672, 100 C. C. A. 224, 20 Ann. Cas. 1255; U. S. v. Traynor (D. C.) 173 Fed. 114.

[4, 5] 2. The original statute of 1839 made the relief conditional on there being "no willful default of the parties," meaning possibly that all the parties to the recognizance who could be in default, both the principal and his sureties, must appear to be free of willful fault. Yet under the act so written it was held in 1863 (U. S. v. Duncan, Fed. Cas. No. 15,004) that a surety who was himself free from willful fault might be relieved; the forfeiture standing as to the principal. All doubt was removed by the Revised Statutes changing the word "parties" to "party," plainly meaning that party who was applying for the remission. Had the defendant or the principal been meant, a term

definitely referring to him would have been used, instead of one that would apply as well to the surety. The statute, being highly remedial, ought to be liberally construed, and not in favor of the forfeiture.

The main object of the recognizance is not to enrich the treasury, or punish the surety, but to secure the attendance of the accused, without imposing on him the hardship, or on the public the expense, of his imprisonment. It would be a short-sighted policy that would make suretyship so hazardous that sureties could not be obtained, and a wise policy to extend a benefit to the surety who, after the willful default of the principal, exerts himself and spends his money to recapture him. Such exertion under such a stimulus is more apt to be effective than the efforts of an officer. The decision in U. S. v. Fabata (D. C.) 253 Fed. 586, is not only opposed to the earlier case of United States v. Duncan, supra, but not well supported by the authority cited (United States v. Robinson, 158 Fed. 410, 85 C. C. A. 520), which reversed the action of the lower court in vacating and setting aside the judgment of forfeiture, including the costs, and thereby relieving the principal and the surety, notwithstanding the willful default of the former, and long after the term at which the judgment was rendered. The same court, in United States v. Jenkins, supra, later made the distinction between setting aside a judgment and remitting under R. S. § 1020, and in a learned decision set forth the liberal policy of this section. It is therefore now held that the willful default of the principal does not debar the surety, who is without willful default. The remission in such case, however, should leave the judgment of full force as to the principal and be conditioned on the payment of costs by the surety.

[6] 3. In this case I think discretion may be exercised to relieve the surety in part. While the defendant has not yet been tried, his being at large is not chargeable to these sureties, who placed him in the hands of the marshal and the commissioner, to whom surrender might have been made before the forfeiture. After his release again upon bond, these sureties had no power over him and no responsibility for him. The relief would undoubtedly have been granted them, if applied for at that time. Yet they have not been diligent in making their application, and the lapse of time may often make difficulties in proof.

In the exercise of discretion, I adjudge that upon payment by the sureties of costs on the forfeiture and $100, the penalty and interest be remitted as to them; the judgment to stand as to the principal.

BENEDICT v. UNITED STATES et al.

(District Court, E. D. New York. December 10, 1920.)

1. **Trusts ⟸191(1)—Power to sell does not include power to convey to city for streets.**
   Under Real Property Law N. Y. § 105, making void a conveyance by the trustee in contravention of the trust, a power given by will to trustees to sell real estate and to deliver conveyances therefor to the purchasers, does not authorize the trustees to convey portions of the real estate to the city for streets pursuant to Greater New York Charter, § 992, since the power was only to convey for a definite consideration and exemption from possible future assessment and street openings is not such a consideration.

2. **Evidence ⟸571(7)—Expert testimony as to values is not to be rejected in all cases.**
   Though expert opinion as to the value of land taken by the government must be received with caution, it is not to be disregarded in all cases.

3. **Evidence ⟸572—Conflicting expert evidence held to show property taken for army base exceeded appraised value.**
   In an action by an owner of land taken by the government for an army base, evidence by four expert witnesses for the plaintiff, all of whom had peculiar experience to aid them in estimating values of water front property, such as that seized, opposed only by the testimony of two experts for the government, who had no peculiar knowledge of that particular kind of property, *held* to show the property was of the value claimed by plaintiff, which greatly exceeded that fixed by the appraisers for the government.

At Law. Action by George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William Langley, deceased, against the United States and the City of New York, to recover for compensation claimed for property seized by the United States for an army base. Judgment rendered for plaintiff for the amount of the claim.

Gannon, Seibert & Riggs, of New York City (William H. Seibert and Royal E. T. Riggs, both of New York City, of counsel), for plaintiff.

Leroy W. Ross, of Brooklyn, N. Y. (Charles J. Buchner, Sp. Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

William P. Burr, Corp. Council, of New York City (E. J. Kenney, Jr., of New York City, of counsel), for city of New York.

GARVIN, District Judge. This action is brought under the Food and Fuel Act of August 10, 1917, section 10 of which provides:

"That the President is authorized, from time to time, to requisition foods, feeds, fuels and other supplies necessary to the support of the army or the maintenance of the navy, or any other public use connected with the common defense, and to requisition, or otherwise provide, storage facilities for such supplies; and he shall ascertain and pay a just compensation therefor. If the compensation so determined be not satisfactory to the person entitled to receive the same, such person shall be paid seventy-five per centum of the amount so determined by the President, and shall be entitled to sue the United States to recover such further sum as, added to said seventy-five

per centum will make up such amount as will be just compensation for such necessaries or storage space, and jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¼ii.

The action is at law and a jury has been waived by consent.

The government took over a large tract of property, a part of the estate of William C. Langley, deceased, for an army supply base, on or about April 6, 1918, fixed its value by a board of appraisers at $1,796,522.20, with interest, and paid over 75 per cent, thereof, $1,347,396.65, with interest. This valuation was fixed at the rate of $1.10 per square foot. Plaintiff claims that the fair market value of the property on April 6, 1918, was $3,428,644, and that therefore he is entitled to recover $2,081,247.35, with interest at the rate of 6 per cent. per annum from the last-mentioned date, and an additional sum represented by the interest at 1 per cent. on $1,347,396.65 from April 6, 1918, to July 11, 1919, which was the date of the voucher for final payment, of the latter sum. The only issue is the reasonable value of the property taken.

The city of New York has been made a party defendant because there is a dispute regarding the title to Sixty-First, Sixty-Second and Sixty-Third streets, from the westerly side of First avenue to New York Bay, which lie within the boundaries of the property taken over by the government. The determination of this dispute does not affect the value of plaintiff's property. All parties agree that if the city owns these streets the opening thereof would be reflected in the value of the land adjoining; if the Langley estate is held to be the owner, it would use the land in the proposed streets for access to the water front upon the improvement of the property. The city claims title under a deed by the trustees of the Langley estate, executed and delivered pursuant to section 992 of the Greater New York Charter (Laws 1901, c. 466), which provides:

"The owners of land and of all the estate therein embraced within the lines of any street laid down and shown on the map or plan of the city of New York, and comprising all the land within said lines in an entire block in extent, may, without compensation and at their own expense, convey all their right, title, and interest therein, providing the same shall be free from incumbrances inconsistent with the title to be acquired by the city, to the city of New York, and upon the delivery of such conveyances to the corporation counsel of said city, with the money necessary to record such conveyances, and affidavits made by all such owners to the effect that the persons making them, are the owners of the estates in such lands so conveyed by them, respectively, and stating their interests, and that such estates in such lands are free of all incumbrances, except as aforesaid, together with abstracts of title and complete searches, if desired by such corporation counsel, it shall be the duty of such corporation counsel to examine such conveyances and papers, and if such title shall not be rejected for good cause, by such corporation counsel, he shall cause the said conveyances to be recorded in the office in which conveyances of real estate are recorded in the county in which such lands are located within sixty days after their delivery to him, and file them with the comptroller of such city, and thereupon the city of New York shall become vested with the title to said lands to the same effect and extent as if they had been acquired by a proceeding taken for the opening of that portion of said street; after the making and acceptance of such conveyances, no proceedings to open the lands so conveyed

shall be taken or maintained, nor shall the lands fronting on that portion of the street so conveyed, and extending to the center of the block on either side of such portion of said street so conveyed, be chargeable with any portion of the expense of opening the residue or any portion of the residue of such street, except the due and fair proportion of the awards that may be made for buildings as aforesaid."

The will of William C. Langley gave to his trustees power of sale expressed as follows:

"I hereby authorize and empower my said executors and trustees and their successor and successors to sell at their discretion as to the time and terms and at public or private sale, all and every part of my real estate, and to execute and deliver all necessary and proper assurances and conveyances for the same to the respective purchasers thereof."

Section 105 of the Real Property Law (Consol. Laws N. Y. c. 50) reads:

"If the trust is expressed in the instrument creating the estate, every sale, conveyance or other act of the trustee in contravention of the trust except as provided in this section, shall be absolutely void."

[1] The conveyance by the trustees under the charter was not such a sale as the trustees could make under the will; it was therefore void and the city acquired no title. The provision of the will, giving power to sell, did no more than to confer the right to convey title for a definite consideration. Exemption from possible future assessment for street openings cannot be held to be such a consideration.

The question of just compensation must now be determined. That is based upon the market value of the land. This tract was peculiarly valuable as water front property. In fact there seems to have been no other site in the harbor so desirable. Four experts were offered by the plaintiff, and two by the government. Experience has revealed that in many cases, expert opinion must be received with caution but in the case at bar there seems to be less reason for rejecting the conclusions of the plaintiff's witnesses than often appears because the reasons which they advance are, generally speaking, sound, and are, in the main, far more convincing than the grounds upon which defendants' witnesses place their valuation. The latter are well-known real estate experts, but were not particularly conversant with water front values on New York Bay.

[2] Plaintiff's witnesses as to value include a former borough president, whose official duties would naturally acquaint him to some extent with land values in the borough of Brooklyn, including water front property, two real estate men of prominence, and a fourth, Mr. Graham, whose appearance, demeanor, experience, and qualifications (which have been heretofore accepted by city and state, as well as by other cities and by numerous conservative and substantial private interests), were unusually impressive and gave to his testimony a weight that cannot be disregarded. It is true he has represented and is representing the estate involved, but all who are testifying as to values have an interest and are appearing for one of the parties to the action. The court has reached the conclusion that this is a case where expert testimony can be safely accepted as a basis for a determination of

values, unless the doctrine, sometimes advanced, that the testimony of real estate experts must be disregarded, is to be adopted in all cases. With this doctrine the court is not in agreement.

[3] The government claims that the issue is not the question of what is just compensation, but whether or not the measure of value fixed by the War Board of Appraisal is less than the fair and reasonable value. Even if that be conceded, a finding that the value so fixed by said board is less than a fair and reasonable amount is amply justified by the evidence.

Plaintiff will therefore have judgment according to the prayer of the complaint.

THE HOKENDAUQUA.*

THE HENRY STEERS.

(District Court, D. C. New York. January 29, 1919.)

1. **Collision ⟸90—Channel between Throgg's Neck and Willet's Point "narrow channel."**
   The channel between Throgg's Neck and Willet's Point *held* a "narrow channel," within the meaning of Inland Rules, art. 25 (Comp. St. § 7899).
   [Ed. Note.—For other definitions, see Words and Phrases, Second Series, Narrow Channel.]

2. **Collision ⟸90—Navigating use determines whether passage is narrow channel.**
   It is not the mere physical dimensions of strait or passage of water that determines whether or not it shall be called a narrow channel, within Inland Rules, art. 25 (Comp. St. § 7899), but it is the kind or character of navigating use to which that water is put.

3. **Collision ⟸91—Custom held not to justify violation of rule.**
   A custom of vessels passing eastward through the channel between Throgg's Neck and Willet's Point to keep to the port side of the channel *held* not justifiable, and not to afford any valid excuse for violation of the starboard side rule.

4. **Collision ⟸95(1)—Violation of rules by meeting tow held sole cause.**
   A collision between meeting tows at the eastern end of the channel between Throgg's Neck and Willet's Point, *held* due solely to the fault of the east-bound tug in keeping to the wrong side of the channel.

In Admiralty. Suits for collision by Anthony O'Boyle and by John Hildebrandt against the tug Hokendauqua, with the tug Henry Steers impleaded, and by the James McWilliams Blue Line against the Henry Steers, with the Hokendauqua impleaded. Decrees against the Hokendauqua.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Herbert Green, of New York City, for claimant of the Hokendauqua.

Park & Mattison, of New York City (Samuel Park, of New York City, of counsel), for claimant of the Henry Steers.

HOUGH, Circuit Judge. There is little, if any, difference of opinion among the witnesses as to the leading facts in this case. The

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

*Decree affirmed 260 Fed. 273.

Hokendauqua made up her tow, went across the stream or river to get within hail of the naval patrol boat, and deliberately went to the north or port side of the channel between Throgg's Neck and Willet's Point, in order by that path to emerge into the open Sound. In order to follow the channel, or at least the ordinary course, so as to pass Stepping Stones Light to starboard and Execution Light to port (going eastward), it was necessary for the Hokendauqua to swing somewhat sharply around the buoy at Throgg's Neck under a starboard helm. All vessels must do this in order to pursue the common course of navigation. There can be no excuse for pursuing such a method of navigation, except a custom that responds to the tests laid down by law in respect of a violation of rule.

[1] It is said that the channel between Throgg's Neck and Willet's Point is a narrow channel within the Inland Rules. I am of opinion that it is, not because it is of any definite width, or measures any particular number of yards across, but because it is a body of water so much used and used in such a manner as to render the application of article 25 (Comp. St. § 7899) both proper and necessary. It was pointed out in The No. 4, 161 Fed. at page 850, 88 C. C. A. at page 668 that "channels within the rule are bodies of water navigated up and down in opposite directions." The inference there drawn was that harbor waters, where the necessities of commerce require navigation in every conceivable direction "up and down and across," cannot be considered narrow channels. In The Three Brothers, 170 Fed. at page 50, 95 C. C. A. at page 324, it was said that the rule under consideration is—

"not an inflexible rule to be followed in all cases, and, where it is manifest that a blind adherence will produce disaster, it is not only the right, but the duty, of the navigator to disregard it. The rule so states explicitly. It must be followed only [in the language of the rule itself] 'when it is safe and practicable.'"

[2] It is therefore not the mere physical dimensions of a strait or passage of water that determines whether it shall be called a narrow channel or not. It is the kind or character of navigating use to which that water is put. Judged in this manner, the strait in question is most emphatically a narrow channel. It is the eastern outlet of New York Harbor. It carries an extensive commerce, which, with the exception of such trivial ferry business as may exist between the Westchester and Long Island shores, is all bound either into the harbor or out from the harbor. Furthermore, its eastern or outward boundary is, for the navigating purposes of vessels of any size, a sharp bend—a place where most east-bound vessels must starboard, and all west-bound vessels must port, in order to get to the best water for their business.

[3] The tide is not unduly strong, even at its topmost strength, barely more than a knot, and no reason appears to me why a variation from the rule should be recognized as a valid custom. Everything that makes for the recognized habit of east-bound vessels going through Hell Gate taking the Ward's Island side of the channel (The Transfer No. 21, 248 Fed. 462, 160 C. C. A. 469) makes against the custom here insisted upon, and the reasoning of the Benjamin Franklin, 145

Fed. 13, 76 C. C. A. 43, is entirely applicable. In point of fact, I consider it proven that this "custom" of tows that leave Hammond's Flats bound east to hug the Throgg's Neck buoy is one devised for their own convenience, not based on any necessity of navigation, distinctly not tending to safety, and by no means universal. It is therefore for every reason bad.

[4] That this erroneous navigation on the part of the Hokendauqua was the prime cause of the disaster is, I think, beyond doubt. It remains to consider whether the Steers was not also guilty of contributing fault. The two tugs saw each other's lights, I believe, at least a half a mile apart. Such, at all events, is the evidence, and, however deceptive estimates of distance over the water and at night time are, it is plain that there were no conditions of haze or fog that should have prevented good lights being seen at this distance, and there is no accusation in respect of the lights of any vessel concerned. Both tugs were in charge of their pilots. Both captains were off watch. If it be necessary to draw any comparison between the apparent intelligence and education of the two navigators, I should unhesitatingly prefer the pilot of the Steers, assuming good intent on the part of both men as witnesses. I find that the Steers, pursuing the channel course and intending, according to his understanding, and correct understanding, of the law, to keep to the starboard side of the channel, saw the lights of the Hokendauqua on his starboard bow at the estimated distance of a half a mile; but, since the buoy at Throgg's Neck was not visible in the nighttime, he could not tell how far away she was from that buoy or the not very adjacent shore. He navigated on the assumption that the east-bound Hokendauqua would take the starboard side of the channel as she went out into the Sound. As, in my opinion, he was justified in this assumption, it follows that he was justified in swinging around the buoy, or where he thought the buoy was, just as he did. That he made a good calculation is shown by the uncontradicted evidence from the tow of the Steers that the barges passed with the buoy plainly in sight a few feet on their starboard side.

It would be possible to enter into some minute calculations as to whether or not the pilot of the Steers might not have inferred a long tow on a long hawser behind the tug that turned out to be the Hokendauqua and have permitted himself to come into too close proximity with such a tow. I do not think that any such computations can be made with accuracy, and if it be true (as I believe and find) that the course and the intended course of the Hokendauqua was a plain violation of the statute, and the course undoubtedly taken by the Steers was a compliance with the statute, the fundamental reasons for the occurrence are apparent and are all unfavorable to the Hokendauqua. Therefore upon most familiar principles it is not necessary, and indeed is not permitted, to the court to search for minute possible faults on the part of one vessel when the great and fundamental faults are plainly to be laid at the door of the other.

For these reasons, all of the libels above enumerated will be dismissed with costs as to the Steers, and sustained with costs as to the Hokendauqua. In those cases in which the Steers has been impleaded, and not originally sued, the petitioning party will pay the costs of the Steers

THE HOKENDAUQUA.

THE HENRY STEERS.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

Nos. 12, 13.

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

Suits in admiralty for collision by Anthony O'Boyle and by John Hildebrandt against the tug Hokendauqua, with the tug Henry Steers, impleaded. Decree against the Hokendauqua (270 Fed. 270), and it appeals. Affirmed.

Herbert Green, of New York City, for appellant claimant of the Hokendauqua.

Park & Mattison, of New York City (S. Park, of New York City, of counsel), for appellee claimant of the Henry Steers.

Macklin, Brown, Purdy & Van Wyck, of New York City, for other appellees.

Before WARD and ROGERS, Circuit Judges.

PER CURIAM. Decree affirmed.

In re PLANTATIONS CO.

(District Court, E. D. Pennsylvania. January 25, 1921.)

No. 5623.

1. **Subrogation ⇐25—One whose tobacco was sold by mutual agent to pay debt held subrogated to pledgee's rights.**
   Where the agent of two companies, one of which, the P. Company, owed a debt secured by a pledge of tobacco, sold a quantity of tobacco belonging to the other company, the C. Company, and paid such debt from the proceeds, the C. Company was subrogated to the rights of the pledgee under the laws of Porto Rico.
2. **Subrogation ⇐35—Equitable lien of subrogated party not affected by attachment proceedings which were dissolved.**
   The equitable lien of a party subrogated to the rights of a pledgee was not affected by attachment proceedings which were dissolved without any sale.
3. **Subrogation ⇐35—Equitable lien of subrogated party not affected by removal of property or proceeds.**
   The equitable lien of one subrogated to the rights of a pledgee of tobacco in Porto Rico was not divested by the removal of the tobacco or its proceeds from Porto Rico by the pledgor's trustee in bankruptcy.
4. **Bankruptcy ⇐188(3)—Trustee takes subject to equitable liens.**
   A trustee in bankruptcy took property subject to liens equitably chargeable against it, and, as respected their enforcement, stood in the shoes of the bankrupt.
5. **Bankruptcy ⇐267—Equitable lien on property in trustee's possession held transferred to proceeds.**
   An equitable lien on tobacco coming into the possession of a trustee in bankruptcy was transferred to the proceeds on a sale of the tobacco by the trustee.
6. **Bankruptcy ⇐188(3)—Trustee knowing facts creating equitable lien held chargeable with knowledge of lien.**
   A trustee in bankruptcy, knowing of the facts upon which an equitable lien was based, was chargeable with knowledge of the lien.

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7. Bankruptcy ⊂345—When property subject to lien used in paying expenses, proceeds will be followed into general assets.

Where a trustee in bankruptcy, knowing the facts creating an equitable lien on property, sold the property and used the proceeds in paying costs of administration primarily chargeable against the general assets, a court of equity, following the maxim that equity will look upon that as done which ought to have been done, will follow the proceeds into the entire mass of the estate, giving the party injured by the unlawful diversion a priority of right over the other creditors.

In Bankruptcy. In the matter of the Plantations Company, bankrupt. On review of an order of the referee. Petition dismissed, and order affirmed.

Karl G. Kirsch, of Philadelphia, Pa., for claimant.
Carr & Steinmetz, of Philadelphia, Pa., for trustee.

THOMPSON, District Judge. The bankrupt conducted a tobacco plantation in Porto Rico, where it had in a warehouse a quantity of tobacco owned by it. In another part of the same warehouse was a quantity of tobacco owned by the Centrosa Company. The warehouse was in charge of one Lopez, who was agent for both companies. The Plantations Company obtained a loan of $5,000 from one Luina, and as security therefor gave Luina a "tobacco note," pledging a quantity of its tobacco as security for the debt. The note having fallen due about May 31, 1915, Luina requested payment. The Plantations Company's tobacco not being in condition to sell, Lopez sold a quantity of the Centrosa Company's tobacco, and out of the proceeds paid Luina. While the action of Lopez was unknown to the Centrosa Company at the time, it, upon being apprised of the facts, raised no objection.

The Plantations Company was adjudicated a bankrupt by this court on November 8, 1915.

Within four months of bankruptcy, the Plantations Company's tobacco was attached and seized by the United States marshal in Porto Rico.

Luina sought to intervene in the attachment proceedings, but, his counsel being advised by the trustee, who had been elected on January 17, 1916, and who had proceeded to Porto Rico to look after the interests of the bankrupt estate, that he could present any claim in this court, and that removal of the tobacco would be without prejudice, the intervention was not pressed.

Upon the application of the trustee, the attachment was dissolved.

The trustee thereupon took possession of the tobacco, and without notice to creditors or with leave of court sold a large part of it at private sale for $3,938.79. The sale was subsequently confirmed, and orders entered for sale of the balance, which was sold for $2,946.78. The total proceeds were $6,885.57. The Centrosa Company had no notice at the time of the confirmation of the first sale nor of the orders for subsequent sales, and on March 2, 1917, filed exceptions to the sales and confirmation thereof.

Out of the funds realized there were, upon the order of the referee

and without notice to the Centrosa Company of such intention, paid out at various times for expenses of administration and costs such amounts that on March 1, 1917, there remained in the trustee's hands, but $1,869.44 of the proceeds of the pledged tobacco. The funds of the estate were, however, increased from other sources to more than $5,000.

On April 3, 1917, the Centrosa Company presented a petition setting out that under the law in force in Porto Rico, through the payment of the debt of the bankrupt to Luina, thus releasing the tobacco from the lien of the note, it had become subrogated to Luina's rights in the tobacco or the proceeds of its sale, and praying for an order on the trustee to pay the Centrosa Company $5,000 in satisfaction of its lien acquired by subrogation.

The referee was of the opinion that under the laws of Porto Rico the lien of Luina was valid; that the Centrosa Company, through the application by Lopez of funds derived from the sale of its tobacco, became subrogated to Luina's rights; that the lien attached to the moneys in the hands of the trustee; and that the equitable lien was not divested by the payment out of the proceeds of the sales of administration expenses, but that general funds which would have been diminished if the administration expenses had been paid out of them should be appropriated to the payment of the amount of the lien. Accordingly an order was entered for the payment of the claim, and the case is here for the review of that order.

[1] Without discussion of the laws in force in Porto Rico, which are fully cited in the referee's opinion, they convincingly sustain the referee's conclusion that the Centrosa Company became subrogated to the rights of Luina.

[2] The equitable lien thus transferred to the Centrosa Company was not affected by the attachment proceedings in Porto Rico. There was no sale which would discharge the lien, and after the dissolution of the attachment the tobacco came into the hands of the trustee in the same condition as to liens and equities as before the attachment.

[3] The lien was not divested by reason of the removal of the property or its proceeds out of Porto Rico. Riddle v. Hudgins, 58 Fed. 490, 7 C. C. A. 335.

[4] The equitable rights of the parties were not changed by the commencement of bankruptcy proceedings. The trustee took the tobacco subject to the liens equitably chargeable against it, and as respects their enforcement stands in the shoes of the bankrupt, and he took it subject to a trust for the benefit of the Centrosa Company. Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641; Hauselt v. Harrison, 105 U. S. 401, 26 L. Ed. 1075.

[5] The lien upon the tobacco was transferred to the fund in the hands of the trustee. Goodnough Mercantile & Stock Co. v. Galloway (D. C.) 171 Fed. 940; Thompson v. Fairbanks, 196 U. S. 516, 25 Sup. Ct. 306, 49 L. Ed. 577.

[6, 7] The trustee knew of the facts upon which the Centrosa Company's equitable lien was based, and therefore is chargeable with knowl-

edge of the lien. The general assets of the estate against which the costs of administration are primarily chargeable cannot be relieved of those charges by the fact that the trustee, knowing the facts, used first the funds chargeable with the lien for their payment in ease of general creditors. Knowing the facts, he should not have used the funds chargeable with the lien in relief of liabilities chargeable against the general funds of the estate, and, following the maxim that equity will look upon that as done which ought to have been done, a court of equity will follow the proceeds into the mass of the estate.

Confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. Frelinghuysen v. Nugent (C. C.) 36 Fed. 229; Peters v. Bain, 133 U. S. 670, 10 Sup. Ct. 354, 33 L. Ed. 696; Alexander v. Fidelity Trust Co., 249 Fed. 1, 161 C. C. A. 61.

Seeing no error in the order of the referee, the petition for review is dismissed, and the order affirmed.

GULLEDGE v. DIRECTOR GENERAL OF RAILROADS et al.

(District Court, W. D. North Carolina, at Charlotte. January 7, 1921.)

1. **Removal of causes ⟸36—Evidence held not to show fraudulent joinder of railroad companies to prevent removal.**

   In an action against a North Carolina and a South Carolina railroad company for injuries sustained on the road of the South Carolina company, facts *held* not to show that the joinder of the North Carolina company, which owned practically all of the South Carolina company's stock, had the same officers and owned the rolling stock used on the South Carolina road, was for the fraudulent purpose of preventing removal to a United States court.

2. **Removal of causes ⟸107(4)—On motion to remand for fraudulent joinder, court need not determine liability, but only plaintiff's belief as to liability.**

   On a motion to remand an action against a domestic corporation and a foreign corporation, removed from the state court on the ground that the domestic corporation was fraudulently joined, the court is not required to determine whether the domestic corporation is liable to plaintiff, but will remand, if it was joined as defendant in the honest belief on the part of plaintiff that it was liable, for which belief there was a reasonable basis.

At Law. Action by W. V. B. Gulledge against the Director General of Railroads and others. On motion to remand to the state court. Case remanded.

Stack, Parker & Craig, of Monroe, N. C., for plaintiff.

Armfield & Vann, of Monroe, N. C., and Cansler & Cansler, of Charlotte, N. C., for defendants.

WEBB, District Judge. This cause was brought to the United States District Court for the Western District of North Carolina by the defendants, from the superior court of Union county, North Carolina,

upon allegations that the defendant Seaboard Air Line Railway Company was fraudulently joined as a party to this action, in that the Charlotte, Monroe & Columbia Railway Company was and is a distinct corporation, organized under the laws of South Carolina, and that the Seaboard Air Line Railway Company is a corporation organized under the laws of North Carolina, and that the Seaboard Air Line Railway Company was made a party to this action for the fraudulent purpose of giving jurisdiction to the state court, and for the fraudulent purpose of denying or preventing jurisdiction of the United States District Court.

After hearing evidence, both oral and upon affidavit, for both the plaintiff and the defendants, on December 31, 1920, at Charlotte, and after listening to extended argument of counsel on both sides, it is the opinion of the court that the cause should be remanded to the superior court of Union county, North Carolina.

[1] It appears from the testimony taken before me, the admission of counsel, and the pleadings in the cause, that the defendant Seaboard Air Line Railway Company is a North Carolina corporation, and that the Charlotte, Monroe & Columbia Railway Company is a South Carolina corporation; that both railroads are, and were at the time of the injury alleged, in operation, and the plaintiff was injured on the Charlotte, Monroe & Columbia road in South Carolina. The defendants in this action, upon whom is the burden of showing a fraudulent joinder, present evidence to the effect that the Seaboard Air Line Railway Company did not operate the Charlotte, Monroe & Columbia Railway Company, and did not have said company leased, at the time of the alleged injury, and that the accounts of the Charlotte, Monroe & Columbia Railway Company were kept separate and distinct, and that the employés were paid off with checks signed by the Charlotte, Monroe & Columbia Railway Company, and that in all respects the two roads are separate and distinct. The Charlotte, Monroe & Columbia road is 18 miles long, and runs from McBee, a station on the Seaboard Air Line, to Jefferson; all of said road being in South Carolina.

On the other hand, the plaintiff, a resident of North Carolina, produced evidence tending to show that 469 shares of the 471 shares of stock in the Charlotte, Monroe & Columbia Railway Company were owned by the defendant Seaboard Air Line Railway Company; that during the last four or five years the passenger cars operated on the Charlotte, Monroe & Columbia road were Seaboard Air Line cars; that the engines which pulled the cars on the Charlotte, Monroe & Columbia were Seaboard Air Line engines; that bills of lading and waybills were issued by the agent at Jefferson, the terminus of the Charlotte, Monroe & Columbia Railway, on Seaboard Air Line stationery, and that this was regularly done for several years past; that the roadmaster or section master of the Charlotte, Monroe & Columbia Railroad was employed by the roadmaster of the Seaboard Air Line, and that he made his reports to the Seaboard Air Line roadmaster, and that he was paid for his services since 1916 by the Seaboard Air Line; that the claim agent, who attempted to settle the claim, which is the basis of this suit, with the plaintiff, was a Seaboard Air Line

claim agent, and signed himself as such, and has his office and home in Charleston, S. C.; that an annual pass was issued to the roadmaster of the Charlotte, Monroe & Columbia by the Railroad Administration as an "employé of the S. A. L. Ry."; and further that the president of the Seaboard Air Line Railway Company is the president of the Charlotte, Monroe & Columbia Railway Company, and that the treasurer of the Seaboard is and was treasurer of the Charlotte, Monroe & Columbia; that the vice president and other general officers were officers in common of both roads, and that the locomotive engine which injured the plaintiff was Seaboard Air Line locomotive No. 131; and it was generally understood among the public that the Seaboard Air Line operated the Charlotte, Monroe & Columbia.

While it was stoutly denied by counsel for the defendants that the Seaboard Air Line had any other connection with the Charlotte, Monroe & Columbia than that of owner of 469 shares of stock above referred to and $35,000 of the $70,000 bond issue of said road, and they argue further that the fiscal accounts of the Charlotte, Monroe & Columbia were kept separate and distinct from the Seaboard Air Line's —and I do not find that this is not a fact—yet from all the facts and circumstances adduced upon the hearing before me, and the allegations in the complaint, I am not able to say that the defendant Seaboard Air Line Railway Company was joined as a party to this action for the fraudulent purpose of denying jurisdiction to the United States District Court.

[2] On the other hand, the court is of opinion that the plaintiff and his counsel acted in good faith and with a reasonable basis for their belief in claiming that the Seaboard Air Line is liable in this action for damages to the plaintiff, and honestly expect to secure a judgment against the Seaboard Air Line Railway Company, as well as against the Charlotte, Monroe & Columbia. I do not understand it to be my function in this proceeding to pass upon the question as to whether the Seaboard Air Line is actually liable to the plaintiff for damages as alleged. My duty is to ascertain whether the joinder was made in good faith; that is, in the honest belief on the part of the plaintiff that the Seaboard Air Line is liable, and whether there is or was a reasonable basis for this honest belief.

Having this view of the matter, the court is constrained to grant the motion to remand; and it is so ordered. The clerk at Charlotte will enter.

ELLIS et al. v. ATLANTA, B. & A. RY. CO. et al.

(District Court, N. D. Georgia. January 21, 1921.)

1. **Railroads ⟸5½, New, vol. 6A Key-No. Series—Company not liable for transactions during federal control.**
   The liability for a railroad's transactions as a carrier during the period of federal control was that of the United States, and not that of the railroad company, and no cause of action exists against the railroad company under Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j).
2. **Railroads ⟸5½, New vol. 6A Key-No. Series—Action against Director General maintainable in district of company's residence prior to orders to contrary.**
   Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), providing that actions might be brought by and against carriers under federal control as provided by law, applied to suits against the Director General, and authorized the bringing of a suit against him in the district of the principal office of the railroad company prior to the issuance of orders of the Director General to the contrary.
3. **Railroads ⟸5½, New, vol. 6A Key-No. Series—Order of Director General fixing venue held authorized.**
   Orders 18 and 18a of the Director General of Railroads, requiring suits to be brought in the district of plaintiff's residence or the district where the cause of action arose, though contrary to Federal Control Act March 21, 1918, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), were authorized by section 9 (section 3115¾i), providing that carriers under federal control should be subject to all laws and liabilities as common carriers, except so far as inconsistent with law or with "any order or the President."
4. **Constitutional law ⟸62—Railroads ⟸5½, New, vol. 6A Key-No. Series—Provision authorizing Director General to limit venue not delegation of legislative power.**
   Federal Control Act March 21, 1918, § 9 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾i), construed as authorizing the President, through the Director General of Railroads, to require suits against the Director General to be brought in the district of plaintiff's residence or the district in which the cause of action arose, was not an unconstitutional delegation of legislative power.

At Law. Action by Leigh Ellis and others against the Atlanta, Birmingham & Atlantic Railway Company and another. Suit dismissed.

Watkins, Russell & Asbill, of Atlanta, Ga., for plaintiffs.

Colquitt & Conyers and Brandon & Hynds, all of Atlanta, Ga., for defendants.

SIBLEY, District Judge. The suit is at law against the Atlanta, Birmingham & Atlantic Railway Company and Walker D. Hines, Director General of Railroads, for an alleged liability under the Bills of Lading Act (Comp. St. §§ 8604aaa–8604w), arising during federal control, and was filed in the Northern district of Georgia, in which is the principal office of the Atlanta, Birmingham & Atlantic Railway Company. The petitioners, however, are alleged to be citizens of the state of Texas, and the cause of action to have arisen either in Alabama or in North Carolina. The suit was filed subsequent to April 18, 1918,

and while General Orders 18 and 18a, promulgated by the Director General of Railroads, were in force. The demurrer raises the question of venue; the contention of the plaintiffs being that the venue is fixed, both for the Director General and for the railroad company, in the district of the latter's home office, and the defendants contending that no cause of action is set forth against the railway company, and that the Director General should be sued either in the district of the plaintiffs' residence or that in which the cause of action arose.

[1] The construction of section 10 of the Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j), made by this court in the case of Westbrook v. Director General, 263 Fed. 211, seems supported by the decision of the Circuit Court of Appeals for the Sixth Circuit in Erie Co. v. Caldwell, 264 Fed. 947, and of the Eighth Circuit in the case of Hines, Director General, v. Dahn, 267 Fed. 105, and of Mardis v. Director General, 267 Fed. 171, and in the absence of controlling overruling authority will be adhered to. According thereto the railway company incurred no liability by the transactions set forth in the petition, they being liabilities of the United States alone, and no cause of action is set forth against that company, and the petition is to be dismissed as to it.

[2, 3] According to the construction given in the Westbrook Case to section 10, the sentence, "Actions at law or suits in equity may be brought by and against said carriers and judgments rendered as now provided by law," applies to suits against the Director General, and makes applicable to them the whole code of procedure formerly applying to railroad companies. This would include the matter of venue and the place where suits should be brought, in the absence of any controlling order by the President. Otherwise, prior to the issuance of such orders, there would be no provision on the subject. Accordingly, until the President, through the Director General, issued Orders 18 and 18a, the venue of this suit against the Director General would have been in the district of the principal office of the proprietary railroad company. But those orders undertook to locate suits against the Director General in the district either of the plaintiff at the time of the accrual of the cause of action or that in which the cause of action arose. This suit is filed in neither district; plaintiffs being citizens of Texas and the cause of action arising in a state other than Georgia.

These orders, while at variance with the implication of the sentence quoted from section 10 of the Control Act, are authorized by the language of section 9 (section 3115¾i) and by the preceding sentence in section 10 that—

"Carriers while under federal control shall be subject to all laws and liabilities as common carriers, whether arising under state or federal laws or at common law, except in so far as may be inconsistent with the provisions of this act or any other act applicable to such federal control or with any order of the President."

Though this sentence relates rather to the existence of the liability than to the mode of its enforcement, it clearly authorizes the President to withdraw liability altogether to any extent to which he may find its existence incompatible with the purposes of the government control.

The preamble to General Order 18 recites the incompatibility found to exist in answering suits in the old places of venue. If the President could withdraw liability altogether, he might limit it by conditioning the place of its enforcement. As the greater includes the less, this must be involved in the powers given him by Congress.

[4] And especially in time of war this is not an unconstitutional delegation of legislative power. Selective Draft Cases, 245 U. S. 366, 389, 38 Sup. Ct. 159, 62 L. Ed. 349, L. R. A. 1918C, 361, Ann. Cas. 1918B, 856, and cases cited. These orders have been sustained by courts which differ from the construction of section 10 made in the Westbrook Case, and which have found it necessary to construe the orders as giving the whole foundation for suits against the Director General as the representative of the United States (see Nash v. Southern Pacific Rwy. [D. C.] 260 Fed. 280; Blevins v. Hines, Director General [D. C.] 264 Fed. 1005), as well as those whose construction approaches more nearly to that of the Westbrook Case, as Hines, Director General, v. Dahn (C. C. A.) 267 Fed. 105; Mardis v. Director General (C. C. A.) 267 Fed. 171; Wainwright v. Pennsylvania R. Co. (D. C.) 253 Fed. 459; Johnson v. McAdoo (D. C.) 257 Fed. 757; Haubert v. B. & O. R. Co. (D. C.) 259 Fed. 361; Rutherford v. Union Pacific (D. C.) 254 Fed. 880.

It will accordingly be adjudged that the suit against the Director General be dismissed without prejudice.

UNITED STATES v. PHILLIPS et al.

(District Court, S. D. New York. February 2, 1920.)

1. **Internal revenue ⇐2—National Prohibition Act did not repeal revenue statute.**
   Even though title 2 of the National Prohibition Act would have effected an implied repeal of the existing revenue laws respecting the manufacture and sale of distilled liquors, section 35 thereof expressly prevents such repeal, so that an indictment for possessing an illegal still contrary to Rev. St. § 3258 (Comp. St. § 5994), for distilling with intent to defraud the United States of taxes contrary to Rev. St. § 3281 (section 6021), and for making mash elsewhere than in an authorized distillery contrary to Rev. St. § 3282 (section 6022), charged offenses.
2. **Indictment and information ⇐150—Demurrer does not raise issue of double jeopardy by separate counts under different statutes.**
   A demurrer to an indictment containing separate counts charging similar acts as offenses under different statutes does not raise the constitutional question of double jeopardy, which can only be raised after conviction if the sentence imposed exceeds the maximum possible on conviction of the most venial crime.
3. **Conspiracy ⇐27—Overt act need not implicate all defendants.**
   The overt act essential to a conspiracy prosecution need not implicate all defendants.

Frank Phillips and others were indicted for violating the revenue laws and the National Prohibition Act, and for conspiracy to commit

those offenses, and they demur to the indictment. Demurrer overruled.

This cause arises upon demurrer to some of the six counts in an indictment which charged as follows: (1) For possessing an illegal still (R. S. § 3258 [Comp. St. § 5994]); (2) distilling with intent to defraud the United States of taxes on distilled spirits (R. S. § 3281 [section 6021]); (3) making mash elsewhere than in an authorized distillery (R. S. § 3282 [section 6022]); (4) using foods to produce distilled spirits (section 15 of the Lever Act [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛l)]; (5) manufacturing whisky (section 6, tit. 2, of the National Prohibition Act [41 Stat. 310]); (6) a conspiracy to commit all the offenses charged in the first five counts. The purpose of the demurrer is to raise the question whether the internal revenue sections of the Revised Statutes are still in force which provide for the collection of taxes on distilled spirits, and whether section 15 of the Lever Act is also in force.

Ransom H. Gillett, of Albany, N. Y., for demurrer.
Robert A. Peattie, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1] The question of the survival of the internal revenue statutes has been in so much conflict that it seems to me scarcely worth while to do more than state very briefly on which side the truth appears to me to be. No authoritative decision can be reached till the Supreme Court passes upon it. Judge Smith in U. S. v. Windham (D. C.) 264 Fed. 376, and Judge Bean in U. S. v. Yuginni (D. C.) 266 Fed. 746, thought that the National Prohibition Act was exclusive. Judge Bourquin in U. S. v. Sohm (D. C.) 265 Fed. 910, and Judge McDowell in U. S. v. Turner (D. C.) 266 Fed. 248, came to an opposite conclusion. Judge Orr in U. S. v. Puhac (D. C.) 268 Fed. 392, thought the Revised Statutes had been superseded at least as regards penalties and in effect ruled with Judge Smith and Judge Bean. I have also received an oral opinion of Judge Sessions in U. S. v. Scalcueci Bros., recently delivered, which goes along with Judge Smith and Judge Bean. On the other hand, apparently Judge Grubb, sitting in this district, overruled the same point in U. S. v. Maresca, now on writ of error to the Circuit Court of Appeals for this circuit.

There is very little I can add to the opinions of Judge Bourquin and Judge McDowell, with whom I agree. The Revised Statutes, unless repealed, still apply, as they did before, to all who sell liquor without paying taxes, as much to those who cannot get permits as to those who can. There must be some subsequent change of legislative intent to limit their effect. Now it may well be true that title 2 of the National Prohibition Act would have effected an implied repealer pro tanto if nothing had been said. The difficulty is that section 35 is entirely explicit, and precludes any such implication. No doubt the two systems overlap and are in part redundant, but that is irrelevant when the intent is clear.

[2] No constitutional question arises at this stage of the proceedings. There can be no double jeopardy except in the case of successive prosecutions. We are familiar with the joinder of counts for different degrees of the same crime, in which the higher degree alleges all the

facts and more which are necessary to make up the lower. So long as the crimes themselves require different proof, it has never been held a good objection to concurrent verdicts on each that the actual facts proved chance to be the same. As to possible difficulties arising on sentence, they do not arise at the present time, nor indeed can they at any time, unless the sentence imposed exceed the greatest sentence possible upon conviction of the most venial crime. The only question raised by these demurrers is of the intent of Congress.

The fourth count under section 15 of the Lever Act is good by the same reasoning. That section was narrower than title 2 because it forbade only distilled spirits. No doubt everything forbidden by it is now forbidden also by title 2. As before, it is a case of two overlapping injunctions, and under section 35, except as they are inconsistent, they must both stand. I can see no inconsistency except that no permits were possible under the Lever Act, which is to that extent repealed. It may be hard to see any purpose to be served by the coexistence of both statutes, or indeed any conceivable reason for adding the fourth count at all, but with that I have nothing to do. We are, as I understand it, still in a formal state of war with the present government of Germany, and indeed are in occupation of a part of her territory.

[3] The sixth count is good. The overt act need not per se implicate all the defendants. The crime is the agreement. Dealy v. U. S., 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545.

Demurrer overruled.

THE SUPERIOR (two cases).

(District Court, E. D. New York. December 8, 1920.)

1. **Salvage ⟸2, 18—Right of crew to salvage is governed by law of vessel's nationality.**
   On libel by the crew of a Norwegian vessel for salvage against their own vessel, the law of Norway applies, and under that law the crew cannot recover salvage.

2. **Salvage ⟸18—Vessel held not completely abandoned by crew.**
   Where a vessel, which was drifting toward a rocky shore, was left by the crew under orders of the master, but thereafter the master and the men in his boat returned to the vessel, after discovery that the anchor had caught and held, there was not such complete abandonment of the vessel as would entitle the crew to salvage for rescuing her.

3. **Seamen ⟸18—Can recover extra wages for bringing in short-handed an abandoned ship.**
   Under Norwegian Maritime Code, seamen, who brought home a ship after it had been abandoned by half the crew under orders of the master, are entitled to extra wages for performing a task not contemplated when the articles were signed, though they are not entitled to salvage.

4. **Seamen ⟸21—Crew ordered to abandon vessel can recover wages and effects.**
   Members of a crew who are ordered to abandon the vessel by the master when it apparently was drifting on the rocks can recover for wages and the value of their personal effects after the master and his boat crew returned to the vessel and sailed her to port, where the failure of libelants to return with the master was due to a misunderstanding of sig-

nals, or to inability to return against the current, and thereafter they made reasonable efforts to reach the vessel.

In Admiralty. Separate libels by one Anderson and others and by one Jensen and another against the Superior. Decrees rendered for libelants.

Silas B. Axtell, of New York City, for libelants.

Haight, Sandford, Smith & Griffin, of New York City (Herbert K. Stockton, of New York City, of counsel), for claimant.

GARVIN, District Judge. The Norwegian ship Superior, on voyage from Manila to New York, was bearing toward Cape Bangko on January 9, 1919. As she attempted to make an entrance through Lombok Strait, Dutch East Indies, she was carried by cross-currents toward the rocky shore and her destruction appeared imminent. Her captain and crew, fearing they would be lost with the ship, got into two small boats and rowed away. Before they were out of sight, it was observed that her anchor, which was cast over as they left, had caught and was holding. The captain's boat thereupon returned, found the vessel unharmed, and navigated her safely to New York. The other boat did not return, and her occupants, after making several attempts, finally landed and waited until the following morning, when they tried to return to the Superior, only to find that she had sailed. They searched for several days without result, and later reached Sourabaya, Java, and were taken before the Norwegian consul there, by whom they were paid off up to and including January 9, 1919.

There is a conflict of testimony as to why one boat returned, and the other, in charge of the mate, did not; but the evidence warrants the finding that the master ordered all hands off the ship, that he directed his boat to return, and that the other boat was justified in not returning with the captain. From the entire record it appears that, while the captain may have signaled the other boat to return, either his signal was not observed or the current was such that the mate's boat could not go back with that of the captain.

Anderson and others of the crew, who returned to the Superior, have brought an action for salvage; Jensen and Lehto, who were in the mate's boat, have each sued for $325 wages, besides waiting time and personal effects, of the value of $75, which each left on board the Superior. The actions have been tried together.

[1] In the Anderson case there should be no award by way of salvage. The Superior was a Norwegian vessel. The Norwegian law must control. The Ucayali (D. C.) 164 Fed. 897, Rainey v. New York & P. S. S. Co., Ltd., 216 Fed. 449, 132 C. C. A. 509, L. R. A. 1916A, 1149. The claimant produced Mr. Arne Rygh, who impressed the court as a careful, reliable witness, thoroughly competent to testify with respect to the law of Norway; his testimony establishes that under Norwegian law a crew cannot recover for salvage.

In the Anderson case the libelants refer to The Georgiana, 245 Fed. 321, 157 C. C. A. 513. In that case the crew left the vessel, which had grounded, in dories, because it was unsafe to remain aboard

longer. The master told them "it was all off." One of the dories, having lost sight of the others, returned, found the vessel afloat, boarded her, and after considerable difficulty beached her without damage. A wrecking steamer later took her away in a reparable condition. The facts are not unlike those with which we are concerned but the case cannot control because we are bound by the Norwegian law.

[2] Even if Norwegian law does not apply, the case of Gjesseng v. S. S. Macona (S. D. N. Y., decided May 13, 1920) 269 Fed. 468, precludes any recovery for salvage in the absence of a definite abandonment. The crew of the Superior left because they thought the boat would be dashed to pieces: when, in a short time, they found their fears were not well founded, they returned at once. This is not such a complete abandonment as released them from their duty to their ship.

[3] It is plain, however, that the libelants in the Anderson case were called upon to perform a task which was not contemplated when their articles were signed, in bringing their ship to port short-handed. For this they should receive compensation. They are awarded the sum of $2,922.96, not by way of salvage, but as extra wages provided by section 95 of the Norwegian Maritime Code.

[4] Jensen and Lehto, the libelants in the second action, should have a decree; the court finding as a fact that they were not deserters, were fully justified in leaving the ship, and made a reasonable effort, in good faith, to return. They were abandoned by their ship in a foreign land, by reason whereof they are entitled to prevail in their action.

UNITED STATES v. POWLOWSKI.

SAME v. KALEDA.

(District Court, E. D. Pennsylvania. January 14, 1921.)

Nos. 62, 63.

1. **Courts ⊜337—State law requiring indictment at first term not applicable to federal courts.**
   Rev. St. § 1014 (Comp. St. § 1674), providing for the arrest and imprisonment or bail of offenders agreeably to the usual process in the state, applies only to the procedure for arrest, imprisonment, or bail, and not to the procedure relating to the indictment, so that the state rule that an indictment returned at a term subsequent to that to which the offender was bound over can be quashed, unless certain facts appear, does not apply to an indictment in the federal court.

2. **Indictment and information ⊜7—Indictment may be returned at term subsequent to that to which accused was bound over.**
   Since an indictment may be laid before the grand jury without the accused having been arrested or bound over by a committing magistrate, an indictment cannot be quashed because it was returned at a term subsequent to the term to which accused had been bound over.

Joseph Powlowski and Michael Kaleda were separately indicted for violation of the National Prohibition Act, and they move to quash the indictments. Motions overruled.

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

Charles D. McAvoy, U. S. Atty., of Philadelphia, Pa.
B. D. Oliensis, of Philadelphia, Pa., for defendants.

THOMPSON, District Judge. The defendants were arrested upon a charge of violation of the National Prohibition Act (41 Stat. 305, c. 85), and, on February 9, 1920, after hearing, were held in bail by a United States commissioner for their appearance "on the first day of the next term of the District Court of the United States for the said District at Philadelphia, and thereafter from day to day." The first day of the next term of the District Court was the third Monday of March. The defendants were not indicted at the March term, but were indicted upon September 10th, during the June term of court.

[1] The motions to quash the indictments are based upon the contention that under section 1014 of the Revised Statutes (Comp. St. § 1674) the mode of process in the federal courts is made similar to that prevailing in the state wherein the defendants are prosecuted, and that such mode of procedure includes the procedure before the grand jury. Section 1014 provides:

"For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or any commissioner, * * * and agreeably to the usual mode of process against offenders in such state and at the expense of the United States, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense."

It is settled as the law of Pennsylvania that an indictment returned at a term subsequent to that to which the defendant was bound over by a magistrate will be quashed, unless it appear that the defendant had notice that the indictment would be presented at a subsequent term, or such course of procedure is required by some pressing necessity. Commonwealth v. Kohle, 2 Luzerne Leg. Reg. Rep. 329; Commonwealth v. Brown, 12 Pa. Dist. R. 316, Commonwealth v. Rice, 15 Pa. Dist. R. 604, Commonwealth v. Wilhelm, 16 Pa. Dist. R. 386, Commonwealth v. Sweetlick, 19 Pa. Dist. R. 397, Commonwealth v. Holt, 21 Pa. Dist. R. 714.

The question raised by the present motions is not whether the condition of the bond requires the defendants' appearance only during the next term, or whether the condition that they appear "thereafter from day to day" renders the bond an undertaking for their appearance "from day to day" thereafter during subsequent terms, and it is unnecessary to pass upon the question whether the condition of the bond is in accordance with the procedure of the Pennsylvania courts under the provisions of section 1014. The question is whether the finding of the indictments is within the terms of section 1014, required to be "agreeably to the usual mode of process against offenders" in the state of Pennsylvania. The usual mode of process which the statute requires to be followed clearly applies only to the procedure by which the offender may "be arrested and imprisoned or bailed," and not the procedure in connection with his indictment.

[2] There has never been any doubt that with leave of court an indictment may be laid before the grand jury without the prerequisite of

an arrest or binding over by a proper committing magistrate. In the recent case of United States v. Thompson, 251 U. S. 407, 40 Sup. Ct. 289, 64 L. Ed. 333, it has been decided that an indictment may not be quashed because the United States attorney did not obtain permission from the court before presenting it to the grand jury, where the same charge had previously been examined and ignored by another grand jury. This decision is broad enough in its effect to cover the case at bar. The bill could have been presented without a preliminary hearing or imprisonment, or the entry of bail to appear at a subsequent term.

It is concluded that section 1014 does not apply to the procedure in connection with laying an indictment before a grand jury, that such procedure is governed by the common law, as sustained by the decisions of the Supreme Court of the United States, and the law as administered in the state courts is not controlling.

The motions are overruled.

THE BELLA.

(District Court, D. New Jersey. October 13, 1920.)

1. **Admiralty ⇐93—Interlocutory decree may be vacated after term.**
An interlocutory decree may be vacated at a subsequent term of court.

2. **Admiralty ⇐99—Sale of vessel in rem without notice to owner and for inadequate price may be set aside.**
Sale of a vessel under an interlocutory decree in a suit in rem, brought when the owner was absent from the country and without notice to him, to enforce a claimed lien of which he had no knowledge, set aside, where the vessel, worth $12,000 or more, was sold for $1,560, provision being made to protect the bona fide purchaser from loss.

In Admiralty. Suit by the Morse Dry Dock & Repair Company against the steamship Bella. On petition of Aymar Johnson, claimant, to set aside sale. Granted.

Wall, Haight, Carey & Hartpence, of Jersey City, N. J., for petitioner.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Joseph P. Nolan, of New York City, for Charles H. McKinney and W. J. Thompson.

LYNCH, District Judge. The petitioner prays that the sale of the steamship Bella, under an order of this court dated July 6, 1920, be set aside, that the order confirming said sale be vacated, and that the petitioner be permitted to appear and defend the cause of action.

[1] It is asserted that the decree of the court in the matter cannot at this time be vacated, because it was entered at a prior term of court. In support of this assertion a line of cases is cited which hold that judgments and final decrees cannot be vacated or opened at a succeeding term of court. In the instant case the decree which is sought to

be reopened or vacated is an interlocutory decree. The final decree or judgment has not yet been entered. It is well settled that an interlocutory decree may be vacated at a succeeding term of court. Storey v. Storey (D. C.) 221 Fed. 262, and cases there cited.

[2] Should the petitioner's application be granted? The petitioner purchased the Bella on December 31, 1919, the bill of sale warranting her free of all liens. The affidavits are to the effect that the vessel was worth upwards of $12,000. She was insured for approximately $90,000.

The Morse Dry Dock & Repair Company on June 7, 1920, two weeks after the petitioner had sailed for Europe, filed a libel alleging that it was entitled to the sum of $1,402.72 for wharfage furnished the Bella between November 1, 1918, and April 13, 1920. No bill for this service charge had ever been furnished Johnson, and when he sailed for Europe on May 25, 1920, he had no notice that there was likely to be any proceedings taken against his vessel therefor. During his absence judgment by default was entered and at a marshal's sale the boat was struck off to one W. J. Thompson for $1,560. It also appears that no notice of the proceedings against the vessel or the sale was given to the South American Shipping Company, which sold the vessel to the petitioner, or to any one representing him. When Johnson returned from Europe he learned what had transpired. In his affidavit he states that he was at all times ready to discharge any known liens existing against the vessel and is still ready to do so.

On the present showing there is nothing to indicate that the purchaser at the marshal's sale (Thompson) was not an innocent purchaser. No affidavit has been filed by him, but his proctor stated in open court that the purchase was made in good faith. So the situation, as I view it, at this time is that the libelant caused to be effected a marshal's sale of a vessel worth at least $12,000 for the sum of $1,560, which sum I do not think anybody will contend is an adequate price.

The case of The Sparkle, 22 Fed. Cas. 875, cited in behalf of the petitioner, disclosed a situation almost identical with that now before the court. A vessel worth from $8,000 to $10,000 was there sold for $1,000 and the court said:

> "A gross inadequacy of price is also shown. The evidence is that the vessel was worth from $8,000 to $10,000 and she was sold for $1,000. To permit such a sale to stand would be to permit Tuttle [the purchaser] to take an unconscionable advantage of the ignorance of the petitioner in respect to the pendency of any proceedings against this vessel."

This case is quoted with approval by District Judge Thomas in the case of The Columbia (D. C.) 100 Fed. 893. The statement of the proctor for Thompson that the court in The Columbia Case held that it is necessary "to show fraud and abuse of process" does not seem to me to be justified.

It appearing that the court has ample power to grant the relief sought, there does not in my opinion seem to be any reason on the facts for denying it. The conduct of the libelant prior to the suit, the nature and time of bringing about the proceedings, the surprise and the inadequacy of consideration in themselves are deemed sufficient by

me to justify the making of an order in accordance with the prayer of the petition.

Assuming that the purchaser, Thompson, is an innocent purchaser, the bill of sale to him will be canceled, and he will be directed to return the vessel to the petitioner, only upon the petitioner's filing a bond in an amount sufficient to cover the amount paid therefor by him and any amounts expended thereupon for improvements or repairs or the upkeep thereof.

In re NEAL.

(District Court, N. D. Georgia. January 26, 1921.)

1. Bankruptcy ⇐410—Delay in bringing application to hearing held not to bar discharge.

Under Bankruptcy Act, § 14a (Comp. St. § 9598), providing for application for discharge, and section 14b, imposing on the judge the duty to hear the application and proof, and to discharge the applicant unless he has committed some act therein specified, the fact that, from some unknown cause, the hearing was not held for 19 months after the application for discharge, does not authorize the judge to refuse to hear the application at all, or to refuse the discharge.

2. Bankruptcy ⇐410—Refusal of discharge too heavy a penalty for mere delay.

A bankruptcy case is one in equity, and the refusal of the discharge in bankruptcy, the effect of which would be to bar the discharge entirely, and to prevent the discharge of the debts therein filed in other bankruptcy proceedings, is too heavy a penalty to impose for mere delay in bringing an application for discharge on for hearing, in view of the fact that the extreme penalty for the negligence in failing to press an equity suit for trial, as fixed by equity rule 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv), is dismissal without prejudice.

In Bankruptcy. In the matter of C. P. Neal, bankrupt. On hearing on application for discharge. Discharge granted.

Lee J. Langley, of Rome, Ga., for bankrupt.

Shattuck & Shattuck, of La Fayette, Ga., for objector.

SIBLEY, District Judge. The adjudication was on August 8, 1917. The petition for discharge was filed February 2, 1918, and an order fixing a hearing was obtained September 12, 1919. On the date set the only objection filed was that neglect and laches in not prosecuting the application to earlier hearing barred it, and required its dismissal. The matter has been submitted on the record, without evidence either as to the cause of the delay or as to any special detriment to any creditor. It appears from the record that at the time of the adjudication the objecting creditor was foreclosing a mortgage on the bankrupt's stock of merchandise, which was his only substantial asset. This was at first sought to be stayed, but within ten days the effort was abandoned, the stock sold, and the proceeds paid over wholly to this creditor. The estate was closed, and the referee recommended a discharge on November 17, 1917. It appears from the court minutes

that, from epidemics of influenza and other causes, courts were irregularly held for more than a year following in this division.

[1] As supporting the objection are cited In re Lederer (D. C.) 125 Fed. 96, where the creditor was kept for more than a year under an injunction while the application for discharge was pending; and Lindeke v. Converse, 198 Fed. 618, 117 C. C. A. 322, where the delay covered more than six years from the adjudication. Each of these cases is distinguishable on its facts, and neither is a controlling authority. Bankruptcy Act, § 14a (Comp. St. § 9598), provides for the filing of the application for discharge within a limited time and—

(b) "The judge shall hear the application for a discharge and such proofs and pleas as may be made in opposition thereto by the trustee or other parties in interest, at such time as will give the trustee or parties in interest a reasonable opportunity to be fully heard, and investigate the merits of the application, and discharge the applicant unless he has" done one or more of six classes of acts minutely specified.

It will be observed that the language of section 14b is directed wholly to the judge and not to the bankrupt, and is mandatory in its terms. While undoubtedly the applicant for discharge is under the usual duties of diligence imposed on suitors, they are not to be derived from or measured by the quoted section. The judge is commanded to do three things: (1) Hear the application for discharge and the proofs and pleas in opposition to it; (2) investigate the merits of the application; and (3) discharge the applicant, unless he has done the things named in the statute.

[2] To dismiss this application unheard would be simply to fly in the face of this mandate. The fact that from some unknown cause the hearing was not had seasonably will not warrant the judge in refusing to hear at all, in declining to investigate the merits of the application, or to discharge the applicant. It would be to amend the statute and add another specification to the grounds for refusing a discharge, to penalize a want of diligence in pressing for a hearing as heavily as the commission of the crimes and frauds mentioned in the section. A bankruptcy case is one in equity. The extreme penalty for negligence in failing to press for a trial, as fixed by equity rule No. 57 (198 Fed. xxxiv, 115 C. C. A. xxxiv) is dismissal without prejudice; but a dismissal of this application would be to bar a discharge entirely, for a new application could not now be filed in this case, nor could these debts be discharged, even by another bankruptcy, In re Silverman, 157 Fed. 675, 85 C. C. A. 224, and cases cited. Parties at interest whose rights are suffering from delay in hearing an application for discharge may move the court to fix a time for the hearing under penalty of dismissal, should the applicant not proceed with the giving of his notices, but there appears in this case only acquiescence in the delay. No sufficient reason to the contrary being shown, the discharge applied for will be granted.

UNITED STATES v. METZGER.

(District Court, E. D. New York. · November 26, 1920.)

1. **Intoxicating liquors ⇐246—Prohibition agents entitled to take possession of locked safe until it could be opened.**
Prohibition agents, holding a warrant to search for intoxicating liquors, were entitled to take a locked safe into their possession for a reasonable time until it could be opened, where defendant locked the safe and refused to open it.

2. **Criminal law ⇐100(3)—District Court may authorize filing of information, though proceedings commenced by commissioner.**
The District Court has power to permit an information for possessing intoxicating liquors for beverage purposes to be filed, though the proceeding was commenced by a commissioner.

3. **Intoxicating liquors ⇐246—National Prohibition Act does not restrict issuance of search warrant to property used in committing felony.**
The National Prohibition Act only refers to the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212h) for the proceedings to be followed respecting the issuance of search warrants, and does not, by such reference, restrict the issuance of such a warrant to cases involving property used in committing a felony.

Criminal proceeding by the United States against Gustave Metzger. On application for permission to file an information. Application granted.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y.
Jenkins & Harwood, of New York City, for defendant.

GARVIN, District Judge. The government has applied for permission to file an information against one Gustave Metzger, claiming that on November 3, 1920, he unlawfully, willfully, and knowingly possessed for beverage purposes certain intoxicating liquor, with appropriate proof indicating a violation of the National Prohibition Law (41 Stat. 305).

On behalf of Metzger it is claimed, and conceded by the government, that under a search warrant authorizing and empowering a search of the cellar and store of the premises at 1727 Atlantic avenue, borough of Brooklyn, city of New York, a safe in said premises had been removed therefrom. Later the safe was returned; two bottles of whisky were found therein, as a result of which the government is now seeking to prosecute the defendant. The government stated on the argument, and it is not denied, that the prohibition agents who executed the warrant when they entered the premises saw Metzger lock the safe; that they demanded that he open it; that he refused. It is further stated on behalf of the government that the safe was returned the following day with no change in its condition, and that upon its return it was opened and found to contain whisky.

[1] The point involved is whether the government, having concededly a right to enter and search the premises, and being refused permission to search a locked safe therein contained, may take the safe into possession for a reasonable time till it can be forcibly opened. I think

this question must be answered in the affirmative. The power conferred by such a warrant to break and enter premises by force, if necessary, must carry with it power to take all reasonable measures which may be rendered necessary by resistance to ascertain what the actual contents of the premises may be. The act of the defendant in locking the safe and in refusing to open it upon demand might render a search warrant of no value. The officers of the government would be authorized to open the locked door of a closet in order to make a search; they were authorized to open by force, if necessary, this safe. Metzger should not be heard now to complain of the act of the officers in taking steps to prevent property of evidential value from being removed and the warrant rendered of no value.

[2, 3] Upon the argument it was understood by the court that only the foregoing question was involved. In the brief submitted in behalf of Metzger it is urged that, as the proceeding was instituted by a commissioner, the District Judge should not intervene. It is further urged that the search warrant was issued without probable cause, and that it was improperly issued, because under the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 10212a–10212h)—under which a search warrant to enforce the National Prohibition Act must issue—there can be a search warrant issued to recover property only when it is used as a means of committing a felony.

I have considered the contentions, and I cannot agree with any of them. The District Court has power to permit an information to be filed. The allegations of the affidavits submitted to the commissioner fully justify the issuance of a search warrant, and in my opinion the reference in the National Prohibition Act to the Espionage Act only refers to the proceeding to be followed, and does not restrict the issuance of a search to cases involving property used in committing a felony. If that construction were adopted, no search warrant could be issued.

The court will direct an information to be filed as requested by the government.

BIESANTZ v. GARVAN, Alien Property Custodian.

(District Court, E. D. New York. November 22, 1920.)

Insurance ⊂=777—Under laws of order, resident of foreign country not entitled to benefit on failure of designation.

Under the laws of a society providing that if the designation of a beneficiary fails, the benefit shall be payable to persons mentioned in the order given, and that no benefit "shall be made payable to persons permanently residing outside the United States or Canada," on failure of the designation of a beneficiary, permanent residents of Germany cannot take.

At Law. Action by Otto Biesantz against Francis P. Garvan, as Alien Property Custodian, etc. Judgment for plaintiff.

Kamen & Ostertag, of New York City, for plaintiff.

Leroy W. Ross, of Brooklyn, N. Y. (Charles J. Buchner, U. S. Atty., of Brooklyn, N. Y., of counsel), for defendant.

GARVIN, District Judge. On December 19, 1910, the Supreme Council of the Royal Arcanum, a corporation organized under the laws of Massachusetts and authorized to write fraternal insurance in the state of New York, issued a certificate by which it agreed to pay Henrietta O'Kolski, therein referred to as the second cousin of August Biesantz, the sum of $1,500, upon the death of the latter. This certificate provided that the payment of any benefit thereunder should be subject to the constitution and by-laws of said Supreme Council, which are in part as follows:

"If Designation Fails.

"Section 330. If at the time of the death of a member, who has designated as beneficiary a person of class second, the dependency required by the laws of the order shall have ceased, or shall be found not to have existed, or if the designated beneficiary is his wife, and they shall be divorced upon the application of either party, or if any designation shall fail for illegality, death of beneficiary, or otherwise, then the benefit shall be payable to the person or persons mentioned in class first, section No. 324, if living, in the shares and order of precedence by grades as therein enumerated, the persons living of each precedent grade taking, in equal shares per capita, to the exclusion of all persons living of subsequently enumerated grades; except that in the distribution among persons of grade second the children of deceased children shall take by representation the share the parent would have received if living; and except that in the distribution among persons of grade thirteenth, only those who are next in kinship to the deceased member shall take. If no one of said class first shall be living at the death of the member, the benefit shall revert to the Widows' and Orphans' Benefit Fund."

"Who may be Designated.

"Section 324. A benefit may be made payable to any one or more persons of any of the following classes only:

"Class First.

"Grade 1st. Member's wife.
"Grade 2d. Member's children, and children of deceased children, and member's children by legal adoption.
"Grade 3d. Member's grandchildren.
"Grade 4th. Member's parents, and member's parents by legal adoption.
"Grade 5th. Member's brothers and sisters of the whole blood."

"Foreign Beneficiaries.

"Section 328. No benefit shall be made payable to any person or persons permanently residing outside the limits of the United States or Dominion of Canada, excepting to a person or persons permanently residing in territory owned by or under the governmental control of the United States of America."

August Biesantz died March 31, 1918. Henrietta O'Kolski was not his second cousin, and her designation as a beneficiary thereby failed. Plaintiff was his brother, and is the only person referred to in class first of section 324, supra, who, at the time of decedent's death, was qualified to take under section 328. After decedent's death, the Alien Property Custodian demanded and received from said Supreme Council said $1,500 due under said certificate, claiming that four residents of Germany were the owners thereof, and that he was entitled

to receive the same under section 7(e) of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d).

The defendants contend that upon the failure of designation of beneficiary the sum of $1,500 must be disposed of in accordance with section 330 of the by-laws of the Royal Arcanum, supra.

The court is of the opinion that the true construction to be placed upon section 328 is that it was intended to avoid the various difficulties which would frequently be encountered in paying over any benefit to a resident of a foreign country. If the section were to be given the meaning urged by the defendants, namely, that it applies only to designation of beneficiaries, the limitation would have contained the word "certificate," so that the section would have read:

"No benefit certificate shall be made payable to any person or persons residing outside the limits of the United States," etc.

The inhibition contained in the section is unqualified, and in the opinion of the court is intended to prohibit a benefit being made payable by its terms, or in any other manner, directly or indirectly, by the by-laws or by operation of law, to permanent residents of Germany. That the defendant's construction of the section could never have been intended is plain from the following case, which might happen at any time: Let us suppose that the insured had a wife and child living, both permanent residents of Germany; the child being designated as beneficiary. The child could not take, and yet, if the defendants' present contention should be upheld, the wife would be entitled to the benefit. The court cannot accept a construction which would permit that which the by-laws obviously intended to avoid.

There will be a judgment for plaintiff.

WARNER v. LIQUID CARBONIC CO.

(District Court, N. D. Georgia. January 8, 1921.)

1. Courts ⇐357—State allowances followed, if no act of Congress establishes allowance.

In federal courts in cases at law, state allowances of costs, which were not allowed at common law, but are such as the law of the particular court fixes, may be followed, where no rule has been established by Congress.

2. Costs ⇐157—Consent verdict does not authorize attorney's docket fee for "trial before a jury."

Under Rev. St. §§ 823, 824 (Comp. St. §§ 1375, 1378), fixing allowances as costs to attorneys, solicitors, and proctors in cases at law, in equity, and in admiralty, and allowing $20 for a trial before a jury or referee, which is the same fee as allowed upon a final hearing in equity or admiralty, the expression "trial before a jury," like "final hearing," implies at least a submission of a contested question to the jury, if not a verdict thereon, and where a verdict was entered by consent of the parties agreed to before the trial, that item cannot be allowed to plaintiff.

[Ed. Note.—For other definitions, see Words and Phrases, Trial Before a Jury.]

At Law. Action by M. R. Warner, by next friend, against the Liquid Carbonic Company. Judgment for plaintiff on a consent verdict, and defendant moves to retax the costs. Contested item of costs disallowed.

Norman I. Miller, of Atlanta, Ga., for plaintiff.
A. H. Davis, of Atlanta, Ga., for defendant.

SIBLEY, District Judge. Before this case at law was ready for trial the parties agreed that a verdict in plaintiff's favor for $25 should be taken. This was stated in open court; a jury was impanneled and directed to sign a verdict, no witnesses being called or sworn. The clerk entered in his journal, "Consent verdict." Judgment was thereupon signed for the amount of the verdict and costs. In taxing the costs, the clerk included $20 as a docket fee for the plaintiff's attorney. On a motion to retax, this item of costs is objected to.

[1, 2] Costs as such were not allowed at common law. They pertain to the practice of the court, and are such as the law of the particular court fixes. In the federal courts, in cases at law, the state allowances may be followed, where no rule has been established by Congress. Scatcherd v. Love, 166 Fed. 53, 91 C. C. A. 639; Michigan Aluminum Foundry Co. v. Aluminum Co. (C. C.) 190 Fed. 903. No attorneys' or solicitors' fees are allowed as costs in Georgia. But this matter has been fully covered for the federal courts by R. S. §§ 823 and 824 (Comp. St. §§ 1375, 1378), fixing the fees allowable as costs to attorneys, solicitors and proctors in cases respectively at law, in equity and in admiralty, and declaring that no others shall be exacted from the opposite party. In common-law cases, if the plaintiff discontinues, the defendant may have $5 allowed for his attorney. If judgment is had by the court, the successful party may have $10 as his attorney's fee. For "a trial before a jury or referee" $20. The last item is associated with an allowance of the same fee upon "a final hearing in equity or admiralty," and the expression "trial before a jury" and "final hearing" ought to be construed together as throwing some light on each other, as the same fee is allowed for each.

The precise question here is whether a verdict taken by consent is "a trial before a jury." No direct authority has been presented. It was held, however, that a disposition by consent decree of an admiralty case was not "a final hearing," to make which there must have been a submission to the court for decision of some question of law or fact. The Dwinsk (D. C.) 227 Fed. 958; Howe v. Shumaway, Fed. Cas. No. 6774. It was said in Merritt, etc., Wrecking Co. v. Catskill (D. C.) 112 Fed. 442, on authorities cited therein:

"Nor would the obtainment of an order pro confesso necessarily entitle the complainant to a docket fee. It would be requisite that a bill should be decreed by the court after an examination to determine whether the facts entitled the complainant to the relief demanded. * * * The test seems to be whether something more than merely formal action of the court is necessary, both in equity and in admiralty."

See, also, Albion Lumber Co. v. Inter-Ocean Transport Co. (D. C.) 240 Fed. 1019.

The words "a trial before a jury" were construed in Howler v. Chicago Co. (C. C.) 166 Fed. 828, and held not to apply to a case where a trial was begun and a settlement had which stopped the trial; no verdict being rendered. It was said that to constitute a trial there must be both an examination and hearing of evidence, and at least a submission of the question to the jury, if not, indeed, a verdict thereon. I am persuaded that the word "trial," like the word "hearing," connotes a contest, or certainly something more aggressive than the mere execution of a consent. Where, as in this case, the consent precedes the calling of the case for trial, there was no necessity for the plaintiff to engage the services of an attorney for the trial, and a considerable motive to settlement is often the saving of further costs.

The item contested is disallowed.

AMERICAN COTTON OIL CO. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, E. D. Louisiana, New Orleans Division. January 15, 1921.)

No. 16395.

1. **United States ⇐125—Emergency Fleet Corporation can be sued in tort.**
   The United States Shipping Board Emergency Fleet Corporation, which was created under the Code of the District of Columbia and has capacity to sue and be sued the same as other corporations, may be sued at law for a tort, though all its stock is owned by the United States.
2. **Courts ⇐289—Suit against Emergency Fleet Corporation "arises under federal laws."**
   A suit at law against the United States Shipping Board Emergency Fleet Corporation, which was created under the Code of the District of Columbia, is a suit arising under the laws of the United States, over which the United States courts have jurisdiction where the amount in controversy exceeds $3,000.

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

At Law. Action by the American Cotton Oil Company against the United States Shipping Board Emergency Fleet Corporation. On exception to the jurisdiction of the court. Exception overruled.

Miller, Miller & Fletchinger, of New Orleans, La., for plaintiff.

Henry Mooney, U. S. Atty., and Terriberry, Rice & Young, all of New Orleans, La., for defendant.

FOSTER, District Judge. This is a suit at law against the Emergency Fleet Corporation to recover damages caused to a wharf owned by plaintiff from a collision with one of the vessels owned and operated by the defendant. An exception is filed to the jurisdiction of the court on the ground that the suit is really against the United States and there can be no recovery for a tort not cognizable in admiralty.

[1] The Emergency Fleet Corporation was created under the provisions of the Code of the District of Columbia by virtue of the authority vested in the United States Shipping Board by acts of Congress and has the capacity to sue and be sued the same as other corporations. In the case of United States v. Strang et al., 254 U. S. —, 41 Sup. Ct. 165, 64 L. Ed. —, decided January 3, 1921, the Supreme Court held that the Emergency Fleet Corporation must be regarded as a separate entity notwithstanding all of its stock is owned by the United States, citing United States v. Planters' Bank of Georgia, 9 Wheat. 904, 6 L. Ed. 244, and other authorities. The following cases are to the same effect: Gould Coupler Co. v. Emergency Fleet Corporation (D. C.) 261 Fed. 716; Southern Bridge Co. v. U. S. Shipping Board (D. C.) 266 Fed. 747; Lord & Burnham Co. v. U. S. Shipping Board (D. C.) 265 Fed. 955; Ingram Day Lumber Co. v. U. S. Shipping Board Emergency Fleet Corporation (D. C.) 267 Fed. 283. In the case of The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962, the Supreme Court held that a vessel of the Shipping Board might be seized under admiralty process in a case sounding in tort.

There is no good reason why the corporation should not be sued for damages arising from tort as well as from breach of contract. The question may arise as to whether or not the property of the corporation may be seized and sold to satisfy a judgment, but there is no need to consider that in connection with the exception in this case. After the plaintiff has established his claim, if he does so, there will be time enough to consider the method of collection.

[2] As the amount in dispute is more than $3,000, and the case must be held to arise under the laws of the United States (Texas & Pacific Railroad v. Cody, 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132), the exception will be overruled. Ten days will be allowed in which to answer.

THE CENTRAL RAILROAD OF NEW JERSEY NO. 27.

(District Court, E. D. New York. December 30, 1920.)

1. **Collision ⇐69—Anchored vessel not required to blow fog whistles.**
   A vessel at anchor in a fog and ringing her fog bell is not obliged to blow danger whistles, unless there is some reason therefor.

2. **Collision ⇐71(2)—Moving vessel held solely at fault for collision with anchored lighter.**
   Lighter at anchor in fog *held* to have rung her fog bell and maintained a lookout, which was all she was required to do, so that a tug, which was negligent in failing to hear the bell or in not coming to anchor during the fog, was solely at fault for a collision between the tow and the lighter.

In Admiralty. Libel by Merritt & Chapman Derrick & Wrecking Company against the steam tug Central Railroad of New Jersey No. 27. Decree for libelant.

Foley & Martin, of New York City, for libelant.
Park & Mattison, of New York City, for claimant.

GARVIN, District Judge. The lighter Edgar, for some days prior to April 2, 1920, had been working in the North River on the wreck of the Mary E. Lynch about one-third of the way across the river; she was anchored by four wire ropes and cables, two from her bow and two from her stern; she had a large fog bell. On the day in question, April 2, the Central Railroad of New Jersey No. 27 came down the river in a heavy fog with full knowledge of the Edgar's position. She had a tow which included the Interstate 54. When she saw the Edgar she attempted to avoid her, but she or her tow struck the lighter, inflicting the injuries for which damage was claimed.

Several witnesses on the Edgar testified that her fog bell was rung continuously for some time before the collision, and that no signals from the No. 27 were heard. A witness who was on a boat in the tow of No. 27 testified that he heard the bell, but on cross-examination he testified that he heard it only just before the collision. Another witness, who appeared to have no interest in the outcome of the case, testified that he had seen the Edgar at her anchorage for several days before the accident, was familiar with the tone of the bell, and that it rang for some time before the collision, as testified by the Edgar's crew. The claimant's witnesses insist that the No. 27 blew her fog whistle and that they heard no bell from the Edgar. It is asserted that the Edgar also was negligent in not blowing its danger whistle.

[1, 2] A vessel at anchor is not obliged to blow danger whistles, unless there is some reason therefor. Wright & Cobb Lighterage Co. v. New England Navigation Co., 204 Fed. 762, 125 C. C. A. 129. I find as facts that the Edgar rang her fog bell and that she had a man on deck who was acting as lookout, which was all that she was reasonably required to do and that the only negligence was that of the No. 27. Indeed, I think under the circumstances that it was the duty of the latter vessel to come to anchor during the fog, and not to proceed unless prepared to make good any damage occasioned thereby.

Decree for libelant.

LOVINGER v. GARVAN, Alien Property Custodian, et al.

(District Court, S. D. New York. October 25, 1920.)

1. **Insurance ⇐587—Requisites to change of beneficiary in life policy stated.**
Where there has been no valid contract made by the insured in a life policy during his lifetime nothing short of an actual exercise of the power given to change the beneficiary according to its conditions will effect such change.

2. **Insurance ⇐587—Contract to change beneficiary in life policy enforceable.**
A promise by the insured in a life policy, payable to a beneficiary named, for a consideration, to change the beneficiary under a power reserved in the contract, is enforceable by the promisee after the death of the insured, and equity will disregard the formal steps and treat the promisee as an already substituted beneficiary.

3. **Insurance ⇐587—Contract to change beneficiary in life policy valid.**
A promise by a woman who had sustained an injury necessitating a surgical operation, to substitute complainant as beneficiary in a life

policy under a power reserved, if complainant would keep and care for her during and after the operation, which complainant did, although not moved thereto wholly by the promise, but partly by motives of kindness and charity, *held* to constitute a contract which equity would enforce after the death of insured without having effectively executed the power.

4. War ⟸12—Notice by publication required in proceeding under Trading with the Enemy Act.

Where proceeds of a life insurance policy payable to insured's brother, a citizen of Hungary, had been paid to the Alien Property Custodian, in suit against the Custodian under Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e), by one who claimed such proceeds on the ground insured had changed the beneficiary in the policy by substituting plaintiff for insured's brother, the brother was entitled to notice; but, his whereabouts being unknown, except that he was last supposed to be in Hungary, the court would order notice printed four times at weekly intervals in some paper in Buda-Pest and the next largest city in the then existing republic, advising him that he must file his appearance within 6 weeks of the last publication, this being the best possible substitute for actual notice.

In Equity. Suit by Paula Lovinger against Francis P. Garvan, Alien Property Custodian, and others. Decree for complainant.

This is a bill in equity under section 9 of the Trading with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e) by a citizen who claims a fund paid to the Alien Property Custodian. Roza Molnar, a citizen of Hungary resident in the United States on November 29, 1917, secured a policy of life insurance in the sum of $1,000 from the New York Life Insurance Company, payable in the event of her death to one Sandor Kamarony, her brother, likewise a citizen of that kingdom and therefore an alien. At that time Roza Molnar had been living for some three years or more with the plaintiff, an American citizen. So far as appears, she had no relatives or friends in the United States and she was in bad health. She was, however, sporadically able to earn about $30 a month in household service, but was obliged for the larger part of the time to be idle. During these periods she lived with the plaintiff, and neither paid for her entertainment nor contributed in the household work. The plaintiff was a married woman with three children, living with her husband in New York. She was friendly disposed to Roza Molnar, and allowed her to live in her family, at least in part, from motives of charity.

About May, 1918, Roza Molnar met with an accident, which required some sort of surgical operation, and at her earnest request the plaintiff allowed the operation to take place at her home, rather than at a hospital. She made a bad recovery, and continued sick until November 8, 1918, when, developing pneumonia, upon her doctor's orders she was taken to a hospital, where she died on November 12, 1918. During this period of six months the plaintiff nursed her at her house.

The life insurance policy had the customary provision by which the insured could change the beneficiary at her pleasure by written notice given to the home office of the insurer, followed by an indorsement of the change upon the policy itself. This was never done, though Roza Molnar requested the collecting agent of the company to substitute the plaintiff, at one time during her sickness and after the accident. He put her off by suggesting that she might safely wait until she had recovered. On the day before her death, Roza Molnar, while in the hospital, had a notary public called in, and in the presence of the plaintiff and her husband executed a document, drawn by the notary and witnessed by the notary and the husband, by which she bequeathed the policy and her money in bank ($25) to the plaintiff. This document is not asserted by the plaintiff to have effected a transfer of the

insurance, but the policy was actually there, and Roza Molnar handed it to the plaintiff at the time.

The plaintiff and her brother testified that Roza Molnar, during her sickness at numerous times not specified, had said that she meant on her death to leave the plaintiff her insurance and all she had, because of the plaintiff's great kindness in nursing and taking care of her. The brother's version of a talk after the accident and before the operation was as follows: "Let me stay here with you and take care of me, and I will try (sic) whatever I have to leave to you." Again: "I will leave my New York Life insurance policy for $1,000 to you for keeping me and nursing me." The plaintiff is said to have answered: "Dont worry; I will take care of you and nurse you just as good (sic) as if you would be (sic) my sister."

The Alien Property Custodian seized the interest of the beneficiary, Sandor Kamarony, under the Trading with the Enemy Act, and has therefore succeeded to his rights. The question arises as between the defendants so substituted and the plaintiff.

Morris Cukor, of New York City, for plaintiff.

Earl B. Barnes, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). [1] The beneficiary of a policy such as this has a contingent interest, which becomes absolute upon the death of the insured, living himself. That interest is, however, subject to defeat by the reserved power of the insured to change the beneficiary and appoint another. Therefore in these cases the question is whether the power has been exercised, or, if not, whether the new beneficiary has the right to compel its exercise after the death of the insured. Where there is no valid contract made by the insured during his life, the rule has uniformly been, so far as I have found, that nothing short of an actual exercise of the power according to its conditions will effect a change. Thomas v. Thomas, 131 N. Y. 205, 30 N. E. 61, 27 Am. St. Rep. 582; Fink v. Fink, 171 N. Y. 616, 64 N. E. 506; Stafford v. Brotherhood, 224 N. Y. 653, 121 N. E. 892; Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283; Berg v. Damkoehler, 112 Wis. 587, 88 N. W. 606; Sullivan v. Maroney, 77 N. J. Eq. 565, 78 Atl. 150. This, as was observed in Thomas v. Thomas, supra, follows from the doctrine that equity will not intervene in favor of a donee to execute a power. The gift is incomplete until the power has been exercised, which means that its terms must be fulfilled. That is the analogue to the delivery of a gift.

[2] However, if the new beneficiary is a promisee for consideration of the person having the power, he has a right to compel the specific performance of the power, which is not determined by the death of the promisor. If the whole transaction were carried out in detail, he could compel the executors of the promisor to execute the power, which would speak as of the date of the contract. Equity will disregard the formal steps, and treat the promisee as an already substituted beneficiary. Nally v. Nally, 74 Ga. 669, 58 Am. Rep. 458; Schoenholz v. N. Y. Life Ins. Co. (App. Div. 1st Dept.) 183 N. Y. Supp. 251. This does not, however, depend upon any vague theory of equity, nor is it based upon general motives of supposed justice. It rests upon the existence of an enforceable contract between the insured and the promisee, creating an obligation to use his reserved power. The case

at bar, therefore, turns absolutely upon the existence of such an obligation.

[3] The plaintiff never gave any promise to Roza Molnar, but none was necessary, because the contract, if any was made, was unilateral. The critical question is whether the parties mutually understood that the promise was made as a consideration for the performance. That is not always an easy question to decide; it depends upon whether the promise was intended to induce the promisee to perform, and whether she was in fact induced by it to do so. That is in turn a question of the actuating motives of the parties. In a case like this, where the performance is explicable in part, at least, from motives of kindness or charity, the question is whether, notwithstanding such motives, the performance was not in part actuated by the promise as well, and understood to be so actuated.

The plaintiff's story is not so probative of her case as her brother's, some of whose language is hardly consistent with any other conclusion than that of a contract. Still I cannot rely upon the exact words which either puts into Roza Molnar's mouth. It is certain that she intended to give the policy to the plaintiff, told her that she would do so, and tried to effect that result. Most of the services rendered by the plaintiff followed the promises, and could have been a consideration for them. I do not rely upon the will, except as corroboration of what had gone before.

Now, it appears to me to fail in understanding the posture of these two women to each other, to read what they said as being nothing but an expression of gratitude and kindness. That it included these is true enough, but I think it went further. The plaintiff was in narrow circumstances, and the presence of Roza Molnar in her home, sick and penniless, both must have known to be a serious incumbrance to her. It seems to me not in any sense to impugn the kindliness of the plaintiff to suppose that Roza Molnar made the promise to insure her continued services, and that the plaintiff accepted the promise in the same sense. I find, therefore, that the parties were engaged in a bargain, though one into which other than selfish motives entered, and that there was therefore a contract which the plaintiff may enforce.

[4] As to the necessity of bringing in Sandar Kamarony, I am in some doubt. If he be an alien enemy, the case ends, for any rights he had are lost; if he be not, he would be entitled to his day in court on the issue here decided. Strictly, he is entitled to it from any point of view. The difficulty is in giving him any real notice, for his whereabouts is absolutely unknown, except that he was last supposed to be in Hungary. Advertisement in this city would accomplish nothing, except, perhaps, in a Hungarian newspaper. On the whole, I think that the best which can be done is to advertise in some newspaper in Buda-Pest and the next largest city in the present republic. This notice will be printed four times at weekly intervals, and will advise the supposititious claimant that he must file his appearance within six weeks of the last publication. Probably this is a futility, but it is the best possible substitute for actual notice, and in some way the case must be decided.

Decree for the plaintiff.

CONTINENTAL CANDY CORPORATION v. CALIFORNIA & HAWAIIAN SUGAR REFINING CO. et al.

(District Court, N. D. California, S. D. December 28, 1920.)

No. 579.

1. **Monopolies ⟸12(1)—Restraint of trade unlawful only if unreasonable.**
A contract, to be within the prohibition of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), must not only be in restraint of trade, but must be so unreasonably, to an unreasonable degree.

2. **Monopolies ⟸12(1)—Reasonableness of restriction must be determined by consideration of circumstances.**
To determine whether the restraint put upon trade by a contract is reasonable or unreasonable, the motive, extent, and effect of the contract, the circumstances under which it was made, and the motives of the parties should be considered.

3. **Monopolies ⟸17(1)—Restriction against resale of sugar held not unlawful.**
A provision in a contract for the sale of sugar forbidding its resale by the buyer, which was inserted in conformity to the suggestions of the Department of Justice and the fair price committee to avoid the purchase of sugar for hoarding at a time when there was a shortage due to the war not yet technically over, and to the efforts toward readjustment, was not an unreasonable restraint of trade, and did not invalidate the contract under the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), especially since the buyer made no objection to the validity of the contract until the sugar had been imported and was ready for delivery and the market price had greatly depreciated, so that the seller would be subjected to great loss occasioned by the buyer's want of foresight if the contract were canceled.

In Equity. Suit by the Continental Candy Corporation against the California & Hawaiian Sugar Refining Company and others. On hearing on motion for injunction after temporary restraining order was issued. Restraining order discharged, and bill of complaint dismissed.

On May 14, 1920, plaintiff Candy Company entered into a contract with defendant Sugar Company for the purchase of 750 long tons of white Java sugar. The contract contained the following provisions:

"1. The California & Hawaiian Sugar Refining Company, of San Francisco have to-day sold, and the Continental Candy Corporation of Chicago, Ill., have to-day bought, the following sugars:

"750 tons, each, 2,240 lbs. 10% more or less, white Java sugar at $19.85, net cash, duty paid, landed weights, f. o. b. cars San Francisco, California; 25 Dutch Standard—99 Polarization.

"250 tons 10% more or less, shipment from Java September, 1920.

"500 tons, 10% more or less, shipment from Java October, 1920.

"2. Payment. Buyer agrees to immediately establish an irrevocable letter of credit through San Francisco bank sufficient to cover the amount of this purchase, same payable on presentation at said bank of invoice and shipping documents by the seller, the California & Hawaiian Sugar Refining Company. In the event of shipping documents being delayed at time of arrival of steamer, the payments are to be made against seller's delivery order.

"3. It is agreed that should strikes, wars, revolutions, accidents, dangers of the seas or other unforeseen events beyond control, prevent shipment or delay delivery of this sugar, then the California & Hawaiian Sugar Refining Company shall have the privilege of canceling this contract.

"4. Any change of import duty understood to be for account of buyer.

"5. In the event of any dispute arising under this contract, same to be settled by San Francisco arbitration, decision of such arbitration to be final on both seller and buyer. Expense of arbitration to be paid by losing party.

"6. Buyer agrees to use these sugars only for his own manufacturing needs and under no circumstances to resell same.

"7. Sales of this sugar to manufacturers constitutes their quota of sugar from the California & Hawaiian Refining Company from delivery date of these Java whites until the end of the year."

Four days later a similar contract between the same parties for the purchase and sale of 500 additional tons of sugar was entered into.

At the time of these purchases the price of sugar in the market had been rising for some time, and was then in the neighborhood of 22 cents per pound. It continued to rise until about the middle of July, when a steady decline ensued. By the latter part of October it had reached 11 cents per pound and on the day the bill of complaint was filed herein, December 1, 1920, it had fallen to 8 cents per pound. By December 17, the day answer was filed, it had fallen to 7½ cents per pound.

Pursuant to the provisions of paragraph 2 of the contracts, irrevocable letters of credit, expiring December 31, 1920, were established by the Candy Company, $300,000 with defendant First National Bank, and $255,800 with defendant Canton Bank.

On December 1 plaintiff filed its bill of complaint alleging the making of the contracts referred to and the establishment of irrevocable letters of credit, and that plaintiff would in due course be bound to repay any sums advanced in payment of sugar delivered pursuant to the terms of the irrevocable letters of credit. Plaintiff further alleged that both of the entire agreements between plaintiff and defendant were illegal, null, and void, because the clauses forbidding the resale of the sugar and establishing plaintiff's quota were in unlawful and unreasonable restraint of trade and in violation of the anti-trust laws (Comp. St. §§ 8820–8823, 8827–8830).

It was further alleged that plaintiff, for the reasons given, had rescinded the contracts and duly notified the Sugar Company thereof. Alleging the arrival and probable immediate delivery of said sugar, with consequent demand on, and payment by, defendant banks of the sums represented by the irrevocable letters of credit, to plaintiff's irreparable damage in the premises, the prayer was for a restraining order enjoining the tender or delivery of the sugar, the negotiation or payment of either of the irrevocable letters of credit, and for a decree declaring the contracts "illegal, null and void, canceled, and rescinded," and for a permanent injunction, etc.

A temporary restraining order was issued, and by agreement the matter came on for final hearing on the merits on December 27. The substantial issues tendered by defendants were to the effect that the clauses in the contracts numbered 6 and 7, specifically objected to by plaintiff, did not suffice in any respect to operate in unreasonable or unlawful restraint of trade or to violate the anti-trust laws or to invalidate the said contracts, and that said clauses were inserted in said contracts because of the general requirement to that end made by the Attorney General of the United States acting through the Department of Justice and the Fair Trade Commission, and were imposed solely in the interest of the public and for the purpose of securing and effecting an equitable distribution of sugar and preventing speculation and profiteering therein. The contention was also made that the clauses were severable if found invalid.

Defendant Sugar Company also alleged that it had no notice of plaintiff's claim that the contracts were void, as being in restraint of trade, etc., until December 1, the day on which notice of rescission was served and the bill of complaint was filed, and that, if plaintiff had notified it of the asserted invalidity of the contracts within a reasonable time subsequent to their execution, and it had acquiesced in such invalidity, a resale of the sugar, at a small loss to defendant, might have resulted, but that plaintiff had delayed advising defendant of its attitude and claims until the price of sugar had fallen so low that a cancellation or rescission of the contracts, as prayed for by plaintiff, would result in a loss to defendant of a sum in excess of $300,000.

The principal argument in the case centered around the asserted invalidity of paragraph 6, forbidding a resale of the sugar purchased.

Charles Leroy Brown, Ira S. Lillick, and John S. Partridge, all of San Francisco, Cal., for plaintiff.

Cushing & Cushing, of San Francisco, Cal., for defendant First Nat. Bank.

H. U. Brandenstein, of San Francisco, Cal., for defendant Canton Bank.

Donald Y. Campbell and Garret W. McEnerney, both of San Francisco, Cal., for defendant California & Hawaiian Sugar Refining Co.

BLEDSOE, District Judge (after stating the facts as above). This sugar was bought in time of war—war still existing legally, if not actually. We were surrounded and hampered by all of the emergencies and efforts growing out of the war and the resultant determination on our part to see that the war program was brought to a successful conclusion, plus the further exigencies and perhaps inconsistencies arising from our intensive efforts to effect some sort of a satisfactory readjustment from our participation in the war.

This contract then is to be weighed and tested, not by what might have been the situation in the year 1913 before the war began, or not what might be the situation years hence, when the immediate economic effects of the war shall have passed into history, but what the situation was in the spring and summer of 1920—a period of uncertainty, insufficiency, readjustment, and rehabilitation.

[1] The Sherman Anti-Trust Act has recently been given very careful consideration by me in proceedings instituted by the government against the California Associated Raisin Company, and I have given it the best thought I could under the circumstances obtaining. I confess that you can read certain decisions emanating from the most exalted tribunal in the world, respecting the Sherman Anti-Trust Act, and then you can read other decisions emanating from the same tribunal, and if you are only human you may be led to assert that they do not always seem to be consistent one with another.

But, aside from all other considerations, taking the decisions in the Tobacco Case, 221 U. S. 106, 31 Sup. Ct. 632, 55 L. Ed. 663, the Standard Oil Case, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, the Trans-Missouri Case, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, the Keystone Watch Case (D. C.) 218 Fed. 502, and even the Steel Trust Case of last spring (decided March 1, 1920) 251 U. S. 417, 40 Sup. Ct. 293, 64 L. Ed. 343, 8 A. L. R. 1121, as I read them and as I now recollect them (recalling particularly the emphasis with which Mr. Justice Harlan dissented in some of those cases, and the growing vehemence with which he indicated that the Supreme Court was reading into that law that which Congress had definitely and deliberately refused to incorporate into it, to wit, "the rule of reason")—taking all those cases into consideration, giving the latest expressions paramount weight, and endeavoring to arrive at the proper path to be traveled by us in the construction of the Sherman Anti-Trust Act, it seems to me that this much clearly lies

within the realm of legal indispute: Regardless of the precise and definite and seemingly controlling language of the statute, as tne same has been read here this morning, the Supreme Court of the United States, which is really the final arbiter of our destinies in this country, has said that a contract in restraint of trade, to be within the prohibitions of the Sherman Act, must not only be in restraint of trade, but it must be so unreasonably—to an unreasonable degree.

[2] The only way, or at least one of the most satisfactory ways, by which you can determine what is the reasonableness or unreasonableness of the restraint put upon trade by a contract is to consider the motive, extent and effect of the contract, consider the circumstances under which it was made, consider what the parties had in mind, what motives served to move them to the various ends they sought to attain, and then, in the light of those considerations, say whether or not that which they did was, under all the circumstances obtaining, in its nature and effect, unreasonable in its restraint upon the free flow of the commerce involved. So measured and tested, if it be unreasonable in its restraints upon trade, it lies within the prohibitions of the Sherman Law; if not, that law has no concern with it.

[3] It is common knowledge, I think, that during the war, and during the period subsequent to the actual cessation of hostilities, the question of the price and the distribution and the allocation of sugar in the United States had attained to a great deal of importance; it was a question that occasioned considerable thought. I know that the exertions and the ramifications of the Department of Justice had been multitudinous and of wide extent with respect to what should be done about the sugar question, as well as how it should be done. In my own court, during this very year, there have been at least two prosecutions under indictment for the sale of sugar, both of them anterior to the transaction involved here, and having to do with the alleged unlawfulness of the sale of sugar at prices other than those fixed by governmental authority, one case in which there was a conviction because the defendants evidently were endeavoring to profiteer upon that necessary of life. In the other case there was an acquittal because, though the sugar had been sold at an advanced price, in excess of the price fixed by the controlling agency, there was lacking that intent, sufficient to make it a criminal transaction, as the jury evidently viewed it. I call attention to these occurrences merely to indicate that there was a great deal of concern being manifested, publicly and privately, with respect to how sugar might be dealt with, to whom it might be sold, under what circumstances it might be delivered to this, that, and the other place, and the prices which might lawfully be exacted for it.

I know that down in Los Angeles—and I am assuming that the same conditions obtained here in San Francisco—for a long time sugar was sold only in small packages; you could get only one or two pounds at a time, and that only with a stated amount of other groceries. I know that I have made more than one journey to the grocery store, at the behest of my wife, to buy a lot of other things we did not need—at least at the moment—in order that we might become possessed of a sufficient amount of sugar to satisfy the requirements

of the day. So that everybody clearly understood that the existence of extraordinary conditions in the matter of the sugar supply made necessary the imposition of extraordinary restrictions; and whether it was lawful or unlawful, whether the government had the power to impose these restrictions and enforce them or not, whether we knew it all or not, or even, as intimated in the argument at the bar, whether we were proceeding along a path that was wrong economically, irrespective of what may have been the true solution of those problems and the true answers to those questions, we did appreciate that we were all joint participants in an elaborate and sustained effort to provide our people with sufficient quantities of sugar to meet their requirements, the requirements of their normal appetites, at prices fairly within reach. As a part of the program in the effort to accomplish that result, we were limiting the sale, the transportation, the allocation of sugar very materially and substantially. And most people, I think, were accepting the situation in the same spirit in which it was tendered.

It is in evidence here that at the time these contracts were made sugar was on a rising market, and on a rising market due to a then present, or confidently expected, scarcity of sugar. It is obvious that that was the case; there was not enough sugar to go around. In order that others might not be entirely deprived, some concerns, some individuals, or some territories had to be limited. I know that we had a fair price committee down in Los Angeles, and they were very busily engaged in the matter; unusual efforts were being made to see, not that a few people got all of the sugar, but that everybody got some of the sugar, if that could be made possible. Under those circumstances, the fair price committee in this community, acting under the direction of the United States Attorney and the Department of Justice, conveyed information to this vender of sugar, the defendant Sugar Company, that it might sell 10,000 tons of Java white sugar under certain limitations, the limitations contained in the contract.

It is, of course, difficult for one to read another's mind; but my own judgment is that the intent of the parties, particularly the government agencies involved, respecting the inclusion of the controverted clauses in the contracts, was, primarily, not to prevent the further disposition or the subsequent sale of this particular sugar, but to place such an inhibition upon its subsequent sale that the buyer would buy only the amount then deemed necessary for its own business requirements for the season; and this was in furtherance of what I conceive to be a very commendable plan on the part of those who gave their best thought to the matter, that sugar should not be hoarded, should not be used unwisely, and that concerns should not, in view of the growing scarcity, become possessed of amounts of sugar outside of and beyond their real requirements, which they might thereafter, it being in excess of their requirements, make a sale of to their great profit and to the very considerable detriment of the purchasing public.

If this contract had been entered into in normal times, and if the defendant Sugar Company had inserted this clause in the contract with the intention on its part to prevent a subsequent sale of this sugar

in order that it itself thereafter might sell more of its own sugar, and in that wise create some sort of a monopoly, or in that wise consummate some sort of a restraint upon the trade in sugar, I would be disposed to give very careful consideration to the argument advanced to the effect that that is the sort of a contract that public policy requires should be declared and held to be invalid. But that is not the situation at all. It is not a time of peace; it is not a time for the normal operation of usual economic laws; it is a time of war, a time of attempted readjustment and recovery from participation in the greatest war that civilization probably has known. These contracts were negotiated at a time when everybody was trying his best, was using his faculties to the very best advantage, to see if we might not be able to provide for the distribution of the necessaries of life, of which sugar is one, in such form and fashion as to prevent some considerable menace being offered to the maintenance of social integrity, social harmony, and well-being in our midst. People wanted sugar, as they wanted other things; and the aim of the government, which was concerning itself with the peace and quiet of its people, no less than with the maintenance of its own perpetuity, obviously was to interest itself as best it might in the distribution of sugar, along with other things, in order that no substantial injustices might be done, and that the greatest number of people who were craving the article might meet with satisfaction.

Under these circumstances, the government indicated to these parties that this sugar could be sold lawfully, and therefore sold at all, only if the clause providing for its use by the vendee and against its resale to any other person were inserted in the contracts. It seems to me that under such a state of facts for this court now to hold that the clauses thus inserted were unreasonable in their nature, so unreasonable as within the terms of the Sherman Anti-Trust Act to invalidate and nullify and render absolutely and completely void the entire contracts, would be to attempt the consummation of a thing under the guise of law which really would have no law or reason or justice to support it, and would tend to make of this government, not a government of law, but a government of men.

There is no evidence in the case that I can see of any attempt, any malevolent motive, on the part of this vender of sugar, to do anything other than comply with what it and nearly everybody else at the same time understood to be the lawful and the reasonable and the proper and the apt demands of governmental authority. Under those circumstances, to hold that in so doing it must now, in virtue of what has transpired, meet the loss that has been sustained here—an amount in excess of $300,000—would be to work out such an obvious injustice as to shake the very foundations of the social structure which we have erected here in our midst, and to undermine the confidence of men in government that it will see that private right is maintained and lawful engagements voluntarily entered into are made good.

Now, the truth of the whole thing is easily apparent. This case is here because sugar went down, and there was no thought of getting it here until sugar had gone down. If this contract was void—and that is the argument of counsel for the plaintiff—because of the in-

clusion of these clauses in it, then, of course, it was wholly void, void at the behest of the defendant in the case. It would have been void in the event of a continued rise in the market and a refusal on the part of defendant to deliver the sugar; would have been held void if the plaintiff had brought suit for damages for such refusal. If it was void in one case, it was void in the other. I can but faintly imagine, however, the vehemence that would have been indulged in here in this court, in support of the argument on behalf of the present plaintiff, that such a clause, entered into under such circumstances, should not suffice to enable one to escape the just consequences of his reasonable and voluntary engagement.

But the shoe is on the other foot. The price of sugar having gone down, these people now seek to escape from the consequences of an unwise move on their part, the purchase of more sugar, really, than they needed in their business. The candy business also went down, as shown by the depositions here. There was less sugar needed by it after the purchase than previously. Not only was there less sugar needed, but there was more sugar to be had, and therefore the price went tumbling down. Five or 5½ months after the contract was entered into, 5½ months after they had had time to look it over carefully, 5½ months, no doubt, after it had been well thumbed by all of their various functionaries, for the first time they came to the conclusion that it was an unlawful contract, an invalid contract, one that shocks the public conscience and is opposed to public policy, one that would result in creating an unreasonable restraint upon interstate trade; and after the sugar had been brought across the wide stretches of the sea and landed ready for delivery, and the price had gone down, and no opportunity was open to the defendant to recoup any of the tremendous loss which might have been overcome if an intimation had been conveyed to it 3 or 4 months previously, it is now proposed that this loss shall be borne, not by the buyer of the article, who bought too much, but shall be borne by the seller of the article, who was merely trying to provide that which society was demanding of it, and in a way then deemed least inimical to the welfare of society.

Aside from the fundamental disposition which I think should be in the breast of every man who expects to engage and continue in business in the United States of America—the disposition to live up to his contracts once he has entered into them—I think there ought to be the further, but equally prevalent, disposition to take one's loss, when it comes, like a sport; and whether it be a loss of $300,000, as here, or a loss of 300 cents, having overpurchased, having overbought, having failed to guess with becoming perspicacity as to the future, if one would contribute something to the well-being of our civilization, he will not seek to avoid such a contract as that, one entailing a loss in virtue of his want of foresight, because, forsooth, on the narrow ground that five months after he entered into it he got advice that it was unlawful. He should bear his loss, bear it like a man, even if the bearing of the loss mean bankruptcy. Unwelcome bankruptcy may be accepted with honor; unwarranted repudiation, however, is a continuing badge of dishonor. To do the honorable thing at all events, even

in the face of loss, is a part of the game; it is a part of the burden. And it seems to me that it is the burden that ought to be maintained by the plaintiff in this case.

Defendant contends that the clause referred to is severable, and therefore cannot in any event suffice to invalidate the entire contract. I have not had time to go into the authorities as to that, and therefore express no final opinion respecting that phase of the case. I am somewhat of the belief, with respect to a clause that in normal times would be so closely allied to the prohibitions of the Sherman Anti-Trust Act, aimed and intended to benefit the public, that the court should be loath to hold it a severable clause and one not sufficient, in itself, to invalidate the contract as a whole. But that becomes unnecessary further to consider, and need not enter into the determination of the case at this time, because of the conclusions to which I have come that, under the circumstances surrounding the transaction, the clause is in no wise an impingement upon the law as laid down by the Supreme Court in its construction of the Sherman Act.

For these reasons, I am of the belief that there is no occasion or propriety for this court at this time to seek to prevent the just consequences of this lawful engagement, lawfully entered into, from falling where they will.

The decree will be in the usual form, discharging the restraining order heretofore issued and dismissing the bill of complaint.

BLUM et al. v. WARDELL, Collector of Internal Revenue.

(District Court, N. D. California, S. D. December 30, 1920.)

No. 16311.

1. **Courts ⇐366(16)—State decisions as to nature of community property binding in applying federal inheritance tax.**
   The federal courts in applying the federal inheritance tax levied by Act Sept. 8, 1916, §§ 201–203 (Comp. St. §§ 6336½b–6336½d) on the transfer of the net estate of a decedent are bound by the decisions of the state court construing the statutes of the state relating to community property as giving the wife her share of the community property on death of her husband by way of inheritance.

2. **Internal revenue ⇐8—Wife's share of community property is not taxable as transfer.**
   Under the modifications of the original Community Property Law of California, culminating in the re-enactment in 1917 of Civ. Code Cal. §§ 172, 172a, whereby the husband was no longer given the absolute power of disposition over such property, and under St. 1917, p. 880, providing that the share of the surviving widow in the community property shall not be subject to the state inheritance tax, the surviving widow no longer takes her interest in the community property as heir as she formerly did, and such interest is not subject to the federal inheritance tax imposed on the transfer of a decedent's estate by Act Sept. 8, 1916, §§ 201–203 (Comp. St. §§ 6336½b–6336½d), especially since in no other state is the widow's share in community property a taxable transfer.

At Law. Action by James B. Blum and another, as executors of the last will and testament of Rosa Blum, deceased, against Justus S. Wardell, Collector of Internal Revenue for the First District of California. On demurrer to the complaint. Demurrer overruled.

Goldman & Altman, Thomas P. Boyd, of San Rafael, Cal., John W. Preston, of San Francisco, Cal., and H. W. B. Taylor, of San Anselmo, Cal., for plaintiffs.

Annette Abbott Adams, U. S. Atty., and Charles W. Thomas, Jr., Asst. U. S. Atty., both of San Francisco, Cal., for defendant.

Robbins, Elkins & Van Fleet, of San Francisco, Cal., amici curiæ.

RUDKIN, District Judge. Section 201 of the Act of September 8, 1916 (39 Stat. 777 [Comp. St. § 6336½b]), imposes a tax upon the transfer of the net estate of every decedent dying after the passage of the act, whether a resident or nonresident of the United States.

Section 202 (Comp. St. § 6336½c) provides that the value of the gross estate shall be determined by including the value, at the time of his death, of all property, real or personal, tangible or intangible, wherever situated, to the extent of the interest therein of the decedent at the time of his death, which after his death is subject to the payment of the charges against his estate and the expenses of administration, and is subject to distribution as a part of his estate, and to the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person.

Section 203 (Comp. St. § 6336½d) provides that the value of the net estate shall be determined by deducting from the value of the gross estate funeral expenses, administration expenses, claims against the estate, unpaid mortgages, losses incurred during the settlement of the estate, arising from fires, storms, shipwreck, or other casualty, and from theft, where such losses are not compensated for by insurance or otherwise, support during the settlement of the estate of those dependent upon the decedent, and such other charges against the estate as are allowed by the laws of the jurisdiction, whether within or without the United States, under which the estate is administered, and an exemption of $50,000.

Moses Blum, a resident of the city and county of San Francisco, died testate on the 22d day of June, 1918, and after his death the executors of his last will and testament paid under protest an estate tax on the sum of $116,663.38, which was the value of the half interest in the community personal property which passed to the surviving widow under the laws of the state upon the death of the husband. The present action was thereafter instituted against the collector of internal revenue to recover the tax thus paid.

The foregoing statement is deemed sufficient to a proper understanding of the questions presented by the demurrer to the amended complaint.

The defendant contends that the decedent was the owner of the entire community personal estate at the time of his death; that the interest of the wife was a mere expectancy, like the interest of an heir in the property of his ancestor, and possessed none of the attributes of an

estate, either at law or in equity. The plaintiffs, on the other hand, while conceding that such was the rule of decision in the state at one period, contend that such was not the law or rule of decision at the date of the marriage of the decedent in 1885; that such is not now the law of the state; and that in any event a federal court sitting in California will place its own construction upon the community property laws of the state and on the federal act imposing the tax in question.

That the Supreme Court of California has repeatedly construed the community property laws of the state, as claimed by the defendant, does not admit of question. Reference to a single decision will demonstrate this. In re Moffitt's Estate, 153 Cal. 359, 95 Pac. 653, 1025, 20 L. R. A. (N. S.) 207, decided in 1908. The court there held that the share of the surviving wife in the community property was subject to the inheritance tax imposed by the laws of the state, and in discussing the nature of her interest in the community property said:

"It is conceded that the determination of the trial court that such property is liable for the payment of this tax finds support in the cases of In re Burdick, 112 Cal. 387, 44 Pac. 734, Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170, and Sharp v. Loupe, 120 Cal. 89, 52 Pac. 134, 586. But it is earnestly contended that this court should overrule these cases to the extent of holding that, as to the community property, the widow has such an ownership or estate or title as enables her to take upon the death of the husband, not as his heir, and not by succession, but by a certain right of survivorship; that, in effect, the wife during the existence of the marriage status has always enjoyed an ownership in one-half of the community property; and that by the death of the husband her ownership of this moiety is simply released from the power of disposition over it, with which the law during his lifetime and during the existence of the marriage status has clothed him. Reference is made to the language of the Civil Code (section 682), which declares that ownership of property by several persons is either (1) of joint interest; (2) of partnership interest; (3) of interests in common; (4) community interest of husband and wife. We are referred also to expressions in some of the earlier decisions of this court, such as the language of Beard v. Knox, 5 Cal. 256, 63 Am. Dec. 125, where it is said: 'The husband and wife during coverture are jointly seized of the property, with a half interest remaining over to the wife, subject only to the husband's disposal during their joint lives. This is a present, definite, and certain interest, which becomes absolute at his death.' All of these Code sections, all of these cases, and all of these arguments were most ably urged upon the attention of the court in the first two cases above cited, and the conclusion then reached was there expressed in the following language: 'Courts and counsel have occasionally endeavored to find some property right in the wife or some respect in which the husband's interest falls short of full property. I think it will be universally admitted that so far there had been a complete failure in this respect. The first attempt shown by our reports of that kind is in De Godey v. De Godey, 39 Cal. 157. In that case it is said that, while no other technical term so well defines the wife's interest as the phrase "a mere expectancy, * * * it is at the same time * * * so vested in her that the husband cannot deprive her of it by his will, nor voluntarily alienate it for the mere purpose of divesting her of her claim to it."' After painstaking investigation and review, and after the fullest deliberation, this court, in Re Burdick, determined and held, as it declared in Spreckels v. Spreckels, that upon the death of the husband the wife takes one-half of the community property as heir. Every argument here advanced against that conclusion was urged by learned counsel in the other cases, and was fully met in the opinions above referred to. No useful purpose can be subserved by a repetition of these arguments or of the answers to them. A reading of the opinions

of this court in those cases will establish how thoroughly the questions were entered into, and what a complete disposition was made of them."

The opinion on rehearing in the same case (153 Cal. 359, 95 Pac. 1025, 20 L. R. A. [N. S.] 207) disposes of the further contention that there was no such rule of decision at the date of the marriage of the decedent in 1885. It was there urged that the property upon which the tax was imposed was acquired under the Constitution of 1849 (article 11, § 14), which declared:

"Laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as to that held in common with her husband"

—and that neither the new Constitution of 1879 nor the laws enacted thereunder could deprive the wife of her interest in the community property thus guaranteed and secured by the former Constitution. But the court, after a full review of the earlier decisions, held that the community property laws of the state had always received the same construction at the hands of the court, quoting the language of Chief Jusice Field in Van Maren v. Johnson, 15 Cal. 303, of Justice Cope in Packard v. Arellanes, 17 Cal. 525, and of Justice Thornton in Greiner v. Greiner, 58 Cal. 119. A similar conclusion was reached in Spreckels v. Spreckels, 116 Cal. 339, 48 Pac. 228, 36 L. R. A. 497, 58 Am. St. Rep. 170. In the late case of Spreckels v. Spreckels, 172 Cal. 775, 158 Pac. 537, decided in 1916, the court said:

"Under the statute prior to the addition of the first proviso in 1891, it was the established doctrine in this state that during the marriage the husband was the sole and exclusive owner of all of the community property, and the wife had no title thereto, nor interest or estate therein, other than a mere expectancy as heir, if she survived him."

And in construing the proviso of that year the court further said:

"Neither does the proviso purport to vest in the wife, during the marriage, any present interest or estate in the community property given away by the husband without her written consent. In view of the long-settled doctrine that the entire estate therein is in the husband during the marriage relation, a doctrine that had become a fixed and well-understood rule of property, it is not to be supposed that the Legislature would have made a change of so radical a character without plain language to that effect. We do not find in the proviso such language, nor anything that can reasonably be so construed. If it confers upon her, during the marriage, any right respecting such gifts, it is nothing more than a right to revoke the gift and, if necessary, sue to recover the property, not as her separate estate, but to reinstate it as a part of the community property, with the title vested in the husband and subject to sale by him, as before."

From these decisions it becomes at once apparent that, prior to the enactment of the legislation upon which the plaintiffs rely, the wife had no estate, legal or equitable, in the community property during the life of the husband, that her interest was a mere expectancy, and that she took as heir to her husband, and not otherwise.

The plaintiffs earnestly insist that many decisions of the Supreme Court of California, both early and late, are entirely inconsistent with the view that the interest of the wife in community property is a mere expectancy, like the interest of an heir in the property of his ancestor.

This much, I think, must be conceded. As said by the Supreme Court of the United States in Arnett v. Reade, 220 U. S. 311, 320, 31 Sup. Ct. 425, 426 (55 L. Ed. 477, 36 L. R. A. [N. S.] 1040):

"However this may be, it is very plain that the wife has a greater interest than the mere possibility of an expectant heir. For it is conceded by the court below, and everywhere, we believe, that in one way or another she has a remedy for an alienation made in fraud of her by her husband."

The same concession has repeatedly been made by the Supreme Court of California, but any attempt to review the many more or less conflicting community property decisions of that court, extending over a period of 70 years, would be futile.

[1] The plaintiffs further contend that this court is not bound by the construction placed upon the laws of California by the highest court of the state. With this contention I am unable to agree. The federal tax is imposed on the transfer of the net estate, and whether there is a transfer upon the death of the husband depends upon the statutes and rule of decision in the state where the parties reside and the property is situate. De Vaughn v. Hutchinson, 165 U. S. 566, 570, 17 Sup. Ct. 461, 41 L. Ed. 827; Randolph v. Craig (D. C.) 267 Fed. 993.

This brings us to a consideration of the more recent legislation upon which the plaintiffs base in part their right of recovery. The first community property law of 1850 (p. 254) provided as follows:

"The husband shall have the entire management and control of the common property, with the like absolute power of disposition as of his own separate estate."

But, notwithstanding this broad language, the courts uniformly held that the husband could not dispose of the entire community property by will, or deprive the wife of one-half thereof upon his death in case she survived him. This limitation on the authority of the husband was embodied in the Civil Code in 1872, the provision reading as follows:

"The husband has the management and control of the community property with the like absolute power of disposition (other than testamentary) as he has of his separate estate."

The next change was in 1891, when the following proviso was added:

"Provided, however, that he cannot make a gift of such community property or convey the same without a valuable consideration, unless the wife, in writing, consents thereto."

In 1901 a second proviso was added, as follows:

"And provided, also, that no sale, conveyance, or incumbrance of the furniture, furnishings and fittings of the home, or of the clothing and wearing apparel of the wife or minor children, which is community property, shall be made without the consent of the wife."

The next change was in 1917, where a distinction is made between real and personal property. Sections 172 and 172a, re-enacted in that year, read as follows:

"Sec. 172. The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate: Provided, however, that he cannot make a gift of such community personal property, or dispose of the same

without a valuable consideration, or sell, convey, or incumber the furniture, furnishing, or fittings of the home or of the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife.

"Sec. 172a. The husband has the management and control of community real property but the wife must join with him in executing any instrument by which such community real property, or any interest therein, is leased for a longer period than one year, or is sold, conveyed, or incumbered: Provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

Another act passed during 1917 (St. 1917, p. 880) provides that, for the purpose of the inheritance tax law of the state, the half of the community property which goes to the surviving widow on the death of the husband shall not be deemed to pass to her as heir of her husband, but shall, for the purpose of the act, be deemed to go, pass, or be transferred to her for a valuable and adequate consideration, and her half of the community property shall not be subject to the inheritance tax.

[2] The plaintiffs contend that this legislation necessarily changes the rule of decision in the state of California, assuming that a fixed or established rule can be gathered from the decided cases. This contention must be upheld. The amendment to the inheritance tax law of the state is a legislative disapproval of the decision in the Moffitt Case. The community property act of 1917 is valid as to community property acquired before its passage (Arnett v. Reade, supra), and if that act does not recognize in the wife a valid, subsisting, vested interest and estate in the community property during the life of the husband, language is without meaning and legislation without avail. When the husband had the management and control of the community property, with the like absolute power of disposition as of his own separate estate, a decision that the wife had a mere expectancy was plausible, if unsound. But under these recent acts such a decision would be without excuse or justification. It is needless to incumber the record with citations from the Supreme Court of the United States and other community property states to demonstrate this. Nor have I overlooked the fact that there has been no change in the community property laws so far as concerns personal property. In all the community property states, from the necessity of the case, the agency of the husband as head of the family is much broader, and his control and dominion over personal property much greater, than in the case of real property; but it has never been supposed, that this difference lessens the estate of the wife in community personal property, or calls for a different rule of succession.

The claim of the government is inequitable at best. It is conceded that the interest of the surviving wife in community property in other community property states is exempt from the estate tax under identical laws, and nothing short of some imperative controlling necessity would justify a court in upholding the tax in a single state. I find no such ob-

stacle in the way of administering equal and impartial justice in this case, and the demurrer is overruled.

Let an order be entered accordingly.

WOODS v. CITY OF SEATTLE et al.

(District Court, W. D. Washington, N. D. January 15, 1921.)

No. 228.

1. **Intoxicating liquors ⇐6—State can prohibit acts permitted under National Prohibition Act.**
   Const. U. S. Amend. 18, and the National Prohibition Act confer no rights to sell Jamaica ginger in quantities not prohibited by the act, but were intended as limitation upon privilege, and therefore a state, under its police power, can prohibit the sale of such quantities.
2. **Intoxicating liquors ⇐10(1)—State may delegate to city police power to prohibit.**
   Though the concurrent power given a state by Const. U. S. Amend. 18, § 2, to enforce that amendment, cannot be delegated by the state, the state can delegate to a city its police power, independent of the amendment, to prohibit the sale of intoxicating liquor, as the state of Washington did by Const. Wash. art. 11, § 11, with the limitation that an ordinance thereunder should not be inconsistent with state statutes.

In Equity. Suit for injunction by J. H. Woods, sole trader, doing business under the name of the Northern Drug Company, against the City of Seattle and others. Motion for temporary injunction denied, and bill dismissed.

John F. Dore, of Seattle, Wash., for plaintiff.

Walter F. Meier, Thomas J. L. Kennedy, and Charles T. Donworth, all of Seattle, Wash., for defendants.

NETERER, District Judge. The plaintiff seeks to enjoin the defendant from interfering in the sale of Jamaica ginger to consumers without prescription in quantities not to exceed one or two ounces at a time, and from causing the plaintiff's arrest for making such sales, alleging that he is the owner of a retail drug store and is a registered druggist under the laws of the state; that under National Prohibition Act, § 1, tit. 2 (7), 41 Stat. 305, the term "regulation" shall mean any regulation prescribed by the commission with approval of the Secretary of the Treasury for carrying out the provisions of the act, and the Commissioner is authorized to make such regulation, and sets out the regulation, and that it is provided that Jamaica ginger must not be sold by retail druggists to consumers in quantities not exceeding one or two ounces at one time, etc.; that the regulation has the force and effect of statutory enactments, and that by reason of the regulation the plaintiff is entitled as a retail druggist to sell Jamaica ginger to consumers in quantities as stated; that under Ordinance 36,242, amended by Ordinance 41,733, and become operative on the 22d day of December, 1920, the selling of Jamaica ginger in the manner above set forth

is prohibited; that on the 28th of December, 1920, an employee of the plaintiff was arrested by the defendant city and punished for selling a one-ounce bottle of Jamaica ginger to a consumer, and that defendants have threatened that he or his employees would be arrested upon each like sale; that Jamaica ginger is a common medicinal preparation and for years has been a "common household remedy"; that, unless injunction is granted, the plaintiff's rights will be infringed, and he will be harassed and forced to expend large sums of money in defending himself in the criminal courts, and that his "business will be destroyed" and his damage will exceed $10,000; that the ordinance and amendment, supra, contravene the Constitution.

The defendant resists the injunction and moves to dismiss the action. The plaintiff, in substance, contends that article 18 is a grant, and that by this amendment the state has surrendered to the national government its police power with relation to traffic in intoxicating liquor, while the contention of the defendant is that the state reserved its police power, limited only by the amendment and the National Prohibition Act, enacted pursuant thereto, and has full power to legislate with relation to the drink evil, not inconsistent with Article 18 or the Prohibition Act, supra. In United States v. Peterson (D. C.) 268 Fed. 864, this court said:

"Section 2, article 18, and section 2, article 6, must have harmonious relation, since no express declaration in the amendment was made, nor are the provisions necessarily inconsistent. The national legislation, therefore, is paramount, and the state laws when in conflict must yield."

[1] The plaintiff asserts that article 18, supra, and the National Prohibition Act, grant him a right to do except that which is prohibited, and that this right overrides all police power of the state with relation to intoxicants. In this the plaintiff is in error. Instead of granting a right, the amendment and the Volstead Acts are limitations upon privilege. The Supreme Court in Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 64 L. Ed. 946, said:

"6. The first section of the amendment * * * is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers and individuals within those limits, and of its own force invalidates every legislative act whether by Congress, by a state Legislature or by a territorial assembly, which authorizes or sanctions what the section prohibits. * * *"

It is therefore apparent that the only legislation referred to is that "which authorizes or sanctions what the section prohibits." It was said in United States v. Peterson, supra:

"Neither article 18 nor the Congress sought to destroy any existing remedies by a state to curb the drink evil."

Section 11, c. 19, Laws of Washington 1917:

"* * * And it shall be unlawful for any person, other than a regularly ordained clergyman, priest or rabbi actually engaged in ministering to a religious congregation, to have in his possession any intoxicating liquor other than alcohol."

Section 1 of the same act:

"* * * And it shall be unlawful for any druggist or pharmacist * * * to dilute or adulterate alcohol or compound it with any other substance in such proportions that it shall be capable of being used as a beverage, and sell, barter, exchange, give away, furnish or otherwise dispose of the same, or to permit any alcohol to be diluted or adulterated or compounded with any other substance and drunk on the premises where sold. * * *"

This is known as the Washington "Bone Dry Law." The National Prohibition Act does not reach into this zone, nor does the state authorize what the National Prohibition Act prohibits. The police power of the state, therefore, is paramount where it does not authorize what the National Act prohibits, and through its inherent reserve power it has the right to legislate in such manner. The state may prohibit, but it may not authorize.

[2] The state, having this power by article 11, § 11, of the state Constitution, has granted to the defendant city police power, with a limitation that ordinances shall not be enacted in contravention of state statute. The Supreme Court of Washington in Seattle v. Hewetson, 95 Wash. 612, 615, 164 Pac. 234, 235, with relation to ordinance in issue, said:

"The ordinance was enacted on December 1, 1915. By section 10, art. 9, of the Constitution, any city of the first class has power to frame a charter for its own government, consistent with and subject to the Constitution and laws of the state. By section 11, a city may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. Section 7507, Rem. Code, enumerates powers of a city of the first class. By subdivision 32 thereof, such city has power to regulate the sale or giving away of intoxicating liquors; by subdivision 33, to grant licenses for lawful purposes; by subdivision 34, to regulate the carrying on within its corporate limits of occupations which are of such a nature as to affect the health or the good order of the city."

The same court, in Seattle v. Brookins, 98 Wash. 290, 167 Pac. 940, said:

"The first two points made upon the appeal are (a) that the city had no power to pass the ordinance under which the appellant was charged and convicted, and (b) that the state, by the passage of initiative measure No. 3 (Laws of 1915, p. 2; Rem. Code, § 6262—1), expressed an intention of removing the subject of intoxicating liquors from the control of municipalities. These two points are answered adversely to appellant's contention in the recent case of Seattle v. Hewetson, 95 Wash. 612, 164 Pac. 234, and, under the holding in that case, the contentions are not well founded."

In United States v. Peterson, supra, it was said:

"The concurrent power given to the state does not, however, authorize the state to delegate that power to municipalities. It is a power which must be exercised by the state itself."

Concurrent power is not an issue here. The prohibiting by national legislation of traffic in liquor with more than one-half of one per centum of alcohol by volume does not prevent the state, or the city within the granted police power, to decide upon measures that are needful for the protection of its people by prohibiting possession or delivery of intoxicants fit for beverage purposes, under the guise of innocent preparations not within the National Prohibition Act. Ruppert v.

Caffey, 251 U. S. 264, 40 Sup. Ct. 141, 64 L. Ed. 260; Mugler v. Kansas, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205; State v. Fabbri, 98 Wash. 207, 167 Pac. 133, L. R. A. 1918A, 416.

The fact, as alleged by plaintiff, that the sale of Jamaica ginger is not prohibited by the National Prohibition Act or regulations does not prevent the city from prohibiting such sale.

Plaintiff asserting his right to relief under art. 18, and the National Prohibition Act, and no right appearing, the motion for temporary injunction is denied, and the motion to dismiss granted.

SNIPES v. MUTUAL TRUST CO.

In re DANSER & CO.

(District Court, E. D. Pennsylvania. January 22, 1921.)

No. 6628.

1. **Jury ⇐9—Justice administered by court and jury.**
   Under the amendments to the Constitution, known as the Bill of Rights, which recognized the jury as the sole trier of the facts of action at law, it is nevertheless true that justice is administered by a court and jury, and not by either alone.
2. **Trial ⇐139(1)—Existence of evidentiary facts is question for jury.**
   Where there is an evidentiary fact to be found, it must be found by the jury.
3. **Trial ⇐142—Inference of ultimate fact for jury, if room for difference.**
   If there is fair room for reasonable difference of opinion as to the ultimate fact finding, or inference to be drawn from the evidentiary facts, it is for the jury to draw the inference; otherwise, it is for the court.
4. **Trial ⇐139(1)—Nonsuit improper, if verdict for plaintiff would be sustained.**
   The test of the right to nonsuit is whether on a motion for a new trial the court would enter judgment on a verdict in favor of the plaintiff, if it were rendered.
5. **Bankruptcy ⇐165(1)—Bankrupt held not indebted to bank, so that payments were not preferences.**
   Where the bankrupt was accustomed to deposit in a bank checks drawn on other banks, and immediately thereafter to check against such deposits, without waiting to see whether the checks were good, and the bank, which was required by the clearing house to make good worthless checks credited by it, required payments from the bankrupt to protect itself against excessive use of its cash reserves, there was no indebtedness from the bankrupt to the bank, and such payments were not preferences.

At Law. Action by Edgar T. Snipes, trustee in bankruptcy of Danser & Co., a Delaware corporation, against the Mutual Trust Company, a Pennsylvania corporation. On motion to take off nonsuit. Rule discharged.

R. D. Brown, of Philadelphia, Pa., for plaintiff.
Francis B. Bracken, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case is unique. The sole controversy is over the existence of a debt. The unusual feature is that

the debtors are asserting and the creditor is denying its existence. The case and defense are in capable hands. The ground upon which the nonsuit was entered has been stated upon the record. There is in consequence no need to discuss the merits of this motion, beyond the statement of our conclusion to adhere to the view of the case taken at the trial. The dividing line between questions which are for the court and those which should be submitted to the jury cannot, except in the most general and practically unhelpful terms, be defined.

[1] It is easy to observe in those amendments to the Constitution of the United States, which have been aptly called the federal Bill of Rights, the clearly expressed desire of our people that the jury system shall be preserved in all its fullness by the jury being recognized to be the sole trier of the facts, and that the courts shall accept whatever facts are established by the verdict. It is just as easy to see and appreciate the truth in the observation that legal justice is administered under the laws of the United States by "court and jury," and not by the jury alone. It is just as true that in common-law actions legal justice is not administered by the courts alone.

[2, 3] The general rule laid down for our guidance is that, if there is what may be called an evidentiary fact to be found, it must be found by the jury, and if there is fair room for a reasonable difference of opinion as to the ultimate fact finding, or inference to be drawn from the evidentiary facts, it is the place of the jury to draw the inference; otherwise, it is for the court. The first part of this gives us a good working rule. The latter is not so satisfactory. Practically it approaches very closely the short-cut doctrine that when the court, although differing with the jury in opinion of what the judgment should be, would nevertheless enter judgment on the verdict, the case was properly one for the jury. The converse supplies us with an equally good test and a practically definite one.

All for which counsel for plaintiff contends is that he has the right to the judgment of a jury as to the proper inference to be drawn from the evidentiary facts. The evidentiary facts are not in dispute. The truth is they were supplied by defendant. Counsel for plaintiff would, if permitted so to do, have asked the jury to make the ultimate fact finding that the bankrupts, for whose estate the plaintiff is trustee, were indebted to the defendant. It is not often that a creditor would be found denying such a fact.

[4] Applying the suggested test, we have the following question presented: On a motion of the defendant for a new trial, would the court enter judgment on a verdict in favor of the plaintiff? The pertinent evidentiary facts are not many. The bankrupts deposited with the defendant checks drawn on other banks, and asked that the sums of money for which the checks called be placed to the depositors' credit. Thus far there could be no thought of an indebtedness due the bank. If, however, the bank permitted the depositors to draw against this account, and the deposited checks were worthless, just as clearly the depositors would owe the bank the overdrawn balance of the account after the worthless checks were charged back. This

is not, as the plaintiff states it, the fact on which rests his cause of action, but this is what in substance it is.

No such fact, however, is in the present case, although something somewhat resembling it is. The depositary bank was not a full member of the Clearing House Association, but was an associate member, with some of the rights of a full member. It had the right to participate in the clearances of checks. It had this privilege, however, on the terms that it was obliged to pay the amount of any balances against it at the time the balance was struck, irrespective of whether the checks, which entered into the balance found, were good or not. In fact it paid them without knowing what they were or by whom drawn. This payment was, however, not as reckless as, in this statement of it, it would seem to be. The payment was not an absolute, but an "if," payment. The defendant had the right and opportunity to check up the correctness of the balance which it had paid. The checks which entered into the statement were handed over to the defendant. If any of them were worthless, the bank which had sent them to the clearing house was notified, and was bound to refund the amount of the worthless checks to the defendant. It is clear that the moneys which the defendant thus paid to the Clearing House were paid, not upon the credit of the depositors, but of the member bank on whose account the checks were paid in the first instance to the Clearing House. This is not meant to be a technically correct statement of the transaction, but one to bring out its essentials, in order to determine whether thereby any indebtedness arose from the depositors to the bank.

To restate the transaction, as counsel for plaintiff in effect states it, if the bankrupts had deposited worthless checks, and the bank had paid the depositors' checks drawn against this account, thus in fact overdrawing the account to the amount of the debit balance shown when the worthless checks were charged back, the depositors would have become indebted to the bank, and if they paid the bank, by making good their account, this payment might be found to be preferential. The transaction proved is averred to have been in substance and effect the transaction above described.

Plaintiff adds to the statement of facts above made the further circumstance that the defendant complained to the bankrupts of the practice of depositing checks and drawing against them before they were collected, thus practically compelling the defendant to use its cash reserves to make its payments to the Clearing House, thereby requiring it to keep a larger reserve, and subjecting it to annoyance, trouble, and risk. The bankrupts thereupon agreed to compensate the defendant by paying it sums of money based upon the advances made and the time during which it was out the use of the moneys advanced.

[5] Without further statement of the reasons for reaching the conclusion reached, we adhere to the view of the case taken at the close of the trial. We could not enter a judgment which involved the finding that a debt arose out of the described transactions from the bankrupts to the defendant.

The rule to take off the nonsuit entered is discharged.

UNITED STATES v. BLANTON et al.

In re RAY et al.

(District Court, E. D. North Carolina. December 9, 1920.)

No. 812.

Courts ⇐489(12), 494—Irregular proceedings outside condemnation suit may be set aside.

Pending a suit in the federal court by the United States to condemn land for a military camp a representative of the government obtained a contract from a widow for the sale of a tract of the land owned by the estate of her deceased husband and through proceedings instituted by him in her name he secured his appointment as commissioner to convey the land, including the interests of the minor children, to the United States, which he did, receiving the agreed price, which he paid into court. Shortly after a guardian was appointed for the widow by the state court on a petition alleging her mental incapacity, and he filed a petition to set aside the order authorizing sale of the land, which proceeding was removed by the United States into the federal court. *Held*, that the condemnation suit vested that court with jurisdiction over all the parties; that, as the mental capacity of the widow when she signed the agreement was subject to doubt, and the price agreed on was materially less than the value fixed by appraisers, of which she was not informed, and as the proceedings in the state court were not in conformity with the state statutes, and the money was still undistributed, that court's order would be set aside leaving the land to be acquired in the condemnation suit.

Condemnation suit by the United States against Vance Blanton and others. In the matter of petition on behalf of Flora Viola Ray and others. Relief granted.

Thomas D. Warren, Sp. U. S. Atty., of Newbern, N. C.
Rose & Rose, of Fayetteville, N. C., for defendants.

CONNOR, District Judge. On the 23d day of June, 1919, the United States filed a petition in this court against Vance Blanton and a large number of other landowners, residing in Cumberland and Hoke counties, N. C., for the purpose of securing, by condemnation, pursuant to the act of Congress of July 2, 1917, as amended April 11, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 6911a), title to a large area in said counties as a military camp, which will appear by reference to the original petition and proceedings thereon in the clerk's office. Process was duly issued and served on the defendants, Flora Viola Ray and her infant children, residents of Fayetteville, N. C. See Petition, p. 14.

Defendant Flora Viola Ray was entitled to a dower, which had not been allotted, and her children, defendants Stella Ray, Frances Ray, and Vontrice Ray, infants, were entitled, subject to their mother's dower, to the tract of land lying and being in Hoke county, within the Camp Bragg area represented in the plat filed with said petition as tract No. 301, containing 384.4 acres.

On May 5 and 6, 1920, "at the request of the officials of the govern-

ment," J. H. Smith, B. R. Gatlin, and A. B. McFayden, citizens of Hoke county, made—

"an estimate of the lands belonging to Mrs. Flora Viola Ray, widow, and the minor children of D. J. Ray, deceased; * * * that said commissioners valued the property at that time as follows: Dwelling, $250; kitchen, $100; barn, $125; crib, $75; smokehouse, $25; fowl house, $25; 30 acres timber, $750; 327 acres of woodland, $4,578—total $7,428."

See Exhibits A, B, and C.

On June 19, 1920, J. C. MacRae, Esq., then—

"employed by the Real Estate Service of the War Department as a real estate expert, in connection with the acquisition of lands in the Camp Bragg area in Cumberland and Hoke counties, was requested by Mr. W. H. McDonald, field representative of the Real Estate Service of the War Department, with offices at Fayetteville, N. C., and in charge of the acquisition of lands in the Camp Bragg area, to call on Mrs. Flora Viola Ray in Durham, N. C., and see if she would sign a contract or proposal to sell the lands described in the petition or motion in this cause to the United States for the sum of $5,736 ($15 per acre). Mr. McDonald stated that this sum was the highest price the real estate service would approve for payment for said lands."

Acting upon the said request, Mr. MacRae—

"went to Durham on June 19, 1920, at the expense of the government, and called on Mrs. Flora Viola Ray, at her home on Arnett avenue, where he found her dressed, but lying down. She got up and sat in a chair in the presence of her daughter, Miss Stella Ray, age 20 years. He stated to Mrs. Ray that he called upon her at the instance of the government for the purpose of ascertaining if she would sell the lands owned by her deceased husband, D. J. Ray, for the sum of $5,736—that is, $15 per acre. He told her that this price was more per acre than that paid by the government for any lands adjoining her lands, which is a fact; the said prices for the adjoining lands ranging from $6 per acre to $13 per acre. He also told her that this price was more than twice the amount of the first appraisal of her land, but that Mr. McDonald felt that the first appraisal was not sufficient, though it had been made by disinterested citizens of Hoke county. He explained carefully to Mrs. Ray and her daughter, Miss Stella Ray, that she did not have to sell her lands to the government at the price of $5,736, inasmuch as the lands were included in the condemnation proceedings instituted by the government, and that she could await the findings of the commissioners appointed by the federal court as to the amount to be paid for the lands." Exhibit 1, Mr. MacRae's affidavit.

It does not appear that Mr. MacRae told Mrs. Ray that the three citizens selected by the government to appraise her lands May 5, 1920, had reported their value to be $7,428.

It appears that about the 21st day of November, 1918, J. W. Johnson and W. T. Covington, together with J. Hector Smith, "visited and viewed the lands of Mrs. Ray, and, after due examination and consideration of the character, location, and condition of said lands, they formed the opinion that a fair cash market value of the said lands was $6.50 per acre." This was the appraisal to which Mr. MacRae referred in his conversation with Mrs. Ray. See Exhibit D. She said the price was satisfactory to her and asked her daughter, Miss Stella Ray, what she should do, and her daughter replied, "Do whatever you want to." Mr. MacRae asked her if she would sign the contract or proposal to sell to the government for $5,736, and she replied that she would, but stated that she was nervous and asked him to sign her

name for her. He suggested that it would be better for her daughter to sign her name, whereupon Miss Stella Ray signed her mother's name, at her mother's request, and in her mother's presence, and witnessed the signature by signing her own name to the paper. He then witnessed it. Exhibit 1.

While not very important, it appears from an examination of the original contract, in the record, that Mr. MacRae wrote the words "D. J. Ray Est.," and Miss Stella Ray wrote thereunder the words "Viola Ray." Exhibit 2. Whether by this manner of executing the paper it became the "act and deed" of Flora Ray may admit of debate. It is, however, not material to the disposition of this motion. It is manifest that Mr. MacRae did not consider the manner in which the paper was signed as material to the final act in passing title to the land, nor was it so.

Mr. MacRae told Mrs. Ray that it would be necessary to pass the title of her children to file a petition in the superior court, and that she would have to secure the services of a lawyer; that, her children being minors, the sale could be completed only by an order of court. She understood this and asked him to suggest the name of a lawyer. He named several lawyers residing in Fayetteville. Knowing, as she did, that Mr. MacRae was a lawyer practicing his profession in Fayetteville, she asked him if he could not attend to the case for her children and herself. He said that he could do so at the same cost as any other reputable lawyer. She requested him to file the petition, and, as it in no way conflicted with his relations with the Real Estate Service of the War Department, the contract or proposal to sell having already been executed by Mrs. Ray, he consented to do so. Returning to Fayetteville, he drew the petition addressed to the clerk of the superior court of Hoke county, having jurisdiction in the premises, and returned to Durham on June 22, 1920, where he again saw Mrs. Ray, read the petition to her, and requested R. C. Cox, a notary public, to take her affidavit thereto. The verification is signed: "Flora Viola $\overset{\text{her}}{\underset{\text{mark}}{\text{X}}}$ Ray."

Mr. MacRae suggested to Mr. McDonald that the government should pay a part of the cost of obtaining the order, and he consented to add $75, making $5,811. It is entitled "In the Matter of Flora Viola Ray and Stella Ray and Annie Ray and Vontrice Ray, by Their Next Friend, C. W. Broadfoot." Exhibit 1.

On April 21, 1920, application was filed by C. W. Broadfoot to the clerk of the superior court of Hoke county, setting forth that "the children of Mrs. Ray are infants without any general guardian; that they each own one undivided interest in the lands described; that said lands are in the Camp Bragg area, and, as appears on the map made by the supervising engineer, are "tract No. 301; * * * that it is desirable that there shall be a sale of said property, and that it is necessary that there be an action or special proceeding at law for that purpose; that the persons closely connected with said infants are interested in the result of said action or special proceeding, and the undersigned, for that reason, has been requested to apply for appoint-

ment as next friend of said infants; that the undersigned has no interest whatever (neither present nor prospective) in the result of said action or special proceeding, except to see that the rights of said infants are protected in the event of his appointment, as their next friend."

The order appointing Mr. Broadfoot, who resides in Fayetteville, N. C., is dated "30th day of June, 1920," and the acceptance of said appointment filed by him bears the same date. It will be observed that the application for appointment as next friend makes no reference to any contract or proposal to sell. The date shows that it was filed nearly two months before the contract or proposal to sell was made by Mrs. Ray.

It does not appear why Mr. Broadfoot filed this application, or by whom he was requested to do so. On the same day the order of sale was made affidavits were filed by J. H. Smith, A. B. McFayden, and B. R. Gatlin, in which they "express the opinion that $5,811 is a fair and adequate sum for the sale of the land, and that the same is advantageously sold at such sum."

The petition (paragraph 5) states that "an appraisal of the land had been made by J. H. Smith, A. B. McFayden, and B. R. Gatlin, and the value found to be $5,811," whereas their affidavits were not made until June 30, 1920.

Pursuant to the order of the clerk, approved by the judge of the district, Jas. C. MacRae, as commissioner, executed a deed to the United States for the lands and received from the officers of the government the purchase money therefor. The clerk of the superior court, in the order directing the sale, also ordered the commissioner, "after deducting for his commission the sum of $200, the cost of the proceeding, including cost of the premium on the title guaranty policy, to pay to Flora Viola Ray the present cash value of her dower interest in the lands, and pay the balance due the infant petitioners into the court to await the further orders of the court."

On the 30th day of August, 1920, H. C. McLauchlin applied to the clerk of the superior court of Cumberland county, being the domicile of Mrs. Ray and her children, for letters of guardianship, alleging that Mrs. Flora Viola Ray was non compos mentis, and that she and her infant children were without any general guardian. No inquisition respecting the mental condition of Mrs. Ray was had by the clerk, but on the same day he appointed, and upon the execution of a bond with security in the penal sum of $400 issued letters of guardianship to, said H. C. McLauchlin, in accordance with his application.

On the 1st day of September, 1920, H. C. McLauchlin, as guardian of his said wards, filed a petition in the cause pending in the superior court of Hoke county, in which he averred that, at the time the petition for the sale of her lands were filed, his ward Flora Viola Ray was non compos mentis; that the said lands were at the time of filing said petition worth $40 to $50 per acre; that the order of sale entered in said proceeding was "contrary to the course and practice of the court of this state in such cases." He set forth other grounds as the basis of his motion to vacate and set aside the orders and decrees made there-

in asking that the deed made by the commissioner be revoked and canceled.

Upon filing the petition, notice having issued to the representatives of the United States, Thos. D. Warren, Special Assistant United States Attorney, came into the court and entered a special appearance for the purpose of moving that the petition of H. C. McLauchlin, guardian, be dismissed, for that the United States of America is the owner of the land in controversy, and is not a party to this proceeding, and that the court was without jurisdiction to set aside or revoke the orders heretofore entered, or to cancel the deed made by the commissioner.

He further moved the court to transfer all proceedings in the cause into the District Court of the United States for the Eastern District of North Carolina, at Raleigh, N. C., for the reason that there is now pending therein condemnation proceedings in which petition was filed June 23, 1919, by the United States asking for condemnation of certain lands in Cumberland and Hoke counties for an artillery range, and that the lands described in said proceedings are lands formerly owned by Flora Viola Ray and others, and are embraced within the boundaries of this petition, and the said Viola Ray and others are parties to this proceeding, and this court has no jurisdiction to make further orders and decrees affecting the title of the United States, but that same should be determined in the condemnation proceedings now pending in the District Court of the United States.

Upon filing the foregoing motion and after notice to Jas. C. MacRae, commissioner, and Chas. W. Broadfoot, the next friend of the infant petitioners, the clerk of the superior court of Hoke county on September 16, 1920, ordered that the cause and all proceedings therein be transferred to this court. Pursuant to said order, the records, orders, and other papers in the cause were duly transmitted to this court for further hearing and determination.

While the course pursued in this case results in a procedure of first impression, counsel for the United States and the other parties interested waive all technical objections to the procedure and desire the court to dispose of the controversy. It is conceded that, under the act of Congress, the government is entitled to secure the title to and possession of the lands for the purpose of establishing and maintaining an artillery training camp. It is equally clear that the defendants are entitled to receive from the government the fair cash value of their lands, and when this is fixed and paid the government is entitled to have a good and valid title thereto. This result can be reached only by an adjudication upon the validity of the proceedings instituted in the superior court of Hoke county, upon which the validity of the deed executed by Jas. C. MacRae, commissioner, is dependent. It is to be regretted that those representing the government, after instituting the condemnation proceeding and bringing the parties into the court, saw fit to endeavor to secure title to the lands in controversy by other methods. The course pursued has resulted in confusion and uncertainty.

As the purchase money paid by the government for such title as was secured by the orders and decrees in the special proceeding is in

the possession of the clerk of the superior court of Hoke county, and as no final decree fixing the amount to be paid Mrs. Ray for the present value of her dower right and the amount due each of the infant petitioners has been passed, the case is open for such motions, orders, and decrees as may be necessary to conclude the rights of all parties.

This court, having taken jurisdiction of the parties and the subject-matter before the special proceeding was instituted, is the appropriate tribunal to pass upon all questions respecting the title to the lands; all persons interested therein being in the record.

Passing the question of jurisdiction and procedure, in respect to which no controversy is made, we proceed to examine the objections raised by the guardian of Mrs. Ray and her infant children, to the proceeding in the superior court of Hoke county and the orders and decrees made therein by which the United States claims to have acquired title to the lands of his wards.

He alleges that Mrs. Flora Viola Ray, at the time she signed the contract or proposal to sell the land, and at which the proceeding to sell her children's interest therein was instituted, had not sufficient mental capacity to understand the nature and terms of the contract or its effect upon her rights. This is denied by the government and by Mr. MacRae, who conducted the negotiation and secured the execution of the contract, filed the petition, and conducted the proceeding. It is also denied by Mr. Broadfoot, who acted as the next friend of the infant petitioners. Conceding, as should be done, that Mr. MacRae did not know or suspect that Mrs. Ray was mentally incapable of entering into the contract, the evidence introduced before me strongly tends to sustain the averment of her guardian. No inquisition of lunacy having been taken by the court upon the application for letters of guardianship, the appointment of a guardian having been made upon the application of Mr. McLauchlin, such appointment carries no other weight in regard to the state of her mind than the sworn statement of the guardian. While the appointment of the guardian may not be attacked collaterally, it is manifest that the clerk making the appointment failed to give the notice of the applicant and make the inquiry respecting the mental condition of Mrs. Ray for which the statute provides. Rev. 1905, §§ 1772 and 1890; Sims v. Sims, 121 N. C. 297, 28 S. E. 407, 40 L. R. A. 737, 61 Am. St. Rep. 665. The finding upon inquisition of mental capacity is not conclusive upon persons dealing with alleged non compos mentis. Parker v. Davis, 53 N. C. 461.

The guardian has filed the affidavit of Dr. N. P. Boddie, of Durham, N. C., who states that he attended Mrs. Ray, as her physician at various times during the month of February, 1920, and thereafter he paid her occasional visits until the latter part of July, 1920, and that, while he has never made a full and complete examination of her mental state, he is of the opinion that at no time while she was under his charge was she able or competent to pass upon land values or any other business or legal affairs, and that she could not comprehend the effect of signing papers relating thereto. Exhibit E.

Dr. D. G. McKethan states that he is a practicing physician residing in Fayetteville, N. C., and that as her physician he has attended Mrs.

Ray and is well acquainted with her mental and physical condition; that, after a thorough examination, he is of the opinion that she has not sufficient mental capacity to understand any legal document, and from the history of her case he is of the opinion that she has been in such condition for several months; that he regards her as a person who is non compos mentis; that he does not regard her as competent to understand the effect of the contract which she signed for the sale of her lands. Exhibit F.

R. H. Ray, a brother of Mrs. Ray, testifies that she was sick for several weeks during the latter part of the year 1919, with influenza, and that after Christmas of that year following this attack she has been subject to epileptic fits; that he has seen her several times during the month of May, 1920; that he visited her in Durham for the purpose of bringing her home; that she was sick, confined to her bed; that he has talked with her during said period, and is of the opinion that she was not able to understand the effect of signing a paper with reference to her land in Hoke county. Exhibit G. Mrs. Baughman, the sister of Mrs. Ray, was examined orally before me and testified to her mental and physical condition to the same effect as the affidavit of her brother.

Counsel for the United States introduced the affidavit of Neil D. Black, who states that he is the brother-in-law of Mrs. Ray; that she came to his home during the month of August, 1920, and remained there for one month; that when she came she was in poor physical condition and at times troubled with weak spells; that he noted a marked improvement in her condition while she was at his home; that on several occasions she talked with him regarding the sale of her land in Hoke county; that she understood and remembered the details of the transaction had with Mr. MacRae in Durham; she said that she thought that she had made a good trade, as the price to be paid for the lands was more than was paid for any of the adjoining lands; that he is of the opinion that she was of sound mind and understanding when he had these conversations with her, and that it was her desire to carry out the trade for the purchase price named in the contract; that she said she thought it was better to sell the land and collect the money than to have the matter tied up indefinitely. He further says that, in his opinion, $15 an acre is a fair price for the land. Exhibit H.

R. C. Cox, the notary public who took the affidavit of Mrs. Ray to the petition on January 22, 1920, testifies that, before taking her affidavit, he asked her if she had read or heard the petition and if she thoroughly understood the contents thereof, to which she replied that she had heard the petition read, and that she thoroughly understood its contents, and that she executed the paper for the purpose therein stated. He says that he is of the opinion that Mrs. Ray was at that time of sound mind, and, if there had been any doubt in his mind as to her understanding and mental capacity, he would not have taken her verification. Exhibit 1.

The foregoing constitutes the evidence before me regarding Mrs. Ray's mental condition at the time she signed the contract. Exhibit J and the petition for the sale; Exhibit K.

The evidence in regard to the value of the land, in addition to the affidavits of J. H. Smith, A. B. McFayden, and R. B. Gatlin, Exhibits A, B, and C, J. W. Johnson and W. T. Covington, Exhibit D, and Neil D. Black, Exhibit 1, are the statements of said Smith, McFayden, and Gatlin in Exhibits A, B, and C, September 1, 1920, in which each of them say:

"That, when he signed the affidavit in the above proceeding in this court, he was informed that the parties interested had agreed to take a lower figure ($5,811) named in the affidavit; that he knows the land involved in this proceeding and is of the opinion that the above figures ($7,428) give a fair value for the same."

A. B. McFayden makes an affidavit November 13, 1920, in which he recites his opinion that the above figures give a fair value of the land—

"and he further states that, taking into consideration the character and location of the land, he is still of the opinion, and so states, that, though $7,428 is a full value for the same, a sale of the lands at the price of $5,811 is a fair, adequate, and advantageous sale to the owners of said lands." Exhibit L.

Neil D. Black says that, in his opinion, the sum paid by the government is a fair price therefor; that it represents its true value.

If the disposition of the motion was dependent altogether upon the allegation that Mrs. Ray was non compos mentis, unable, by reason of mental incapacity, to understand and appreciate the effect upon her rights of the paper which she directed her daughter to sign for her on June 19, 1920, proposing to sell the land, I would have difficulty in reaching the conclusion that such was her mental condition. I am satisfied, from the evidence, that she was in a weakened, debilitated physical condition, resulting from the attack of the influenza through which she had recently passed, and doubtless her mental condition was affected by her physical state. If the government was seeking to compel her to specifically perform the contract, I would, in the exercise of the judicial discretion which the chancellor is directed to exercise, leave the plaintiff to his legal remedy, but I am unable to find that, when she verified the petition in the special proceeding before Mr. Cox, she did not then understand its purpose and effect. As to her the proposal to sell has passed into an executed contract; the title has, by virtue of the orders and decrees and the deed by the commissioner, vested in the United States. While the evidence in regard to the price at which the land was sold is conflicting and unsatisfactory, the valuation placed by Smith, Gatlin, and McFayden, as appraisers selected by the government, May 5, 1920, is the only satisfactory basis upon which I can act. If Mrs. Ray and her children had been apprised of that valuation, I would have regarded this sum, $7,428, as conclusive. I do not attach weight to the affidavits made by the appraisers of June 30, 1920, upon which the clerk based his order. In Odom v. Riddick, 104 N. C. 515, 10 S. E. 609, 7 L. R. A. 118, 17 Am. St. Rep. 686, the jury found that the grantor was not of sufficient mental capacity to execute the deed. The court in a well-sustained opinion held that, in the absence of knowledge of such fact on the part of the gran-

tor, and of any fraud or undue influence, the deed was not void, but only voidable.

Passing, for the present, however, the effect of the paper writing signed by Mrs. Ray upon her rights, the guardian insists that the proceeding in the superior court by virtue of which the title of the infant children was conveyed is irregular, contrary to the course and practice of the court, and that all orders and decrees made therein should be vacated and set aside.

The record discloses that at the time the petition was filed, June 22, 1920, no order had been passed appointing C. W. Broadfoot next friend of the infants, nor was any such order made, nor did he accept such appointment until June 30, 1920, the day upon which the order of sale was made.

It is difficult to understand why Mr. Broadfoot applied to the clerk, as the record discloses, on April 21, 1920, to be appointed the next friend of these infants, two months before any suggestion is made to their mother to sell the land. He simply states the infants own undivided interests in the land, that it is described as tract No. 301, Camp Bragg area, and that it is desirable that there shall be a sale of the lands; no reference is made to any condemnation proceeding, although such a proceeding had been instituted; "that the persons closely connected with said infants are interested in the result of said action, and for that reason he has been requested to apply for the appointment as next friend; that he has no interest in the result of the action, except to see that the rights of said infants are protected." So far as appears from the record, no action was taken upon this application until June 30, 1920, although the petition for the sale of the land is verified by Mrs. Ray on June 22, 1920, in which Mr. Broadfoot appears as the next friend of the infants.

The application falls far short of complying with the rule prescribed by the judges of the superior court (92 N. C. 850–855, rule 15), which requires the application to be filed "by a reputable, disinterested person closely connected with such infant," but, if such person will not apply, then upon like application by some reputable citizen, etc.

Of course, there is no suggestion that Mr. Broadfoot is not such a reputable citizen as the rule requires, but the application fails to assign any other reason than that those closely connected with the infants are interested in the result of the action. It is manifest that the mother had precisely the same interest in securing a fair price for the land as her children. The reason assigned does not meet the spirit of the rule. The clerk, so far as appears from the record, took no action upon the application until two months after it was filed and more than one month after the petition was filed. Without attributing to Mr. Broadfoot any improper purpose, it is manifest that the clerk did not give consideration to the appointment. He failed to comply with the measure of duty imposed upon him by repeated decisions of the courts of this state. Morris v. Gentry, 89 N. C. 248, and many other cases.

It does not appear whether Mr. Broadfoot was aware of the valuation placed by the appraisers on this land. That he was not aware of this important fact is manifested from the allegation (No. 5) of the

petition "that the said lands had been appraised by the following citizens of Hoke County: J. H. Smith, B. R. Gatlin, and A. B. McFayden—and the value found to be $5,811 as being full, fair, and adequate."

There is nothing in the record to indicate that Mr. Broadfoot gave the interests of his quasi wards any personal attention or consideration.

The record shows that the clerk, acting as the judge, made the order of sale upon the allegations in the petition and the ex parte affidavits of three citizens made on the day of the order that $5,811 was a fair and adequate price for the lands; whereas they had on May 5, 1920, appraised it for the purchasing government at $7,428. This they explain by saying that they were informed that the parties were willing to sell at the lower sum.

While it is conceded that the court may entertain a petition for the sale of the lands of infants, without general guardian, when represented by a next friend, as said by Justice Ruffin in Campbell v. Baker, 51 N. C. 256–258:

"It is unsafe to decree a sale of the lands of infants, except on the application of the guardian, as a responsible person, under bonds for his fidelity."

The statute (Revisal, § 1798) provides the procedure by which a guardian may secure an order for the sale of the lands of his wards. It requires that, a petition by the guardian, verified upon oath, showing that the interest of the ward would be materially promoted by the sale, and the truth of the matter alleged in the petition being ascertained by satisfactory proof, a decree may be made, etc.

Here the next friend does not verify the petition, for the manifest reason that he had not, at the time the petition was filed, been appointed. The record in this case illustrates the wisdom of the language of Chief Justice Ruffin in Harrison v. Bradley, 40 N. C. 136 (144):

"The court cannot forbear expressing a decided disapprobation of the loose and mischievous practice adopted in this case of decreeing a sale of an infant's land upon ex parte affidavits offered to the court, without any reference to ascertain the necessity and propriety of the sale, and the value of the property, so as to compare the price with it. The court ought not to act on mere opinions of the guardian or witnesses, but the material facts ought to be ascertained and put upon the record, either by a report of the master or the finding of an issue; and after a sale it ought to appear in like manner to be for the benefit of the infant to confirm it. Otherwise there is great danger of imposition on the court and much injury to infants."

It is worthy of note that neither of the persons who made the affidavits as to the value of the lands verified them before the clerk. The result of the examination of the entire record discloses that when the petition was filed no one was authorized to represent the infants; that they were without natural or statutory guardian or next friend. Their mother was sick both mentally and physically. No one representing the infants or interested to protect their rights, ever appeared before the court. They were girls, and, so far as appears, residing in another county.

Without attributing to any one concerned any purpose to deprive them of their rights, I am constrained to conclude that, as to the infants and their rights, the proceeding, from start to finish, is irregular

and contrary to statutory rules of procedure and a uniform current of decided cases in the courts of this state.

The order or decree directing the sale and all that has been done thereunder will be vacated and set aside.

I am not clear as to my power to deal with the interest of Mrs. Ray. While the appointment of Mr. McLauchlin as her guardian cannot be questioned collaterally in this cause and she is pro hac vice represented by him, such appointment does not affect the validity of her contract or proposal to sell her dower interest in the land.

If the orders made in the special proceeding, so far as they affect her interest, be set aside, her contract subsists until annulled in a direct proceeding instituted for that purpose. While until her dower is allotted she has no estate or interest in the lands which she can convey, she has a right which may be assigned by which her assignee would be entitled to her dower estate when allotted. Fishel v. Browning, 145 N. C. 71, 58 S. E. 759.

Whether the deed executed by Mr. MacRae as commissioner conveys Mrs. Ray's right to dower and entitles the United States to have a sale of the infants' land in the proceeding before the clerk upon a regular procedure is doubtful. She is entitled, if so advised, to maintain an action in the nature of a bill in equity to set aside the alleged contract or proposal and the deed made by the commissioner upon the ground that she was non compos mentis and for such other causes as she may see fit to rely upon. A chancellor would probably grant her relief, but I am very doubtful whether in this proceeding I have the power to do so.

As the government has a judgment of condemnation in this proceeding of this land and all parties are in the record, it would seem that complete relief could be had without further delay by a decree setting aside the contract, the orders and decrees, canceling the deed made by the commissioner, and directing the clerk to return the $5,811 in his hands to the government, thus placing the parties in the same position they were in before the negotiation for the purchase was begun.

Mr. McLauchlin, guardian of Mrs. Ray and the infants, will be made a party to the condemnation proceeding. Summons will issue to him to the end that he may file such pleadings and take such action as he may be advised to be necessary to protect the interests of his wards. It is noted that the bond filed by him is for the penal sum of $400. It is suggested that this sum is inadequate and not in accordance with the statute of this state.

It is worthy of consideration whether the interest of the widow and her children will not be best conserved by holding the proceeds of the land, when paid into court, and paying one-third of the interest thereon to the mother during her life, thus preserving the inheritance for her daughters.

For the present an order will be signed vacating and setting aside the orders and decrees made in the special proceedings instituted in the superior court of Hoke county, with such orders respecting the disposition of the amount in the hands of the clerk as may be agreed upon by counsel or directed by the court.

A copy of this opinion will be certified to the clerk of the superior court of Hoke county, and the cause retained for such further orders as may be necessary.

RANKIN GILMOUR & CO., Limited, v. NEWTON, Collector of Customs.

(District Court, S. D. New York. August 18, 1920.)

No. 604.

1. **Customs duties ⇐109—Collector cannot be sued in official capacity.**
   A collector of customs cannot be sued in his official capacity; the remedy being by suit against him individually to recover money wrongfully exacted under color of his office, or by suit against the United States, under Judicial Code, § 24, subd. 20 (Comp. St. § 991 [20]).
2. **Courts ⇐296—Complaint against collector must show controversy under the federal laws or diverse citizenship.**
   A complaint against a collector of customs individually to recover money wrongfully exacted by him must show either that the Constitution and laws of the United States are involved, or diverse citizenship of the parties, to be maintainable in the United States District Court.
3. **Courts ⇐299—Counts against collector for money received held not to show jurisdiction.**
   Counts in a complaint against a collector of customs individually, which merely alleged generally that defendant had received the money to plaintiff's use, without showing that the money was exacted under color of his office, do not show a controversy under the laws of the United States, which must appear, not by mere inference but by distinct averments, to give the United States court jurisdiction, in the absence of diversity of citizenship.
4. **Pleading ⇐369(6)—Motion to require election held to authorize dismissal of insufficient counts.**
   A motion to require plaintiff to elect on which one of the five causes of action alleged against defendant, both individually and as collector of customs of the port, plaintiff intended to proceed, and also ask for such further relief as he might be entitled to, authorizes orders dismissing all counts against defendant in his official capacity, and dismissing four of the five counts against him in his individual capacity, for failure to allege jurisdictional facts.

At Law. Action by Rankin Gilmour & Co., Limited, against Byron R. Newton, individually and as Collector of Customs of the Port of New York. On motion by defendant to compel plaintiff to elect on which of the five causes of action set up in the complaint it will proceed, and for further relief. All causes of action dismissed as against defendant in his official capacity; four causes of action dismissed as against him in his individual capacity.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for plaintiff.

Francis G. Caffey, U. S. Atty., and J. Joseph Lilly and Richard S. Holmes, Asst. U. S. Attys., all of New York City, for defendant.

AUGUSTUS N. HAND, District Judge. This is a motion to compel plaintiff to elect on which of the five causes of action set up in the complaint it will proceed, and for further relief.

[1] The actions were brought against Byron R. Newton, individually and as collector of the customs of the port of New York. I have been referred to no statutory provisions which authorize a suit against the defendant as collector. The suit must be brought against him individually to recover money wrongfully exacted while acting under color of his office. This was given by the common law.

Under section 24, subd. 20, of the Judicial Code (Comp. St. § 991 [20]), such a suit may also apparently be brought in this court against the United States. United States v. Emery, B. T. Realty Co., 237 U. S. 28, 35 Sup. Ct. 499, 59 L. Ed. 825. For the reason that no action may be brought against the collector as such, I think all causes of action should be dismissed as against him in his official capacity.

[2] In regard to the action against the collector individually, the complaint must show in respect to each action that the Constitution and laws of the United States are involved, or the causes of action must fail, for there is no allegation of diverse citizenship. Hull v. Burr, 234 U. S. 712, 34 Sup. Ct. 892, 58 L. Ed. 1557.

The first cause of action is for money received and collected by the defendant to plaintiff's use. The allegations are very scanty, and do not set forth the grounds or color of title under which the moneys were collected. They seem to me to proceed with far less particularity than the forms for any of the common counts would indicate to be customary. This will be apparent from reading Chitty, or any of the old books on pleading, which in the recitals of the "whereas clause" were accustomed to set forth the nature of the consideration, or the relation between the parties which gave rise to the receipt of moneys for the use of the plaintiff.

The second cause of action contains mere conclusions, namely, that the defendant was indebted to the plaintiff for money paid by the plaintiff to the use of the defendant. This, again, is subject to the same difficulty as the first cause of action.

The third cause of action goes even farther than the first and second in failing to plead any facts, and simply sets forth that the defendant was indebted.

The fourth cause of action, I am inclined to think, does set forth an account stated, although in an unusual and inartificial form.

[3] None of these four counts, however, set forth any law of the United States under which the defendant claimed the right to collect moneys, or whereby he became indebted or stated an account. Such pleading far from complies with the rule laid down in the case of Hall v. Burr, supra, where Mr. Justice Holmes said the dispute or controversy respecting the validity, construction, or effect of some law of the United States must appear, "not by mere inference, but by distinct averments, according to the rules of good pleading. * * *"

As there are no allegations of diverse citizenship, and it appears affirmatively that the amount of $3,000 is not involved, this court can have no jurisdiction of such controversy, and the first four causes of action should be dismissed.

I may add that I can see no reason for any cause of action that does not recite the ultimate facts showing that penalties were being

illegally exacted and were paid under protest. The first four causes of action would in any view seem to be surplusage. As this is clearly the case, I think the first four causes of action as against the collector individually, and all causes of action as against him in his official capacity should be dismissed. The plaintiff may then proceed to litigate against the defendant individually in respect to its fifth cause of action.

[4] The defendant has asked in its motion papers for such further relief as he might be entitled to, and I think the foregoing orders of dismissal may properly be granted at this time.

Settle order on notice.

Ex parte EBERHARDT.

(District Court, E. D. Missouri, E. D. January 7, 1921.)

1. **Time ⟸9(1)—Declaration of intention still valid on seventh anniversary, but not afterwards.**
   Under the law placing a limitation of seven years upon the life of a declaration of intention, as the law excludes parts of days, the declaration is valid and will support a petition for naturalization on its seventh anniversary, but may not be extended beyond such anniversary.
2. **Aliens ⟸68—Naturalization petition, to which certificate of arrival not attached, is a nullity.**
   Under Act June 29, 1906, c. 3592, § 1 (Comp. St. § 963), as amended by Act March 4, 1913, § 3 (Comp. St. §§ 961, 962), requiring the Bureau of Immigration to keep a register of the arrival of aliens and issue a certificate thereof to the alien, and section 4, subd. 2, par. 4, of the act of 1906 (section 4352), requiring the certificate of arrival to be filed at the time of filing a petition for naturalization, a petition to which such certificate is not attached is a nullity, though the certificate is being forwarded from Washington and a telegram stating that fact is attached, and cannot be validated or amended by subsequently attaching the certificate.
3. **Statutes ⟸219—Construction by executive officers executing statute entitled to great consideration.**
   While the construction of a statute is a judicial function, yet the construction placed on a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government.
4. **Aliens ⟸60—Congress may prescribe terms and conditions of naturalization.**
   Naturalization is a privilege, and not a right, and Congress has authority under the Constitution to prescribe the terms and conditions upon which such privilege shall be granted.
5. **Aliens ⟸68—Terms and conditions of naturalization must be strictly construed and conformed to.**
   The terms and conditions specified and prescribed by Congress respecting the naturalization of aliens must be strictly construed and enforced, and aliens are bound to strictly meet and conform to such terms and conditions.

Application by Joseph Eberhardt for citizenship. Petition denied.

M. R. Bevington, of St. Louis, Mo., Chief Naturalization Examiner.

DYER, District Judge. [1] The petitioner, Joseph Eberhardt, filed his application for citizenship August 25, 1920. He based this upon a declaration of intention executed August 25, 1913. Existing law places a limitation of seven years upon the life of a declaration of intention. The law excludes parts of days. A declaration is therefore valid, so far as its age is concerned, for the purpose of petitioning for naturalization, on its seventh anniversary. In re Babjak (D. C.) 211 Fed. 551. But there is no expedient that may be resorted to whereby the life of a given declaration of intention may be extended beyond said seventh anniversary. United States v. Mueller, 246 Fed. 679, 158 C. C. A. 635.

[2] The petition for citizenship of this candidate recites that he landed in the United States at the port of New York, N. Y., on the steamship Germania, on January 1, 1911. He was therefore required by law to support his application by what is commonly known as a "certificate of arrival." Eberhardt, at the time of the filing of his application, that is, on August 25, 1920, did not possess such a certificate of arrival. He could not delay filing his petition, as the life of his declaration of intention had run. In lieu of the needed certificate of arrival, he made a part of his petition a telegram from Washington to the effect that the document in question was being sent forward by mail forthwith. His application is therefore submitted to the court on the question of law involved.

The Act of March 4, 1913, c. 141, § 3, 37 Stat. 737, U. S. Comp. Stat. §§ 961, 962, amending Act of June 29, 1906, c. 3592, § 1, 34 Stat. 596, U. S. Comp. St. § 963, provides:

> * * * That it shall be the duty of the said Bureau [of Immigration] to provide, for use at the various immigration stations throughout the United States, books of record, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this act of the name, age, occupation, personal description (including height, complexion, color of hair and eyes), the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof.

Paragraph 4 of the second subdivision of section 4 of the aforesaid act of June 29, 1906 (Comp. St. § 4352), which is in effect at the present time, contains this provision:

> *At the time of filing his petition* there shall be filed with the clerk of the court a certificate from the Department of Labor, if the petitioner arrives in the United States after the passage of this act [that is, on and after June 29, 1906], stating the date, place, and manner of his arrival in the United States, * * * which certificate * * * shall be attached to and made a part of said petition.

The requirements of law surrounding certificate of arrival matters were for a time very broadly construed. In re Schmidt (D. C.) 207 Fed. 678; In re McPhee (D. C.) 209 Fed. 143; In re Pick (D. C.) 209 Fed. 999; In re Titone (D. C.) 233 Fed. 175. But these cases have been deprived of any authority by the pronouncement of the Supreme

Court of the United States in United States v. Ness, 245 U. S. 322, 324, 38 Sup. Ct. 118, 119 (62 L. Ed. 321), in which Mr. Justice Brandeis, speaking for the court, laid down this rule:

> It is urged that the certificate of arrival is merely a form of proof which the naturalization court has power to dispense with for cause. The uses served by the certificate, the history of the provision, and its relation to other parts of the act show that this contention is unsound.
>
> Section 1 requires that a registry be made of certain facts concerning each alien arriving in the United States; and that "a certificate of such registry with the particulars thereof" be granted to each alien. Section 5 requires clerks of court to give public notice of each petition for naturalization filed. Section 6 prohibits courts from taking final action upon any petition until 90 days after such notice has been given. That period is provided so that the examiners of the Bureau of Naturalization and others may have opportunity for adequately investigating whether reasons exist for denial of the petition. The certificate of arrival is the natural starting point for this investigation. It aids in ascertaining (a) whether the petitioner was within any of the classes of aliens who are excluded from admission by sections 2 and 38 of the Immigration Act of February 20, 1907 (34 Stat. 898); (b) whether he is among those who are excluded from naturalization under section 7 of the Naturalization Act for political beliefs or practices; (c) whether he is the same person whose declaration of intention to become a citizen is also attached to the petition under section 4, subdivision second; (d) whether the minimum period of five years' continuous residence prescribed by section 4, subdivision fourth, has been complied with. The certificate of arrival is in practice deemed so important that in the regulations issued by the Secretary of Labor under section 28 "for properly carrying into execution the various provisions" of the act, the clerk of court is advised that he "should not commence the execution of the petition until he has received the certificate of arrival."
>
> Filing the certificate of arrival being a matter of substance, it is clear that no power is vested in the naturalization court to dispense with it. Section 4 declares "that an alien may be admitted to become a citizen of the United States in the following manner and not otherwise." Section 27 declares "that substantially the following forms shall be used in the proceedings to which they relate"; and the form of petition therein prescribed recites: "Attached hereto and made a part of this petition" is "the certificate from the Department of Labor required by law." Experience and investigation had taught that the widespread frauds in naturalization, which led to the passage of the act of June 29, 1906, were, in large measure, due to the great diversities in local practice, the carelessness of those charged with duties in this connection, and the prevalence of perjured testimony in cases of this character. A "uniform rule of naturalization," embodied in a simple and comprehensive code under federal supervision, was believed to be the only effective remedy for then existing abuses. And, in view of the large number of courts to which naturalization of aliens was intrusted and the multitude of applicants, uniformity and strict enforcement of the law could not be attained unless the code prescribed also the exact character of proof to be addued. The value of contemporary documentary evidence was recognized, and the certificate of arrival was therefore specifically included among the prerequisites to naturalization. Naturalization granted without the certificate having been filed is therefore "illegally procured." United States v. Ginsberg, 243 U. S. 472.

It is particularly to be noted that "at the time of filing his petition there shall be filed with the clerk of court," by the petitioner, the certificate of arrival called for by the statute. The same provision of law requires the candidate to make a part of his application, in the same manner, his declaration of intention. Where a valid declaration of intention is not attached to such a petition at the time of its filing, that

fact renders the application void. United States v. Morena, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359. And the same rule prevails, as we have seen in the Ness Case, supra, where at the time of the execution of the petition, the same was not supported by a valid certificate of arrival. The fact that such a certificate was in existence, on the date petition was executed, and that the same was being mailed to St. Louis from Washington, does not in any manner alter the situation. The statute is specific in its requirement that at the time of the execution of the petition the certificate of arrival needed must be in the hands of the clerk of the court, who is required to make the same an integral part thereof. A later attaching of such a certificate of arrival to a given petition does not meet the requirements of the law. Such petition is a nullity. It is not voidable, but is void. In the language of the United States v. Martorana, 171 Fed. 398, 96 C. C. A. 354, such a petition cannot be validated by any subsequent process, "as in point of law there is nothing to amend by, and nothing to amend." In other words, no petition has in contemplation of law actually been executed. The court, in such a case, is without jurisdiction, as there is nothing legally before it that it can entertain.

[3] It is worthy of notice, also, that the administrative officer concerned with naturalization matters, to wit, the Secretary of Labor, has in naturalization regulations promulgated September 24, 1920, rule 5, declared that when a clerk of court executes a petition for an alien who arrived after June 29, 1906, and fails to attach thereto his certificate of arrival, then no valid petition is docketed. While the construction of a statute is a judicial function, the ultimate exercise of which must lodge in the courts, yet "the construction placed upon a statute by the officers whose duty it is to execute it is entitled to great consideration, especially if such construction has been made by the highest officers in the executive department of the government." 36 Cyc. (III), 1140, 1141; In re Brefo (D. C.) 217 Fed. 133. There can be no question as to the soundness of the administrative view in this case, in view of the unequivocal language of the Supreme Court, in the Ness Case, supra.

[4, 5] Aliens have no right, inherent or statutory, to be admitted to membership in the body politic of the United States of America. Naturalization, then, being solely and entirely a political privilege extended by sovereign grace to aliens resident within the United States, Congress has undoubted authority under the Constitution to prescribe the terms and conditions upon which such privilege shall be granted. In re Spitzer (D. C.) 160 Fed. 138; In re Buntaro (D. C.) 163 Fed. 922; In re Knight (D. C.) 171 Fed. 301; United States v. Spohrer (C. C.) 175 Fed. 442; Johannessen v. United States, 225 U. S. 240, 32 Sup. Ct. 613, 56 L. Ed. 1066; United States v. Ginsberg, 243 U. S. 472, 37 Sup. Ct. 422, 61 L. Ed. 853; United States v. Gulliksen, 244 Fed. 727, 157 C. C. A. 175. The terms and conditions specified and prescribed by Congress respecting the grant to aliens of the favor or privilege of naturalization as citizens of the United States of America must be strictly construed and enforced, and aliens are bound to strictly meet and conform to these terms and conditions upon which alone the

right they seek can be conferred. Spitzer, Knight, Spohrer, Johannessen, Ginsberg, and Gulliksen Cases, supra; United States v. Nisbet (D. C.) 168 Fed. 1006; United States v. Martorana, 171 Fed. 398, 96 C. C. A. 353; United States v. Cohen, 179 Fed. 835, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829; United States v. Peterson, 182 Fed. 291, 104 C. C. A. 571; United States v. Rodgers, 185 Fed. 334, 107 C. C. A. 452; United States v. Kolodner, 204 Fed. 244, 124 C. C. A. 1; In re Hollo (D. C.) 206 Fed. 854; United States v. Mueller, 246 Fed. 679, 158 C. C. A. 635; and United States v. Vogel (C. C. A.) 262 Fed. 262.

It is made the duty by law of the Commissioner of Immigration at the port of entry to make such record of the arrival of each and every alien as will later permit such official to prepare from the official records of his office a certificate of arrival for use in naturalization purposes. Nothing short of a certificate prepared by such official, in the manner prescribed, will meet the requirements of the statute. A petition for naturalization, that was not at the time of its execution supported by a certificate of arrival fully meeting the terms of the act, is a mere nullity, and must be denied. Such disposition must therefore be made of this application, as a telegram such as was used by the petitioner at the time of the filing of his application cannot be substituted for the lawfully prescribed certificate of arrival.

LACLEDE CHRISTY CLAY PRODUCTS CO. v. CITY OF ST. LOUIS.

(District Court, E. D. Missouri, E. D. January 8, 1921.)

No. 5174.

1. **Patents ⟸328—No. 986,455, claims 1 to 3, for furnace arch, held anticipated, but infringed if valid.**
   Claims 1 to 3 of the Girtanner patent, No. 986,455, for a furnace arch consisting of a pair of I-beams, brackets supported thereby, with flanges on the lower edges, and tiles provided with grooves to receive such flanges, *held* anticipated; also *held* infringed, if valid.
2. **Patents ⟸178—Claims for straight arch covers hipped arch.**
   Though a patent for a furnace arch illustrated only a straight roofed arch, a hipped arch was within its range of protection where the construction of such arch involved only the use of a bracket having the angle of attachment modified by a mere difference in forging or by the use of shims.
3. **Patents ⟸237—Parts performing same function held equivalents, though differing in shape and method of support.**
   Where the tile hanger in defendant's furnace arch performed precisely the same functions as the brackets in plaintiff's arch, though differing in shape and the method of support, and mere mechanical skill was involved in making the change, the parts were equivalents.
4. **Patents ⟸314—Infringement is question of fact.**
   The matter of infringement, in its final analysis, is a question of fact.
5. **Patents ⟸39—Use of I-beams instead of channel beams not patentable novelty.**
   The use of I-beams instead of channel beams in the construction of fire arches constitutes no patentable novelty.

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6. Patents ⇐24—Use of multiple piece tile hanger instead of single piece hanger not invention.

The use of a multiple piece tile hanger in the construction of fire arches instead of a single piece hanger was not invention.

In Equity. Suit by the Laclede Christy Clay Products Company against the City of St. Louis. Decree for defendant.

Sheridan, Jones, Sheridan & Smith, of Chicago, Ill., and Jesse McDonald, of St. Louis, Mo., for plaintiff.

Carr & Carr, of St. Louis, Mo., for defendant.

FARIS, District Judge. This is an action for an alleged infringement of the Girtanner patent, No. 986,455, for a furnace arch, which patent is owned by plaintiff, as assignee of Girtanner.

[1] There are four claims in this patent, only three of which, however, are involved in this action. Plaintiff selects claim 3 as a fair type of its several claims. I shall do the like. This claim reads as follows:

"In a furnace arch, the combination with a pair of I-beams extending across the furnace of brackets supported by said I-beams; each of said brackets comprising a pair of separate end pieces, one extending at the front, the other at the rear, of said I-beams, and a separate center piece extending between said I-beams; flanges on the lower edges of both said end pieces and said center piece, and tiles provided with grooves to receive said flanges."

The defenses are: (a) That there is no infringement; (b) that there is no patentable novelty in the alleged invention, the prior art as developed by numerous other patents being regarded; and (c) estoppel. It will be borne in mind that claim 4 is not involved here, and that this discussion does not affect this claim in any wise. It is not in issue, I assume, because not deemed by plaintiff to be infringed by defendant's construction of its furnace arches.

The salient features of plaintiff's patent, so far as the issues here in dispute are concerned, are illustrated by the below drawings or cuts:

Fig. 4.

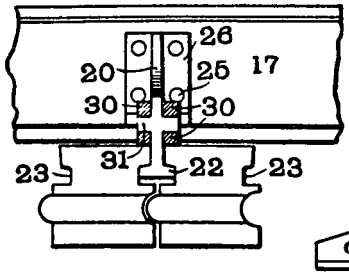


Fig. 5.

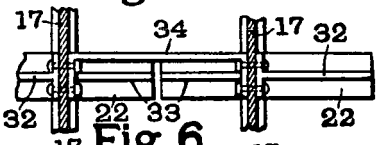
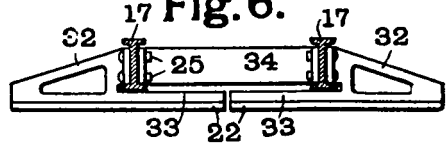


Fig. 6.



It is conceded by plaintiff that the I-beams, *17*, which span the furnace arch transversely, are old in the art, as are likewise the refractory tiles, *23*. The construction of the so-called brackets, *32* and *34*,

their attachment (which was by bolts and nuts) to the I-beams, and their functions, are the points upon which turn the alleged invention and the infringement urged. While it is scarcely pertinent upon the point of novelty, it may be said in passing that the defendant's construction, here complained of, consists essentially of a single I-beam, set transversely and approximately in the longitudinal center of the arch, of a modified I-beam at the rear, which has no flange on the upper rear portion, but an elongated flange on the bottom rear portion, and of an angle plate or angle beam set in the front of the arch and resting against the furnace wall. Upon these several beams and plates the two series of hangers which carry the refractory tiles are placed or rest without being bolted thereto. Rearwardly from the modified I-beam, a cantilever tile carrier is placed, which is supported by a hook forged or molded onto the bottom of this rear I-beam. This cantilever is not involved here, however.

[2] Defendant's arch is a hipped arch as contradistinguished from a straight arch; but, while plaintiff's patent in suit illustrates only the straight roofed arch, yet I take it that a hipped arch is within its range of protection, since the construction of the latter instead of a straight arch only involves in plaintiff's construction the use of a front bracket having the angle of attachment to the front I-beam modified, either by a mere difference in forging, or by the use of shims at the point of attachment. Winans v. Denmead, 15 How. 330, 14 L. Ed. 717.

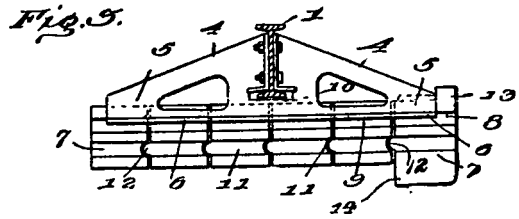
[3] I am forced to the conclusion that defendant's construction infringes the patent of plaintiff, if the latter, upon the claims before me, possesses patentable novelty. Of course, this view arises from the doctrine of equivalents. In the defendant's device its middle and principal tile hanger, while differing in shape, and while not bolted to, but merely resting on, flanges on the equivalent I-beams, yet performs the precise function of plaintiff's brackets. Defendant's front tile hanger likewise is not bolted to its middle I-beam, but is kept in place by projecting flanges and by stress, or rather by pressure against the front angle plate. I think, therefore, the matter is merely one of equivalents. "One thing, to be the equivalent of another, must perform the same functions as the other." Walker on Patents, 436. Undoubtedly the tile hangers of defendant perform precisely the identical functions of those of plaintiff. Mere mechanical skill only was involved in the change of shape and of the method of support. Even a novice in the mechanical art, it is apparent, might devise other methods of supporting these tile hangers.

[4] The matter of an infringement is in the final analysis a question of fact, and that question upon the evidence and exhibits adduced I find for plaintiff and against defendant, provided (and I come next to that point) plaintiff's construction upon the claims here involved possesses patentable novelty.

To beat down the prima facie inference of patentable novelty arising from the issuance of a patent to plaintiff, defendant offered numerous prior patents. I have examined and considered all of these. Some of them relate to building construction and the manner of affixing fireproofing to ceilings and floors. Whether the latter constructions

on account of the different problems to be solved are analogous, I will hereafter consider. I am constrained to hold that the prior art as shown by the older patents offered in evidence anticipated plaintiff's invention.

Among others offered to illustrate this prior art was a former patent to Girtanner, No. 910,809, owned by plaintiff as assignee, but not in suit in this case. The patent last above illustrated a furnace arch having a single bracket, attached to a single transverse I-beam, as shown by the cut which follows:



It is apparent, I conclude, that in the last analysis the patent in this action covers a construction similar in all material respects to that last above illustrated. There are in the patent in the instant case two transverse I-beams instead of one. The one bracket is wholly similar in function (except as to the "removable tip," which is not here involved). Additional length of the arch is obtained by the mere mechanical expedient of using two I-beams instead of one, thus, in effect, spacing further apart the two ends of the brackets, which are common to both patents. This expedient also, in effect, converts the transverse I-beams into a single box beam, such as was used in the prior patent of McKenzie, No. 766,966, which was also offered by the defendant as showing the prior art and urged as anticipatory. The first Girtanner patent (last above illustrated), no less than the instant one, allows the creation of the hipped arch by the permissible expedient of changing the angle of attachment of the forward bracket to the I-beam. This can be accomplished in the first patent by a change in this angle by forging, and in the second by either forging or the use of shims.

[5] The pair of I-beams used and called for is not new in the art. Such I-beams in pairs were used in the older patents for fire arches of Duncan, No. 958,379. They also were used by Green & Gent, No. 676,605, and by Poppenhusen, No. 783,132. Some of these differ, it is true, in using channel beams instead of I-beams, but this variance is in patent law negligible, and obviously constitutes no patentable novelty.

Girtanner's problem in the instant patent, as compared to that in his No. 910,809, above illustrated, was only that of converting his one-piece hanger or double bracket into a multiple piece tile hanger or a multiple bracket. A mere burning in two of the one-piece bracket or an accidental breaking thereof would instantly suggest this change, if it were not otherwise obvious.

[6] I am constrained to consider that there is no invention in the use of a multiple piece tile hanger, instead of a single piece hanger (Howard v. Detroit Stove Works, 150 U. S. 164, 14 Sup. Ct. 68, 37 L. Ed. 1039; D'Arcy v. Staples, etc., Co., 161 Fed. 733, 88 C. C. A. 606; Bernz v. Schaefer [D. C.] 205 Fed. 49; Milwaukee Co. v. Avery, 209 Fed. 616, 126 C. C. A. 572), although I am impressed that this question is the decisive and crucial point in the whole case. Moreover, in the Rosebrough patent, No. 1,086,467 (applied for June 4, 1909), two brackets are used, and to these brackets the tile-carrying member is attached by bolts, thus in effect converting the two brackets into one. In the McKenzie patent, supra, a single bracket or tile hanger similar to one of the brackets used by plaintiff is used, and this single bracket is likewise bolted to the box beam. The mere necessity for making a longer furnace arch would instantly suggest the mechanical expedient of a mere multiplication of these tile-hanging members.

In the art of fireproofing floors and ceilings, urged by defendant as entirely analogous, the use of multiple tile-hanging members resting upon or supported by I-beams is common. In the latter art the ordinary and constantly recurring problem of making a long arch has been met by the use of as many multiples of the single tile hangers as the situation requires.

On the oral hearing I entertained a casual doubt whether, the differing problems to be met regarded, any compelling analogy exists between the art of furnace arches and that of suspending fire proofing from a ceiling. I think there exists such analogy. The chief difference lies, not in the art of suspension, but in the nature of the material suspended. The problem in both arts is to fend the fire and heat away from the suspending material and construction, so as to minimize or avoid destruction of the latter. The difference then lies only in the nature or the degree of refractoriness of the tiles or fire brick and the fireproofing. The latter usually are wholly different, but the problem to be surmounted is similar. Lately I took occasion to say that no invention lies in merely changing the use of a wagon jack from lifting ox wagons to that of lifting automobiles. St. Louis Electrical Works v. Fore, etc., Co. (D. C.) 267 Fed. 440.

I am constrained to conclude that plaintiff's patent here in suit, upon the claims urged, is void for lack of patentable novelty. And since upon this view no occasion exists to consider whether plaintiff is estopped by reason of its alleged participation in constructing the mechanical stoker, I lay the point aside.

It follows that the finding should be for defendant and against plaintiff, and that plaintiff's bill should be dismissed, and it is so ordered.

Ex parte GIN KATO.

(District Court, W. D. Washington, N. D. December 2, 1920.)

No. 5631.

1. **Aliens ⇐53—One employed in connection with disorderly house may be deported after expiration of five years.**
Under Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), providing that any alien employed by, in, or in connection with any house of prostitution shall be deported, and that the provisions of that section, with the exceptions therein noted, shall be applicable, irrespective of the time of the alien's entry into the United States, the five-year limitation on the deportation of certain classes of aliens does not apply to one employed by, in, or in connection with a house of prostitution.

2. **Aliens ⇐39—Congress has inherent power to exclude or deport.**
Congress has the right to exclude or deport aliens, in its discretion, as an inherent right of sovereignty.

3. **Treaties ⇐11—Later statute to be followed by courts in case of conflict.**
If an act of Congress and the stipulations of an earlier treaty are in irreconcilable conflict, it is the duty of the court to follow the last expression of the legislative branch, and leave the question of breach of the treaty to the executive branch of the government.

4. **Treaties ⇐11—Immigration Act not in conflict with treaty with Japan.**
In view of article 2 of the Treaty with Japan of March 21, 1895, providing that the stipulations of such treaty shall not affect the laws, ordinances, and regulations of either country regarding the immigration of laborers, there is no conflict between such treaty and Immigration Act Feb. 5, 1917.

Petition by Gin Kato for a writ of habeas corpus. Writ denied.

James Kiefer, of Seattle, Wash., for petitioner.
Robt. C. Saunders, of Seattle, Wash., for the United States.

NETERER, District Judge. Gin Kato, a subject of Japan, claims to have been in the United States since 1884, and to have a wife living in Japan. He was order deported for having been "found in the United States in violation of the Immigration Act of February 5, 1917, to wit, that he has been found employed by, in, or in connection with a house of prostitution."

It is contended that the five-year limitation provided by section 19 of the act, supra, applies, and that he cannot be legally deported, and further that to deport him is a violation of the treaty stipulations between Japan and the United States of March 21, 1895 (29 Stat. 848).

[1] The provision of section 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), supra, among other matters, provides:

"Any alien who manages or is employed by, in, or in connection with any house of prostitution * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported. * * * The provisions of this section * * * shall be applicable to the classes of aliens therein mentioned irrespective of the time of their entry into the United States. * * *"

It is apparent that the five-year limitation does not apply to the petitioner. Article 2 of the treaty, supra, provides that the stipulations contained in the treaty—

"do not in any way affect the laws, ordinances and regulations with regard to * * * the immigration of laborers, * * * which are in force or which may hereafter be enacted in either of the two countries."

[2, 3] It is primer law that Congress has the right to exclude or deport aliens in its discretion, as an inherent right of sovereignty, and should an act of Congress and the treaty stipulation be in irreconcilable conflict, the duty of the court is to follow the last expression of the legislative branch, and leave the question of breach of treaty stipulation to the executive branch of the government.

[4] I think it is clear, however, that there is no conflict between the treaty stipulation and the Immigration Act, supra. An examination of the record shows that a fair trial was accorded.

The writ is denied.

EDGAR-MORGAN CO. v. ALFOCORN MILLING CO. et al.

(District Court, E. D. Missouri, E. D. January 20, 1921.)

No. 5124.

1. **Trade-marks and trade-names ⟸59(5)—"Happy Hen Feed" held not anticipated.**
   The trade-mark "Happy Hen Feed" was not anticipated by a trade-mark "Happy Child" applied to cakes and cookies intended for human consumption, or by the word "happy" applied objectively and not subjectively in a large class of trade-marks, such as "Happy Vale" for canned goods.
2. **Trade-marks and trade-names ⟸21—Right at common law arises from priority of appropriation.**
   The right to a trade-mark in the absence of registration in the Patent Office arises at common law from priority of appropriation.
3. **Trade-marks and trade-names ⟸61—Use for hen feed gives protection against use for mule feed.**
   The use of the word "happy" in a trade-mark for hen feed in connection with a picture of a hen apparently displaying happiness gives an exclusive right to the use of that mark in connection with prepared feeds for domestic animals, including horses and mules.
4. **Evidence ⟸13—Courts judicially notice the habits of domestic animals.**
   Courts may so far judicially notice the tastes and habits of well-known domestic animals such as hens and mules so as to know from the formulæ of prepared foods in evidence that the hen will eat the mule feed and the mule will eat the hen feed.

In Equity. Suit by the Edgar-Morgan Company against the Alfocorn Milling Company and others for infringement of a common-law trade-mark. Decree for plaintiff.

Arthur E. Wallace, of Chicago, Ill., and Hezekiah Sanders, of St. Louis, Mo., for plaintiff.

Cobbs & Logan and Howard G. Cook, all of St. Louis, Mo., for defendants.

FARIS, District Judge. This is an action for injunction and for profits for the alleged infringement of plaintiff's common-law trade-mark. The parties are each engaged in the identical business of

manufacturing and selling what are commonly called mixed feeds, or commercial feeds, for domestic animals.

Plaintiff began making and selling a feed for hens and other domestic fowls in 1915, which it called "Happy Hen" Scratch Feed. In August, 1918, it began to make and market "Happy Hog" Feed, "Happy Cow" Feed and "Happy Chick" Feed. Plaintiff advertised its Happy Hen Feed very extensively in the South in 1916, 1917, and 1918. It sold annually in each of these years from 5,000 to 7,000 tons of its Happy Hen Feed.

Plaintiff put this Happy Hen Feed on the market in jute bags on which, below the legend "Happy Hen," appeared the picture of a hen scratching dollars out of the jute background. This hen, while not seemingly dominated by superabundant bliss, yet appeared from her counterfeit presentment to be enjoying a life of supreme contentment, unalloyed by carking care or remorse of conscience.

In compliance with the local laws of Florida plaintiff registered its "Happy Hen Scratch Feed" formula, brand, and trade-mark in that state in 1915. Cf. sections 12151-12161, R. S. Mo. 1919. In August, 1918, it likewise registered its formulæ, brands, and trade-marks for divers other of its "Happy" feeds, including Chick Feed, Cow Feed, and Hog Feed. Plaintiff did not begin making and selling any "Happy" brand of mule or horse feed till September, 1919, at which time it registered the formula, brand, or trade-mark for its "Happy Horse and Mule" Feed in divers states. These several registrations were had in some 18 states or more at approximately the several dates stated above.

Defendants began making and selling a similar, but much cheaper and inferior feed for horses and mules in April, 1918, which it called "Happy Mule Horse and Mule Feed." This feed they marketed in jute bags, similar in size, color, shape, and contents to those used by plaintiff. Defendants' product bore on this container the words "Happy Mule Horse and Mule Feed," with the net contents and the name of defendant corporation very legibly and prominently displayed thereon. The bag also bore printed thereon a picture of a mule, palpably enjoying the most hilarious happiness, if a wide-open mouth and upreared caudal appendage serve to depict such a status. Inferably the mule's exuberant felicity is attributable to the opinion entertained by the mule of the quality of defendant's feed.

Both plaintiff and defendant corporation are, as forecast, large manufacturers of mixed feeds for poultry and other domestic animals. Both of them put these feeds upon the market under various names and brands; the constant effort apparently being to devise some "catchy" name or phrase by which to designate these feeds and thus add to their sales. There is no doubt upon the record that plaintiff adopted and used the name "Happy Hen" to designate a brand of hen feed made and sold by it some three years before defendant corporation began to use the name "Happy Mule" to designate the horse and mule feed sold by it. In April, 1918, the time at which defendant corporation began using the designation Happy Mule as a name for its horse and mule feed, plaintiff was advertising, making, and selling but one

feed, namely, hen feed, in which it used the word "happy." Four months after this plaintiff began using the word "happy" in connection with cow feed and chick feed. Sixteen months later plaintiff first put out its "Happy Horse and Mule Feed." So that plaintiff is now making and selling a fairly complete line of goods of its Happy brand as feed for domestic animals.

Defendants offered divers registered trade-marks wherein the word "Happy" was used as anticipatory of plaintiff's claim. These included "Happy Child" (simply, without any picture of a child) for cakes and cookies, "Happy Vale" for canned goods, and others belonging in the class of that last above mentioned.

[1] I do not think that as a matter of law plaintiff's use and adoption of the word "happy," in combination with the name of the particular animal for which the feed was intended, as a designation of its feeds for domestic animals, is so far anticipated by the use of the word "happy" in combination with the word "child" to designate cakes intended for human consumption as to preclude plaintiff's adoption for the purpose and in the mode stated of the combination here in issue. With the other examples from the analogous prior art there is no manner of difficulty. Each of them may be said to be objective illustrations of the use of the word "happy" as contradistinguished from the subjective phase connoted and present in the instant case. The former class is exemplified by the use of the words "Happy Vale" on canned fruit.

Of course, the phrase "Happy Child" when applied to cakes, or cookies, connotes the idea of a child made happy by the excellence of the goods sold under the name. So far the cases are similar. But there exist two points of difference: One of these is that the food is intended in the one case for human beings, and in the other for domestic animals. The other is that in addition to the words "Happy Hen" plaintiff has used as its mark the picture of a hen, in the seeming enjoyment of apparent bliss, thus conveying the notion of happiness by both the picture and by the phrase or words used. This notion to the very fullest extent defendant has taken over and adopted.

[2, 3] The right to a trade-mark, absent, as here, registration in the Patent Office, arises at common law from priority of appropriation. Trade-Mark Cases, 100 U. S. loc. cit. 94, 25 L. Ed. 550. Such priority upon the undisputed facts here belongs to plaintiff, so far as the use of it to designate feed for poultry is concerned. Defendants insist, however, that plaintiff's priority of use attaches under the facts to the use of the phrase and picture only for the purpose of designating poultry feed, and therefore defendants are, under the law, invading no right of plaintiff in adopting and using the idea to designate horse feed and mule feed.

[4] I do not think the law applicatory to the facts warrants so narrow and restricted a view as defendants here urge upon this point. Plaintiff and the corporate defendant are engaged in precisely the same business and are competitors for trade in the same territory. Some confusion has already arisen. The proof shows that domestic fowls eat the mule feed. Absent such proof, the formulæ in evidence dis-

close that, present opportunity, the hen will eat the mule feed and the mule will eat the hen feed. Courts may, I opine, so far judicially notice the tastes and habits of well-known domestic animals such as those here involved.

The ruled cases, moreover, as I am constrained to construe them, seem to be opposed to the contention of defendants. Carroll v. Ertheiler [C. C.] 1 Fed. 688; American Tobacco Co. v. Polacsek [C. C.] 170 Fed. 117; Florence Mfg. Co. v. Dowd, 178 Fed. 73, 101 C. C. A. 565; Van Zile v. Norub Mfg. Co. [D. C.] 228 Fed. 829; Aunt Jemima Mills Co. v. Rigney & Co., 247 Fed. 410, 159 C. C. A. 461; Helmet Co. v. Wm. Wrigley Co., 245 Fed. 830, 158 C. C. A. 164; Hanover Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713.

The case of Florence Mfg. Co. v. Dowd & Co., supra, is upon the facts on all fours with the case at bar upon this mooted point. The facts of the latter case and the rule of law which governs are thus stated by the court:

> "But it is urged that, as the complainant did not manufacture toothbrushes at the time the defendants entered the field, it cannot be injured by the sale of toothbrushes by others. We do not think the conclusion follows. The complainant had acquired a reputation as the manufacturer of high-grade toilet brushes; it certainly had a right to include toothbrushes at any time, and, when it did so, purchasers who were acquainted with the high character of its goods would quite likely purchase its toothbrushes, deeming its previous reputation a guaranty of excellence. In other words, the complainant did not abandon the right to make 'Keepclean' toothbrushes because it did not at the outset make such brushes, as well as other varieties of toilet brushes.
>
> "Test it by an illustration: Suppose a hatter had for years engaged in making silk hats and 'Derbys,' and as such had acquired an enviable reputation, but had never made straw hats; could the proposition be successfully maintained that a rival could make straw hats and offer them to the public in circumstances which would lead them to believe they were procuring the product of an old established manufactory? The public is deceived by such conduct, the reputation of the established manufacturer is injured if the goods represented to be his are of inferior quality, and he is hindered in entering a field which he has a right to enter at any time he sees fit. These views are, we think, sustained by the following authorities: Collins Co. v. Ames Co. (C. C.) 18 Fed. 561; Holeproof Co. v. Wallach, 172 Fed. 859, 97 C. C. A. 263; Holeproof Co. v. Fitts (C. C.) 167 Fed. 378."
>
> Florence Mfg. Co. v. Dowd & Co., 178 Fed. loc. cit. 75, 101 C. C. A. 567.

Other cases which I cite above affirm the doctrine announced in the quoted excerpt from the Dowd Case, supra. I am constrained to conclude, therefore: (a) That since plaintiff was first in point of time to use as its trade-mark the word "happy" in connection both with the name of a domestic animal for which the feed was designed and of a picture depicting such animal in a condition of seeming bliss, it is, as against defendant, entitled to use this brand or common-law trade-mark; and (b) that such prior use of this trade-mark to designate feed designed for one species of domestic animals confers on plaintiff as against defendants the legal right to extend the use of this trade-mark to feed designed for others of the genus domestic animals.

The finding will therefore be in favor of the plaintiff and against

the defendants on the issues joined, and a decree perpetually enjoining defendants as prayed in the petition may be submitted.

That matter of damages and an accounting therefor will be referred to a master to be hereafter appointed and named in the decree.

In re McLEAN.

(District Court, W. D. Washington, N. D. December 15, 1920.)

No. 6423.

1. **Chattel mortgages ⟸190(2)—Of mortgaged stock of goods must require accounting and application of sales.**
   Under Laws Wash. 1915, p. 277, a chattel mortgage of a stock of goods is void as to creditors, where there is no provision for an accounting and application of the proceeds of the sale of those goods by the mortgagor to the satisfaction of the mortgage.
2. **Chattel mortgages ⟸201(2)—Evidence held to show failure to "account," as required by chattel mortgage.**
   Testimony that the mortgagor of the stock of goods made the monthly payments to the mortgagee as required, and talked over his business in a general way, but made no statement in writing with relation to the sales of the mortgaged stock, shows a breach of the provision of the mortgage that the mortgagor should account to the mortgagee for sales of stock and apply the proceeds thereof to satisfaction of the mortgage, since "account," which has no inflexible technical meaning, is defined generally as a written or printed statement of business dealings of debts and credits (citing Words and Phrases, Account).
3. **Chattel mortgages ⟸190(1)—Mortgagee not requiring accounting liable to general creditors for sales of stock on credit.**
   A mortgagee, who did not require the accounting by the mortgagor of the sales of the mortgaged stock, which was necessary to make the mortgage valid against general creditors, can be charged in bankruptcy proceedings against the mortgagor with the amount of the sales of the stock on credit, but is entitled to the lien of his mortgage for the balance of the debt, where there was no showing of any other misapplication of proceeds.

In Bankruptcy. In the matter of the estate of Allen McLean, bankrupt. On petition for review of an order of the referee sustaining a chattel mortgage, but charging the mortgagee with credit sales made by the mortgagor thereunder. Decision of referee affirmed.

George A. Joiner, of Anacortes, Wash., and J. L. Corrigan, of Seattle, Wash., for Citizens' Bank of Anacortes.

Nelson R. Anderson, of Seattle, Wash., for trustee.

NETERER, District Judge. The bankrupt, in July, 1919, borrowed from the Citizens' Bank of Anacortes the sum of $4,000 cash, the payment of which was secured by chattel mortgage upon a stock of groceries and fixtures of the mortgagor. The mortgage contained the following provisions:

"And if all the conditions of this mortgage are fulfilled, said mortgagor is to remain in peaceful possession of said property, with the privilege of selling such portion of said property as is kept in his store and stock for the

purpose of sale at retail, but, however, to account to the mortgagee for the proceeds of such sale at the end of each week and to apply the proceeds thereof upon this said mortgage, less costs, if any, in making such sales, and such sum or sums as may be necessary to expend to replenish said stock; said mortgagor agrees to keep said property in as good condition as it is now, at his own cost and expense, and that this mortgage shall cover any and all new stock which said mortgagor shall purchase and place in said stock and store, the same as though said property now constituted a part of said stock, and particularly described in this mortgage."

The mortgagor remained in possession and sold the merchandise in the usual course of business. On August 7, 1920, the bank foreclosed its mortgage by taking possession as the law provides. Petition in bankruptcy was thereafter filed, and inventory showed stock, $1,800; fixtures, $1,000; accounts receivable, $1,608.52; unsecured debts, $5,545.65; mortgage debt, $2,900; attorney's fees provided in mortgage as claimed, $150. The bank filed its claim as preferred for $4,000, less $1,100 paid, and asked for an allowance of $150 attorney's fees provided in the mortgage.

Objections were filed to the allowance on the ground that there was no accounting as provided; that the proceeds of sale were not applied to the payment of the mortgage; that through the negligence of the mortgagor the mortgagee dissipated the said stock, which was a fraud upon the rights of creditors; and that if the mortgage is held valid the credits for goods sold should be credited upon the mortgage and the mortgage canceled to that extent. All of the objections were overruled, except that the referee charged against the claim $1,608.52, the outstanding credits. The mortgagee paid to the mortgagor $100 per month as stipulated in the mortgage, and the testimony shows that the mortgagor frequently discussed the business in a general way. No statement in writing with relation to the business or an account of the sales and expenditures was made, at least for many months immediately prior to its closing; that many goods were sold on credit; that the community is one in which many workingmen live and are paid periodically, and credit is necessary to the maintenance of a successful business.

The trustee claims that the mortgage is void, and ought not to be sustained, because of fraudulent conduct and collusion between the mortgagor and the mortgagee, in not protecting the general creditors by requiring the accounting which the mortgage provides, while the mortgagor claims that he acted in good faith, and that he did receive statements in accordance with the true tenor of the stipulations in the mortgage. There were no debts at the time the mortgage was taken, and the sum of $4,000 was actually advanced. The matter comes before the court for review.

[1] Under the Washington statute (Laws 1915, p. 277) a chattel mortgage is void as to creditors where there is no provision for an accounting and application of the proceeds to the satisfaction of the mortgage; Keyes v. Sabin, 101 Wash. 618, 172 Pac. 835; Miller v. Scarbrough, 108 Wash. 646, 185 Pac. 625. We must conclude at the outset that at its inception the mortgage was valid, because it was for a present loan and had the provision for accounting. The mortgage

was recorded as the law provides, and the mortgagee did pay to the bank the amount periodically that was stipulated. If, therefore, the mortgage is void, it must be because of the subsequent conduct of the parties. I do not think that the record discloses that either of the parties acted in bad faith, which would impute fraud, and, since the transaction was entered into in good faith, it can only be condemned when it is not carried out in good faith, and the condemnation should extend to the damage which was entailed by reason of the commission or omission to do what the law and the circumstances require. Frankhouser v. Ellett, 22 Kan. 127, 31 Am. Rep. 171. And, as was stated by Justice Hunt, Associate Justice of the Supreme Court of Montana, now one of the United States Circuit Court of Appeals of this Circuit, in Noyes v. Ross, 23 Mont. 425, 59 Pac. 367, 47 L. R. A. 400, 75 Am. St. Rep. 543:

"The quality of the transaction, as fraudulent or otherwise, is determined from its effect, possible or probable, upon the interests of other creditors."

[2] Through these standards we must ascertain the duty that devolved upon the parties. The stipulation in the mortgage was:

"To account to the mortgagee for the proceeds of such sales at the end of each week."

An account is:

"A sum stated on paper, a registry of a debt or credit, an entry in a book of things bought or sold, of payments, services, etc." Theobald v. Stinson, 38 Me. 149, 152.

An account—

"is a formal statement in detail of the transactions between two parties, made contemporaneously with the transactions themselves." Richardson v. Wingate (Ohio) 10 West. Law J. 145, 146; 1 Words and Phrases, 87.

The word "account" has no inflexible technical meaning, being defined by Webster to mean:

"A registry of pecuniary transactions, a written or printed statement or business dealings of debts and credits, and also of other things subjected to a reckoning or review." Preston Nat. Bank v. Emerson, 102 Mich. 462; 1 Words and Phrases, 89.

Standard Dictionary—Account:

"A record or statement of debits and credits, of receipts and expenditures. (2) A business relation involving a record of debits and credits."

[3] It is clear from the testimony that default was made in this provision of the mortgage, in that there was no "accounting." There is no evidence that any of the funds were misapplied, except on the credit extended. Under the law, the mortgagee is held responsible to the creditors for the credits which were extended, and it must be held in the interest of fair dealing and protection, and discouragement of fraud, as against general creditors, for all sales made upon credit. Warren v. His Creditors, 3 Wash. 48, 28 Pac. 257.

The referee is right, and his decision is affirmed.

Ex parte WU KAO.

(District Court, W. D. Washington, N. D. December 16, 1920.)

No. 5652.

1. **Aliens ⟸31—Deportation of Chinese temporarily admitted determined by status at admission.**
   Where a Chinese person was temporarily admitted on bond pending determination of his right to enter, his liability to deportation thereafter is to be determined by his status at the time of admission.
2. **Aliens ⟸23(2)—Mercantile status after temporary admission does not entitle Chinese to judicial inquiry.**
   A Chinese person who was temporarily admitted under bond and who thereafter engaged in mercantile business did not thereby acquire the right to have a judicial settlement of his right to remain which is accorded to resident Chinese persons, but not to those seeking admission who are subject only to executive orders.

Habeas Corpus. Application for the writ by Wu Kao. Writ denied.

Reynolds, Ballinger & Hutson, of Seattle, Wash., for petitioner.
Robert C. Saunders, U. S. Atty., of Seattle, Wash.

NETERER, District Judge. The petitioner, a subject of China, sought admission upon the following certificate:

"American Consulate General, Canton, China, August 12, 1918. This is to certify that this passport has been issued by Mr. Loh Cheng, Commissioner of Foreign Affairs, Canton, to Mr. Wu Kao (Ng Go), who is to proceed to the United States under commission from His Excellency Mo Yung Hein, Military Governor of the Quong Tung province, to investigate matters pertaining to industry. Mr. Wu Kao is accompanied by his secretary, Mr. Lei Chen Huan (Lui Chun Wan). [Signed] C. D. Heinhardt, Vice Consul in Charge." (No fee prescribed.)

Impressed upon which was the American Consulate General of Canton, China, seal.

Admission was denied. Appeal was taken to the Commissioner of Labor, and permission to temporarily enter was granted on condition that a recognizance be given to secure his appearance before the Commissioner of Immigration upon demand. Among other things, the bond recites that:

"And whereas, the evidence submitted by the said person is not considered sufficient to justify admission under the United States Chinese exclusion laws:

"And whereas, pending further investigation or verification of his claim, the said person has been granted permission to land temporarily for the period of one year from December 7, 1918, and proceed to his destination, in accordance with rule 5, paragraph 5, of the Chinese Rules of the Bureau of Immigration, Department of Labor:

"Now, therefore, the condition of this obligation is such that if, in case the said person is allowed to land temporarily and proceed as aforesaid to his destination within the United States, the above-bounden obligor shall cause said person, when required by any officer of the United States mentioned in rule 23 of the rules governing the admission of Chinese, approved May 1, 1917, to appear for any hearing or hearings touching his right to admission into the United States, and * * * the said person is found by any such

officer or by the Secretary of Labor not to be entitled to enter or remain in the United States cause the said person, * * * to be delivered over into the custody of any such officer at the port of entry, whence he was allowed to proceed for return to the country whence he came, and shall cause the said person to be delivered over into the custody of such officer for deportation, unless his case has then been otherwise disposed of, on or before December 7, 1919. * * *"

[1] After admission the petitioner engaged in the mercantile business in California, and shortly after the expiration of the temporary privilege requested permission to remain because of his mercantile status. The hearing was ordered "as of the status" of his arrival, and he was excluded. Appeal has been taken to the Secretary of Labor and his deportation ordered. He contends that he is not subject to executive action and decision, but is entitled to have his right to remain judicially determined, and that he must be proceeded against as provided in section 13 of the act of September 13, 1888 (Comp. St. § 4313), as amended. The rights of the petitioner must be determined as of the date of his application for entry. All of the proceedings show such to be the fact. No proceeding has been taken by the Department of Labor except as it relates to a date of application for admission, and he reported to the Department of Labor in obedience to the recognizance entered into and stipulation then made. No action has been taken by the department in violation of any of the rights given under the Exclusion Act or the treaty.

[2] Since the petitioner was not admitted, he is not entitled to residential rights, and he may not plead an exempt status which he acquired during the probationary period. What he did in endeavoring to establish a mercantile status was in fraud of the department and out of harmony with the stipulation and recognizance of the temporary admission. Being engaged in such enterprise without residential right, no residential status obtained, and no vested right could follow, as was held by this court in Ex parte Mac Fock (D. C.) 207 Fed. 696. In this case the court said at page 698:

"No lapse of time would ripen such a wrong into a right nor afford a basis upon which to predicate abuse of discretion."

The Supreme Court in White v. Chin Fong (May 17, 1920), 253 U. S. 90, 40 Sup. Ct. 449, 64 L. Ed. 797, distinguished between the situation of a Chinese person in the United States and one seeking to enter it, and held that the former was entitled to a judicial inquiry and determination of his rights, and that the latter was subject to executive action and decision.

The writ is denied.

In re PUGET SOUND ENGINEERING CO.

(District Court, W. D. Washington, N. D. December 30, 1920.)

No. 6460.

1. **Bankruptcy ⇐89(1)—Party can enter "appearance" only by "pleading."**
Under Bankruptcy Act, § 18b (Comp. St. § 9602), fixing the time for the bankrupt to appear and plead to the petition, and section 18e, requiring the judge to make adjudication or dismiss the petition if no pleadings are filed the last day allowed, there can be no "appearance," which is defined as coming into court as a party to a suit, without "pleading," which is a written allegation of what is affirmed on one side and denied on the other.

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

2. **Courts ⇐340—State practice does not obtain as to bankruptcy.**
The state practice act does not obtain in bankruptcy proceedings.

3. **Bankruptcy ⇐100(2)—Adjudication pro confesso not set aside, if tendered answer is insufficient.**
An adjudication in bankruptcy entered pro confesso will not be set aside on application of the alleged bankrupt, in the exercise of the court's discretion, where the answer tendered with the application is insufficient to controvert the act of bankruptcy alleged in the petition.

4. **Bankruptcy ⇐58—"Preference" held given by recorded bill of sale under previous indemnity contract.**
Under Rem. & Bal. Code Wash. § 5291, making a bill of sale invalid, where property remains in the seller's possession, unless the bill of sale is recorded, a transfer by a contractor to his surety company was made by the bill of sale of his property recorded by the surety, not by the previous contract of indemnity, whereby he agreed to transfer such property to the surety, so that the transfer was a "preference," under Bankruptcy Act, § 60 (Comp. St. § 9644), if the bill of sale was recorded within four months of the filing of the petition and the contractor was then insolvent.

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

In Bankruptcy. Involuntary petition in bankruptcy against the Puget Sound Engineering Company. On application by the alleged bankrupt to set aside an adjudication in bankruptcy entered pro confesso. Application denied.

Tucker & Hyland and McClure & McClure, all of Seattle, Wash., for bankrupt.

Sidney Teiser and W. G. Keller, both of Portland, Or., for petitioners.

NETERER, District Judge. On November 22d petition in involuntary bankruptcy was filed and a subpœna issued, which was served on the 28th of November. On November 29th appearance was served and filed by attorneys for the alleged bankrupt, but it did not plead to the petition. On November 30th the attorney for the petitioner acknowledged receipt of a copy of the appearance, and stated in the letter that papers filed would be served upon the attorneys prior to the filing, and inquiring whether the adjudication would be contested. On

December 9th the alleged bankrupt, through its attorneys, replied to this letter, stating: "We will likely file an answer within a short time." On December 15th the attorneys for the petitioners, who resided at Portland, inclosed to the clerk an order of adjudication pro confesso, requesting the clerk to present it to the judge, and inclosed a copy of the letter to the attorneys for the alleged bankrupt. On the 16th the matter was called to the court's attention, and adjudication was made. On the 17th the petitioner, through its attorneys, moved to have vacated and set aside the order of adjudication, and permission given to file its answer. The 21st of December, at 10 o'clock, following, was appointed for hearing of the application, and notice was directed to be given to the attorneys for the petitioning creditors, and the tendered answer was directed to be served. By consent of all parties the matter went over to the 27th.

[1] The Bankruptcy Act does not recognize an appearance aside from pleading. Section 18b of the act provides that:

"The bankrupt, or any creditor, may appear and plead to the petition within five days after the return day, or within such further time as the court may allow." Comp. St. § 9602.

A pleading is:

"A written allegation of what is affirmed on the one side and denied on the other, disclosing to the court or jury having to try the matter the real matter in dispute between the parties." Bouv. Law Dict.

Appearance is defined as:

"A coming into court as party to a suit, whether as plaintiff or defendant." Bouv. Law Dict.

The act supra, therefore, provides the coming into court and setting forth the contention with relation to the issue. Section 18e of the act, supra, provides:

"If on the last day within which pleadings may be filed none are filed * * * the judge shall on the next day * * * make the adjudication or dismiss the petition."

[2] The state practice act does not obtain in bankruptcy proceedings. It has been held that, where an answer is filed after the time specified, adjudication shall be made pro confesso as in the case of a failure to plead. Bray v. Cobb (D. C.) 91 Fed. 102; Brandenburg on Bankruptcy (4th Ed.) p. 278.

[3] It is urged that the adjudication was inadvertently made, and that in its discretion the court may set it aside. It is not necessary to determine now whether there is such discretion in the court. Under all of the circumstances, if it is a matter of discretion and the answer is sufficient, the adjudication would perhaps be set aside. An examination of the answer which is presented, however, discloses that the matters therein pleaded are not a defense, and the court would not do an idle thing.

Insolvency is pleaded in the petition, and I think appears in the record, and the acts of bankruptcy alleged are that within four months preceding the filing of the petition the alleged bankrupt transferred "all or a large portion of his property to one of his creditors, with

intent to prefer such creditor over his other creditors, * * * the property * * * was certain personal property located on the Pacific Highway, * * *" and also alleges transfer of certain trucks; that the transfer was made to the United States Fidelity & Guaranty Company. The answer denies insolvency, then alleges that prior to July, 1919, the alleged bankrupt obtained a contract from the state of Washington for the paving of Pacific Highway in said state between given points, and that the alleged bankrupt was required to give a bond in a large sum of money, which was furnished by the United Fidelity & Guaranty Company, and that as a part of the bond an indemnity agreement was made with the bonding company for its better protection, and in the agreement the alleged bankrupt did assign, transfer, and convey to the bonding company all right, title, and interest in all tools, plant, equipment, and materials of every nature, etc., and that as a part of the agreement the bonding company was subrogated to all of the rights and privileges and properties of the alleged bankrupt.

It is a part of the record in this case that the alleged bankrupt was unable to carry forward his contract, and on the 25th day of September, 1920, it by formal bill of sale did "grant, bargain, sell, and deliver" to the bonding company "all that certain personal property, possession of which is herewith delivered." Then is included the properties to which reference is made in the bonding agreement. It is recited in this bill of sale that the understanding was that the bonding company would faithfully carry out the contract under the terms of its bond, and that the bill of sale was made in pursuance of the contract made between the parties at the time that the bond was given.

[4] It is contended by the alleged bankrupt that the transfer is not within the purview of the Bankruptcy Act, and that, if it was, the transfer antedated the period of four months, in that the transfer was made in July, 1919, and such act would control. Duplan Silk Co. v. Spencer, 115 Fed. 689, 53 C. C. A. 321; Debus v. Yates (D. C.) 193 Fed. 427. This bill of sale was filed for record on the 30th day of September, 1920. If the transfer, within the purview of the Bankruptcy Act, was made in July, 1919, then no act of bankruptcy is alleged, and the bankrupt would have a good defense, even though insolvent, as insolvency and act of bankruptcy must be both present.

Section 60 of the Bankruptcy Act provides that:

"A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication, * * * made a transfer of any of his property, and the effect of the * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or the registering of the transfer, if by law such recording or registering is required." Comp. St. § 9644.

The possession remaining with the alleged bankrupt, the transfer was not operative as against creditors. Section 5291, R. & B. Code of the State of Washington, provides:

"No bill of sale for the transfer of personal property shall be valid, as against existing creditors or innocent purchasers, where the property is left in the possession of the vendor, unless the said bill of sale be recorded in the auditor's office of the county in which the property is situated, within ten days after such sale shall be made."

The intent of the law is not to permit a party to pledge his property to secure one obligation—in this case, to the bonding company to secure the bond by transferring the property—and then use it as an unincumbered asset to secure further credit. The only operative bill of sale in this case against the creditors is that executed on September 25th, and recorded September 30th. That was within the prohibited period. Benner v. Scand. Am. Bank, 73 Wash. 488, 131 Pac. 1149, Ann. Cas. 1914D, 702; Morgan v. First Nat. Bank, 145 Fed. 466, 76 C. C. A. 236.

The provision of section 60, supra, by reason of section 5291, supra, is conclusive upon the Court.

The motion is denied.

Ex parte AH SUE.

(District Court, W. D. Washington, N. D. October 28, 1920.)

No. 5452.

1. **Aliens ⊂=54—Department's findings conclusive, if sustained by any evidence.**
   On habeas corpus by an alien, ordered deported by the Department of the Interior, the finding of the department is binding upon the court, if there is any competent evidence, however slight, to sustain it.
2. **Aliens ⊂=54—Representation by counsel during taking of all evidence, except preliminary alien held sufficient.**
   Where the alien was advised at conclusion of her first examination of her right to representation by counsel, and was thereafter represented at the hearing of all the evidence, and was permitted to give further testimony herself, and there is evidence to sustain the department's findings, she is not entitled to release on habeas corpus.

Habeas Corpus. Application by Ah Sue, alias Chin Ghne for the writ. Writ denied.

John J. Sullivan and Adam Beeler, both of Seattle, Wash., for petitioner.

Robert C. Saunders, U. S. Atty., of Seattle, Wash.

NETERER, District Judge. The petitioner was arrested pursuant to warrant, and was preliminarily examined the 30th day of January, 1919, at the conclusion of which she was asked whether she desired to be represented by counsel, and also advised that she could be released by giving bail in the sum of $1,000. On the same day counsel entered an appearance for the petitioner. Thereafter further testimony was taken. Opportunity was given for the petitioner to be heard and to present any testimony that was desired, and the testimony was finally closed on the 31st of July, 1919. Testimony from a number of witnesses was presented. Voluminous briefs were presented,

and appeal prosecuted to the Secretary of Labor. The findings of the Commissioner of Immigration at Seattle was affirmed, and an order of deportation issued.

[1] The petitioner contends that she was not accorded a fair trial, in that she was not timely advised of her right to be represented by counsel, and that there was no competent evidence to support the findings. If there is any competent evidence, however slight, the finding of the department is binding upon the court. I have examined the voluminous record. There is much in this record which is incompetent and irrelevant, and cannot be considered in concluding upon the rights of the petitioner. There is, however, sufficient material, competent testimony in the record, which, if true, shows that the petitioner was practicing prostitution subsequent to her entry into the United States. The weight of the evidence is not for the court.

[2] Ex parte Plastino (D. C.) 236 Fed. 295, it is strenuously urged, sustains petitioner, and is decisive here. The facts in this case are entirely different from the facts in the Plastino Case. That case was decided, not upon the fact that the privilege of counsel was not granted, but upon the fact that there was no evidence which supported the charge. In that case it was contended the petitioner was not advised of the privilege of counsel, and it was found that the reference to counsel in the record was in different colored ribbon, and it was stated at page 297:

"This was, in my judgment, inserted after the testimony was completed; for, if the ribbon had been changed just at the time that this statement commenced, it would not have been changed back to the old ribbon for the certificate, but the record would have been in the same colored ribbon from the time the first change was made."

In the instant case, counsel immediately entered his appearance, and all of the testimony was thereafter taken, except that of the petitioner, and she was further examined on July 31st, following, after all of the other testimony was in, and every opportunity given to present testimony which it was desired, or explain or change any testimony given.

This case is clearly within Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, and Guiney v. Bonham (C. C. A.) 261 Fed. 582, and is not against the spirit of the Plastino Case, supra; and while it was said in that case that it was the right of the accused to be advised of the privilege of counsel before he was examined, in that case petitioner was not advised at all, and he was discharged because there was no evidence; whereas, in the instant case, the petitioner was advised and employed counsel, and all of the testimony was thereafter taken, except as stated, including her own re-examination, and there is evidence to sustain the charge.

MORRISON CO. v. CUDAHY PACKING CO.

(Court of Appeals of District of Columbia. Submitted November 18, 1920. Decided January 3, 1921.)

No. 1352.

Trade-marks and trade-names ⊂=43—Mark of applicant held similar to opposer's mark.

The owner of a trade-mark, consisting of the figure of a Dutch woman with the words "Dutch Cleanser," over it, which had become widely known as the fanciful name for the owner's product, can successfully oppose the registration of a trade-mark for goods of the same descriptive properties, consisting of the figure of a Dutch mother spanking a Dutch child, over which were the word "Beats the Dutch."

Appeal from the Commissioner of Patents.

Application by the Morrison Company for registration of a trade-mark, opposed by the Cudahy Packing Company. From a decision of the Commissioner of Patents, sustaining the opposition, the applicant appeals. Affirmed.

E. Hayward Fairbanks, of Philadelphia, Pa., and James Hamilton, of Washington, D. C., for appellant.

William S. Jackson, of Philadelphia, Pa., and James L. Norris, of Washington, D. C., for appellee.

ROBB, Associate Justice. Appeal from a decision of the Commissioner of Patents sustaining the opposition of the Cudahy Packing Company to the registration by the Morrison Company of the words "Beats the Dutch," over the figure of a Dutch mother beating or spanking a Dutch child.

At the time of the alleged adoption of applicant's mark, the mark of opposer, consisting of the figure of a Dutch woman with the words "Dutch Cleanser" over it, was widely known. Many thousands of dollars had been expended in advertising this particular cleanser, and, while in this advertising and in the actual use of the mark it clearly appeared that the cleanser was made in the United States, nevertheless it had come to be known by the fanciful name under which it was sold, "Dutch Cleanser." Although the evidence introduced by the opposer tends to prove that actual confusion has resulted, we do not stop to analyze it, because it is as apparent to us as to the Patent Office that applicant's mark was intended, not only to "Beat the Dutch," but, to some extent at least, to beat the Cudahy Packing Company as well. That confusion would be likely to result from the registration of these marks, applied to goods of the same descriptive properties, is too plain to require further discussion.

The decision is affirmed.

Affirmed.

CHURCH v. CHURCH.

(Court of Appeals of District of Columbia. Submitted December 8, 1920. Decided January 3, 1921.)

No. 3366.

1. **Habeas corpus ⟸25(2)—Not proper remedy to remove child from lawful custody.**
   Under Code, § 1150, allowing habeas corpus to any person entitled to the custody of another person who is unlawfully confined or detained by third person, habeas corpus is not the proper remedy, where it was admitted the child was in the lawful custody of defendant under an order of the court.

2. **Divorce ⟸332—Custody of child awarded by state court will be disturbed only for reasons subsequently arising.**
   The decree of the state court in divorce proceedings, awarding the custody of a child to the mother, is res judicata as to all matters decided or which might have been decided in that case between the parties, and therefore the husband, in seeking to regain custody of the child, can rely only on grounds which arose since the decision in the divorce case.

3. **Divorce ⟸332—Equity can determine custody of child for its welfare, as against prior decree of state court awarding custody.**
   Under Code, § 1123, providing that nothing therein shall limit the power of a court of equity to appoint a guardian of children when their welfare requires it, a court of equity has jurisdiction of a bill by husband to take his minor child from the custody of his wife, to whom the custody had been awarded in divorce proceedings in the state court, on the ground that the change of custody was for the best interests of the child.

Appeal from the Supreme Court of the District of Columbia.

Suit by Herbert A. Church against Minnie B. Church to recover the custody of a child. From a decree dismissing the bill for want of jurisdiction, plaintiff appeals. Reversed and remanded.

See, also, —— App. D. C. ——, 270 Fed. 361.

Alfred D. Smith, of Washington, D. C., for appellant.

R. E. Walker and W. P. Plumley, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. This is a proceeding in equity, wherein the husband seeks to wrest from his wife the custody of their child.

In 1914 the wife secured from the circuit court for Montgomery county, Md., a divorce a mensa et thoro, alimony, and the custody of the child. Afterward the husband filed a bill in the Supreme Court of this District, asking that the custody of the child be awarded to him, for reasons stated in the bill. A rule to show cause why he should not have possession of the child pendente lite was issued against the wife. She answered, setting up, inter alia, the Maryland decree. At the argument on the answer the presiding judge, sua sponte, questioned the court's jurisdiction, and later held that habeas corpus was the proper remedy for the husband to pursue, as provided by section 1150 of the Code, and dismissed the bill for want of jurisdiction.

[1] It is provided by the section just mentioned that—

"Any person entitled to the custody of another person, unlawfully confined or detained by a third person, as a parent, * * * or husband, entitled to the custody of a minor child, * * * upon application to the court or a justice as aforesaid, and showing just cause therefor, under oath, shall be entitled to a writ of habeas corpus, directed to the person confining or detaining as aforesaid," etc.

The child was not unlawfully confined or detained. It was in the legal custody of the mother by order of a court having jurisdiction over the parties. This is undenied. Habeas corpus was not, therefore, the proper remedy.

[2] The father could not have obtained possession of the child, save on grounds which arose since the decision in the divorce case. As to all matters decided, or which might have been decided, in that case, the judgment therein is res judicata. We recently considered this question quite thoroughly in Heavrin v. Spicer, 49 App. D. C. 337, 265 Fed. 977. For that reason it is not necessary to say more upon it here. We may observe, however, that the right to proceed by writ of habeas corpus was not challenged in that case, nor was it passed upon.

[3] The Code (section 1123), after declaring that the parents shall be the natural guardians of the person of their minor children, and making other provisions for their custody in case of death or incapacity of the parents, or one of them, says that—

"Nothing herein contained shall be held to limit or affect the power of a court of equity to appoint some other person guardian of such children when it shall be made to appear to said court that the welfare of said children requires it."

By this provision the power of equity to guard the welfare of the child is preserved. "The writ of habeas corpus," said the court in In re Poole, 2 McArthur (D. C.) 583, 593, "confers no jurisdiction to provide for the guardianship of infants or for their education and instruction in correct habits of life. The court of chancery in a proper case will interfere to protect them from cruelty or from immoral influences, and may even deprive parents of the care of their own children for this purpose when their estate is involved." And in Slack v. Perrine, 9 App. D. C. 128, 152, we quoted with approval from Richards v. Collins, 45 N. J. Eq. 283, 17 Atl. 831, 14 Am. St. Rep. 726, this language:

"But the Court of Chancery exercises far more extended control in respect to the custody of children in virtue of an inherent jurisdiction over that subject."

A recent text-writer observes:

"One of the most distinctive duties of the Court of Chancery in England was the protection of the interests of infants. It was said by Blackstone that chancery 'is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom.' Consequently an application to chancery was the proper procedure to procure the appointment of a guardian, and the infant for whom a guardian was thus appointed was often called a 'ward in chancery.'"

But he adds that the jurisdiction of chancery in this regard has by statute "become practically obsolete in the United States." 12 R. C.

L. 13. See, also, Fox v. Minor, 32 Cal. 112, 117, 91 Am. Dec. 566; Hobbs v. Harlan, 10 Lea (Tenn.) 268, 278, 43 Am. Rep. 309. Not so, however, in the District of Columbia, for, as we have seen, that power is expressly retained by the Code.

Where it is desired to test the validity of the custody of a child, a writ of habeas corpus is the proper remedy by which to do it. If the validity of the custody is admitted, but it is believed that the welfare of the child demands that it should be changed, resort must be had to equity for the purpose of effecting the change.

It follows, from what we have said, that the judgment must be, and it is, reversed, at the cost of the appellant, and remanded for further proceedings not inconsistent with this opinion.

Reversed.

CHURCH v. CHURCH.

(Court of Appeals of District of Columbia. Submitted December 8, 1920. Decided January 3, 1921.)

No. 3401.

1. **Appeal and error ⟸70(1)—Order overruling motion to quash service not appealable.**
   An order overruling defendant's motion to quash the service of process upon him, on the ground that he was served while he was in the District for the purpose of appearing in court in another proceeding, is an interlocutory order, from which no appeal lies as a matter of right.
2. **Process ⟸119—Accused attending court immune from service.**
   A nonresident of the District, who came into the District to appear and plead to an indictment against him charging him with wife desertion, cannot be served with process in a civil action by his wife, while in attendance at court, or until he has had a reasonable time to leave the District after such attendance.
3. **Process ⟸119—Voluntary attendance at criminal trial entitles accused to immunity.**
   The fact that the attendance of accused at court within the District was voluntary on his part and the proceedings criminal does not deprive him of his immunity from service of process while so attending, since his voluntary appearance saves the expense of extradition and is to be encouraged by the courts.
4. **Process ⟸119—Attendance at court, which could be enforced by extradition, is not voluntary.**
   The attendance of a nonresident at court to answer an indictment for crime is not voluntary, since such attendance could be compelled by extradition proceedings, so that defendant is immune from service of process during such attendance, even though voluntary attendance would not confer immunity.

Appeal from the Supreme Court of the District of Columbia.

Action by Minnie B. Church against Herbert A. Church, to recover allowances awarded plaintiff by a state court for her support. From an order overruling defendant's motion to quash the service, defendant appeals. Reversed and remanded.

See, also, —— App. D. C. ——, 270 Fed. 359.

Alfred D. Smith, of Washington, D. C., for appellant.
W. P. Plumley, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellant, Church, was indicted by a grand jury of this District for nonsupport of his infant child. He, a resident of Virginia, through an arrangement with the district attorney, came to Washington from his place of employment in North Carolina, entered a plea to the indictment, and was tried. As he was leaving the courthouse for the purpose of returning to the state of his employment, he was served with process in this case, which is an action at law by his wife to recover from him allowances made by a Maryland court for her support, and which, according to the allegations of the declaration, have not been paid. Appearing specially, he moved to quash the service, on the assumption that he was immune from the service of process during such time as was reasonably requisite for him to leave the District by the usual routes of travel, but the motion was overruled. From the order overruling it he appeals.

[1] The order is interlocutory merely, from which no appeal lies as a matter of right. Dieterich v. Dieterich, 48 App. D. C. 356. Considering the character of the action, however, we will treat the appeal as a special one under the Code (section 226), and dispose of it on the merits. This, however, must not be taken as a precedent.

[2] We think that the great weight of decision, both state and federal, on the subject, indicates that the court erred.

"Courts of justice ought everywhere to be open, accessible, free from interruption, and to cast a perfect protection around every man who necessarily approaches them. The citizen, in every claim of right which he exhibits, and every defense which he is obliged to make, should be permitted to approach them, not only without subjecting himself to evil, but even free from the fear of molestation or hindrance. He should also be enabled to procure, without difficulty the attendance of all such persons as are necessary to manifest his rights. Now, this great object in the administration of justice would in a variety of ways be obstructed, if parties and witnesses were liable to be served with process, while actually attending the court." Halsey v. Stewart, 4 N. J. Law, 420.

The Supreme Court of the United States quotes with approval the following language:

"The privilege which is asserted here is the privilege of the court, rather than of the defendant. It is founded in the necessities of the judicial administration, which would be often embarrassed and sometimes interrupted, if the suitor might be vexed with process while attending upon the court for the protection of his rights, or the witness while attending to testify." Stewart v. Ramsay, 242 U. S. 130, 37 Sup. Ct. 46, 61 L. Ed. 192.

[3] Appellee argues that the appellant came into the jurisdiction voluntarily and therefore is not entitled to immunity from service. Assuming that his appearance here was voluntary, we think the circumstance is immaterial. The rule, as we find it, is the same, whether he came of his own volition or was coerced.

"As to nonresidents charged with crime, or brought within the jurisdiction of the court by compulsory process, the general rule seems to be that they are exempt from the service of civil process while coming into the jurisdiction, while necessarily in attendance on the court, and while returning to their

place of residence, provided no unnecessary delay occurs in returning." 21 R. C. L. 1313.

Judge Cooley, in People ex rel. Watson v. Judge of Superior Court, 40 Mich. 729, said, in answer to the contention "that, as the relator must be considered as going at the time to or from a place of confinement under the process of arrest, he was not within the privilege," that he found the law to be otherwise. It was decided in Larned v. Griffin (C. C.) 12 Fed. 590, that the arrest of a person while attending before a commissioner for the purpose of giving depositions in a case pending before a court in a foreign jurisdiction was invalid because he was privileged from arrest during that time. Judge Evans, in Kaufman v. Garner (C. C.) 173 Fed. 550, 554, examined quite thoroughly the authorities, both English and American, bearing upon the point, and as a result of his study said that a nonresident, who comes into a state for the sole purpose of appearing in a court where he is charged with a crime, in obedience to a recognizance previously given by him, is exempt from service of summons in a civil action while in such attendance or before he has secured further bail required by the court. To the same effect are Compton et al. v. Wilder, 40 Ohio St. 130; note to Worth v. Norton, 76 Am. St. Rep. 541; Murray v. Wilcox, 122 Iowa, 188, 97 N. W. 1087, 64 L. R. A. 534, 101 Am. St. Rep. 263; Palmer v. Rowan, 21 Neb. 452, 32 N. W. 210, 59 Am. Rep. 844; and United States v. Bridgman, 24 Fed. Cas. 1230, No. 14645.

If the appellant had appeared voluntarily in a civil action, it is conceded that he would be entitled to the privilege. We are unable to perceive any reason for according the immunity to a civil litigant while denying it to one who comes to defend himself against a charge of crime. Unless he was before the court the criminal action could not proceed. By coming voluntarily the defendant removes an obstacle to the administration of justice and saves the expense and trouble of extradition. Is it not in the interest of a sound public policy that this should be encouraged?

[4] But did the appellant come voluntarily? He knew that if he did not appear his attendance in all probability would be compelled through extradition proceedings. Such an appearance can hardly be said to be voluntary. In a case where the facts were quite similar, the court held that the defendant did not come voluntarily. United States v. Bridgman, supra.

But, whether we view his appearance as voluntary or involuntary, we think the privilege attached to him, and that the service should have been quashed. It would border on an abuse of process to force a person to come within the jurisdiction for one purpose, say that he may be prosecuted for a crime, and then subject him to other litigation, for which he could not have been compelled to leave the state of his home.

The judgment of the lower court must be, and it is, reversed, at the cost of the appellee, and the case remanded for further proceedings.

Reversed and remanded.

SNOW v. SNOW.

(Court of Appeals of District of Columbia. Submitted October 14, 1920. Decided January 3, 1921.)

No. 3383.

1. **Action ⇐6—Execution of quitclaim deed held not to have made case moot.**
Where plaintiff sued his wife for specific performance of her antenuptial agreement to waive all claim to plaintiff's property and to execute such conveyances as he might request, and alleged her refusal to execute a deed to an intervener, as a result of which refusal his negotiations for the sale of other real estate were discontinued, the execution by the wife of a quitclaim deed to the intervener did not render the case moot, so as to defeat the husband's right to have the validity of the antenuptial agreement determined.

2. **Trial ⇐25(4)—Plaintiff, who has burden of proving fairness of agreement, has right to open and close.**
In a suit by the husband for the specific performance of his wife's antenuptial agreement, where the defense was fraud, and the defendant claimed the burden was on plaintiff to prove the perfect fairness of the agreement, plaintiff had the right to open and close.

3. **Appeal and error ⇐969—Ruling as to right to open and close not reviewable.**
The ruling of a trial court on the question as to who should open and close a case is merely upon a matter of practice, not proper to be made the subject of exception or to be reviewed on appeal.

4. **Appeal and error ⇐1009(3)—Court's finding on conflicting testimony reviewable only if manifestly wrong.**
In a suit for specific performance, the findings by the trial court, based upon conflicting evidence, all of which was given orally in his presence, will not be disturbed on appeal, unless they are clearly wrong.

5. **Husband and wife ⇐34—Evidence held to show antenuptial agreement was supported by consideration.**
In a suit by husband for specific performance of his wife's antenuptial agreement to waive her claim to a share of his estate, evidence *held* sufficient to sustain the trial court's findings that the agreement was based on a valuable consideration and fairly arrived at, so as to be valid.

Robb, Associate Justice, dissenting.

Appeal from the Supreme Court of the District of Columbia.

Suit by Chester A. Snow against Addis H. Snow for specific performance of an antenuptial agreement. Decree for plaintiff, and defendant appeals. Affirmed.

Henry E. Davis, of Washington, D. C., for appellant.

J. J. Darlington, George P. Hoover, and F. J. Hogan, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. The parties to this suit are husband and wife living apart under a decree of divorce a mensa et thoro. The appellee, as plaintiff, brought suit against the appellant for specific performance of an antenuptial agreement. A decree was entered in favor of the appellee, and the appellant, alleging error, brings the decree here, asking for its reversal.

Appellee married the appellant July 29, 1913. At that time he was

about 70 years of age and she 36. He was a man of much wealth and had an annual income in the neighborhood of $60,000. About two days before their marriage he exhibited to her a draft of a proposed agreement waiving her right to dower in his property, and reciting the payment to her of $30,000 "as an antenuptial marriage settlement," and asked her if she was willing to sign it, to which she replied that she was. He did not then ask her to sign, but, in response to his request, she went to his office the next day, and there he again submitted the draft to her, with the request that she read it. She read it in part, and, perceiving it was practically the same as the one he had exhibited to her the day before, she, at his request, signed it in the presence of two witnesses. She now avers that it was procured by fraud and should be treated as of no effect.

By it she was obligated to sign promptly all papers which the appellee should present to her for the purpose of relinquishing her interest in his estate.

Having sold some real estate, appellee submitted to her a deed of conveyance for her signature. She refused to sign, except upon a condition to which he was not willing to consent. Thereupon he brought this suit. While it was pending the purchaser of the real estate intervened and asked that appellant be required to execute a quitclaim deed releasing to it, a corporation, her inchoate right of dower in the property, without prejudice to any claims she might have against the appellee. In answer to a rule upon her, she, through her counsel, in open court, expressed her willingness to execute the conveyance. Thereupon the court, over the objection of the appellee, entered an order directing her to do so; subsequently she complied with the order.

[1] It is asserted that by the execution of the quitclaim deed, just referred to, the prayer of the bill was satisfied, and that, as there was nothing more for the court to consider, the suit should have been dismissed. This is a misapprehension. The bill prayed, not only for relief with respect to that particular piece of real estate, but also with respect to all other lands which her husband owned or might subsequently acquire. This prayer for relief is supported by uncontradicted testimony that before filing the bill appellee had entered into negotiations with certain real estate agents looking towards the sale of other real estate owned by him, but that he was compelled to abandon them because his wife refused to join in the conveyances. This, we think, entitled him to proceed with the case for the purpose of having determined once for all whether or not it was her duty to sign deeds of conveyance of his real estate when they were presented to her for that purpose.

[2, 3] Counsel urges that appellant had the right to open and close the case, but he cites an authority (13 R. C. L. 1011) to the effect that the burden was on the appellee to prove the perfect fairness of the agreement. If this be correct, then the court did not err in giving to the appellee the right to open and close. However that may be, it is the law:

"That the ruling of a trial court on the question as to who should open and close a case is merely upon a matter of practice not proper to be made the

subject of exception or to be reviewed upon writ of error." Overby v. Gordon, 13 App. D. C. 392, 406.

To the same effect, see Lancaster v. Collins, 115 U. S. 222, 225, 6 Sup. Ct. 33, 29 L. Ed. 373, and Hall v. Weare, 92 U. S. 728, 732, 23 L. Ed. 500.

We now come to the issues of fact with respect to the validity of the agreement. The court below found that the parties, before they definitely became engaged to marry, had in mind an arrangement by which the appellant was to give up her marital rights in the appellee's property, that the appellant knew the nature of those rights, that she deliberately entered into the antenuptial agreement with a complete understanding of its terms, and that she knew that if the appellee should die as wealthy as he then was, leaving her his widow, her interest in his estate would be worth much more than the amount she received under the agreement. Have these findings any support in the testimony?

Appellee asserts that several times during the three or four months before their marriage the matter of an antenuptial agreement was discussed by them. She denies this, and says nothing was said about it until the draft of the agreement was submitted to her the day before their nuptials. He testified that he paid the $30,000 recited in the agreement by delivering to her his promissory note for $30,000 on the day the agreement was signed, though it was drawn, he says, some days before. She takes issue with him, and says the note was delivered the previous day, and had no connection whatever with the agreement, but was given in lieu of an annuity which she had been receiving from a benefactor, and which she was about to surrender. In response to a question her counsel admitted in open court that it was "absolutely so" that she understood that by signing the agreement and receiving the $30,000, she would waive her rights in the estate of her prospective husband. She concedes that she was aware, before she signed the agreement, that he was a man of abundant wealth, and admits knowledge at that time that a wife had some rights in her husband's property and that she had heard of a "widow's third." He says she thoroughly understood her rights, for they had discussed them often before the agreement was signed, and there is testimony showing that the agreement was prepared at her request, so that he might understand that she was not marrying him for his property, but because of the esteem in which she held him.

[4] Without pursuing the subject further, let it be sufficient to say that on every point which she did not admit there was a conflict in the testimony, all of which was delivered in the presence of the court. He had an opportunity to study the witnesses as they testified, an advantage which we do not possess. In the light of that study, and of all the circumstances under which the testimony was given, he reached the conclusions just stated. It has been frequently adjudged by this court, and by the Supreme Court of the United States as well, that conclusions arrived at in that manner will not be disturbed by the reviewing court, unless they are clearly wrong. In Nash v. Milford, 33 App. D. C. 142, 144, 149, Mr. Justice Robb, speaking for the court in a

suit for specific performance, said of the findings of an auditor, confirmed by the court:

"Such findings will not be set aside, unless it appears that there has been an error in law or a conclusion of fact unwarranted by the evidence."

In another case Mr. Justice Van Orsdel used this language:

"The appeal presents no question of fact of sufficient importance as a precedent to justify an extended review of the evidence. It was tried in open court, with full opportunity in the trial justice to observe the demeanor of witnesses and to judge of their veracity. In such cases the finding of the trial justice on questions of fact has much the same sanctity as the verdict of a jury, and will not be disturbed on appeal unless a mistake of judgment is so apparent as to demand a reversal." McLarren v. McLarren, 45 App. D. C. 237, 238.

In Lawson v. United States Mining Co., 207 U. S. 1, 12, 28 Sup. Ct. 15, 19 (52 L. Ed. 65), this was said:

"With reference to the conclusion of the Court of Appeals it is sufficient to say that, if the testimony does not show that it is correct, it fails to show that it is wrong, and under those circumstances we are not justified in disturbing that conclusion. It is our duty to accept a finding of fact, unless clearly and manifestly wrong."

It is the settled rule of procedure that where—

"the finding of the master or judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.'" Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 170 (61 L. Ed. 356).

Bearing upon the same point are United States Trust Co. v. Blundon, 42 App. D. C. 500, 508, and Butte & Superior Copper Co., Ltd. v. Clark-Montana Realty Co. et al., 249 U. S. 12, 30, 39 Sup. Ct. 231, 63 L. Ed. 447.

[5] A careful examination of the record satisfies us it cannot be correctly said that any of the court's findings is "clearly and manifestly wrong." On the contrary, it appears that they are amply sustained by the testimony. They show that the agreement rests on a good consideration, $30,000, and was fairly arrived at. This being so, it merits the law's sanction. Birbeck's Estate, 215 Pa. 323, 64 Atl. 536; Smith's Appeal, 15 Pa. 319, 8 Atl. 582; In re Devoe's Estate, 113 Iowa, 4, 84 N. W. 923; Biblehausen v. Biblehausen, 159 Wis. 365, 150 N. W. 516; Hockenberry v. Donovan, 170 Mich. 370, 136 N. W. 389.

For the reasons given, we are constrained to hold that the decree should be, and it is, affirmed, with costs.

Affirmed.

ROBB, Associate Justice (dissenting). For two years prior to the marriage of Mrs. Snow, a friend, a lady of large means, had provided her with an annual income of $1,500, derived from a principal of the estimated value of $30,000. The evidence is clear and convincing that it was the intent of this friend to make this benefaction permanent. This appears from the uncontradicted testimony of the lady and her husband. Mrs. Snow became engaged to Snow on July

22, 1913. Shortly thereafter, and before their marriage, she suggested the propriety of surrendering this benefaction, which suggestion Snow approved. Mrs. Snow testified, and other facts and circumstances tended strongly to corroborate her, that Snow thereupon said he would make good the amount, and that he immediately signed and delivered to her a promissory note for the $30,000. Subsequently, when Snow delivered to her securities in that amount, the note was surrendered to him. Its production would go far toward settling the vital issue in this case. Among all the papers bearing upon the case and coming into his hands, it is significant that this is the only one not produced. That Snow fully understood how this sum of $30,000 was arrived at is evident from the letter accompanying the securities, and in which he said:

"You do not like this talk of money, but my conscience must have this anodyne—that, no matter what our future may be, you will be independent, and not worse off than I found you."

I am fully convinced that the only consideration for the so-called antenuptial agreement subsequently signed by Mrs. Snow was this $30,000, and that her signature to that agreement was obtained through subterfuge. Snow himself admits that at the time the agreement was signed he was possessed of more than $1,000,000, with an annual income of almost $70,000. It may be conceded that Mrs. Snow understood that he was a man of means, but wealth is a relative term. She undoubtedly would have considered $200,000 a very large sum, and Snow did not inform her as to the extent of his wealth.

It results, therefore, that this wife, a lady of character and refinement, has surrendered, without any actual consideration, her interest in an estate of more than $1,000,000. In my view, the explanation of the conduct of this man lies in the fact that his love of money has dwarfed and withered every other impulse.

I dissent.

WASHINGTON WATER POWER CO. v. KOOTENAI COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. February 1, 1921. Rehearing Denied March 9, 1921.)

No. 3546.

1. **Taxation ⊜375(1)—Adoption of valuation by Utilities Commission for assessment held proper.**
A valuation made by the Idaho Public Utilities Commission of a power company's property under Comp. St. Idaho 1919, §§ 2471, 2514, after considering all elements of value, may be adopted by the state board of equalization as the full cash value of the property for taxation under the Idaho Revenue Law (Comp. St. Idaho 1919, §§ 3097, 3104, 3110), though the valuation was made by the Utilities Commission for the purpose of fixing rates.

2. **Taxation ⊜42(2)—Fact that all utilities properties were assessed alike does not defeat recovery for overvaluation.**
That all property of public utilities in the state was assessed at 75 per cent. of its full cash value does not defeat the right of a power company to have its taxes reduced, if property of other classes within the state was assessed at only 50 per cent. of its cash value.

3. **Taxation ⊜40(8)—Owner assessed at 75 per cent. of value not liable for full amount, if others were assessed at 50 per cent.**
Under Const. Idaho, art. 7, §§ 2, 5, requiring all taxes to be uniform, a public utility corporation, whose property was assessed at 75 per cent. of its full cash value by the state board of equalization, under Comp. St. Idaho 1919, § 3171, is entitled to relief against a portion of the taxes thereby levied, under the Idaho Revenue Law (Comp. St. Idaho 1919, § 3183), where other property assessed by the county assessors under section 3110, and equalized by the state board of equalization under sections 3172, 3175, 3183, was assessed at only 50 per cent. of the cash value, notwithstanding the requirement of sections 3097, 3104, that all property in the state be assessed at its full cash value.

4. **Taxation ⊜840—Taxpayer liable for total penalty, if tender is insufficient.**
A taxpayer, who objected to the payment of the tax on the ground of unequal assessment, and who tendered the amount he admitted to be due, is liable for all the penalties on the amount due under Laws Idaho 1915, c. 69, § 1, amending Laws 1913, c. 58, § 113, if the tender was insufficient to cover the amount of the taxes lawfully assessed.

5. **Taxation ⊜840—Taxpayer not liable for penalties after sufficient tender.**
Where the taxpayer protested against a portion of the taxes because of unequal assessment against it, and made a tender sufficient to cover the taxes which should have been paid if the board of equalization had valued its property on the same ratio as other property, no penalty is recoverable for nonpayment of the taxes.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Washington Water Power Company against Kootenai County and others. From a decree granting part of the relief claimed, plaintiff appeals. Reversed and remanded.

The Power Company, an electric power corporation, appellant, sued Kootenai county and certain of its officials for a determination of taxes due upon the property of the company for the year 1918, and that the county be re-

quired to accept the sum paid for taxes, and that all taxes in excess of 55 per cent. of the tax levied be declared void and that all penalties be declared null.

The plaintiff alleges that the Idaho state board of equalization assessed the property of the plaintiff for 1918 at $2,750,000, which was in excess of the full cash value of the property at that time; that before the assessment the company filed with the state board of equalization full reports disclosing the property, its value, income, and operating expenses; that at the meeting of the state board of equalization at which the assessment was to be made the company, by counsel, called attention to the value of its property and to an opinion of the Public Utilities Commission of Idaho which had valued the property of the company in Idaho for rate-making purposes as of December 31, 1917, which was just prior to the time when the board of equalization was charged with the duty of assessing property; that the judgment of the Public Utilities Commission showed the value of the property of the company in Idaho to be not in excess of $2,438,978. It is also alleged that plaintiff owned a distribution system in St. Maries, Idaho, which had not been valued by the Utilities Commission, and the actual value of which was $31,461; that the attention of the board of equalization was called to the fact that the assessors in Idaho, charged with the duty of assessing all property except that of public utilities, were not assessing in excess of 50 per cent. of full cash value, and that the Power Company demanded assessment upon the same basis and by the same rule; that the total value of the operating property of the company in Idaho on the second Monday in January, 1918, did not exceed $2,470,430, and reproduction cost not in excess of $3,384,413. It is charged that the county assessors in Idaho and the county boards of equalization generally and intentionally assessed property at not to exceed 50 per cent. of its full cash value, and that such assessments were made as the result of an understanding between assessors and the state board of equalization; that this rule prevailed in Kootenai county, but that the assessment made by the state board of equalization imposed upon the company in Kootenai county an unjust and undue burden, and the state board of equalization did not assess the property at 50 per cent. of its full cash value, but at 100 per cent. thereof and more; that knowledge of the understanding that assessments should not exceed 50 per cent. of its full cash value was within the knowledge of the members of the state board of equalization, and that the defendant county, through its officers, proceeded to collect taxes upon the 100 per cent. valuation assessed by the state board of equalization on the property of the company. It is set forth that tender and refusal of 55 per cent. of the taxes assessed were had, and that the county officers issued a delinquency certificate, whereby a 6 per cent. penalty and an additional penalty of 1 per cent. per month is claimed. The answer denied the allegations of the complaint.

After hearing, the court decreed that the company owed the county a balance of $12,431.20, $23,080.84 having theretofore been paid, and that, of the sum of $12,431.20, $10,049.32 was the balance of taxes due, and $2,381.88 was penalty and interest, and that upon payment of such sum to the county, with interest from the date of decree, satisfaction of record should be entered by the county officials, and injunction should issue against the county officials from selling the property of the company on account of taxes for the year 1918, and the certificate of sale for taxes for 1918 should be canceled. Appeal from the decree was taken.

The corporation was under obligation to pay a tax in proportion to the value of its property (Const. Idaho, art. 7, § 2) and all taxes levied must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax (Const. art. 7, §§ 2 and 5). The statutes which are material are as follows: By section 2471, Idaho Comp. Stat. 1919, the Public Utilities Commission of the state shall have power to ascertain the value of the property of every public utility "and every fact which, in its judgment, may or does have any bearing on such value." For the purpose of ascertaining the matters specified in section 2471 concerning the value, the Commission may have a hearing at which the public utility affected shall

be entitled to be heard, and shall make and file its findings of fact in writing upon all matters concerning which evidence shall have been introduced, and which have bearing on the value of the property of the public utility affected. Section 2514. The findings of the Commission so made and filed shall be admissible in evidence in any action or proceeding before the Commission, or any court in which the Commission, the state, or any officers of any body politic and the public utility affected may be interested, whether arising under the provisions of the chapter of which section 2514 is part, or otherwise, and such findings shall be prima facie evidence of the facts therein stated as to the facts therein stated under conditions then existing, and such facts can only be controverted by showing a subsequent change in conditions bearing upon the facts therein determined.

By section 3097 of the revenue laws, all real and personal property subject to assessment and taxation must be assessed at its full cash value for taxation as of the second Monday in January. By section 3104 it is provided: "By the term 'value,' 'cash value' or 'full cash value' is meant the value at which the property would be taken in payment of a just debt due from a solvent debtor, or the amount the property would sell for at a voluntary sale made in the ordinary course of business, taking into consideration its earning power when put to the same uses to which property similarly situated is applied. Section 3110 provides that in ascertaining the value of any property the assessor of the county shall not adopt a lower or different standard of value because the same is to serve as a basis of taxation; nor shall he adopt as a criterion any value or price for which the property would sell at auction or at forced sale, or in the aggregate with all the property in the taxing district; nor shall he adopt a speculative valuation, but he shall value each article or piece of property by itself and at such sum or price as he believes same to be fairly worth in money at the time such assessment is made.

The state board of equalization equalizes the assessment of property throughout the state by classes, as shown by abstracts submitted. Section 3171. In equalizing the board has power to increase the total value of any class of property in any county as shown by the abstract, when in the opinion of the board the value of that class is not just and equal as compared with the value of other classes of property in that county, or the value of property in other counties, because of its being less than the full cash value as determined by such comparisons; and the board may decrease the total value of any class of property in any county as shown by the abstracts when in the opinion of the board the value of that class appearing in such abstract is not just and equal, as compared with the value of other classes of property in that county, or the value of property in other counties, because of its being in excess of the full cash value as determined by such comparison. The board of equalization may add to or deduct from the aggregate value of all property in any county as shown by the abstract, such percentage of such aggregate values as in the opinion of the board may be necessary to establish uniformity and equality of value among the several counties in the state. Section 3172. Section 3175 provides that the valuation of all property which, according to the provisions of the chapter of which section 3175 is a part, shall be exclusively assessed for taxation by the state board of equalization and shall be equalized in relation to the valuation of other property in the state according to its full cash value. Section 3183 provides that the operating property of electric current transmission lines and the franchises of persons owning or operating as lessees electric current transmission lines, wholly or partly in Idaho, shall be assessed for taxes exclusively by the state board of equalization. The board of equalization shall ascertain and determine the full cash value of the lines in each county separately and shall determine the total value, total number of miles, and value per mile of each electric current transmission line in each county into or through which the line extends and the value per mile and number of miles of such line in any incorporated city, town, or taxing district into or through which the line extends. The value per mile of electric current transmission lines is to be determined by dividing the total value of such lines within each county by the number of miles of such line within each

county, and all operating property of such line shall be assessed as of and apportioned to the county in which the same is situated as a part of the transmission line in said county.

John P. Gray and W. F. McNaughton, both of Cœur d'Alene, Idaho, and F. T. Post, of Spokane, Wash., for appellant.

Bert A. Reed, C. H. Potts and N. D. Wernette, all of Cœur d'Alene, Idaho, for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). The District Judge expressed the opinion that the evidence was not sufficient to sustain the contention that the property of the company was overvalued, while all other property was undervalued, and he held that the board of equalization had adopted the findings of the Public Utilities Commission of the state which had determined that the value of appellant's property was $3,587,500, to which sum the court added the valuation of the St. Maries lighting system, estimated at $33,000, making a total of $3,620,500. It was also the opinion of the learned judge that the state board of equalization intended to make the assessment on the basis of 75 per cent. of the actual cash value of the property, although the evidence demonstrated that most of the other property in the state was assessed at not to exceed 50 per cent. of the actual cash value, and that generally that standard was recognized in making the assessments of property. But the court held, however, that it had not been established that the board of equalization valued any of the public utilities at 50 per cent. and that the presumption was that it put all public utilities upon an equal footing and on the 75 per cent. basis. The way of consideration by the court was as follows:

The total assessed valuation of Kootenai county for 1918 was taken at $18,396,436, of which sum $11,595,837 was assessed by the local assessor, and the balance, $6,800,599, was found as the valuation put upon public utilities by the state board of equalization. From the assessment of $11,595,837 the court substracted the assessments improperly made under the 50 per cent. value upon bank stock, $129,500, and, after adding this sum to the assessment on public utilities, found that, including appellant's property, the total valuation of $6,930,099 was on a 75 per cent. basis for all public utilities, and $11,466,337 was upon a 50 per cent. basis upon property other than public utilities. In conclusion the court said:

"As against the other property in the first class, plainly the plaintiff's property is entitled to no relief. But, as against the second class, equality of treament requires a 33⅓ per cent. reduction."

The ratio of the two classes was found to be approximately 7 to 12, and the plaintiff was held to be entitled to a reduction of 33⅓ per cent. upon twelve nineteenths of its assessment, or a total reduction of $8,835. In objection to the decree appellant's contention is that the court erred in holding that the value of the property of the appellant subject to taxation was greater than $2,438,978, and in holding that the state board of equalization found that the total actual value of the operating property was $3,620,500.

[1] We do not think it necessary to extend our opinion with excerpts from the voluminous evidence introduced before the trial court. There were elaborate tax statements, coupled with the evidence of reports of public utilities, their operation costs, percentages earned, production costs, depreciation, value, and many other features relating to valuations and elements in arriving at actual values, whether for rate or general purposes. It also appeared that, at the hearing before the board of equalization of the state, counsel for the Water Company and the state, respectively, made arguments. When the matter was before the board of equalization, that body heard evidence of witnesses as to valuation; but it does not appear that any extended independent investigation into valuations was made. We gather that the board accepted as a basis of assessment the findings of the Public Utilities Commission. These were contained in an exhaustive report (which is in the record in this case), and as the Water Company urged the board of equalization to adopt and follow the determination of the values made by the Public Utilities Commission, it ought not to feel aggrieved at results based upon the acceptance of the conclusion of that Commission.

It is true that the finding of the Public Utilities Commission was primarily to arrive at a valuation for the purpose of rate-making and not taxation, and that when that body determined that as of December 31, 1917, the value of the used and usable property of the Power Company used in delivering electrical energy in Idaho, the Commission had in mind the fixing of a reasonable rate for service. But, as we have indicated, it is also true that in arriving at the valuation for such purpose the Commission considered many other elements bearing directly upon the question of actual value and really considered actual value. The evidence shows that they referred to the books and records of the company, which were audited by the accountant force of the Commission, considered depreciation, capital and stores account, development cost, going concern value, values of property which had not been used and which probably never would be used in the operation of the light and power property, earnings, land values, and what would be fair apportionments of value of tangible and intangible property. After consideration of these and other elements, including inventories and revenue statements and "all the evidence, facts, and circumstances surrounding the case," a value of $3,800,000 was unanimously determined upon by the commissioners.

The findings of the District Court was that the Public Utilities Commission determined that the ultimate conclusion of the present worth of the property of appellant was based not exclusively upon any one of several methods more or less commonly employed for reaching the value of properties such as public utilities, and that the theory of reproduction cost, in so far as it was used, was not applied without making allowance for depreciation and that other compensating considerations were recognized by the Commission and that on the whole the decision of the Commission was so clear that the board of equalization must have understood and did understand that the value of the property subject to taxation was $3,587,500. In this connection it

is said that the District Court erred in not taking depreciation into consideration, but when we examine the very careful report of the Public Utilities Commission, which was the basis used by the board of equalization, we find that the Commission did consider depreciation and made detailed estimate of the cost of reproduction, less depreciation of all property used and usable in the business on December 31, 1917, first, based upon the unit prices for five years preceding June 30, 1915, and, second, based upon unit prices for five years preceding December 31, 1916. Furthermore, in their findings of the total value of $20,500,000 and apportionment as between the states of Washington and Idaho, the Public Utilities Commission considered various theories of apportionment, and found that under one the value was $3,587,500 for the Idaho properties, and said:

"We shall not attempt to fix any separate and distinct value for each of the elements herein discussed, but the same have all been taken into consideration in our final value. Neither has the Commission adopted any one particular theory of value, but has endeavored to give due consideration and weight to all theories and elements of value."

Following this statement the Commission put the total value of all the property of the company, tangible and intangible, used and useful, in Idaho as $3,800,000. The court adopted the $3,587,500 value and added the value of the St. Maries lighting system, $33,000.

[2] Having seen that the assessment of property other than public utilities was intentionally made by local assessors upon a valuation of 50 per cent. of cash value, but the property of the appellant, a public utility, was deliberately assessed by the state authorities upon a basis of 75 per cent. of actual value, we are met with the question whether appellant is entitled to injunction against the excess over which the general property of the state was assessed. Whether or not the state board of equalization assessed other utilities upon the basis of 75 per cent. of actual value is not vital in the present instance, because if the state board, knowing of the intentional assessment of property generally on a 50 per cent. value, assessed the property of appellant on a 75 per cent. basis, the fact that they may have assessed other public utilities upon a like basis cannot defeat the right of appellant to relief.

[3] In Greene v. Louisville & I. R. Co., 244 U. S. 501, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88, we have the latest expression of controlling authority in a case somewhat analogous with the one now presented. There there was a systematic undervaluation of certain kinds of property other than railroads by assessing officers within the state of Kentucky, and a higher valuation upon railroad property by a state board in performing its duty correctly by assessing railroad properties at fair cash value. The court considered the question of the state law, and after citing sections of the statutes of Kentucky, which required uniform taxation upon all property subject to taxation within the limits of the levying authority according to the value, and the same rate as between corporate and individual property, assumed that the state board performed its duty by assessing the property of the railroad company at fair cash value, and then inquired what the effect

of such action was in view of the systematic undervaluation by the assessing officers charged with valuing other classes of property, and approved of the rule quoted in Cummings v. National Bank, 101 U. S. 153, 25 L. Ed. 903, that—

"Uniformity in taxing implies equality in the burden of taxation, and this equality of burden cannot exist without uniformity in the mode of assessment, as well as in the rate of taxation."

The court said:

"It is equally plain that it makes no difference what basis of valuation—that is, what percentage of full value—may be adopted, provided it be applied to all alike. The adoption of full value has no different effect in distributing the burden than would be gained by adopting 75 per cent., or 50 per cent., or even 10 per cent., as the basis—so long as either was applied uniformly. The only difference would be that, supposing the requirements of the treasury remained constant, the rate of taxation would have to be increased as the percentage of valuation was reduced. * * * Therefore the principal, if not the sole, reason for adopting 'fair cash value' as the standard for valuations, is as a convenient means to an end—the end being equal taxation. But if the standard be systematically departed from with respect to certain classes of property, while applied as to other property, it does not serve, but frustrates, the very object it was designed to accomplish. It follows that the duty to assess at full value cannot be supreme in all cases, but must yield where necessary to avoid defeating its own purpose."

The court fortified this view by quoting extensively from the very learned opinion of Judge Taft, writing for the Circuit Court of Appeals for the Sixth Circuit in Taylor v. Louisville & Nashville R. Co., 88 Fed. 350, 31 C. C. A. 537. In that case the Constitution of Tennesee required that all property should be taxed according to its value so that taxes should be equal and uniform throughout the state. Certain kinds of property were valued by one body of officials, while property in general was valued by another. It is true there was no provision for equalization as between the two classes, but in the light of the facts, that in the instant case there was the deliberate discrimination, we do not believe that that point is of vital importance, because the case turned upon the broad principle that the sole and manifest purpose of the Constitution of the state was to secure uniformity and equality of burden upon the property in the state, and that as a means of securing such a result there was a provision that the assessment should be according to true value. Judge Taft, for the court, treated the case as one in which the complaining taxpayers and other taxpayers owning the same species of property were taxed at a higher rate than the owners of other species of property, and referred to the discrimination as brought about by the intentional and systematic disregard of the law by those charged with the duty of assessing all other species of property than that owned by complainant and its fellows of the same class. The court found itself placed in a dilemma, and said that an intentional undervaluation of a large class, where assessments at true value should be had, is necessarily designed to operate unequally upon other classes of property to be assessed by different taxing tribunals who presumably would conform to the law.

"The various boards whose united action is by law intended to effect a uniform assessment on all classes of property are to be regarded as one

tribunal, and the whole assessment on all classes of property is to be regarded as one judgment. If any board, which is an essential part of the taxing system, intentionally, and therefore fraudulently, violates the law by uniformly undervaluing certain classes of property, the assessment by other boards of other classes of property at full value, though a literal compliance with the law, makes the whole assessment, considered as one judgment, a fraud upon the fully assessed property. And this is true, although the particular board assessing the complainant's property may have been wholly free from fault or fraud or intentional discrimination."

It is the justice of the principle stated that also prevailed in the recent case of Greene v. Louisville & I. R. Co., supra, and that appeals most forcibly to us. Cases which take a contrary view are regarded by the Supreme Court as taking "little or no account of the rights of aggrieved taxpayers."

[4] Should penalties be collected? Under the laws of the state of Idaho (section 113, c. 69, Sess. Laws 1915), taxes extended on the real property assessment roll shall be payable without penalty on or after the fourth Monday in November in the year in which the taxes are levied, and prior to the first Monday in January next thereafter, and all such taxes which have not been paid prior to the first Monday in January shall be delinquent, and the penalty of 6 per cent. of all such taxes shall be added thereto. By further provisions of the statute all delinquent taxes and penalties, as shown by the delinquency certificates, shall bear interest from the date of such certificate until paid, or until the issuance of tax deed, and such interest must be paid by any redemptioner of the property as a condition of redemption. Under these statutes one liable to pay taxes, and who makes a tender of an amount insufficient to cover the amount of the taxes lawfully assessed, becomes liable for all penalties and interest upon any sum found to be due. Western Union Tel. Co. v. State, 64 N. H. 265, 9 Atl. 547; Winnipiseogee Lake C. Co. v. Gilford, 64 N. H. 514, 15 Atl. 137; Western Union Tel. Co. v. State, 146 Ind. 54, 44 N. E. 793; Cedar Rapids R. Co. v. Carroll County, 41 Iowa, 153.

[5] It would appear from the allegations of the complaint that the tender made by the appellant was sufficient to cover taxes which should have been paid upon the property of appellant if the board of equalization had proceeded consistently with relation to valuation put upon other like property. Under such circumstances no penalty is recoverable.

The decree of the District Court is reversed, and the cause is remanded to the District Court, with directions to enter decree in accordance with the views herein expressed; and, should it be necessary for the court to hear additional testimony as to the exact amount which may be due, the court may proceed accordingly.

Reversed and remanded.

WASHINGTON WATER POWER CO. v. SHOSHONE COUNTY et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3547.

1. **Taxation ⟸40(8)—Mines assessed under statutory method held assessed at full value.**
   Mines assessed under Comp. St. Idaho 1919, § 3360, based on the annual net proceeds of producing mines with additions for surface grounds and improvements, as a result of which the assessed value of mining properties was approximately one-half the total assessed value in the county, must be deemed to have been assessed on full value as far as could be determined, where the validity of the statute prescribing the method was not drawn into question.

2. **Taxation ⟸40(1)—Partial exemption of property must be borne ratably by other property.**
   Where property is exempted from taxation in whole or in part, the increased burden thereby cast on property not exempt must be borne ratably and without discrimination.

3. **Taxation ⟸319(2)—Without definite proof of value of other property, 75 per cent. assessment of utility cannot be held invalid.**
   Where much of the personal property in the county, including mining improvements and bank stocks, was assessed at full value, though some of it was assessed for less, and the lands were valued at from 50 per cent. of the value up, and no satisfactory proof was offered of the real value of mining property assessed by a special statutory method, the court cannot fix the value of the mines, nor say they were partially exempted, nor that an assessment of property of utility by the state board of equalization at 75 per cent. of the full value was excessive.

Appeal from the District Court of the United States for the Northern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Washington Water Power Company against Shoshone County and others. From a decree dismissing the complaint, complainant appeals. Affirmed.

John P. Gray and W. F. McNaughton, both of Cœur d'Alene, Idaho, and F. T. Post, of Spokane, Wash., for appellant.

H. J. Hull and James A. Wayne, both of Wallace, Idaho, for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In many respects this case is a companion to Washington Water Power Co. v. Kootenai County et al., 270 Fed. 369. In Shoshone county, Idaho, the following conditions appeared:

The Power Company tax was assessed at $7,667.08; the total assessed valuation of property in Shoshone county was $31,828,640, $12,916,645 of which sum was assessed on account of net profits of mines. An assessment of $154,645 was made on account of mineral land acreage, valued as required by the statutes, $3,876,170 upon mine improvements, assessed at their actual cash value, and $374,103 assessed upon bank stock, as required by the laws of the state. The board of equalization assessed public utilities at a total value of $6,336,243, while $8,150,834 was the aggregate of assessments by the

local assessor. The court held that of this last referred to amount, personal property, much appeared to have been assessed for approximately 50 per cent. of its actual value, and some of it upon a higher rate, approaching 70 to 75 per cent. of value, and that the assessment at 75 per cent. of actual value upon the property of the Power Company was not unjust. This conclusion was reached by reasoning that the larger part of the assessment was in accord with or in excess of the statutory standard, while the assessment of the property of the plaintiff was 25 per cent. below such standard and upon the same footing with the assessments of other public utilities. The complaint was dismissed.

The Power Company now contends that it was error to hold that the mines of Shoshone county were assessed on a 100 per cent. basis for 1918, and argues that the court should not have held that, because mines were assessed according to the statutes and such assessments amounted to about half of the total assessment in Shoshone county, appellant was entitled to no relief, and, further, that the court should not have ruled that, if mine improvements, bank stock, and property of public utilities were assessed at a higher rate than property was generally assessed, appellant should be compelled to pay taxes at a higher rate than the owners of general property in the county were required to pay.

[1] There is no complaint of the method employed in the assessment of the mines, for the statute was followed. Section 3360, Comp. St. Idaho 1919. Under its provisions the assessment is not based upon the value of productive mines, but upon an ascertainment from the annual net proceeds of the net ore produced, plus $5 per acre for surface ground when patented, and improvements when valuable for other purposes. Appellant urges, however, that the actual value of mines is much greater than the amount of the net proceeds, and that as a matter of fact the method constitutes a partial exemption of mining properties from taxation, and that, as a consequence, in this case there is an increased burden cast upon the property not favored, and that appellant is entitled to relief.

The producing mines of Shoshone county were assessed for taxes upon net profits of $12,916,645; mining improvements were assessed at $3,876,170, mineral lands (surface) at $154,645; bank stock at $374,103, and other property assessed by the local assessors was valued at $8,150,834. It is plain, therefore, that upon a total valuation of $31,828,640 the assessment of the mining properties is approximately one-half of the total assessment. We are clearly of the opinion that the court was correct in holding that the assessment of the mines was, as far as could be determined, an assessment upon full value, and that, although the assessment of mines might be under an inequitable method, nevertheless the validity of the statute prescribing the method was not drawn into question.

[2] Appellant urges that, without considering the question of the validity of the statute with respect to the assessment of mines, if the general property of the county was assessed at 50 per cent. of its value, the correct rule is that where property is exempt from taxation in

whole or in part, as are mines, the increased burden thereby cast upon property not so favored shall be borne ratably and without discrimination, and that where the general property of the county, as well as of the state, has been intentionally assessed on a 50 per cent. basis the law demands that the property of the appellant be assessed on the same basis.

[3] There is no doubt of the general force of such a position. But, when it comes to applying the controlling rules of uniformity and equality, the proper authorities often meet with difficulties which call for the exercise of painstaking judgment and discretion. In the present case we have an illustration of such complexities. In Shoshone county much personal property appears to have been assessed on a basis of full value; it is certain that at least mining improvements, mills and machinery, were so valued, while stocks of merchandise were assessed at invoice prices or less, and lands were valued at figures varying from 50 to higher percentages of value. Of the total valuation of $31,828,640, property valued at $23,677,806 appears to have been assessed on a basis of approximately 75 per cent. valuation. Of the remainder, $8,150,834 in value, it may be there was some undervaluation by the county assessor; but without satisfactory proof the court cannot say what, if any, real error prevailed, and cannot safely undertake the task of fixing the real market values of mines in an endeavor to determine relationships of the assessments made.

We gather that the undervaluation of classes of property which prevailed as referred to in Washington Water Power Co. v. Kootenai County et al. (C. C. A.) 270 Fed. 369, was by no means extensive in Shoshone county, and that as a result appellant has not made a case for relief as against the assessment of its property in the county.

The decree is affirmed.

BULLOCK TRACTOR CO. v. KNAPP et al.*

(Circuit Court of Appeals, Ninth Circuit. January 3, 1921. Rehearing Denied February 14, 1921.)

No. 3549.

1. **Principal and agent ⟸47—Sales agent has implied warranty goods will be fit for resale.**
   In a contract appointing a sales agent for the sale of tractors, which contained no express warranty in favor of the agents, but did contain a copy of the warranty which the agents were authorized to make their customers, the agents, although not entitled to the benefit of the warranty in favor of the customers, had an implied warranty that the tractors furnished them for sale would be reasonably fit for that purpose.

2. **Principal and agent ⟸47—Evidence held to show breach of warranty of fitness for sale.**
   Evidence that 13 of the 22 tractors furnished by defendant to plaintiffs, sales agents, were of defective material and manufacture, so that parts thereof wore out after a few days' operation, *held* to sustain the trial court's finding that there was a breach of the implied warranty that the tractors would be fit for the purposes for which they were intended.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 536, 65 L. Ed. —.

3. Principal and agent ⟸47—Sales agent can recover entire expenditure to perform contract breached in part by principal.

Where a sales agent incurred expenditures and devoted his time to the sale of tractors, and the sale of 13 of the 22 tractors furnished him was impossible, because of the breach of the manufacturer's implied warranty of fitness for sale, the agent can recover for his entire expenditure and services, without apportioning their value between the tractors which were sold and those which could not be sold.

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Action by J. Herbert Knapp and another, as partners, against the Bullock Tractor Company. Judgment for the plaintiffs for part only of the amount claimed, and both parties bring error. Judgment modified and reversed.

Action in damages by Knapp & Black, partners, against Bullock Tractor Company for breach of a written contract made on March 10, 1915, between Knapp, called agent, and the Tractor Company, called the company. Under the contract Knapp, appointed sales agent for the Creeping Grip tractors and attachments and repairs, agreed to receive all goods shipped under the agreement at the written request of the agent; to pay freight from factory; to keep the goods in good condition, and make good any damages resulting from improper handling or storage until sold or reshipped; to keep the goods free from charges and expense to the company; to collect from the purchaser the freight on all goods sold, and to make no charge for freight handling, storage, or other expenses, under conditions not now material; to deliver, set up, and fairly start every machine sold, and to instruct purchasers how to adjust the machines; to take a signed order from each purchaser, the order to be subject to the approval and acceptance of the company; to use or give no warranty, other than the regular warranty, which is incorporated in the order blank furnished by the company, printed on the back of the contract, and made a part thereof.

The company was to pay to the agent as commission 15 per cent. discount from the list prices which are set forth in detail, commission to be paid on machines only when sold and settled for "and none shall be paid on machines returned nor on orders, nor on repairs furnished gratis on machines." The agent was to receive, as commission on all repairs for tractors or attachments, 25 per cent. off the list price, and the agent agreed to pay all freight and express on the same, the agent to be responsible for all tractors purchased and ordered in writing through him and shipped under the contract, and to make settlement promptly for same with the net cash price named in the contract, after deducting the expressed commission on all machines so ordered in writing by him under the contract as provided. All machines ordered, repair parts, or goods shipped were to be held by the agent as the exclusive property of the company until the purchase money was paid in full. The company agreed to use its best efforts to complete and ship all machines ordered, and was not to be held responsible for damage in case of inability to furnish the goods or any part thereof. The contract was not to be binding upon the company until approved by an officer thereof, and it could not be changed in any of its provisions by any person without the written approval of an officer of the company at Chicago.

On the back of the contract was a warranty and a form of order for the purchaser to sign. The order set forth that the purchase was made subject to all the conditions of agreement and warranty printed on the back of the order and made a part thereof; the purchaser also agreeing that the tractor should be held as the exclusive property of the company until the purchase money was paid in full. The warranty was in effect that the tractor would be well made of good material and durable, if used with proper

care. The company agreed to furnish free defective parts within a year, and if upon three days' trial with proper care the tractor should fail to work and notice were given to the agents, a capable expert would be sent to give assistance to the operator.

The company denied all claim for damages, and set up that there was but one contract, and that upon computation of debits and credits there was a balance of $5,020.23 due the company. This sum was arrived at by taking the amount received by the agents, $13,061.38, and deducting the amount remitted, $6,283.03, which leaves $6,778.35. From this a deduction of 15 per cent. of the amount received is made, which leaves $4,819.14, and the difference between $4,819.14, claimed to be due the company, and $5,020.23, is alleged to be for parts.

The case was tried to the court, which found that the contract was continued by mutual consent up to and including June 30, 1916; that prior to the execution of the contract plaintiffs had not seen any of the tractors, and had no opportunity to examine them, but that defendant warranted the tractors to be well made, of good material, suitable to do the work usually done with horses and mules; that plaintiffs relied upon the representations and warranties, and thereupon and by reason thereof made the written contract already referred to, and agreed to act as agents of the defendant, and rented a suitable place; that they received from defendant twenty-two tractors and parts, paid the freight thereon, and stored and cared for the same, and advertised and exhibited the tractors, and did all they could to promote sales and expended $9,771 in advertising, storage, and other expenses. It was found that Knapp, one of the plaintiffs, gave his entire time to the business from April 1, 1915, to July 1, 1916, and that his services were reasonably worth $2,000; that Black gave his entire time from February 1, 1916, to July 1, 1916, and that his services were worth $600. The court found that the tractors were not as represented and warranted, were not well made, would not do the work designed, were not free from defective materials and workmanship, but that in vital parts the materials of which they were made were inferior; that when experts endeavored to demonstrate and operate the tractors, they would apparently work well for three or four days, but in practical use in the control of skilled mechanics they would fail to work satisfactorily; that the tractor proved to be wholly unfit for the uses for which they were intended and were not durable, and that the parts would wear out within three or four days. It was found that there was a large demand for tractors such as those had been represented to be, but that there was no demand for tractors such as defendant furnished; that defendant agreed to remedy the defects, and that before the tractors were proved to be imperfect plaintiffs sold a few, but that the defects soon were known, and that thereafter all of the tractors were unsalable; that nine tractors and some parts were sold during fifteen months, for which plaintiffs were paid the gross sum of $13,061.38, of which $6,283.03 was paid by plaintiffs to defendant, and $6,778.35 was retained by plaintiffs and applied in payment of necessary expenses already referred to. It was also found that plaintiffs lost their entire time spent under the contract, by reason of the defective tractors and the inability to sell the tractors; that they lost the amount expended in endeavoring to carry out the contract, except in so far as the sum was offset by the $6,778.35 retained from the gross receipts; that plaintiffs had accounted to defendant for all goods, except one harrow, and that the goods, except the harrow, had been sold or returned, and that damages sustained by plaintiffs should be diminished by the value of the harrow, $60; that during the time from the first delivery of the tractors to plaintiffs, to June 30, 1916, plaintiffs frequently notified defendant of the defects, and defendant promised to remedy the faults, and that by reason of the promises plaintiffs continued to work under the contract, trying to remedy defects, until June 30, 1916, when defendant failed and neglected to remedy the defects, and refused to attempt to furnish workable and salable tractors; that the nine tractors which were sold were sold after expenditures were made in attempting also to sell tractors which were defective; but the court found that the amounts expended in

connection with the sale of the nine tractors and those which were not sold could not be apportioned, and also that it was impossible to determine the amount of time spent by plaintiffs in selling the nine tractors and the time spent in attempting to sell tractors which were not salable.

Defendant was found guilty of a breach in furnishing to plaintiffs 13 unsalable tractors, while plaintiffs were found to have faithfully endeavored to carry out the contract. The court awarded plaintiffs as damages $600, and as a conclusion of law gave judgment for $540, which was evidently $600, less $60, the value of the harrow not accounted for. The $540 was evidently computed as in addition to the $6,778.35 retained by plaintiffs.

Bicksler, Smith & Parke, of Los Angeles, Cal., for plaintiff in error and cross-defendant in error.

Ray W. Bruce, of Los Angeles, Cal., for defendants in error and cross-plaintiffs in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] Keeping in mind that by the terms of the written contract of agency the agents were authorized to make sales pursuant to the provisions of the contract, it is clear that the agents had authority to give a purchaser the warranty printed on the back of the contract of agency. This warranty was that the tractors sold would be made of good material and durable if used with proper care, and that in the event any trouble with the tractors was due to defective material or workmanship, and an expert could not make the tractors work well, then the purchaser should immediately return the tractor to the agents and the price should be refunded which should constitute a settlement in full of the transaction. But as between the principal and the agents there was no warranty stipulation other than such as the law implied. The implication of law, however, made it the duty of the Tractor Company, the maker of the tractors, to furnish to the agents tractors reasonably fit for the general purposes for which the manufacturing company authorized the agents to sell the tractors (Williston on Sales, § 232; Bucy v. Pitts Agricultural Works, 89 Iowa, 464, 56 N. W. 541); and considering the nature of the subject-matter, it is obvious that the general purpose of a creeping gasoline tractor for farm work is to do such work as has been usually done by horses and mules.

[2] Do the findings show that this implied warranty was broken? The specific findings are that certain of the tractors furnished to the agents were defective in both materials and workmanship; that the vital parts subjected to heavy wear, and which should be made of the best materials obtainable and highly tempered, were made of soft and inferior metals and wore out within three or four days; that the tracks would not remain in their proper positions; that the pistons would wear out in less than a month's use and that the engine heated to such an extent in so short a length of time as to make the tractors wholly unfit for practical use on farms and in orchards in California, and that the engines would not develop enough power to draw the load the tractor was designed to draw; that they were not durable and were wholly unfit to do the work for which they were designed, notwithstanding the fact that skilled and experienced mechanics were employ-

ed to operate and adjust them. In plain words, the tractors were not reasonably fit for the purposes intended and were not salable. For breach of the implied warranty we believe the agents can sustain this action. Little v. G. E. Van Syckle & Co., 115 Mich. 480, 73 N. W. 554. While in many respects the warranties given to the purchaser and the implied warranty are similar in effect, the express warranty given to the purchaser went beyond the conditions of the implied; for instance, as to notice of defects being given by the purchaser within a certain time. The agents are therefore confined to the implied warranty for upon that they made their contract with the manufacturer.

In Wood Mower & Reaping Co. v. Thayer, 50 Hun, 516, 3 N. Y. Supp. 465, there was a contract between the Mower Company and one Thayer, by which the company gave to Thayer exclusive right to the sale of machines within certain territory. The complaint pleaded performance by the company and delivery of machines. Defendant admitted the agreement, but denied performance, and pleaded that the company had delivered imperfectly constructed and unmerchantable machines and machines unsuitable for the purposes for which they were manufactured. The Supreme Court of New York held that the contract construed with reference to the nature of the business implied a warranty on the part of the company that the machines should be reasonably fit for the purposes for which they were intended, and should be salable. The court said:

"Otherwise, how could the defendant sell them? Or, how could he realize anything from them either for the plaintiff or himself? The evidence shows that the machines, if made in a good and workmanlike manner, and of proper materials, were reasonably fit for the purpose for which they were made, and were salable. Unless these machines should be of this character, the whole business would be wrecked at the outset. Instead of * * * salable machines the defendant would have a mass of rubbish. * * * Here the defendant was the factor of the plaintiff for the express purpose of making sales of plaintiff's machines, and it was of the essence of the contract that the machines should be salable."

We approve this reasoning and sustain the right of the plaintiffs below to a judgment.

Let us now turn to the question of damages. Plaintiffs below sold nine tractors during the fifteen months for which they were employed, and collected from purchasers for the nine tractors and repairs therefor the gross sum of $13,061.38. Of this amount they paid to the Tractor Company $6,283.03, which left $6,778.35 retained by plaintiffs to be applied on the payment of $14,330.99, made up of time expended, $2,600, commissions, $1,959.20, plus $9,771.79, expenses which the court found had been necessarily incurred by them in rent, freight, advertising, telegrams, and other incidental items connected with the handling of tractors and parts. From this there should be deducted 15 per cent. of $13,061.38 commissions, which is $1,959.20. This left $12,371.79, from which there should be deducted $6,778.35, the amount retained, which leaves (after deducting $60 on account of the harrow) $5,533.44, which plaintiffs below claim they are entitled to recover.

[3] But the court found that, nine tractors having been sold as salable, the portions of the expense heretofore referred to incurred by

plaintiffs, which related to the nine tractors could not be separated from the expenses in connection with the efforts to sell the tractors which could not be sold. Nor could the court make apportionment with respect to the award for time spent in connection with tractors sold and those not sold. But as the court found that the Tractor Company was guilty of a breach and that the agents lived up to their obligations under the contract, the damages to the plaintiffs would be the amount which would compensate them for all the detriment proximately caused by breach of the contract or which in the ordinary course of things would be likely to result therefrom. United States v. Behan, 110 U. S. 338, 4 Sup. Ct. 81, 28 L. Ed. 168; Grosse v. Peterson, 30 Cal. App. 482, 158 Pac. 511; Blair v. Brownstone Oil & Refining Co., 35 Cal. App. 394, 170 Pac. 160. It would therefore follow that the agents should recover the actual expense to which they were put in living up to their contract.

There can be no recovery for profits that the agents would have realized by performing the contract because there is no specific finding that plaintiffs lost profits. The actual loss by way of necessary expenditures for which they are entitled to recover is $9,771.79. They are entitled, however, to recover for value of time and services, because under the findings Knapp diligently and honestly gave his entire time to the business from April 1, 1915, to June 30, 1916, and his services were worth $2,000, while Black gave his entire time between February 1, 1916, and June 30, 1916, and his services were worth $600. United States v. Behan, supra.

We conclude, therefore, that as against $9,771.79, found to have been actual and necessary outlay, there are no credits other than $6,778.35, allowed by the court as an offset. This leaves $2,993.44 and the value of the services. Sixty dollars for the harrow unaccounted for should be deducted. Knotts v. Clark Construction Co., 249 Fed. 181, 161 C. C. A. 217.

The judgment rendered was erroneous, and is set aside, and the cause is remanded, with directions to the District Court to render judgment in favor of plaintiffs below in accordance with the views herein expressed, together with interest and costs.

Modified and reversed.

OLYMPIAN DREDGING CO. v. SOUTHERN PAC. CO. et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921. Rehearing Denied March 9, 1921.)

No. 3527.

1. Navigable waters ⇐20(6)—Railroad company removing old bridge bound not to leave obstructions.

A railroad company authorized to build a new bridge over a navigable river and to remove the old one is bound to see that no part of the old bridge is left which is an obstruction to navigation or which is likely to become an obstruction under conditions reasonably to be anticipated, and

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

it is not relieved from such obligation by compliance with specific conditions imposed by the War Department in granting authority to rebuild.

2. Navigable waters ⟸20(5)—**Railroad company liable for injury to vessel by submerged piles of old bridge.**

A railroad company and its lessee, which under the lease assumed the building of a new bridge on the lessor's road over the Sacramento river and the removal of an old one, both *held* liable for injury to a vessel caused by parts of piles of the old bridge left submerged when it was destroyed, and which, because of a jetty built by the government prior to such removal, resulting in changing the channel of the river, became dangerous obstructions to navigation.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit in admiralty by the Olympian Dredging Company against the Southern Pacific Company and the California Pacific Railroad Company. Decree for respondents, and libelant appeals. Reversed and remanded, with directions.

Libel in personam against the Southern Pacific Company and California Pacific Railroad Company filed by Olympian Dredging Company to recover damages arising out of a collision of the dredger Thor with certain submerged piles in the Sacramento river. The allegations of the libel are that the piles were negligently left in the river by the respondents at the time of the removal of a certain railroad bridge.

The District Court dismissed the libel on the ground that there was no liability, and from a decree entered in favor of the respondents appeal was taken. In brief the evidence showed these facts:

In 1858 a wagon road bridge was built across the Sacramento river connecting the city of Sacramento with the county of Yolo in California. In 1869 the California Pacific Railroad Company, respondent, obtained a franchise to run its railroad across the 1858 bridge. In 1878 the California Pacific Railroad Company built another bridge above the 1858 bridge, and the 1858 bridge was destroyed. Later, in 1896, the 1878 bridge was destroyed. In 1895 the California Pacific Railroad Company had permission from the War Department of the United States to build another bridge across the Sacramento river. In 1909 another bridge was built above the 1895 bridge. It will thus be observed that the 1858 and 1878 bridges were located above the present, or 1909, bridge, while the 1895 bridge was below the present bridge.

About midnight of July 13, 1918, the dredger Thor, 120 feet long, 58 feet wide, drawing between 5 and 6 feet of water, was moving down the Sacramento river drifting with the current with the bow of the dredge upstream, and when about to enter the draw of the present or 1909 bridge she struck upon one or more partially destroyed piles, and her hull was pierced and she sank, in about the center of the east draw channel of the 1909 bridge. The divers said that there was a bulge about 4 feet square in the upper floor inside of the hull underneath the hatch; that there was also a hole with a pile sticking up on the aft end of the port side on the Yolo county side; that there was also a hole in the rake where a pile from a cluster went through; that the tops of these piles were ragged as though they had been blasted off, not sawed off square; that some stuck up 4 or 5 feet higher than others; that they sawed off several feet of these piles in order to free the dredge. The depth of the water in the draw at the time of the collision was not less than 7 feet, and according to respondent's diagram put in evidence

the tallest pile of a certain cluster in the river was 4 feet 6 inches below zero on what is called the K street Sacramento gauge. But it is plain that there was not sufficient clearance for the dredge when the accident occurred.

When the War Department gave a permit to the California Pacific Railroad Company to build the 1895 bridge, one of the conditions imposed was that the railroad company remove the piles constituting the structure of the 1878 bridge "to a depth of 7 feet below the level of the lowest low water, being a reading of 7.5 feet on the Sacramento, Cal., K street gauge." Accordingly some of the piles of the 1878 bridge were blown off by dynamite placed in the river bed against the piles, and some appeared to have been cut off several feet below the bed of the stream as it existed at that time. The bed of the river was lowered in 1893 by the construction of a jetty by the government on the Yolo side of the river just above the point where the accident occurred, and some dredging was done by the government at a point below the place of the accident. Undoubtedly there has been a "scouring out" of the river for many years, and there was a material change in the flow at the point of the 1878 bridge, so that the extreme low-water mark, as fixed by the Secretary of War in the original permit, was in 1918 approximately 7 feet lower, although the depth of water was really not less. Obviously under such conditions piling which had been blown or cut off in 1895 below the mark prescribed by the War Department extended much higher above the low-water mark when the Thor was damaged.

James S. Spilman and Haven, Athearn, Hall & Chandler, all of San Francisco, Cal., for appellant.

Geo. K. Ford and Elliott Johnson, both of San Francisco, Cal., for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] When the railroad company built the new bridge there was an obligation upon it to remove any piling that had been used in support of the 1878 bridge, and which then constituted an obstruction to navigation, or which, considering the general character of the Sacramento river and the reasonable probability that in the future its bed in that vicinity would be materially shifted, would become an obstruction. We believe such a standard is correct generally, and is to be applied to the facts of the present case, where the railroad company knew that the channel of the river was a shifting one, and with such knowledge left piles standing in the bed of the river at places where it was reasonably probable the channel would shift. The piles could have been removed entirely, but for reasons of its own not material at all to be inquired into the company chose to cut the piles off and to leave them submerged where under changed conditions which ought to have been anticipated and guarded against they became a positive menace to navigation. It is, of course, highly important that there be no unnecessary obstruction to the navigation of rivers; hence it is a salutary rule that one who lawfully constructs a bridge across a river for railroad or business purposes must not only not obstruct free navigation at the time of construction, but must exercise diligence in guarding against dangers fairly to be anticipated. Among cases bearing upon the question we cite Vessel Owners' Towing Co. v. Wilson, 63 Fed. 626, 11 C. C. A. 366; N. P. R. Co. v. United States, 104 Fed. 691, 44 C. C. A. 135,

59 L. R. A. 80; State v. So. Carolina R. Co., 28 S. C. 23, 4 S. E. 796. Philadelphia, W. & P. R. Co. v. Philadelphia & Havre de Grace St. Co., 23 How. (64 U. S.) 209, 16 L. Ed. 433, is cited by both sides. There the piles in the channel were cut off under the surface of the water and became a hidden and dangerous nuisance as the result of negligence in cutting off the piles, "not at the bottom of the river, but a few feet under the surface of the water." We cannot draw the implication that the Supreme Court meant that, if the piles had been cut off at the bottom of the river, negligence could not be inferred. On the contrary, the court said it was the duty of the railroad company to take care that all the obstructions to the navigation which had been placed in the channel by their orders and for the purpose of their intended erection should be removed. Thus it seems to us was a general obligation recognized.

[2] Respondents say that the act of the railroad company in leaving the piles in the river bed was not the proximate cause of the accident, but that the construction of the jetty above the bridge site and the dredging operations below it were the cause. It may be granted that those two latter things had the effect of changing the channel of the river, and that as a result the level of the river was reduced. But when the 1878 bridge was destroyed in 1895 the railroad company knew that the channel was shifting, and knew that in 1893 the government had constructed a wing dam directly by the 1878 bridge for the very purpose of throwing the current of the river and the channel from the Yolo to the Sacramento side. For years there was knowledge that the shifting current would in all probability change the channel over to where the piles were submerged in the bed, and in constructing the later bridges the draw span was moved farther over toward the Sacramento side.

Under the circumstances and with the knowledge possessed, we think the railroad company cannot avoid liability upon the ground of an intervening cause. It was the failure to remove the piles left in the shifting stream that caused the damage, and the shifting of the channel, so far as it became a contributing force, ought reasonably to have been considered. The Santa Rita, 176 Fed. 890, 100 C. C. A. 360, 30 L. R. A. (N. S.) 1212; Vessel Owners' Towing Co. v. Wilson, 63 Fed. 626, 11 C. C. A. 366. Nor is the question of liability affected by the fact that the conditions imposed by the War Department were complied with; for plainly the restrictions so imposed did not define the measure of liability of the railroad company to third persons rightfully navigating the river. Maxon et al. v. C. & N. W. R. R. Co. (D. C.) 122 Fed. 555. It is said that the liability of the Southern Pacific Company has not been established. The evidence is that the 1878 bridge was destroyed by the maintenance forces of the Southern Pacific Company and that the permit for the construction of the 1895 bridge had been issued by the government to the California Pacific Railroad Company; it being the custom for permits for bridges to issue to the corporations, not necessarily the leasing and operating company. It appeared that the Southern Pacific Company leased the California Pacific Railroad Company under an agreement dated No-

vember 1, 1886, and that the provisions of the lease made it the duty of the Southern Pacific Company to keep and maintain the property leased in good order, condition, and repair, and operate, maintain, and add to and better the same at its own expense. If it be assumed that there was no obligation under the lease which required the Southern Pacific Company perpetually to care for property abandoned by the California Pacific Company, it is none the less true that the Southern Pacific built the 1895 bridge and destroyed the 1878 bridge, and in a practical way interpreted the provisions of the lease as requiring it not only to build the bridge that it built, but to do those things which it was under obligation to do in the way of keeping the channel free from obstructions which had been left there at the time of the construction of the 1895 bridge.

The decree dismissing the libel is reversed, and the cause is remanded, with directions to determine the amount of the appellant's damages upon the evidence in the case, and enter a decree therefor.

PRESIDIO MINING CO. et al. v. OVERTON et al.*

(Circuit Court of Appeals, Ninth Circuit. January 17, 1921.)

No. 3253.

1. **Courts ⇐356—Case tried de novo on appeal under federal equity rules.**
While proper consideration will be given to the findings below, an equity case is triable de novo upon appeal under the new equity rules, especially where the evidence is chiefly documentary and the oral testimony of witnesses largely uncontradicted.

2. **Corporations ⇐320(14)—Minority stockholders' relief confined to specific performance of contract.**
Where a stockholder and director of a mining company acquired, with his own money, adjoining ore land which he leased to the company and offered to convey to it on being reimbursed for the purchase price, his title cannot be declared fraudulent on a bill by minority stockholders, and relief will be confined to decreeing specific performance of the conveyance.

3. **Corporations ⇐320(13)—Receiver not appointed for solvent mining company on complaint of minority stockholders.**
In a suit by minority stockholders, alleging that a defendant stockholder and director had fraudulently acquired adjoining ore land which he had leased to the company, evidence that no fraud had been practiced, that the company was solvent, etc., *held* not to authorize appointment of a receiver to liquidate the company's affairs.

4. **Corporations ⇐320(11)—Evidence held to establish good faith of majority stockholder and director as to acquisition of property leased to company.**
In suit by minority stockholders, evidence that defendant majority stockholder and director had acquired adjoining ore lands which he had leased to the company and that he had publicly stated his willingness to convey such property to the company on being reimbursed for its purchase price, etc., *held* to establish that he had acted in good faith.

5. **Corporations ⇐320(14)—In suit by minority stockholders, held that specific performance of contract by corporate director might be decreed.**
Where a director of a mining corporation acquired adjoining ore land which he leased to the company and offered to convey to it on being

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 535, 65 L. Ed. —.

reimbursed for the purchase price, a suit by minority stockholders seeking to establish a constructive trust on the property and for receivership proceedings need not be dismissed, but the court has discretionary power to decree specific performance of the conveyance, under Judicial Code, § 269 (Comp. St. § 1246), as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), authorizing judgment after examining the entire record without regard to technical errors.

Gilbert, Circuit Judge, dissenting.

On rehearing. Former judgment (261 Fed. 933) affirmed.
See, also, 261 Fed. 1023.

R. T. Harding and Henry E. Monroe, both of San Francisco, Cal., for appellants.

William Denman and Wm. F. Rose, both of San Francisco, Cal. (Charles Clyde Spicer, of Los Angeles, Cal., and William B. Acton, of San Francisco, Cal., of counsel), for appellees.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

PER CURIAM. It should be stated that it appears that, after the filing of the amended bill and before the filing of the supplemental bill, an application was made to the court and to Judge Van Fleet for the appointment of a receiver and that after argument the court, by Judge Van Fleet, denied this motion and made an order refusing to dismiss the amended bill or to strike out parts thereof, and further that the application for the appointment of a receiver was denied without prejudice.

It also appears that after Judge Van Fleet had made this order of denial of receiver, a supplemental complaint was filed wherein the allegations of conspiracy to control the directorate of the corporation are made and thereafter trial was had on the pleadings as so amended. The receiver was not, however, appointed until the trial and until testimony had been introduced by the plaintiffs which they contended supported their allegations of conspiracy.

[1] The original opinion in this case is reported in 261 Fed. 933. That opinion is objected to by plaintiffs in this rehearing on the ground, among others, that the court treated the case as a trial de novo in this court and that the court did not give to the opinion of Judge Van Fleet that consideration it was entitled to receive under the practice in equity proceedings. The case was tried de novo in this court as required by the equity practice. In 4 Corpus Juris, 726, the rule in Equitable Proceedings is stated as follows:

"Under the old chancery practice and usually under the Codes of Procedure, suits in equity are tried de novo on appeal upon the entire record and evidence. The appellate court itself will sift the whole question and determine what the findings of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact."

See New Equity Rule 46, to which Hopkins in his new Federal Equity Rules adds this note:

"By empowering the trial court to pass upon the admissibility of the evidence and providing for the appellate review of questions of evidence, the

rule restores the practice as it existed prior to 1842 as explained in Blease v. Garlington, 92 U. S. 1, 23 L. Ed. 521."

In American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129, in the Circuit Court of Appeals for the Seventh Circuit upon a petition for rehearing the appellant claimed that the court in affirming a decree of the District Court without filing a written opinion had either expressly or impliedly held that, under the new equity rules, the decree of the trial court upon a disputed question of fact was binding upon the appellate court. In answer to this objection, the court said:

"We had no intention of being so understood. Under the new equity rules, as well as under the old ones, the reviewing court has the right, and owes to itself and to the parties, the duty, of trying the question of fact de novo. Under the old rules, the findings of the trial court were entitled to be treated as very persuasive, and such findings were not to be disturbed, unless it appeared quite clearly that the trial court had either misapprehended the evidence or had gone against the clear weight thereof. We conceive that the new rules have made no change in those respects. Cases now are ordinarily to be heard by the trial judge in open court, while formerly they were ordinarily referred to a master. But under either set of rules, if the witnesses have been heard in open court, one element that rightly enters into the reviewing court's consideration of the evidence de novo is the opportunity of the trial judge to estimate the credibility of the witnesses by their appearance and demeanor on the stand. Espenschied v. Baum, 115 Fed. 793, 53 C. C. A. 368."

Also Westermann v. Dispatch Printing Co., 233 Fed. 609, 147 C. C. A. 417, where, in an equity case on appeal, Judge Denison for the Court of Appeals of the Sixth Circuit said:

"It follows that we must decide the questions of fact as well as * * * of law, * * * save that, under familiar rules, the conclusion of the trial court on questions of fact will not be lightly disturbed."

This is the established rule of this circuit. We believe this to be a correct statement of the equity rule. Where evidence is conflicting and the trial judge has had the opportunity of seeing the witnesses, observing their demeanor, while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony, the finding of the trial court is persuasive and presumptively correct, but not conclusive. U. S. v. Grass Creek Oil & Gas Co., 236 Fed. 481–484, 149 C. C. A. 533.

In the present case, the opinion of this court and its findings of fact were based upon the pleadings, letters, documents, exhibits, transcripts from books of accounts, the report of a public accountant appointed by the District Court, and the uncontradicted testimony of witnesses—all in the record. This character of the evidence made it the duty of this court to examine the record and find the material facts for itself.

We are not here dealing with any serious or material conflict of testimony obtained from witnesses who appeared and testified in open court and where the court was called upon to determine the credibility of witnesses from their appearance or demeanor on the stand, but we are dealing with testimony, much of it uncontradicted and with the proper construction of a variety of written documents

and accounts and their relation to each other in certain business transactions extending over a period of years. That this may appear fully and distinctly, we again refer to the facts as they appear in the record.

[2-4] The Presidio Mining Company had owned and worked section 8 under the superintendency of the defendant Noyes since 1883. It was a silver-producing mine, and in 1907 the high grade ore had been practically exhausted and Noyes recommended to the board of directors of the company the installation of a cyanide plant for the more efficient and economical working of the ores. The stock of the company was divided into 150,000 shares of the value of $1 each. The installation of such a plant would require the levy of an assessment of at least 10 cents per share on the stock. The question of levying such an assessment was submitted to the stockholders for their action.

Objection was made by stockholders, coming mainly from General Anson Mills, living in the East, owning 17,000 shares and the predecessor in interest of the plaintiffs in this suit. This objection is contained in a letter to John F. Boyd, the president of the company, dated April 26, 1907, and states the objection as follows:

"My dear Boyd: Yours of March 1st, with inclosure, was duly received, and I beg your pardon for the gross neglect I have given you, especially as you have always been so kind and upright with me in our dealings with the Presidio business. I have now your second letter of the 18th instant. I had no adequate excuse for my neglect, but will explain that when your first letter was received the slump in the stocks of railways and industrials was in progress and as Mrs. Orndorff, who lives with me, and I have a great deal invested in that line we did not feel like taking any action until we saw how that matter was coming out, which is still in agitation. Then comes the great political excitement, which will probably keep the financial matters in a turmoil for the next year; then comes the silver slump, so we did not feel like joining you in the cyanide proposition and do not yet.

"Of course you know more about such matters than I do, but it seems that it would be rather risky to put $70,000 in the business as it stands now, I suggest that it would be better to shut down for at least a year; discharging all employees save two or three inexpensive men to watch the property; sell off all the transportation property and other property that is expensive to maintain and await for future developments. If the country settles down to the business basis of a year ago and silver rises to, say, 60 cents, I think we might start the cyanide process up at the mine, as you suggest in your last letter, saving the expensive transportation.

"Thanking you for your kindness and regretting that I had neglected you so long, I am,

"Very truly yours, Anson Mills."

In response to this objection of Mills, the board of directors directed the closing down of the mine and milling property of the company and the discharge of all the employees. At that time John F. Boyd, the president of the company, owned 36,966⅔ shares of the stock of the company in his own name and 20,265⅔ shares as trustee for his wife, Louise A. Boyd, making a total of 57,232⅓ shares. Boyd immediately resigned the presidency of the company, and he and his wife transferred their stock to one Osborn, who had been the secretary of the company since 1887; but with the direction to Osborn that Noyes should have one half of the stock if he so de-

sired. Noyes accepted the stock but requested that it remain in the books of the company in the name of Osborn. Boyd's proposal to transfer half of his stock to Noyes was because Noyes had been the superintendent of the mine since its organization in 1883, and had made it highly profitable for the stockholders during his superintendency. Osborn thereupon became the trustee of one-half of the Boyd stock for the defendant Noyes; but the stock was not transferred on the books of the company until December 13, 1912.

On September 16, 1907, Mills wrote to Boyd as follows:

"My Dear Boyd: I have again neglected you very kind letter regarding the Presidio Mine, partly because I have been moving around, but principally because at the time I received it the great disturbance in the financial world was going on and is still in progress, affecting me as I suppose it affects you—railroad stocks and bonds, and there is no telling when it is going to end; so I take it for granted that you would not be willing to put in the new process under existing circumstances.

"I am going down to Presidio del Norte some time soon, probably next December, and will visit the mine and learn all I can about it, as of course I want to save it if it is possible, and whatever I can of the investment I have in it. Mrs. Orndorff is living with us at present and she agrees with me that it would be inadvisable to make the investment under the present circumstances.

"Yours very truly, Anson Mills."

On June 2, 1908, Mills wrote to Boyd as follows:

"My Dear Boyd: I have two of your letters, unanswered, and must explain that I was confined to my bed most of the time after January first with grip and other afflictions, but I am now well again and want to thank you for the interest you have always taken in the Presidio mine.

"I have lost my confidence in it, however, and hardly expect to receive anything further, but I want to ask you this question: Am I in any way personally responsible for future assessments should it run into debt?

"I know that the last few years has been very hard on you financially owing to the destruction of the city, but we have all been restricted financially owing to the hard times, which seems to be improving now.

"Yours very truly, Anson Mills."

The average price of silver per ounce at this time was 53 cents. It is evident Gen. Mills wished to avoid further responsibility for the mining operations of the company.

In reply to this letter Boyd appears to have written to Mills that he had disposed of his (Boyd's) stock to Osborn, and in answer to Mills' inquiry as to his liability as a stockholder, he wrote (as appears from a pencil note on the Mills letter) as follows:

"As a stockholder of the Presidio mine you are responsible in the proportion that the stock held by you bears to the capital stock for all debts and obligations incurred by it while you are such a stockholder."

In reply to this letter, Mills wrote Osborn under date of June 18, 1908, as follows, from Washington:

"My Dear Mr. Osborn: Mr. Boyd has informed me that he has disposed of his holdings in the Presidio mine to you and has retired from the presidency.

"Under the circumstances, I feel disposed to dispose of my interests. Are you willing to make me an offer? If so, please do so. You are aware of the extent of my holdings.

"Perhaps Mrs. Orndorff would be willing to consider an offer for her holdings, also.

"Yours very truly, Anson Mills."

On September 7, 1908, Mills wrote to Osborn as follows:

"Dear Sir: Inclosed please find my certificate for 15,000 shares in the Presidio Mining Company with transfer indorsed on the back thereof as follows: Ten thousand shares to Winfield S. Overton, No. 2 Dupont Circle, Washington, D. C. Twenty-five hundred shares to Carl A. Martin (Capt. & Quartermaster Fort Leavenworth, Kansas). Twenty-five hundred shares to Kathleen C. Kline, the Crown Hotel, Providence, Rhode Island.

"Please make out new certificates and forward to the addresses above designated.

"Yours very truly, Anson Mills."

On December 22, 1908, Mills wrote to Osborn as follows:

"My Dear Mr. Osborn: I inclose you herewith two certificates Nos. 7 and 8, representing 1,000 shares in the Presidio Mining Co., which I desire transferred to Winfield S. Overton, 2 Dupont Circle, Washington, D. C., and have made proper endorsement on the back of said certificates.

"Please make the transfer and send the new certificates to Capt. Overton at above address.

"Yours very truly, Anson Mills."

Capt. Overton is a son-in-law of Gen. Mills.

After Capt. Overton became a stockholder in the Presidio Mining Company in September, 1908, he received from Mr. Noyes, the manager of the company, the annual reports to the stockholders in which the operations of the company during the preceding year were set forth. It does not appear, however, that Capt. Overton took any notice of these reports or made any inquiry concerning the operations of the company or the workings of the mine, until March, 1915, when with his wife he came to San Francisco to visit the Panama-Pacific International Exposition. In his testimony upon the trial he said he then came in contact with the officers of the company. He first saw Mr. Osborn, the secretary of the company, in the office of the Presidio Mining Company. Mr. Osborn offered to take him to see Mr. Noyes. Capt. Overton said he wanted to know something about the affairs of the company just in a general way. His wife was present with him at that time. Mr. Osborn took them to see Mr. Wm. S. Noyes at his office in the Mills Building, and they had rather a general and pleasant conversation with him. Capt. Overton asked Mr. Noyes and Mr. Osborn generally about the affairs of the company; what the prospects were for getting any money out of it. Osborn said he had been offered quite a good price for the stock but had not sold it.

Section 5 had been mentioned by Mr. Noyes in his annual reports and the possibility that the Presidio Mining Company might purchase it at the price he paid for it. Capt. Overton made inquiry concerning it. Mr. Noyes said he bought it for sentimental reasons but was very sorry he bought it, that, a widow (Mrs. India Scott Willis), an old friend of his, owned considerable stock (in the Presidio Mining Company), and that he bought section 5 in order to enable her to get some dividend out of it, but that she had died

since and he was now sorry that he bought it because he had no interest in that respect and he wished he had his money back.

Capt. Overton inquired about the meaning of "one-half" (referring to the lease of section 5 to the Presidio Mining Company dated November 19, 1913); he said that, being a farmer, he divided the net after all expenses had been deducted, and he asked Mr. Noyes if that was the case in this instance and Noyes told him that it was. Capt. Overton asked Noyes if an actual account was kept by the mine of the cost of mining and milling and if the "cream" was divided, and he said it was. Overton asked Noyes for a letter to the mine, where he was going on his way East, and Noyes gave him one to Mr. Gleim, the superintendent, requesting him to show Capt. Overton the mine. Capt. Overton went to the mine on his way East; that was in April, 1915. Gleim met Capt. Overton and his wife at Marfa with an automobile and took them to the mine at Shafter, where they remained over night at Gleim's home. Gleim took them through the mine and showed them the plant. Capt. Overton expressed to Gleim a great surprise at seeing such a splendid equipment because the mine seemed to be a going concern and not a dead one.

In the evening Capt. Overton asked Mr. Gleim to show him the records where the expenses of mining and milling from section 5 were kept. Mr. Gleim said no such record was kept there. Capt. Overton said, "Then Mr. Noyes has told me a falsehood." Mr. Gleim said he could not help it there was no such record kept there. Capt. Overton inquired whether it was possible to arrive at what half of the net was without keeping the expenses there, and he said it was not. Mr. Gleim said Noyes did not even want a detailed statement from him, and to illustrate he showed Capt. Overton a blueprint where Noyes had written across in red ink: "I think this is getting too d——d fine." Gleim pointed that out as showing that Noyes did not want details. It was a blueprint where they put down the assays and things of that kind. Mr. Gleim said Noyes wanted him to figure everything under two heads, "general expense and mining expense—mining and milling."

It appears that Mr. Noyes and Capt. Overton did not understand each other as to how or where the detailed reports were kept, whether at the mine or in the office in San Francisco, or whether section 5 and section 8 were being worked as one mine or separately. Capt. Overton told Gleim that "Noyes had lied and was a liar." Upon the trial Capt. Overton was asked on cross-examination:

"Do you mean to say that Mr. Gleim did not in detail explain to you that one-half of the net was arrived at by stope assays, and by keeping the tonnage separate from the two mines, and didn't he tell you that he kept accurate stope assays of section 5 and accurate stope assays of section 8 and that he kept an accurate account of every ton of ore that came out of section 5 and that he kept an accurate account of every ton of ore that came out of section 8?"

Capt. Overton answered: "I do not know." But Capt. Overton insisted that Gleim told him "that" he (Gleim) "knew nothing of how one-half of the net was arrived at, * * * that he worked

section 5 and section 8 * * * as one mine and absolutely knew nothing about the details at all—they treated them as one mine." This testimony of Capt. Overton with respect to this matter is flatly contradicted by Mr. Gleim and by the reports themselves.

This controversy resulted in Capt. Overton refusing to ask any further explanation from Mr. Noyes concerning the operations of the company and undoubtedly became one of the contributory causes of this suit.

Mr. Gleim showed Capt. Overton the annual report of the stockholders, which Overton had not then seen, but he found his copy when he arrived home in Washington. Capt. Overton went over this annual report with Gleim. He testified that he saw in this report that Noyes claimed that the company owed him a very large sum for the operation of section 5 for his half of the net. He went over the report mathematically with Mr. Gleim and said to Gleim: "If those figures be true section 8, our section, must have been run at a tremenduous loss. Has it done so?" Mr. Gleim said: "No, it has not done so." Overton said: "Well, if Noyes made so much and the mine made nothing the difference must have been a loss. You must have mined and milled every ton of ore at a loss." Mr. Gleim said: "That was not so." Capt. Overton testified:

"I then said, 'These figures reduce this report—using a Latin expression reductio ad absurdum,' and he said, 'Yes.' It was Mr. Noyes' report that we were referring to. I stayed there overnight and I told Mr. Gleim that I was going to make an investigation; that things could not be right and there had been too many falsehoods told me."

What was there in this discovery tending to show that the mine was being operated at a loss? The report referred to was the annual report of Mr. Noyes as vice president and manager for the period of 16 months ending December 31, 1914. Referring to that report we find that the "very large sum" which Noyes claimed they owed him was $42,822.40. Turning to the preceding page of that report we find the following:

Mr. Gleim's report shows an operating profit of $67,014.10 (for the sixteen months ending December 31, 1914); the disbursements at San Francisco (comprising administration expenses, taxes, insurance, interest and exchange, and legal expenses) of $20,959.04 leaves a final net for the year of $46,055.06. To this net was added the increase in bills payable during the year $21,753.39, making a total of $67,808.45 to account for. Out of this total the following capital expenditures were made:

Mill (additions to)	$10,929.19	
Tramway	24,752.32	
Surface tracks	4,346.22	
Total additions to plant		$40,027.73
Ore purchased	$15,689.90	
Supplies (additions to)	3,714.56	19,404.46
Total payments		$59,432.19
Increase in cash on hand		8,376.26
		$67,808.45

Turning to the report of Klink, Bean & Co., the court's official accountants, we find that they reported that the operative profit on ore taken from section 5 from January 1, 1913, to December 31, 1915, was:

1913	$ 78,837.82
1914	72,389.72
1915	75,004.18
Total	$226,231.72

But Capt. Overton's complaint was that while Mr. Noyes had $42,822.40 due him on December 31, 1914, the mine had made nothing; that this could not be right and he was going to make an investigation. What is the answer to this criticism of Mr. Noyes' report? It is this: The company had put in some absolutely necessary improvements for the economical operation of the milling property, viz., the cyanide plant, a tramway, and track, improvements which were of course an expense of the company to be paid for by the company out of its share of the profits.

When on the trial the defendants were proceeding to prove the cost of these improvements by the testimony of Mr. Noyes, the plaintiffs' counsel, having examined the books of the company, offered to stipulate that there was paid for the cyanide plant $35,000, approximately $20,000 for the tramway, and $24,000 for the track improvements—all on the property—totaling $79,000. The actual amount, as appears from the books, was $79,359.03. On December 31, 1914, the company had these improvements on its property as its share of the profits and Mr. Noyes had then due him $42,822.40 as his share of the profits.

After leaving Shafter and the mine, Capt. Overton went home to his farm in Maryland, where he studied the annual report more closely, the one he found there on his arrival or shortly after. He then wrote to members of his family who had large sums involved and proposed to raise a fund for investigation. Capt. Overton returned to San Francisco, arriving here on July 6th, to start an investigation. He testified that he went to the office of the company with a Mr. Glidden and found Osborn there. He told Osborn that he believed he had been deceived by the reports about the low price of silver and the low grade of ore and that he was going to find out. He asked to look at the books. Prior to this time he knew nothing as to the cost of the operation or the cost of conducting the business of the Presidio Mining Company except in a general way. He first asked about the salaries of the officers. He understood that Noyes was getting $450 a month. He knew nothing else. He knew that Osborn was the secretary and Wm. S. Noyes was the vice president and general manager because that was in the annual reports. He did not know that B. S. Noyes was an officer, director, or president or anything else. That did not appear in the annual report. In the course of the investigation, the first thing Overton went after was these large salaries. In the course of the examination Glidden had the minute book. He called to Overton and said, "Well, here is where the graft is," and they found the $45,000 bonus resolution.

When Capt. Overton saw the bonus resolution of $45,000, he told Osborn that $3,000 of that was his (Overton's) money and he wanted to know what it was done for; what these extraordinary services were, and he said: "Well, he got the lease for the Silver Hill Mill & Mining Company." Overton asked why he had never known about it; why the stockholders had never been informed, and Osborn said: "There are the books. You could have known it." Capt. Overton stated that this was on November 19th (evidently referring to the lease of that date), and he said to Osborn:

"Mr. Noyes got $45,000 for getting this contract and he promised to see it extended and investigated, and instead of that at the end of ten months he canceled it himself."

The "bonus resolution" is a misnomer. It did not provide for the payment of money as additional compensation or as compensation at all, but for ore delivered by Noyes from section 5 to the Presidio Mining Company. This fact was set forth in the defendants' answer and clearly established by the evidence. The answer is as follows:

"This defendant avers that said resolution of February 15, 1913, was not intended to authorize or provide for the payment of any bonus to this defendant, but was intended to confer upon the officers of said Presidio Mining Company authority to settle with him for ore delivered to the said Presidio Mining Company from said section 5 in accordance with said previous agreement or understanding, namely, that the said Presidio Mining Company should account to the said Wm. S. Noyes for the one-half of the net profits of all ores derived from said section 5, and that the partial payments in said resolution provided for were designed to equal, as nearly as possible, the estimated one-half of the said net profits, and they did so equal, approximately, one-half of the said net profits. That said resolution was further intended only as a temporary expedient until this defendant could acquire the legal title to said section 5, and be in a position to legally contract as a lessor."

Overton told Osborn that he was going to make a thorough investigation and push this thing to the limit, and Osborn replied:

"We have got more money than you have got, and if you do this we will ruin you and make a beggar out of you."

Overton told Osborn that threats never scared him and he was going ahead. He did go ahead with his examination of the books of the company, and on July 26, 1915, as a result of such examination, he verified the original bill of complaint filed in this action. The bill of complaint contained recitals from the proceedings of the Presidio Mining Company as set forth in the minutes of the board of directors of the corporation, a copy of the lease of January 25, 1913, attached to the bill of complaint, wherein the Silver Hill Mill & Mining Company leased to the Presidio Mining Company, upon specific conditions, section 5 for the term of one year, but containing the express provision that the lease should terminate on 30 days' notice given in writing from either party to the other party to the contract; and also in the body of the complaint there was set forth the resolution of February 15, 1913, wherein the corporation agreed to pay to Wm. S. Noyes for valuable services rendered the corporation the sum of $45,000 to be paid in installments at times specified, provided the earnings of the company should be sufficient to make the payments at such times; and if the earnings were not sufficient then as

fast as the earnings of the company would permit. There was also attached to the bill of complaint a copy of the lease dated November 19, 1913, wherein Wm. S. Noyes, who in the meantime had become the owner of section 5, leased to the Presidio Mining Company for the term of one year, that section upon certain specified conditions, provided that the lease, like the one of January 29, 1913, should terminate on 30 days' notice given in writing from either party to the other party to the contract.

As said in our previous opinion:

"It was the mixing of the ores from section 5 with the ores from section 8 that made the mining and milling operations of the Presidio Mining Company profitable. Without such ores the operations of the company would have been unprofitable. The latter had a mill, but no ore in section 8 of sufficient value to make the working of the plant under the pan-amalgamation process profitable. Noyes had ore in section 5 of sufficient value, but he had no mill to reduce the ore, and the evidence was that the building of an independent mill for section 5 alone was not justified by the amount of ore in sight. * * * What, then, could be more practicable and profitable than to bring these two properties together, by an arrangement or agreement such, as we find in the lease of November 19, 1913, wherein it was agreed that the Presidio Mining Company would pay Noyes one-half of the net value of all the ores taken from section 5? The advisability of bringing these two properties together is admitted by the plaintiffs and is made the basis of this suit." 261 Fed. 945.

The company was solvent at the time this action was commenced, and at all times since January, 1913, it has been solvent and a going concern. Capt. Overton in April, 1915, expressed his great surprise to Mr. Gleim at seeing such a splendid equipment because the mine seemed to be a "going concern and not a dead one." It is nowhere charged that Wm. S. Noyes was insolvent or that he was not able to respond in damages.

The defendants moved the court (Judge Dooling) to dismiss the bill of complaint on the ground that it did not state facts sufficient to constitute a cause of action. Judge Dooling granted the motion on the grounds that—

1. The bill did not show that section 5 was bought with the money of the Presidio Mining Company.

2. It did not show that the lease of November 19, 1913, was not profitable to the Presidio Mining Company.

3. It did not show that Wm. S. Noyes was not the owner of section 5.

4. It did not show any legal or equitable interest of the Presidio Mining Company in section 5.

If the complaint did not show that the company had any legal or equitable interest in section 5, it did not show any grounds for the assertion of either a resulting or a constructive trust.

The plaintiffs were given 20 days within which to file an amended bill of complaint stating a cause for the granting of equitable relief.

On September 25, 1915, plaintiffs filed their amended bill of complaint, verified as before by Capt. Overton, in which matters set forth in the original bill of complaint were restated with some amplification and with the copies of the original exhibits attached to the complaint.

The case set forth in the amended bill of complaint, like the case stated in the original bill of complaint, was based upon recitals contained in the minutes of the board of directors of the corporation, upon the lease of January 25, 1913, the resolution of the board of directors of February 15, 1913, and the lease of November 19, 1913.

Three days after the filing of the original bill of complaint, to wit, on July 29, 1915, Capt. Overton sent to Mr. Gleim in Texas the following letter:

"The Montclair, 995 Pine St., San Francisco, Cal., July 29, 1915.

"Dear Mr. Gleim: Well, you see I have struck and struck hard. I shall pursue these men to the end of the trail and shall live here the rest of my life if necessary.

"I have telegraphed Mr. Stevens to ask the El Paso papers to say that I hold you in highest esteem—you are the only clean official in my opinion. .

"In going over the books I learn we pay some one $46 a month regularly from the S. F. office to spy on you. I asked Osborn who the spy was but he said 'I don't know. Only Mr. Noyes knows who he is.' So be discreet.

"You will never have them over you again. I expect I shall have quite a little to do with it hereafter and with honest men in the mine will be a success. Bonuses will go in dividends.

"I have told the S. F. reporters that I have only one thing to say beyond what they see in the complaint and that is, Mr. E. M. Gleim is an honorable and efficient official and is excluded in my complaint of the management.

"I think better days are in store for you. Mrs. Overton liked you and your wife too. I have not written because I did not want these people here to jump on you as assisting me—which you did not.

"I am glad I like you. I so hate those 'bonus' men up here it is a relief to recall a clean efficient official. Of course, Noyes would insist on this too for he needed all the graft.

"If I ever control the management here I pledge you my word I shall put no spy on you; I wouldn't insult a man so.

"Please regard this note only as confidential. You can show the rest all you please. It is in the press now.

"Anything you may say to me will be considered confidential but with your spy there it is best not to write me.

"Hastily [Signed] W. S. Overton."

The defendants contend that this letter discloses the fact that the real purpose of this suit and the only purpose was to enable Capt. Overton to secure control and management of the company in his own hands and not to serve the interests of the minority or other stockholders in the corporation. In support of this contention the defendants point to the silence of the minority stockholders in this action—they have not asked to be made parties to it—the extraordinary character of the charges of conspiracy and fraud contained in the original and amended bills, and the prayers for relief attached to each. The temporary injunction issued against Noyes restraining him from receiving any money from the company on account of section 5 and against transferring any title thereto; the amended prayer to the amended bill demanding the removal of all the directors and officers of the company; a sweeping injunction against all their acts as officers of the company; the appointment of a receiver to take charge of all the affairs and business of the company, authorizing him to sell the entire property and assets of the Presidio Mining Company, wind up the affairs of the corporation, including section 5, prohibiting Wm. S. Noyes and the other defendants from in any way par-

ticipating in said sale directly or indirectly or from having anything further to do with said section 8 or section 5 or with the affairs of the corporation.

This prayer for relief and Capt. Overton's letter to Gleim dated July 29, 1915, appear to have the same object in view, namely, to oust Wm. S. Noyes and his codefendants from the corporation and deprive them from any further connection with it or interest in its affairs.

The District Court in an oral opinion found that the main matter for consideration in the case was the acquisition of section 5 in the name of Wm. S. Noyes; and he finds that the property was in fact acquired by the funds of the company in this way:

"That while he manipulated the securing of the control of that section and its eventual transfer to his name by means which might upon their face bear the impress of having been procured by funds other than those of the company, nevertheless he knew at the time that he had potential control of this company and that he could procure the means or funds from the company with which to pay for this land; and that he pursued a course which brought that result about."

That is to say, the money for the purchase of section 5 was paid by the Presidio Mining Company but the title was taken in the name of Wm. S. Noyes, thereby raising a resulting trust in favor of the Presidio Mining Company, but notwithstanding this finding, in its oral opinion, the District Court directed a decree to be entered finding among other things that Wm. S. Noyes was a trustee of said section 5 for and holding the title for the benefit of the Presidio Mining Company, subject however to the payment of its purchase price of $24,009.33, together with taxes and assessments paid by said Wm. S. Noyes on section 5 and other moneys properly paid by him on account of that section. It was further provided that he be allowed interest on all of said sums from the date of payments made by him at the rate of 7 per cent. per annum. It was also provided that in and by a final decree to be entered in the case, the said Wm. S. Noyes should be ordered and directed within 30 days from the date thereof to transfer said section 5 to said Presidio Mining Company by proper deed free and clear of all liens and incumbrances; that said Wm. S. Noyes be credited with the purchase price of section 5, together with interest thereon at the rate of 7 per cent. per annum from January 25, 1913, and also any sums which might be found to have been paid by said Wm. S. Noyes, for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of 7 per cent. per annum from the date of application.

The plaintiffs claim that this decree raises a constructive trust wherein Wm. S. Noyes, while holding a fiduciary relation to the Presidio Mining Company, acquired the title to section 5, but this is not sufficient to entitle the plaintiffs to a decree which carries with it the judicial declaration of a fraudulent acquisition of the title by Noyes and that he has refused and still refuses to convey the title to section 5 to the Presidio Mining Company upon the payment of the purchase price. Noyes admits that he purchased the title to section

5 for the Presidio Mining Company. It has been judicially determined that he did so with his own money as the decree recites, and the record shows that he has been ready and willing at all times since said purchase to convey the title to the Presidio Mining Company upon being paid the purchase price. He does not refuse to convey. He does not hold the title fraudulently. His willingness to convey upon the payment of the purchase price deprives equity of its jurisdiction to declare Noyes' relation to the title fraudulent. What then remains for equity? It may decree specific performance, a remedy within the discretion of the court. Willard v. Tayloe, 8 Wall. 557-565, 19 L. Ed. 501; 25 Ruling Case Law, par. 16, and cases there cited.

There is an order in the decree appointing a receiver to take possession of all the property of the corporation including section 5 and operate the same in all its departments and ramifications as a mining and milling property. The corporation was not insolvent nor in any danger of insolvency, but was a going concern in a high state of efficiency as shown by defendants' objections to the appointment of a receiver, and the accompanying statement filed January 28, 1918, summarized as follows:

The total liquid assets of the Presidio Mining Company, consisting of bullion and supplies, were in 1913 invoiced at $38,203.28, but for which the company realized $25,884.

On August 28, 1916, three years after the new plant had commenced operations (with the exception of the tramway) the company had on hand the following:

1. The cyanide plant all paid for	$ 79,359.03
2. Mining supplies at Shafter	30,627.78
3. Bullion in transit	3,600.00
4. Bullion at the Selby Refinery	11,167.75
5. Cash in San Francisco	7,741.97
6. Cash at Shafter	32,438.94
Total	$164,935.47

And all this was accomplished by Noyes upon his own credit, without the levying of a single assessment upon the stockholders.

In the five years of the defendants' administration of the property as directors of the corporation, the assets of the complainants had increased in value to the sum of $349,285.27 as of the date of January, 24, 1918, consisting of the following items:

Cash and bullion in San Francisco	$ 63,912.03
Liberty bonds	25,000.00
Cash in Savings Bank, Marfa, Tex.	15,000.00
Cash in Marfa National Bank, Marfa, Tex.	43,154.46
Mining supplies at Shafter, Tex.	45,183.50
Permanent equipment since Jan. 1, 1913	157,036.28
Total	$349,286.27
Deduct from this amount the sum due Wm. S. Noyes for his one-half of the net proceeds under the terms of the lease of November 19, 1913, estimated as of the date above at	110,000.00
	$239,286.27

The complainants' only answer to the first mentioned statement is the assertion that all the alleged assets mentioned in the defendants' objections were on hand because of the injunction granted in the suit and the vigilance of the complainants in guarding the company's welfare. This statement is unsupported by any evidence in the record. The injunction pendente lite was issued December 12, 1916, after the property had been operating under the management of Wm. S. Noyes for nearly four years under the leases of January 25, 1913, and November 19, 1913. During this time at least four-fifths of the assets of the company were accumulated; but assuming that this answer is in some degree true, it was not alleged that the injunction was to be dissolved or that the alleged vigilance of the complainants in guarding the company's welfare was to be withdrawn. On the contrary, the objection to the appointment of a receiver was based upon the assumption that the injunction was to be continued and that section 5 would finally be adjudged to be the property of the Presidio Mining Company with a decree for its conveyance to the company. On that assumption defendants urged as a ground for their opposition to the appointment of a receiver that—

"Defendants further state that on the assumption that section 5 will finally be adjudged to be the property of the Presidio Mining Company, the company could now, with business prudence, declare a dividend to the stockholders dividing the sum of $100,000; and that these defendants, as directors of the Presidio Mining Company, are ready and willing to pay into this court, in cash and Liberty Bonds the sum of $100,000 and to stipulate the sum of $61,155.60, representing their equitable interests, as stockholders in the Presidio Mining Company in said fund of $100,000, may be held by this court as a bond to insure the payment of any money judgment which the complainants may recover, either for the benefit of the Presidio Mining Company, or for the benefit of themselves as and for costs and counsel fees in this suit."

Why was not this offer sufficient security for any decree that might be entered in the case?

There is incidentally another objection to defendants' opposition to the appointment of a receiver in the statement of the assets of the corporation. It is alleged by the complainants that these assets were subject to deductions, among others, that there must be a deduction of $50,000 and upwards for income taxes. If, as is here asserted by the complainants, the corporation was liable for at least $50,000 income taxes for the preceding year under the federal income tax law, then there must have been a net income of considerable proportion to call for such a tax. This item alone would seem to be sufficient to establish the fact that the Presidio Mining Company, when the appointment of a receiver was applied for, was a going concern of considerable efficiency engaged in profitable mining operations under the Noyes management.

As Wm. S. Noyes had been ready and willing at all times since he had become the owner of section 5 on May 26, 1913, to convey it to the Presidio Mining Company upon the payment of the purchase price, it is difficult to see what substantial or equitable matter remained for a decree in equity to operate upon. There is nothing in the evidence calling for a decree in accordance with the amended

prayer to the amended bill of complaint that a receiver be appointed to take charge of all the affairs and business of the company authorizing him to sell the entire property and assets of the corporation, wind up its affairs, including section 5, prohibit Wm. S. Noyes and the other defendants from in any way participating in the sale, either directly or indirectly, and from having anything further to do with said section 8 and section 5 and with the affairs of the corporation.

We find nothing which justifies any decree other than a decree for conveyance of section 5 by Noyes to the company upon payment of the purchase price in accordance with his offer. That Noyes in all his dealings with the Presidio Mining Company acted in good faith is abundantly established by the evidence. On January 23, 1913, Mr. Noyes wrote to Mrs. Willis, who was then the holder of 36,000 shares of the Presidio Mining Company's stock:

"I have borrowed the money and got control of section 5—to add to the Presidio later on."

In the report of Noyes dated October 6, 1913, to the board of directors of the corporation, he said:

"Early in 1913 section 5 adjoining the Presidio mine was on the market for sale. The company being unable to buy it, it having exhausted its credit on the new installation before mentioned (cyanide plant and tramway), it was purchased by the writer and an agreement made wherein this company will work it on terms of the division of the net and perhaps will purchase the same later on. Late developments in section 5 indicate that it will be a source of large revenue."

A copy of this report was sent to all the stockholders of the company, including the plaintiffs.

In Noyes' report to the stockholders dated February 20, 1915, he inclosed the report of the superintendent, Mr. Gleim, for the period of 16 months ending December 31, 1914. This is the report Capt. Overton saw at the mine in April, 1915, and a copy of which he found at his home on his return to Washington, and which he says he then studied more closely. In this report, Noyes says, among other things:

"As mentioned in the report for 1913, I bought section 5 to work in conjunction with the Presidio. It was offered to the Presidio Mining Company which was unable to buy it, and after that the contract to work it on shares was made."

In Noyes' report to the stockholders dated February 28, 1916, he makes a detailed statement of the operation of the company and says:

"The contract to buy ore from section 5 has been a source of good profit to the company, though, of course, much less than it might have been, but for the poor conditions in the silver market. * * * But for this last mentioned decline in the market price for silver the company would long ago have acquired section 5 as was originally contemplated in 1913. Provided the market remains at its present level, we should be prosperous during the coming years."

The testimony of Noyes concerning the purchase of section 5 by him, but for the Presidio Mining Company, if the company wanted it and would pay for it, was open, clear, and distinct and corresponds

to his reports to the stockholders of the corporation. It will be found stated fully in the previous opinion of this court in 261 Fed. at pages 962, 964.

The case thus presented to the court by the plaintiffs and on the trial by letters, documents, exhibits, transcripts, and books of accounts, the report of a public accountant constituted evidence of a character peculiarly subject to examination and review by the court of appeals when the case was brought to this court to be tried de novo, and our conclusions are reached after thorough and repeated examination of this evidence.

The appellees in their petition for a rehearing complain that this court did not mention Noyes' "confession" that during the entire period over which the analysis of his character extended, he was receiving a monthly graft from a contractor doing one of the largest businesses with the company. The appellees say this "confession" was forced out of Noyes while under examination. The matter referred to was a transaction with Benton Bowers relating to the hauling of freight for and the selling of wood to the company. The evidence was not forced out of the witness and was in no sense a "confession," but was related by him voluntarily in the course of his examination by his own counsel and referred to a transaction which he had stated took place some time in the 90's or the early part of 1900. The transaction grew out of the necessity of having reliable transportation and a better quality of wood for the company. To enable Bowers to start this business, Noyes took an interest with him in the enterprise. The company was benefited by the arrangement. It secured reliable transportation and a better quality of wood for the same price as before. This occurred about 15 years before the question here in controversy arose. Benton Bowers, whose testimony was uncontradicted, testified as follows:

"We made no profit the first year. We did not make any profit until we commenced to deliver this wood and began to get back the money that he had advanced on these teams and the wood that we had cut and hauled out there to dry. I delivered that wood to the company at Shafter for $6, the same price the former company had been putting it in for, but it was a very different quality of wood—a very much superior quality of wood. I hauled straight wood, split wood that grew on the bottoms, and the other wood had been scrub wood off the mountains that was very crooked. It took four or five years before we got our money back—probably a little longer before we got all our capital back. After that, what we made out of it varied according to the prices we had to pay for the stuff. We got about $100 a month out of it for two or three years, both Mr. Noyes and myself together; sometimes it would run a little more and sometimes a little less; we got $100 for each of us. After that, it commenced to dwindle down. The profit that we made out of this business was made on wagons and supplies and things we furnished the men—the equipment. There was very little profit, if there was any, made out of the wood hauled—in producing the wood. We had to buy the stumpage. The conditions when Mr. Noyes drew out of that business were that it dropped down. When they went to use oil, that cut off the use of wood, and it did not take but a few teams. After that, the equipment dwindled down to very little. It was just the provisions, feed, and stuff that was furnished. When I say that they commenced to use oil, I mean by that to use oil for fuel instead of wood, at the mill. Wood was not plentiful around that country on the Texas side; there was very little. You had to

go up into the mountains, and the wood was cut off of the mountains and carried down on burros, thrown down, because you could not get up after it in the wagon. All of the timber that grew on the mountains here was scrubby. The change from using wood to oil took place in 1902 or 1903, I do not remember which, but some time about that time."

As the company was not prejudiced in any way and as the transaction is in no way connected with the present controversy, we did not consider it necessary to discuss it in our opinion.

After a careful re-examination of the evidence and a review of the argument on this rehearing, we find no reason for changing our original opinion in any material matter. In our former opinion we found the charges of conspiracy and fraud directed against Wm. S. Noyes and his codefendants unsupported by the evidence. This conclusion left the case as Judge Dooling found it upon the insufficiency of the original complaint with respect to the controlling question in the case, namely:

1. The evidence did not show that section 5 was bought with the money of the Presidio Mining Company.

2. The evidence did not show that the lease of November 19, 1913, was not profitable to the Presidio Mining Company.

3. The evidence did not show that Wm. S. Noyes was not the owner of section 5.

4. The evidence did not show any legal or equitable interest of the Presidio Mining Company in section 5.

5. The evidence did not show that the salaries paid the officers of the company were illegal or fraudulent, but on the contrary the evidence did show that such salaries were reasonable and just.

[5] Upon this evidence we did not direct the dismissal of the action as we might have done and as the defendants insist we should have done and should do now; but in view of all the circumstances, in the interest of what appeared to be the substantial rights of the parties and an equitable and economical disposition of the controversy, we treated the action as in the nature of a notice for the specific performance of an agreement to sell section 5 with a notice to terminate the lease of November 19, 1913, in accordance with its terms and an accounting that would provide for the conveyance by Wm. S. Noyes of section 5 to the Presidio Mining Company upon the payment to him of the purchase price, together with interest and all taxes and assessments paid by him during the ownership of the property in accordance with his repeated offer. This was a remedy within the sound discretion of the court and we deemed it appropriate to the circumstances of the case and authorized by the direction contained in section 269 of the Judicial Code (Comp. St. § 1246) of the United States, as amended by the act of February 26, 1919 (40 Stat. 1181 [Comp. St. Ann. Supp. 1919, § 1246]).

Our former judgment (261 Fed. 933–965) is reaffirmed and will be re-entered as follows:

"That part of the interlocutory decree providing 'that in and by said final decree the said William S. Noyes shall be ordered and directed within 30 days from the date thereof to transfer said section 5 to said Presidio Mining

Company by proper deed free and clear of all liens and incumbrances' will stand affirmed.

"That part of the decree relating to the payment of the purchase price of the property to William S. Noyes, providing, 'that said William S. Noyes be credited with the purchase price of section 5, together with interest thereon at the rate of 7 per cent. per annum from January 25, 1913, and also any sums which may be found to have been paid by said William S. Noyes for the use and benefit of said Presidio Mining Company, together with interest on said sums at the rate of 7 per cent. per annum from the date of payments,' will stand affirmed.

"That part of the decree will run against the Presidio Mining Company and its officers and directors, and will be as of the date of February 16, 1918; the amount due thereon to be ascertained by a reference to the accountants, Klink, Bean & Co.

"The final decree will also provide for the payment to William S. Noyes of the amount due him under the lease of November 19, 1913, from January 25, 1913, to February 16, 1918; the amount to be ascertained by a reference to the accountants, Klink, Bean & Co., with direction to extend and complete their schedules as they appear in the record and are there numbered 4, 5, 6, 7, 8, and 9, so as to include in like manner, but in a condensed form, all royalties due and payable to William S. Noyes for the years 1916, 1917, and down to February 16, 1918.

"In this computation Wm. S. Noyes will be charged with $3,500, which we find was in effect paid to him on September 6, 1913, and was applied by his direction to make good a further shortage in the accounts of L. Osborn. This amount is included in the statement made by Noyes that up to December 31, 1915, he had received $63,336.20. To the amount thus found due William S. Noyes under the lease of November 19, 1913, will be added the amount found due him on the purchase price of section 5, and for the full sum so found due him the final decree will run against the Presidio Mining Company, its officers, and directors.

"The interlocutory decree in all other respects not herein mentioned will be reversed and set aside, the interlocutory injunction dissolved, and the receiver discharged. The plaintiffs and defendants will each pay their own costs in this court."

GILBERT, Circuit Judge (dissenting). There is no question of res judicata in the case. In denying the motion for the appointment of a receiver and for an injunction on the original bill, Judge Dooling denied the motions with leave to renew the same upon filing an amended bill, and said:

"The motion to dismiss will be granted unless plaintiffs within 20 days file an amended bill stating a ground for the granting of equitable relief."

No order was made dismissing the bill, and no judgment was entered. Under permission of the court an amended bill was filed. Whether that bill was in substance the same as the original bill, as the appellants contend, is unimportant. It was the bill which the appellants answered and on which, together with a supplemental bill and the answers thereto, the case went to trial, and those two bills are the only bills before this court for consideration on the present appeal, except that the original bill, having been introduced in evidence, may be referred to for whatever it may contain in the way of admissions on the part of the appellees. The general rule of law which prevails in all courts is succinctly stated in Post v. Pearson, 108 U. S. 418, 2 Sup. Ct. 799, 27 L. Ed. 774, where it was held that an order sustaining a defendant's demurrer and giving the plaintiff

leave to amend does not preclude the plaintiff from renewing or the court from entertaining the same question of law at the subsequent trial on an amended declaration. No case is found which sustains the contrary view. The decisions in C. S. M. Co. v. V. & G. H. Sawmill Co., 1 Sawy. 685, Fed. Cas. No. 2990, and Plattner Implement Co. v. International Harvester Co., 133 Fed. 376, 66 C. C. A. 438, hold only that it would lead to unseemly conflicts if the ruling of one judge upon a question of law should be disregarded or be open to review by another judge in the same cause. There was no question of res judicata in those cases. It was solely a question of the propriety of judicial conduct. There was no denial of the power of one judge to overrule the prior decision of another judge of co-ordinate power in the same court and in the same cause, but it was held that to do so would be unseemly, not that it would be reversible error. The rulings in those cases might have been presented to Judge Van Fleet as a reason why he should decline to rule otherwise than had his predecessor if identical questions had been presented to both, but it has no place here in an appellate court in aid of the proposition that Judge Dooling's decision constituted res judicata. If Judge Dooling had entered a final judgment dismissing the suit, which he did not, the judgment would of course have been res judicata as to a second or a concurrent suit on the same grounds as were disclosed in the original complaint, but not if the judgment was for the omission of an essential averment which was supplied in the second suit. Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Wiggins Ferry Co. v. O. & M. Ry. Co., 142 U. S. 396, 12 Sup. Ct. 188, 35 L. Ed. 1055; and see the decision of this court in Miller v. Margerie, 170 Fed. 710, 96 C. C. A. 30. There is no res judicata in any case in which the court, in sustaining a demurrer or a motion to dismiss, grants leave to amend, and an amended complaint is filed and further proceedings and final judgment are had thereon. None of the cases cited for the appellants holds otherwise. In point of fact the amended bill contained a number of new averments of fact tending to establish a constructive trust in W. S. Noyes, such as the allegation that the expenses incurred by him in connection with acquiring control of section 5 were paid by the Presidio Mining Company, as well as the fact that the surveying and testing of the ores from section 5 during the existence of the options which Noyes obtained were performed by the officers and employés of the Presidio Mining Company at the expense of that company.

The court below reached the following conclusions as to the facts: (1) That the original acquisition of control of the corporation by the appellants was through a fraudulent manipulation of the Osborn stock; (2) that the Osborn shortage came to the knowledge of Noyes as early as December, 1912, and that he took advantage of it, to secure from Osborn his stock without any real compensation whatsoever, and that this was accomplished by the use of funds which belonged to the company, but in a manner that never resulted in the shortage being made good to the company, that the circumstances which culminated in control of the corporation in the hands of W. S. Noyes indicated

that it was not a just and fair transaction; (3) that W. S. Noyes acquired section 5 by virtue of his control of the company and its board of directors; (4) that it was in substance an acquisition of that property by funds of the corporation; (5) that Noyes and his superintendent Gleim were the only persons connected with the company fully cognizant of the character of section 5 and its value; (6) that Noyes knew at the time that he had potential control of his corporation; (7) that he could have procured the means or funds from the corporation with which to pay for the land, and that the course he pursued brought about that result, and that the bonus resolution was with that object in view, first, to secure the means by which to manipulate the control of the Osborn stock, and, second, the bonus resolution brought about a situation which enabled him to secure the funds of the company, and that the subsequent lease of section 5 to the corporation enabled him to procure the means with which to pay the consideration which was paid for section 5; (8) that the entire transaction after Noyes got control by getting a board of directors which was absolutely under his domination shows a persistent manipulation of its affairs, in fraud of the minority stockholders, and which redounded solely to the interest of said Noyes.

The following facts in my opinion fully justify the decision of the court below: W. S. Noyes, during the 30 years of his connection with the company, sustained a highly fiduciary relation to it. Until the year 1913 he had the general management of the mining operations. On January 29, 1913, he was made director, vice president, and general manager. His duties, as he testified, remained about the same that they had been before. He said that the mining property "had been for years under my charge with full discretion down there." In his answer to the amended bill he stated that since 1882 he had been in the full charge of all the mining operations conducted by the corporation, keeping in constant touch with all the mining, milling, and reduction work carried on, and acting as consulting engineer for the corporation as well as general manager of all its mining operations. At the time when he acquired section 5 and entered into the contracts of lease, and obtained the bonus resolution, he had complete control of the directorate of the company. The lease of section 5 to the mining company was made on January 25, 1913. Noyes made the terms of it, and he was in effect both the lessor and the lessee. It reserved to him a royalty of 50 cents per ton of the ore to be taken from section 5. Three weeks thereafter he procured the bonus resolution of the corporation, which provided for payment to him of $45,000, of which $11,000 was to be paid forthwith. By the terms of the resolution the bonus was given solely for services and money expended by Noyes in obtaining the lease. But he testified that in fact it was given to secure him the rental which had been agreed upon, which instead of 50 cents per ton of ore was in fact to be one-half the net profits of the ore. A resolution of the corporation passed in November following adopts that construction of the bonus resolution.

In his answer to the amended complaint Noyes alleged that he was forced to buy section 5 without knowledge of or opportunity for investigating its value, and that it would have been a hazardous venture for the mining company in the absence of knowledge of the ores contained in that section to undertake to buy the property. This was wholly untrue. Noyes had had opportunity to know the value of the property. He had examined it and he had made numerous assays of its ores, and the mining company had borne the expense of the examination. He had discovered, as he subsequently admitted, that ore of the net value of $50,000 was then in sight. He knew that within a few months in milling in the cyanide plant then to be installed in the mining company's property the ore already developed in section 5, there would be realized, net, double the amount of the purchase price of the section. Before he even took options on the property he had made arrangements to borrow on his personal credit the money to purchase the same. If he made any suggestions to the officers or stockholders of the company that they buy section 5 for the company, there is no pretense that he ever disclosed to them the knowledge which he had acquired of the property or its value. Knowledge of all those facts was withheld. Again, it is not credible that upon the credit of the company the money could not have been obtained to buy the property. About that time Noyes had obtained on the company's credit money to install a cyanide plant at a cost of $44,000 and to make other improvements aggregating $70,000, and immediately after the execution of the lease, he had the bonus resolution passed requiring the company to pay him $45,000, a sum almost double the purchase price of section 5, and under the bonus resolution and the lease, he received within 33 days $11,000, and within ten months he received from the mining company a total of $26,503.60, a sum more than sufficient to pay the purchase price, and more than sufficient to meet his obligations for the money which he had borrowed to make the purchase of section 5. By December 31, 1915, he had received $63,000 cash, and the mining company still owed him, so he testified, $49,000. In addition to this he was paid his yearly salary of $5,400. Further facts may be adverted to as confirmatory of the view that Noyes was conducting the company's business for his individual benefit rather than for the benefit of the corporation, such as the confessed fact that he received from Bowers, who had a contract for hauling and furnishing supplies for the mining company, monthly payments out of Bowers' profits amounting to $3,195 between 1908 and 1914, for which payments Noyes admitted that there was no specific consideration "other than Mr. Bowers' friendship for me."

Noyes incurred no risk to himself in buying section 5. Before he became obligated to pay the purchase money he had ascertained that the value of the property was far in excess of the purchase price. When in November, 1913, he had received from the company sums sufficient to reimburse him for all of his outlay with interest thereon, he was in duty bound to transfer the section to the company. Instead of discharging that obligation, he took advantage of the fiduciary relation

which he sustained to the company to obtain for himself profits which in equity belonged to his corporation, and for which he should be held to account to the appellees, and he retained title to property which in equity should be impressed with a constructive trust for their benefit. Koehler v. Black River Falls Iron Co., 2 Black, 715, 17 L. Ed. 339; Wardell v. Railroad Co., 103 U. S. 651, 26 L. Ed. 509; Seacoast Railroad Co. v. Wood, 65 N. J. Eq. 530, 56 Atl. 337; H. C. Girard Co. v. Lamoureux, 227 Mass. 277, 116 N. E. 572; Meeker v. Winthrop Iron Co. (C. C.) 17 Fed. 48; Morgan v. King, 27 Colo. 539, 63 Pac. 416; Ross v. Quinnesec Iron Co., 227 Fed. 337, 142 C. C. A. 33; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; Iroquois Iron Co. v. Kruse, 241 Fed. 433, 154 C. C. A. 265.

BRIGHT et al. v. VIRGINIA & GOLD HILL WATER CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3481.

1. **Witnesses ⟸154—Testimony of party to transaction with corporation through agent since deceased incompetent.**
   Under Rev. Laws, Nev. § 5419, providing that "no person shall be allowed to testify (1) when the other party to the transaction is dead," the testimony of a witness, who was interested at the time, to a parol contract with defendant corporation, *held* incompetent, where defendant's superintendent, who is alleged to have made the contract on its behalf, is dead.

2. **Waters and water courses ⟸257(1)—Irrigation company may discontinue service on refusal to pay agreed price.**
   In an action against an irrigation company for refusal to furnish water to a consumer, an instruction that, if the jury found that a contract was made between the parties on refusal of plaintiff to pay the agreed price for water furnished, defendant was justified, after due notice, in refusing further service, *held* correct.

In Error to the District Court of the United States for the District of Nevada; Edward S. Farrington, Judge.

Action at law by Rose Bright and others against the Virginia & Gold Hill Water Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

See, also, 254 Fed. 175.

This action was instituted by Rose Bright and others against the Virginia & Gold Hill Water Company, a corporation. There was a judgment for the defendant, on the refusal of the plaintiff to amend her complaint after demurrer to an amended complaint was sustained. Upon review this court reversed the judgment of the District Court, with directions to overrule the demurrer, with leave to the defendant company to answer. Bright v. Virginia & Gold Hill Water Co., 234 Fed. 839, 148 C. C. A. 437. The complaint alleges that the defendant company was engaged in business in Nevada as a water company, impounding, ditching, fluming, storing, and distributing water for the purposes of irrigation and domestic uses for pay; that for more than 30 years plaintiffs and their predecessors owned the land described in the complaint, and the water and water rights pertinent thereto; that for

40 years defendant, by ditches, impounding waters, and use of tanks, has diverted the waters of Marlette Lake, Nev., for mining, agricultural, and domestic uses, and permitted the water so appropriated to overflow along a natural channel to the lands belonging to Garavanto, and dug a ditch to convey the overflow away from the lands, but it gave way and damaged the lands; that Garavanto prepared to bring suit against the company for such injuries by overflow, whereupon Garavanto and the defendant company made an oral agreement, whereby Garavanto would permit the overflow waters to flow across his land, and defendant would have the right of way for the overflow waters for all the time that it would be engaged in furnishing water pursuant to articles of its incorporation, and that Garavanto and his successors would have the right to divert the waters and use the same, without charge or interference, to irrigate the lands to the extent in which the overflow water then and there ran as long as defendant was engaged in the business of its incorporation and carried on its business as averred in the complaint; that in pursuance of the agreement, and in consideration of the use of the water for irrigation, Garavanto waived his right of action for damages for the injuries he had sustained, and consented that the overflow waters from the works of the defendant should run down the natural channel and ravine, and gave a right of way therefor through the lands; that in pursuance of the agreement Garavanto began to use the water, and irrigated 100 acres for 7 years, and planted crops and orchards, and increased the value of the land; that he then sold the lands to one Raffetta, through whom by mesne conveyances the premises have become vested in fee in the plaintiffs in the present action, together with the right to use the water; that under the agreement, up to the year 1913, plaintiffs and their predecessors and grantors have used the overflow water, and the same have overflowed by permission under the agreement. It is alleged that the lands are arid, and that with the consent of defendant the waters were used for 40 years in pursuant of the agreement; that in 1913 defendant cut off the water and ruined plaintiffs' crops, all in violation of the agreement and to the damage of the plaintiffs.

The defendant answered, denying the material allegations of the complaint, and putting in issue the existence of the alleged Garavanto contract, and the use and the right to the use of the water thereunder. Defendants also alleged a counterclaim for a balance on account as rental for water furnished by the defendant to plaintiffs, under an agreement or lease with plaintiffs, alleged to have been made about 10 years before 1913, and which called for delivery or let down from its works of 4 miner's inches of water during the irrigating season of each year, in consideration of which plaintiffs and their predecessors in interest agreed to pay defendant a stipulated annual rental on the 1st of July each year, and that plaintiffs owed defendant rentals for the years 1911 and 1912; that in 1913 defendant failed to furnish water, because of failure to pay the sums past due. Defendant pleaded that plaintiffs are estopped from claiming right to have the water. The plaintiffs denied the existence of any contract for water, other than that heretofore referred to in the statement of the complaint, and denied that there had been any water furnished under any agreement, except as set forth in their complaint.

The case was tried to a jury. Plaintiffs offered a witness to prove that one Overton, deceased, an officer of the defendant corporation, made the alleged Garavanto contract. The defendants objected to the testimony of such witness, on the ground that she could not testify concerning transactions had with a deceased officer of the defendant corporation. The court ruled that under the statute of Nevada such testimony was not competent and declined to receive it. After the ruling of the court plaintiffs obtained a continuance in order to prepare an amendment. When the case was again called, counsel for plaintiffs said that they would propose no amendment, having reached the conclusion that they could proceed to trial without an amendment. Defendants objected to plaintiffs proceeding under any theory other than that which had been presented at the time the continuance was given, whereupon plaintiffs' counsel announced that they were not proceeding under a new theory, but would prove the Garavanto contract, and that they intended to rely, not only upon that contract, but upon two other distinct grounds alleged in the

complaint: One, the legal duty of the defendant, a public service corporation, to furnish the water without a contract; the other, the contract called the "four-inch contract," set up by the defendant, "not as a defense to this action, but merely as an estoppel against plaintiffs to rely upon the Garavanto contract." At the close of plaintiffs' evidence, and again at the close of all evidence, defendant moved for a directed verdict, on the ground that the evidence failed to support the claim set forth in the plaintiffs' complaint. These motions were overruled, and after instructions a verdict was rendered for the defendant, and judgment was rendered accordingly. Plaintiffs then sued out writ of error.

H. V. Morehouse and Augustus Tilden, both of Reno, Nev., for plaintiffs in error.

Cheney, Downer, Price & Hawkins, of Reno, Nev., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] The plaintiffs contend that the court erred in excluding the testimony of Mrs. Raffetta, called to prove that between 1880 and 1884, when she was living upon the ranch, which then belonged to her husband and herself, and afterwards passed to Garavanto, Mr. Raffetta and Garavanto and Mr. Overton, as superintendent of the defendant corporation, since deceased, made an oral agreement whereby the defendant corporation would give to Raffetta all the water he wanted for his ranch, provided Raffetta did not bring action to enforce damages done by overflow of one of defendant's ditches. The District Court held that under section 477 of the Nevada statute (Rev. Laws, § 5419) the witness could not testify. Section 477 provides:

"No person shall be allowed to testify (1) when the other party to the transaction is dead."

In Roney v. Buckland, 4 Nev. 56, the court, discussing an earlier, but somewhat similar, Nevada statute, said:

"The answer is obvious: Because the Legislature, doubtless, deemed it injudicious and unjust to allow a person to testify in his own behalf about a transaction when the other person actually engaged in it is unable to appear by reason of death."

Crane v. Closter, 13 Nev. 280, and Vesey v. Benton, 13 Nev. 284, were also under earlier statutes and prior to the section as hereinbefore quoted. Burgess v. Helm, 24 Nev. 242, 51 Pac. 1025, was decided after 1881, and is to be distinguished, in that the testimony there admitted was not from a party to the transaction, but from a disinterested person as to admissions made by a party subsequent to the transaction. In Bagby, Adm'r, v. American Surety Co., 161 Ky. 78, 170 S. W. 492, the Supreme Court of Kentucky said of a generally similar statute:

"The whole object of the Code provision is to place the living and the dead upon terms of perfect equality, and, the dead not being able to testify, the living shall not."

See Edmonds v. Scharff (Mo.) 213 S. W. 823.

Some cases hold that one who acts as agent for another in the making of a contract is not a party thereto, within the meaning of a statute

forbidding the survivor to testify when one party to a contract or cause of action is dead, and hence such agent is competent. 40 Cyc. 2299; Clark v. Thias, 173 Mo. 628, 73 S. W. 616; Beaston v. Portland Trust & Savings Bank, 89 Wash. 627, 155 Pac. 163, Ann. Cas. 1917B, 488. But the better reasoning seems otherwise. Carroll v. United R. Co., 157 Mo. App. 247, 137 S. W. 303; Edmonds v. Scharff, supra; Williams v. Edwards, 94 Mo. 447, 7 S. W. 429. The underlying purpose of the statute being to prevent one from testifying in his own behalf about a transaction when the other person actually engaged in it is dead, we cannot see how a distinction may well be drawn between the agent of a corporation acting solely for his company and one acting in his individual capacity. See cases already cited.

Jones on Evidence, vol. 4, § 785, considers the meaning of the word "transaction," as used in a statute such as is under consideration, and defines the general policy as excluding the evidence of an interested witness concerning any transaction between himself and a deceased person, or in which the witness in any manner participated and all communication between the person deceased and the witness, including communication in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one of two or more persons, if all were interested.

"Transactions and communications embrace every variety of affairs which conform the subject of negotiation, interviews or actions between two persons and include every method by which one person can derive impressions or information from the conduct, condition or language of another."

In view of the policy of the statute we must hold that there was no error in the ruling which excluded the proof offered. After excluding the evidence the court submitted to the jury such other evidence as there was upon the question whether there was an oral agreement as alleged between Garavanto and the defendant company, and charged that while there was no direct evidence of such an oral contract there was circumstantial evidence proper for their consideration. We need not detail the testimony, for the verdict of the jury was against the plaintiffs, and thus it was determined that the oral contract did not exist. Plaintiffs say, however, that the Garavanto contract might and should have been disregarded "as surplusage," in that it could amount to nothing more than a "waiver of tolls" and "of compliance with regulations, etc., exacted of ordinary customers," and they argue that there was a relation of public service corporation and customer; that there was a "tortious diversion of the water," which was actionable as a breach of public duty, regardless of the existence or nonexistence of any contract, and that there was a waiver of conditions in the four-inch contract.

While the position just stated is a departure from that relied upon until after the court excluded the testimony of Mrs. Raffetta, we pass possible question of estoppel by reason of inconsistent attitudes, and briefly inquire into the merits of the contention. By the terms of the 4-inch contract as pleaded by way of counterclaim defendant was to furnish for plaintiffs' ranch a limited quantity of water at a certain rental. Plaintiffs denied the existence of the alleged contract or that

any water was furnished except under the agreement pleaded in their complaint. Defendant's evidence, tending to support the fact that there was such a contract, was that defendant sold water, about 4 inches, to the Bright ranch for 11 years prior to the time of trial of an action, which had been brought in the state court, under an arrangement made between the water company and a Chinaman, formerly on the ranch, but that, when the agreement for the supply of water expired, Overton, deceased superintendent of the defendant company, declined to make further agreement with the Bright ranch, or with the Chinaman, though the defendant continued to supply the same quantity of water to the ranch from year to year on the same basis as theretofore.

The water supplied, according to the testimony of Superintendent Leonard, was under the lease; it came from tanks, the intake of which ran across Washoe Valley, about 2 miles above the Raffetta ranch. From the tanks defendant had a flume, about 4,000 feet long, which took the water from the overflow and carried it into a canyon, and from the canyon it ran down to the Raffetta ranch. Witness said that there had been difficulty concerning the water between Raffetta and the company, and that he knew water was needed for irrigation in 1913, and that four inches of water were not sufficient to irrigate the land; that often more than 4 inches flowed; that the water was brought down from a lake to the intake of defendant's syphon, where there is an overflow box; that it flowed down from the overflow point when plaintiffs pay for it, but that defendant ceased to continue to deliver, because the Bright people were in arrears in the sum of $98 for 1911 and 1912 rentals, and that, although the owners were notified that if the bill was not paid the company would not supply water for 1913, nothing was done by the ranch owners; that in 1913 water was low; that explanations were made to Mrs. Bright at the time, and that effort was made to arrange with her to take the 4 inches of water from a hose connection at Lakeview, but that she declined it, and ordered water shut off, with the result that she lost her crop. The superintendent also said that the surplus water which came from the flume in 1913 would not reach the ranch in the summer, and that an overflow had to be created from Marlette Lake in order to deliver water to either one of the ranches.

[2] The court did not overlook the relationship of the defendant as a public service corporation, for it carefully instructed that to the extent of its ability defendant was under obligation to supply water to those who demanded it and paid therefor; that the consumer had a right to have water and as long as he paid current installments and otherwise conforms to reasonable regulations governing the supply; but that where the price of water had been agreed upon the law would presume a promise to pay the rate as agreed, and if the consumer refused to pay the company would be justified in shutting off the water. Again, the court charged that if the defendant notified the plaintiffs that, unless the amount due under the agreement, if there was such agreement, was not paid, defendant would not furnish any more water, and that if plaintiffs failed to pay defendants could not be held liable for damages. The court also charged that the defendant

could not deprive the plaintiff of such water merely because the company did not have sufficient waste water or sufficient water to supply all its customers, provided the jury found that plaintiffs were entitled to the water claimed by them in their complaint. The jury found that the 4-inch contract was made, and that under it plaintiffs owed defendant $98.53.

We cannot see that there was any waiver of the obligations under the contract. There was evidence that plaintiffs in July, 1913, asked for as much water as possible to be furnished by hose discharge from Lake View station to augment tank overflow, and that defendant's superintendent by letter consented, provided it was not to be construed as an admission of plaintiffs' right to have the water when defendant needed it for its business. Surely the act of defendant's superintendent was not a waiver of any of its rights in this litigation, and the requested instruction to the effect that merely furnishing water in 1913 constituted a waiver would have been misleading.

The court was right, we think, in refusing requests presenting general rules concerning the appropriation of water, and the general obligations of public service corporations with respect to the furnishing of water. The duty of defendant in the premises was sufficiently defined in the charge given, which was relevant to the issues of the case on trial.

Other requested instructions included the proposition that, while public service corporations could make and enforce reasonable rules and regulations, the question of the observance or violation of rules or regulations was not a matter involved in the case and could not be considered by the jury. In view of the issues presented by the pleadings, our opinion is that the request did not state the law correctly, and that the court was right in charging that defendant was justified in refusing to furnish the water, if, after notice, plaintiffs refused to pay, provided the contract existed as pleaded.

By another request plaintiffs asked the court to charge that the question involved was whether plaintiffs were entitled to water from the water system, and not whether or not any water delivered to or used by plaintiffs from defendant's water system was waste water, and, furthermore, that if plaintiffs were entitled to water, it was immaterial whether the water was waste or live water, and that if defendant had not sufficient waste water to supply plaintiffs' right, if any right they had, up to the limit thereof, it was defendant's duty to let down and discharge live water to plaintiffs up to said limit. There was no error in refusing the request, because the court instructed fully that, if the defendant made a contract for delivery of water to the plaintiffs, it must live up to it, unless by the refusal of the plaintiffs to pay the rental the defendant rightfully cut off the water after notice that, unless the arrears were paid up, the supply would be shut off.

We have carefully considered other points presented, and find no ground for disturbing the judgment.

The judgment is affirmed.

KETCHUM v. UNITED STATES. WELDON v. SAME. HENDERSON v. SAME.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1921.)

Nos. 5662–5664.

1. **Internal revenue ⇐2—Absolute prohibition of liquor business is "inconsistent" with regulation for revenue purposes.**
The word "inconsistent," used in National Prohibition Act, § 35, repealing inconsistent laws, has a broad meaning, and, speaking generally, a law having for its primary purpose the absolute prohibition of the manufacture and sale of spirituous liquors is inconsistent with legislation seeking to derive a revenue from such manufacture and sale by the imposition of taxes.

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

2. **Internal revenue ⇐2—Statutes regulating distilleries and liquor business for revenue purposes held repealed by Prohibition Act.**
Rev. St. § 3258 (Comp. St. § 5994), penalizing the possession of any still or distilling apparatus not registered as therein required, section 3260, as amended by Act May 28, 1880 (Comp. St. § 5997), penalizing distillers failing to give bond as therein required, section 3257 (Comp. St. § 5993), penalizing distillers defrauding or attempting to defraud the United States of the tax on the spirits distilled by them, section 3279 (Comp. St. § 6019), punishing persons working in, carrying distilled spirits from, or carrying raw materials to, a distillery not bearing the sign thereby required, and section 3242 (Comp. St. § 5965), penalizing the carrying on of the business of a retail liquor dealer without paying the special tax required by law, were repealed by National Prohibition Act, § 35, notwithstanding the provision of that section for the assessment and collection of a tax on the illegal manufacture or sale of liquors in double the amount now provided by law, etc.

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

Bill Ketchum, Charles Weldon, and Chester Henderson were convicted of offenses, and they bring error. Reversed.

M. E. Dunaway, of Little Rock, Ark. (Murphy, McHaney & Dunaway, of Little Rock, Ark., and Richard M. Ryan, of Hot Springs, Ark., on the brief), for plaintiffs in error.

June P. Wooten, U. S. Atty., of Little Rock, Ark. (R. W. Wilson, Asst. U. S. Atty., of Little Rock, Ark., on the brief), for the United States.

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

CARLAND, Circuit Judge. Plaintiffs in error, hereafter defendants, were convicted and sentenced to the penitentiary and the payment of fines upon an indictment containing seven counts. The first count charged the defendants with having in their possession and custody on March 9, 1920, in Garland county, Ark., a still and distilling apparatus for the production of spirituous liquors set up *without having the same registered as required by law.* The second count charged that at the same time and place defendants did carry on the

business of a distiller of spirituous liquors *without having given a bond as required by law.* The third count charged that at the same time and place defendants did engage in and carry on the business of a distiller of spirituous liquors *with intent to defraud the United States of the tax on the spirits distilled by them.* The fourth, fifth, and sixth counts charged the defendants at the same time and place with working in, carrying distilled spirits from, and raw materials to, such a distillery as above described and on which no sign bearing the words "Registered Distillery" *was placed and kept as required by law.* The seventh count charged that the defendants at the same time and place did carry on the business of a retail liquor dealer *without having first paid a special tax as required by law.*

The evidence at the trial showed that the offenses charged were committed, if committed at all, on the date charged. The jury found the defendants guilty on all counts, except the defendants Ketchum and Henderson were acquitted on the seventh count. The indictment charged a violation of the following sections of the R. S. U. S.: First count, 3258 (Comp. St. § 5994); second count, 3260, as amended May 28, 1880, 21 Stat. 145 (Comp. St. § 5997); third count, 3257 (Comp. St. § 5993); fourth, fifth and sixth counts, 3279 (Comp. St. § 6019); seventh count, 3242 (Comp. St. § 5965). At the close of all the evidence counsel for defendants moved the court for a directed verdict in their favor. The motion was denied, and this ruling is assigned as error.

It is urged that the ruling was erroneous because the sections of the R. S. U. S. upon which the different counts of the indictment are based had been repealed or superseded by the Act of Congress passed October 28, 1919 (41 Stat. 305), commonly known as the National Prohibition Act, hereafter referred to as the Act, and which went into effect January 17, 1920, the effective date of the Eighteenth Amendment to the Constitution of the United States. In determining the validity of the contention of counsel, we first turn to the expressed will of the Congress in relation to the subject. It is found in section 35 of the Act. Said 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. * * *"

It appears from the express language of the above 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."

The language above referred to states a general rule of law in the absence of statute applied by the courts in considering repeals by implication. We do not find it necessary to enter into a discussion of general principles, as the Congress has expressly declared what laws should be repealed by the Act. It only remains for the courts to determine what laws existing prior to January 17, 1920, are inconsistent with it.

[1] The word "inconsistent" has a broad meaning. Speaking generally, a law which has for its primary purpose the absolute prohibition of the manufacture and sale of spirituous liquors is manifestly inconsistent with the whole body of legislation which found no fault with the business of the manufacture and sale of spirituous liquors, but only sought to derive a revenue for the support of the government from such manufacture and sale by the imposition of taxes, and to prevent persons engaged in such business from defrauding the government out of the taxes imposed. In view, however, of the large volume of legislation enacted for the purpose of revenue collection, and the language of the above-quoted section, it would seem unwise to discuss the question of repeal, except as is necessarily required in disposing of the question before us. No general rule or declaration of law with reference to all revenue legislation could safely be declared but each case should be decided on its own facts and law.

[2] Coming, now, to the several counts in the indictment, it appears that the defendants were punished, not for having in their possession and custody a still and distilling apparatus for the production of spirituous liquors, but for not having said still registered as required by law; not for carrying on the business of a distiller of spirituous liquors, but carrying it on without having given a bond as required by law; not for carrying on the business of a distiller of spirituous liquors, but carrying it on with intent to defraud the United States of the tax on the spirits distilled by them; not for working in a distillery for the production of spirituous liquors, nor for carrying distilled spirits from such distillery, nor for carrying and delivering raw materials to such distillery, but the doing of these last three acts with reference to a distillery upon which no sign bearing the words "Registered Distillery" was placed and kept as required by law; not for carrying on the business of a retail liquor dealer, but carrying it on without having first paid the special tax as required by law.

As the Eighteenth Amendment and the Act absolutely prohibited the manufacture and sale of spirituous liquors, except for certain purposes mentioned in the Act, the procedure for which is provided for therein, there could have been in force at the date charged, no law which would have permitted the defendants to be in possession of a distillery such as is described in the record in this case, whether registered or not. The defendants could have in no way obtained a register of their distillery for the purpose for which they were using it. They could not have carried on the business of a distiller of spirituous liquors, even if they had given a bond, and there was no way by which they could

give such bond. The laws in force absolutely prohibited such business, bond or no bond. They could not have carried on the business of a distiller in spirituous liquors with intent to defraud the United States of the tax on the spirits distilled by them, for the reason that at the time the offense charged was committed it would have been impossible for the defendants to pay any tax, or to receive any protection even if it had been paid. There was no tax to be paid. To absolutely prohibit the manufacture and sale of spirituous liquors, and then to send persons engaged in such business to the penitentiary because they had not paid a tax on the spirits distilled, involves such a contradiction of purpose that there would seem to be no escape from the conclusion that the law requiring the payment of a tax is inconsistent beyond all reasonable doubt with the Act.

In this connection, it is proper to refer to the claim made that by section 35, above quoted, no one is relieved "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 claim is made that, notwithstanding the manufacture and sale of spirituous liquors is absolutely prohibited, still the government intends to collect revenue taxes on such business. Of course such a procedure would be legally and morally impossible. The language of the section absolutely prohibits the payment of any tax in advance, which negatives the idea that the business may be taxed in the sense of the sections of the law upon which the indictment in this case is based. In regard to the offenses of working in, carrying spirituous liquors from, or raw materials to, a distillery that did not have a proper sign upon it, it is clear that, if the sign had been there, it would have been no protection to the defendants or benefit to the United States. It would not have served any lawful purpose. They might as well have been indicted for not having the sign placed on their barn or on a tree, because the law of the country did not recognize their business, their distillery, or anything connected with it.

In regard to the seventh count, there was no law at the date of the alleged offense that required defendants to pay a special tax on the business of a retail liquor dealer, but that was what they were convicted and punished for. They could not have paid any special tax to any one, and it would have been no protection to them if they had. It thus appears plainly that the defendants were convicted and punished for omitting to do things that no law required them to do. Other courts have expressed similar views as to the sections of R. S. U. S. before them. In U. S. Windham, 264 Fed. 376, District Judge Smith, District of South Carolina, decided that sections 3258, 3279, and 3281 (Comp. St. § 6021) were repealed by the Act. In Reed v. Thurmond, 269 Fed. 252, decided November 4, 1920, the Court of Appeals of the Fourth Circuit approved the decision of Judge Smith, and

decided that section 3296 (Comp. St. § 6038) was repealed by the Act. District Judge Bean, District of Oregon, in U. S. v. Yuginni (D. C.) 266 Fed. 746, decided that sections 3257 and 3279 were repealed. These sections are two of the sections involved in the present case.

District Judge Neterer, District of Washington, in the Goodhope Case, 268 Fed. 694, decided that sections 3061, 3082, 3095, 3099, and 2865 (Comp. St. §§ 5763, 5785, 5807, 5548) were superseded by the Act. District Judge Faris, Eastern District of Missouri, in U. S. v. Stafoff, 268 Fed. 417, decided that sections 3258 and 3282, were superseded by the Act. 3258 is one of the sections involved in the case before us. District Judge Pollock, holding the District Court for the Western District of Oklahoma, in U. S. v. Fortman, 268 Fed. 873, decided generally that the Act had repealed all the general revenue laws of the government relating to intoxicating liquors. District Judge Call, Southern District of Florida, in U. S. v. One Haynes Automobile, 268 Fed. 1003, decided that section 3450 of the Revised Statutes (Comp. St. § 6352) had been repealed by the Act.

We also are of the opinion that the necessary effect of the decision of the Supreme Court in Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946, sustains the views heretofore expressed. District Judge Bourquin, District of Montana, in U. S. v. Sohm, 265 Fed. 910, decided that sections 3282 and 3260 (Comp. St. §§ 6022, 5997) were not repealed by the Act. District Judge Sibley, Northern District of Georgia, in U. S. v. One Essex Touring Auto, 266 Fed. 138, decided that section 3450 was not repealed. District Judge McDowell, Western District of Virginia, in U. S. v. Turner, 266 Fed. 248, decided that section 3296 was not repealed. It may be noted, however, that this last decision is contrary to that of the Court of Appeals for the Fourth Circuit in Reed v. Thurmond, supra, at least in principle.

We are further of the opinion that, laying aside the absolute prohibition of the sale and manufacture of spirituous liquors by the Eighteenth Amendment and the Act, the other provisions of the Act are clearly inconsistent with the laws for the violation of which the defendants were convicted.

It results from what we have said that the defendants were convicted for violating statutes which had been superseded by the Act, and that the motion for a directed verdict in their favor should have been given. For this error the judgment below is reversed.

ZENITH CARBURETOR CO. v. STROMBERG MOTOR DEVICES CO.
STROMBERG MOTOR DEVICES CO. v. ZENITH CARBURETOR CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

Nos. 2797, 2798.

1. **Injunction ⟸44—Court in equitable suit for determination of right can restrain disposition of assets.**
   The rule that disposition of assets by a party will not be enjoined until after judgment and execution returned unsatisfied does not apply, where the court already had jurisdiction of the suit for equitable relief, where the complainant's right to some relief had been established, though the amount was undetermined, and where the fund affected may be in whole or in part a trust fund for which defendant must account.

2. **Equity ⟸39(2)—Can grant entire relief after obtaining jurisdiction.**
   After a court of equity has obtained jurisdiction it may give all the relief to which the party is entitled, though some of such relief could be recovered at law, and though an original bill could not be maintained for such relief.

3. **Patents ⟸305—Infringer not enjoined from paying royalties to foreign company.**
   Where a decree finding infringement and ordering an accounting had been rendered, the infringing defendant should not, in the exercise of the court's discretion, be enjoined from continuing the payment of royalties to a foreign company for the use of patents owned by that company, the nonpayment of which might drive defendant out of business and thereby prevent recovery by plaintiff.

4. **Patents ⟸305—Relative to right to enjoin payment of royalties out of country, corporations held distinct entities, though stockholders were the same.**
   A corporation organized under the laws of Michigan is a distinct entity in law from a French corporation, though all its stock was owned either by the French corporation or by stockholders thereof, so that such foreign ownership does not affect the right of the Michigan corporation to pay royalties for use of a patent to the French corporation as operating expenses, when sought to be enjoined on a decree against it for infringement.

5. **Patents ⟸305—Payment of dividends by infringer restrained pending accounting.**
   Where a decree finding infringement and directing an accounting had been rendered, and it appeared that all the stock of the defendant, a Michigan corporation, was owned by a French corporation or its stockholders, and that the Michigan corporation was paying large amounts in dividends to the parent company, the payment of such dividends can be enjoined pending the accounting, to preserve the assets for the payment of the amount found due.

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

Suit for infringement of patent and for an accounting by the Stromberg Motor Devices Company against the Zenith Carburetor Company. From an order modifying a previous injunction restraining defendant from making payments to a foreign corporation pending the accounting, so as to permit the defendant to pay a part of the royalties, but not the balance of the royalties or the dividends, both parties appeal. Modified and affirmed.

Walter E. Oxtoby, of Detroit, Mich., and Edward Rector, of Chicago, Ill., for Zenith Carburetor Co.

Charles A. Brown, of Chicago, Ill., for Stromberg Motor Devices Co.

Before BAKER, ALSCHULER, and EVAN A. EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. This suit was brought by appellee to restrain appellant from infringing the Ahara patent, No. 684,662, and for damages. A decree sustaining the patent and ordering a reference to determine the amount due for past infringements was duly entered and subsequently modified and affirmed on appeal. 254 Fed. 68, 165 C. C. A. 478. The position of the parties and character of the two patents, the Ahara and Baverey patent, are fully described in the opinion in that case. The accounting before the master followed as a matter of course. While in progress, and before appellee had completed its introduction of evidence, it applied for and obtained an order restraining appellant from—

"* * * disposing of its assets by sending money beyond the jurisdiction of this court or sending to Société du Carburateur Zenith of France or to any one directly or indirectly connected with said French company, any funds, securities, money, goods or assets of defendant of any kind or description, for alleged royalties or to pay alleged debts or to reduce the assets of defendant which will be available to meet the judgment of the court herein, except by paying salaries, wages and material bills, etc., in the regular course of business. Leave is given to defendant to apply for a modification hereof."

An application was thereafter made to vacate this restraining order, which resulted in a partial modification; appellant being permitted to make certain royalty payments, hereinafter more specifically referred to, under the Baverey license contract. Both parties have appealed from this order.

Appellant is a Michigan corporation, whose stock is owned by a French corporation of a similar name that may be well called the parent or French company, and by the stockholders of such company. It was organized to conduct the Zenith carburetor business in the United States and enjoyed a remarkable growth. From a small corporation, into which the stockholders paid $10,000 in cash in 1911, it has developed into a large and prosperous company. The French company also enjoyed a large business in France and in other European countries, where it manufactured and sold the so-called Zenith carburetor, a carburetor in general use on many of the leading European cars. This company controlled other patents, which it considered extremely valuable. When appellant was organized, a contract was made between it and the parent company, by the terms of which a royalty was agreed upon, for the use of the Baverey and other patents. The trial judge, in modifying the original order said:

"On the 27th day of February, 1919, this court, on application of the plaintiff, restrained the defendant from disposing of assets by sending money beyond the jurisdiction of this court or by remitting royalties to the Société du Carburateur Zenith of France or from paying alleged debts, or in any way reducing its assets, except by paying salaries, wages, and material bills in the regular course of business. This order was made under quite unusual cir-

cumstances. It appeared that the defendant was owned by a French corporation of the same name, and that a large amount of money had been sent by defendant to the French company in payment of dividends and royalties on the Baverey patent, under which defendant is licensed. * * * Of course, the amount of the possible recovery cannot be determined on this motion. * * * In view of this uncertainty, the injunction should stand for the present, except so far as relates to a 5 per cent. royalty claimed to be due to Baverey. It appears that Baverey took out patents on his carburetor in France, the United States, and various other countries, and in 1910 assigned all these patents to the French company, receiving a royalty of 11 per cent. of the net selling returns, and that defendant was licensed by the French company subject to the same royalty. In 1914 this was reduced to 5 per cent. of the net sales. This royalty is a legitimate expense, and defendant should be permitted to pay it."

The original cash investment was $10,000, but further sums were paid by the stockholders into the company. In 1918 the capital stock of the company was increased to $320,000, and the French company conveyed to appellant a valuable piece of real estate as well as other tangible assets. When the injunctional order was made, appellant was paying the French company in royalties and dividends approximately $30,000 per month.

Appellant insists (a) that the court possessed no jurisdiction to make the order complained of; and (b) that it was an abuse of discretion to grant the injunctional order. Appellee complains because the court modified the original order.

[1] Contending that the court is without jurisdiction to enter the order, appellant relies on those cases, of which there are many, holding that a plaintiff, who has instituted an action upon a claim, but who has not reduced it to judgment, cannot obtain an order restraining the debtor from disposing of its assets. In all such actions the court requires that the plaintiff's claim be reduced to judgment and that execution be returned nulla bona. The present suit is distinguishable from the class of cases thus referred to in at least three respects:

(a) The instant suit has proceeded to a decree, final so far as the question of liability is concerned. National Brake & Electric Co. v. Christensen, 258 Fed. 880, 169 C. C. A. 600. True, the amount is still unascertained, and execution cannot issue, because that amount must first be determined. Appellee, nevertheless, is in the position of a creditor the validity of whose claim has been established by a judgment of the court.

(b) A second reason for distinguishing the present suit from the class of cases referred to is found in the fact that this is a suit of which a court of equity originally took jurisdiction. Having acquired jurisdiction for reasons in no way connected with the relief here sought, it will do complete justice. Quite different is an action at law, where equitable relief is sought pending the trial without showing that plaintiff has exhausted all its legal remedies. In the one suit, equity has already taken jurisdiction. In the other, a creditor is in a court of law, but asking for equitable relief without showing those facts (namely, that all remedies at law have been exhausted) upon which alone a court of equity will assume jurisdiction.

[2] The rule which is at the bottom of the decisions heretofore referred to is based on the maxim that equity will not intervene until claimant has exhausted all his remedies at law. Hence the requirement of a judgment and an execution returned unsatisfied. This rule is, in the class of cases referred to, applied to actions at law, and with such application there can be no quarrel. But the instant suit is one in equity, and another rule or an exception to this rule is applicable. For when plaintiff has established a right to equitable relief, the court will not only grant that relief, but all other relief essential to a complete adjustment of the subject-matter between the parties, although it is thereby required to grant relief obtainable at law, and which, if the object of an independent action, could be obtained at law alone. 16 Cyc. 106; Camp v. Boyd, 229 U. S. 530, 552, 33 Sup. Ct. 785, 57 L. Ed. 1317. Likewise, relief of an equitable character may be incidentally obtained when an original bill would not lie for such relief. 16 Cyc. 108. And a court of equity which has obtained jurisdiction of a controversy on any ground or for any purpose will retain such jurisdiction for the purpose of administering complete relief and doing entire justice without respect to the subject-matter. Twin City Power Co. v. Barrett, 126 Fed. 302, 61 C. C. A. 288. Frequent instances of the application of these rules of equity may be found in divorce suits where restraining orders are entered immediately upon the beginning of the suit (Smith v. Waalkes, 109 Mich. 16, 66 N. W. 679), and in foreclosure proceedings where receivers are not infrequently appointed before a decree is entered.

(c) Finally, the present suit is distinguished from the class of cases before referred to, because the fund which appellee seeks to hold may be in part or in whole a trust fund from which appellant must account to appellee for lost profits.

The question of discretion, however, presents a different issue. A court of equity may have jurisdiction to make the order, but it by no means follows that the relief sought will be granted. Should the court have restrained appellant from paying royalties and dividends?

[3] First, as to royalties: It appears that, when appellant was organized under the laws of Michigan, it secured from the parent company a license to use the Baverey patents. By the terms of this contract appellant was obligated to pay as royalty 20 per cent. of the sales in the United States. The agreement was made in good faith and long before any suit with appellee was contemplated. Later the royalty was reduced, the parties again negotiating in good faith, hoping by the change to increase sales and bring about results mutually advantageous. Baverey also reduced his royalty charge to the parent company. At the time the injunctional order was entered, the parent company was paying Baverey 5 per cent. of the sales in the United States and appellant was paying the parent company 10 per cent. of its sales.

Judge Sanborn at first enjoined the payment of all moneys to the parent company, but by the second order permitted as a partial payment under the license contract such sums as equaled the amount the parent company was required to pay Baverey—namely, 5 per cent.

Of this appellee complains, while appellant insists its obligations to pay its full royalty should not have been enjoined.

We agree with appellant. It was as necessary and as proper to permit appellant to meet this obligation as it was to authorize the payment of the other necessary operating expenses. We cannot say that the royalty payments are not necessary to the future conduct of the business. It may be that failure to pay the royalties as they become due will forfeit appellant's right to make and sell carburetors provided with the features covered by the patents upon which royalties are paid, and that without these privileges appellant would be so crippled that it would be unable to continue in business. Such a result might furnish appellee with more satisfaction than the payment of its claim, but it is exactly what the court will not lend its aid to accomplish. Moreover, the continuance of the so-called license contract may, in the last analysis, make the collection of appellant's judgment more certain. Certainly this court will not aid one litigant in eliminating a formidable rival as a business competitor.

[4] But appellee insists that, as the parent company and its stockholders are holders of the capital stock of appellant, a situation exists that justifies its contention that no moneys should be paid—certainly nothing more than the 5 per cent. of gross sales which the parent company is required to pay Baverey. In so urging its position, appellee overlooks the facts that the two companies are entirely separate entities—distinct corporations. Appellant is a Michigan corporation, subject to the laws of that state, and subject to the taxes which may be imposed upon it by the state of Michigan and the United States. There is no privity between it and Baverey. The extensive use of carburetors in the United States may well have resulted in such obligations as to make their fulfillment impossible, unless the parent company receives its payment from appellant. At any rate, we are unable to recognize mere similarity in stockholders, or one corporation's ownership of a large part of the stock of another corporation, as a basis, in a suit like this, for the abridgment of existing contracts between such corporations, contracts of long standing and antedating appellee's claim.

[5] As to dividends: A different situation is presented when we come to consider dividends. Here the amount that may be declared is uncertain. They may be declared in such sums as to defeat appellee's judgment. Their declaration is not essential to the continued operation of appellant's business. The situation is unusual, as the District Judge pointed out. Appellee's asserted claim far exceeds the amount of appellant's property. Liability for some amount has been judicially established. The measure of liability for each infringement is not easily stated. Upon the showing thus far made it would be impossible to attempt to determine it.

Moreover, it is more or less a matter of discretion, which must first be exercised by the trial judge. Any injustice or unforeseen injury may be promptly corrected by the District Judge. Moreover, a bond protecting appellee may at any time be presented and a reasonable dividend can be paid. Considering all these factors as we are required

to do on this appeal, we cannot say there was an abuse of discretion in restraining the payment of dividends.

The order is modified, so as to permit all payments of royalties, not exceeding 10 per cent. of appellant's sales in the United States, due or to become due, from appellant to the parent company, under contract between them for royalties, and, as modified, is affirmed. Appellant is to recover costs on this appeal.

THE ARPILLAO. *

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 1.

1. **Shipping ⇐132(3)—Excessive loss does not relieve burden of proving negligence.**
   Where the bill of lading for a shipment of oil in barrels contained the usual exceptions against liability for leakage or breakage, the fact that the leakage was 10 times that ordinarily to be expected is not of itself sufficient to establish a prima facie case of negligence against the carrier, but still leaves it incumbent upon libelant to show negligence overcoming the exception.

2. **Shipping ⇐132(5)—Evidence held to show negligent stowage of oil in barrels.**
   Evidence that when barrels of olive oil were properly stowed there was no direct pressure on the bilge and that the barrels in question were crushed at the bilge around the bunghole, though the vessel had encountered no unusual storms and her crew testified the cargo did not shift, *held* to show improper stowage of the oil.

3. **Shipping ⇐141(2)—Bad stowage is negligence.**
   Bad stowage of a cargo of barrels of olive oil is negligence for which the shipper can recover notwithstanding an exception in the bill of lading against leakage or breakage.

4. **Shipping ⇐132(5)—Ship's copy of bill of lading with admission of condition held incompetent.**
   The contract of shipping is the bill of lading delivered to the shipper, not that retained by the ship, so that a ship's copy containing an admission of defective barrels written above the space for the master's signature is incompetent where it was identified only by proof of the authenticity of the signature by the shipper's agent who testified contrary to the admission.

5. **Evidence ⇐407(2)—Bill of lading as contract but not as receipt is within parol evidence rule.**
   A bill of lading has a dual aspect; as a contract it is not to be varied by parol evidence, but as a receipt it is, like other receipts, subject to contradiction or explanation of proof of the facts.

6. **Interest ⇐53—Interest disallowed during time hearing was delayed.**
   Where the hearing on appeal from a decree dismissing the libel was delayed at the suggestion of libelant for more than two years with no reason being given therefor, libelant will not be allowed, after reversal of the decree and award of damages, to recover interest on the damages during the period the appeal was delayed.

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

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 377, 65 L. Ed. —.

Libel by the Pompeian Company against the steamship Arpillao; the Jose Taya Sons Company, claimant. From a decree dismissing the libel (241 Fed. 282), libelant appeals. Reversed, and damages awarded to libelant.

Libelant was the owner of about a thousand barrels of olive oil, laden on the Spanish steamer Arpillao in Spain, for carriage to New York City. The steamer arrived after a voyage subjecting her to no unusual or unexpected peril of the sea and discharged her cargo. Thirty-nine oil barrels were found entirely empty and 30 barrels more had lost part of their contents, and all 69 were more or less "pressed and crushed," according to the uncontradicted evidence of a surveyor for one of the insurance companies concerned. The oil had been shipped under bills of lading containing usual exceptions against liability for leakage and/or breakage.

Alleging negligence in the "handling, stowing and dunnaging" of the cargo, libelant brought this suit to recover as damages the value of the lost oil. The trial court dismissed the libel; libelant appealed.

Morris & Samuel Meyers, of New York City (Walter C. Noyes and Morse S. Hirsch, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones and Vine H. Smith, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It is proven that the expected and usual leakage of olive oil in barrels during a voyage across the Atlantic is, if the containers are sound and well stowed, not over 1 per cent. of the shipment. It is admitted that this cargo lost almost exactly 10 per cent.

We adhere to rulings of which the most frequently quoted is The St. Quentin, 162 Fed. 883, 89 C. C. A. 573 (and see also The Good Hope, 197 Fed. 149, 116 C. C. A. 573, and cases cited), to the effect that where the cause of cargo loss is covered by a valid exception, mere excessive or unusual loss is not in and of itself sufficient to establish a prima facie case of negligence against the carrier.

Therefore, although the percentage of loss on this cargo is in the absence of severe storms or other excessive maritime dangers most unusual, proof of this fact still leaves it incumbent on libelant affirmatively to show negligence overcoming the exception; neither the burden of proof nor the burden of evidence has been shifted by the fact of excessive loss.

That crushing and destruction of packages is some evidence of negligent stowage (Doherr v. Houston [D. C.] 123 Fed. 334, affirmed 128 Fed. 594, 64 C. C. A. 102) does not, as has been suggested in argument, militate against the rule as above stated.

[2] Thus the question presented by this appeal is one of fact only, viz., whether libelant has by a fair preponderance of evidence proved the negligence alleged in the libel, which negligence on this record must consist in bad stowage if it exists at all.

It is in evidence from both sides of the case that the barrels containing libelant's oil were good barrels, well made of excellent material; it is shown without denial that they were recoopered as they went

aboard, and it is equally well shown by photographs taken on discharge that some of the empty barrels came out of the ship crushed at the bilge, i. e., the shook containing the bung was actually squeezed in. It is said, and not denied, that the taking of photographs other than the three in evidence was prevented by the men on the receiving dock in New York.

It is also admitted that the only proper way of tiering barrels is to place them "bilge and cant-line," or "one on four." This means that a lower tier having been laid, chocked, and dunnaged, each second tier barrel rests on its bilge with the bung uppermost on the adjacent ends of the four barrels underneath. By this means, assuming a reasonable similarity in size in the tiered barrels and proper chocking, it is obvious that there will never be any pressure upon the bung, and no barrels will lie bilge touching bilge.

There is admittedly also a limit to the tiering of barrels one on the other, and it is customary and necessary to interpose platforms of planks when a tier has got high enough and then begin another tier on top of the platform. We think it shown that the tiering on the Arpillao was carried at least as high as safety permitted, but do not find it as proved that there was any absence of platforms. To go further into the details of evidence would serve no useful purpose, it being enough to state our conclusion that we consider it shown by a fair preponderance of evidence that when the Arpillao arrived in New York and lay in safety at her dock many of the barrels were lying, and were seen to be lying, bilge to bilge. We also conclude that the kind of injury shown at the bungs of the photographed barrels has not been and cannot be explained otherwise than by a finding that not only were these injured barrels bilge to bilge with some others, but that that portion of the bilge containing the bung was exposed to great and unnecessary pressure.

The direct evidence as to chocking and dunnage does not reveal by a fair preponderance of evidence any negligence in these respects; but one of two things is plainly true, i. e., the 69 barrels that were pressed and crushed were either originally improperly stowed in the particulars above pointed out, or the cargo shifted on a voyage where there is no pretense to a sea peril reasonably productive of such disaster.

[3] Respondent's witnesses, who had the best chance of seeing the cargo in situ, all say that there had been no shifting of the cargo, and there ought not to have been; but it was bad stowage so to arrange the cargo that injuries of the admitted kind occurred; and bad stowage is negligence.

[4] We think the learned court below gave weight to an offer of evidence which we reject. Claimant produced the ship's copy of the bill of lading, a document which (apparently according to some Spanish custom suggested but unproved) was signed by, or at any rate contains the signature of, a man described as the shipping agent for the buyer (of oil) of libelant. Not over this man's signature, but over the place for that of the captain (who, however, did not sign the copy), is written in Spanish, "Not responsible for breaking, leaking, some barrels leaking." No such words are found in the original bill.

It is urged that the above constitutes an admission of the condition of the cargo of great evidential value.

[5] Even a bill of lading has a dual aspect; as a contract it is not to be varied by parol evidence, but as a receipt it is like other receipts, subject to contradiction or explanation by proof as to the facts. Vanderbilt v. Ocean, etc., Co., 215 Fed., at 888, 132 C. C. A. 226. But this ship's copy is not a bill of lading at all; the contract is the paper issued to the shipper and in this case produced by the libelant. The Thames, 14 Wall. 98, 20 L. Ed. 804.

It was this shipping agent's principal who testified to his personal knowledge of the condition of the shipment as it went aboard. As against such testimony the admission (if it be one) is of no weight. But there is no other evidence concerning it except the existence of the copy bill of lading and identification of the shipping agent's signature. Under such circumstances, while not denying that a shipper may make most injurious written admissions by signing any document, we think the legend on the ship's copy was not even competent.

[6] The decree must be reversed with costs and the libelant awarded reasonable damages to be computed before a commissioner. We note, however, that the apostles on this appeal were lodged in this court in the spring of 1918. The cause appeared on our calendar for the October term ensuing. It would have been reached in regular call on or before October 11, 1918. At the suggestion of libelant, hearing was deferred until the case was set for argument on the Day Calendar of November 8, 1920, and was actually argued three days later. Except by oral statements at bar we have no knowledge as to the reason for this delay, but on this appeal libelant was the prime actor. It has presented the same case as was ready for hearing two years ago. Such delays seem to us inexcusable, and it is ordered: That upon the damages as assessed the libelant shall recover interest for a period two years and one month less than that for which it would normally obtain recovery.

ROYAL BAKING POWDER CO. v. EMERSON, Pros. Atty.

(Circuit Court of Appeals, Eighth Circuit. November 5, 1920. Rehearing Denied December 29, 1920.)

No. 5575.

1. **Courts ⟸292—Suit to protect trade-name within jurisdiction of federal court.**
   A suit to protect complainant's right to use an established trade-name or brand, alleged to be of the value of more than $3,000, *held* within the jurisdiction of a federal court.

2. **Injunction ⟸105(1)—May be granted to restrain criminal prosecutions.**
   Equity may enjoin criminal prosecutions where a multiplicity of such prosecutions are threatened either under an invalid statute or which are not authorized by statute.

3. Food ⇐½, New, vol. 15 Key-No. Series—Baking powder an "article of food."

Baking powder *held* an "article of food," within the meaning of Pure Food and Drugs Act Ark. May 28, 1907 (Kirby & Castle's Dig. § 6369 et seq.), making it an offense to misbrand "any article of food."

4. Food ⇐15—Criminal liability for violation of Arkansas Pure Food Act.

Under Pure Food and Drugs Act Ark. May 28, 1907 (Kirby & Castle's Dig. § 6369 et seq.), the seller of a misbranded article of food is subject to criminal prosecution.

5. Food ⇐1—Scope of state legislation.

Where a state law is not in conflict with the national Food and Drugs Act a broad latitude is allowed states in protecting their citizens from adulterated or misbranded articles.

6. Appeal and error ⇐895(3)—Admission of improper evidence in equity suit harmless error.

Where an equity suit is heard de novo in the appellate court the admission of improper evidence by the trial court is harmless error.

7. Food ⇐15—Test of misbranding is deception of purchasers.

The purpose of a statute against misbranding of food articles is to prevent deception through a label or brand, and to ascertain whether a given label would act deceptively, the attitude of the average buyer toward that product at the period the label is put out may be examined.

8. Food ⇐15—Baking powder held "misbranded."

Where complainant, manufacturer of "Price's Cream Baking Powder," had for many years advertised the fact that its product was made with cream of tartar, and contained no phosphate nor alum, claiming superiority and greater healthfulness on that ground, by which means it had acquired a high reputation for its product and a valuable good will, its continued use, after it had substituted phosphate for cream of tartar therein, of labels on its cans bearing the same name and having the same coloring, style of printing, and general appearance as those previously used, which would be accepted by the average purchaser accustomed to its product as denoting the same article, *held* a misbranding, although it truthfully stated the ingredients in an inconspicuous place on the back of the can, and although for a new and unknown product the label might not be objectionable.

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

9. Food ⇐15—Failure to effectively inform purchasers of change in article constitutes misbranding.

If the manufacturer of a product or article of established reputation makes a change in the article, and that change be of a character which would, considering all the attendant circumstances, naturally affect the attitude of purchasers of that article, fair dealing and the law require that such purchasers be effectively informed of that change.

10. Words and phrases—"Baking powder."

"Baking powder" is a mixture in dry form of certain alkali and acid substances, combined with a filler; and when moistened and heated, as in baking dough, a chemical reaction occurs, which liberates carbonic gas, which "raises" or leavens bread.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit in equity by the Royal Baking Powder Company against George W. Emerson, as Prosecuting Attorney. From the decree, complainant appeals. Affirmed.

Archibald Cox, of New York City (John M. Moore, of Little Rock, Ark., and Samuel W. Fordyce, Jr., of St. Louis, Mo., on the brief), for appellant.

T. M. Mehaffy and J. F. Loughborough, both of Little Rock, Ark., and John D. Arbuckle, Atty. Gen. (James Love Hopkins, of St. Louis, Mo., on the brief), for appellee.

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

STONE, Circuit Judge. Appellant has been for years a manufacturer and seller of a baking powder known as "Dr. Price's Cream Baking Powder." Until recently this powder was what is known as a cream of tartar powder, as distinguished from phosphate powders or alum powders. A few months before this action was commenced this powder had been changed to a phosphate powder, by entire substitution of phosphate for cream of tartar as the acid ingredient. Appellant thereupon altered the labels upon the cans of this powder in an attempt to avoid deception of the buying public, and at the same time to retain the good will it had, during years, built up for the Dr. Price brand. Some of these new-labeled cans of the phosphate powder were sent into Arkansas. Under the statutes of that state against misbranding of foodstuffs, the state commissioner of mines, manufactures, and agriculture is empowered to issue a certificate to the effect that an article of food is misbranded, and upon receipt of such certificate by any prosecuting attorney of the state it is his duty to institute criminal proceedings against persons selling or offering to sell such misbranded articles. Such a certificate was issued by the commissioner in regard to the above new phosphate powders made by appellant. This bill was filed against Emerson, as a prosecuting attorney and as representative of all prosecuting attorneys, to enjoin such prosecution. Upon final hearing, the court found that the certificate issued by the commissioner had been erroneously issued, because not based upon substantial evidence at the hearing before him, as required by the state statute. It, therefore, granted a permanent injunction against prosecutions based upon that particular certificate. The court, however, refused to enjoin Emerson and other prosecuting attorneys from beginning and pursuing prosecutions for misbranding "on their own initiative under the general laws of the state." From this latter portion of the decree this appeal is brought.

[1] The jurisdiction of the court is contested by appellee, upon the grounds that the jurisdictional amount is absent and that this is an attempt to enjoin a criminal prosecution. The jurisdictional amount is alleged to be the value of the good will in the long-established brand of powder made and sold by appellant. The value of this good will is not questioned, but appellee contends that its present use is a fraud prohibited by statute, and that there can be no property right or value in an unlawful brand. Of course, no right to defraud can be recognized by courts as having any claim to legally exist or be protected, or as having any value. Here, however, the appellant has had for years a valuable good will in the brand of powder known as "Dr. Price's Cream Baking Powder," and it claims that the new label is lawful and enables it to

retain this good will, and that such valuable good will thus lawfully employed is threatened with destruction by the illegal acts of appellee. If these claims of appellant are true, it has a valuable property right which is imperiled. At least, that is the substantial basis of the action as revealed in the complaint, and therefore sufficiently establishes the jurisdiction against this objection.

[2] It is true that the general rule is that courts of equity will not enjoin criminal prosecutions. The exception is that where property rights are involved, and it is claimed seriously and in good faith that the act of the prosecutor is not authorized by law, equity can act. Hebe Co. v. Shaw, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255; Greene v. Louisville, etc., R. R. Co., 244 U. S. 499, 506, 507, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88; Truax v. Raich, 239 U. S. 33, 37, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; Western Union Telegraph Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; 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. This lack of legal authority may arise because the act is within an invalid statute, or because it is not authorized by a valid statute. In either case the act is without legal sanction, is not protected by the official status of the prosecutor, and can be restrained. The complaint alleges a multiplicity of threatened prosecutions, and irreparable injury thereby through destruction of a valuable good will in an established trade brand; that such prosecutions are arbitrary, capricious, and unreasonable, and therefore not within nor authorized by the state statutes, but violative of appellant's rights, under Amendment 14, § 8, of article 1, and article 6 of the national Constitution. These contentions are apparently urged seriously and in good faith. They support the jurisdiction of the court.

The contentions made by appellant are, first, that the Arkansas statute as to misbranding does not include baking powders; second, that if such statutes do include baking powders, the only penalty provided for the sale of such as are imported into the state is a seizure of such powders through a proceeding in rem; third, that the label involved complies with the national Food and Drugs Act, and shipment of powders so branded cannot be interfered with prior to "the first sale of said packages in Arkansas"; fourth, that certain evidence was erroneously admitted and considered by the trial court; fifth, that upon the entire evidence the conclusion should be that the new label was not a misbranding.

[3] The basis of the claim that baking powder is not within the state misbranding statute are that such powder is not within the statutory term "article of food," and that the circumstances of the enactment of the statute prove that the Legislature did not intend baking powders to be included in such term, even if that term were in itself sufficient to include them. The contention as to the first ground is that baking powder is not eaten or taken into the body, but that it is merely an agency for "raising" the bread through the release of carbonic acid gas by chemical action, produced when moisture and heat in the bread dough act upon the powder. This seems an artificial view, when the fact, admitted in the record, is considered that the appellant has for

years carried on an extensive advertising campaign based on the claim that cream of tartar powders were healthful, while alum and phosphate powders were deleterious to health. The statute covers "any article of food," and was designed to protect the public from adulteration and deception. The term "any article of food" is sufficiently broad to cover any article ordinarily eaten or drunk, whether it be so used alone, or as a part of some mixture or compound which is eaten or drunk. Neither baking powder nor flour is eaten as such, but both are intended as components of bread. The purpose of the statute requires that this broad meaning be given the above term, unless the statute is to be materially crippled in its intended effect. The legal history of a similar English statute (St. 38 & 39 Vict. c. 63) as construed in James v. Jones, [1894] 1 Q. B. 304, is not persuasive in the presence of the obvious purpose of the Arkansas statute.

But it is claimed that, even though the term "any article of food" might be construed to include baking powders, yet the circumstances of enactment of this statute reveal that such construction was not intended by the Legislature. This contention is based on the claim that this statute was closely modeled after the national Food and Drug Act of June 30, 1906 (34 Stat. 769 [Comp. St. §§ 8717–8728]); that the national act (section 8), which defined misbranding, was, by its terms, made applicable "to all drugs, or articles of food, *or articles which enter into the composition of food*"; that baking powders were brought within the act only by the above italicized language; that this language is omitted from the Arkansas statute; that therefore the Legislature intended to omit such articles from the state statute. The national, as the state, act is aimed at adulteration, and also misbranding. The only language therein which could make baking powders subject to the adulteration provisions of the national act is "any article of food which is adulterated or misbranded," in section 1, and "the term 'food,' as used herein, shall include all articles used for food, drink, confectionery, or condiment by man or other animals, whether simple, mixed, or compound," in section 6.

The argument of appellant is that this language does not include such powders under the adulteration provisions of the act, because in the misbranding portions (section 8) it declares that misbranding shall apply "to all * * * articles of food, or articles which enter into the composition of food." We have neither been cited nor have we found any adjudication of this exact point in any contested case. The nearest approach is Hipolite Egg Co. v. United States, 220 U. S. 45, 31 Sup. Ct. 364, 55 L. Ed. 364, where the charge was that preserved eggs were adulterated. One point urged in that case (220 U. S. 52, 31 Sup. Ct. 365, 55 L. Ed. 364), was that the act did not apply—

"to an article of food which has not been shipped for sale, but which has been shipped solely for use as raw material in the manufacture of some other product."

The gist of that contention was that the shipment was not for sale, and no particular emphasis was placed on the character of the product. However, the court held the preserved eggs to be within the provision

against adulteration. Such eggs are not of themselves food, or fit for or intended to be used alone as food, but are designed for use with flour and other articles in making cakes. There is a guide, persuasive, though not governing, in the action of the administrative officers who have for more than a decade been charged with the enforcement of this law. In 1906, the year the law was enacted, the Secretary of Agriculture received a letter of inquiry as follows:

"We import a preparation of gelatin preserved with sulphurous acid for the purpose of fining wine. This gelatin is not used as a food and does not remain in the wine, although a small amount of the sulphurous acid may be left in the wine. Please inform us if the sale of this product is a violation of the food law."

The ruling thereon of the Secretary (Food Insp. Dec. No. 48) was:

"It is held that the products commonly added to foods in their preparation are properly classed as foods and come within the scope of the food and drugs act. * * * Pending a decision on the wholesomeness of sulphurous acid as provided in regulation 15 (b), its presence should be declared."

Regulation 15 governed "wholesomeness of colors and preservatives." Since then the department has repeatedly prosecuted the adulteration of such articles as gelatin, flour, tomato pulp, and tomato purée. None of these articles is fit for food as such, but all are intended to be used as components of food. The department has also adopted a definition and standard for baking powders. F. I. D. No. 174. So far as we are advised, this is the first attempt to contend that the above sections of the national law do not cover adulteration of all articles commonly entering into food composition. The above sections are copied into the Arkansas statute. If the omission in the Arkansas statute of the portion of section 8, above italicized, has any influence upon the construction of that statute, it is to emphasize that adulteration and misbranding are upon an equal footing so far as articles included, and that both cover all articles commonly entering into food.

[4] The second contention is that the only penalty under the state statute is forfeiture in an in rem proceeding, and that therefore prosecutions for sales are without the legal authority of the state officials. It is claimed that the personal penalties apply only to the manufacture within the state. This contention is based upon section 1 of the act, which penalizes the "manufacture within the state of any article of food or drug which is adulterated or misbranded within the meaning of this act. * * *" Kirby & Castle's Digest, § 6369; Acts Ark. 1907, p. 1156. If this were the only pertinent portion of the statute there would be much in appellant's claim. But section 6 of the act provides for the sale of adulterated or misbranded articles, and section 7 provides that—

"No dealer shall be prosecuted under the provisions of this act when he can establish a guaranty signed by the wholesaler, jobber, manufacturer, or other party residing in this state, from whom he purchased such articles. * * *"

The title of the act, to which we may refer for construction purposes (36 Cyc. 1133, note 91), is:

"An act preventing the manufacture or sale of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines and liquors and for other purposes."

[5] Appellant's third contention, which is that the new label complies with the national act and therefore shipment of powders so branded cannot be interfered with prior to "the first sale of said packages in Arkansas," is not in the case, for there is no showing that any attempt has been or will be made to apply the statute to imported original packages. It may be added that, where the state law is not in conflict with the national act, a broad latitude is allowed states in protecting their citizens from adulterated or misbranded articles. Hebe Co. v. Shaw, 248 U. S. 297, 39 Sup. Ct. 125, 63 L. Ed. 255; Corn Products Co. v. Eddy, 249 U. S. 427, 39 Sup. Ct. 325, 63 L. Ed. 689.

[6] The fourth contention is that certain evidence was erroneously admitted and considered by the trial court in reaching the conclusion that the new label was misleading. The challenged testimony may be classified as follows: Statements by grocers and others that they believed buyers would be deceived into thinking that they were buying the cream of tartar powder formerly sold under this brand; advertisements, claimed to be deceptive, issued by appellant concerning the new powder; advertisements issued by appellant prior to the change commending cream of tartar as an ingredient, and condemning phosphate and alum as ingredients. As we may examine the entire evidence which we deem pertinent, disregarding such as seems to us immaterial, and determine the issue of fact de novo, no harm can result in this court from the admission of evidence in the trial court.

[7] The final and crucial question is whether the new label on the new phosphate powder is deceptive. Appellant contends that the new label accurately and truthfully states the facts, and all of the facts; that no one, reading the label, could possibly be deceived; that a change of ingredients may be properly made and the brand name preserved, provided the label, after the change, truthfully states the ingredients; that it cannot be held responsible for deception of such purchasers as do not take the trouble to notice the plain statements on the label. The broad purpose of the Arkansas statute is to prevent deception through a label or brand. The deception must be of the average buyer of the product. Ansehl v. Williams, 267 Fed. 9, this court, filed July 15, 1920. To ascertain whether a given label would act deceptively, the attitude of the average buyer toward that product at the period the label is put out may be examined. In no other way can there be proper determination of the probable effect upon him of the label. In most instances there is no definite nor particular information as to this attitude, and therefore the average buyer, in such instances, is treated as a person of average intelligence, exercising ordinary care in ascertaining what he is purchasing. In such cases he is charged with knowledge of what the label fairly tells him. The question there gets down to the statements upon the label itself. If they are, in words, form, and arrangement, such as to fairly apprise the average buyer of the truth as to the product, they are sufficient.

[8] There are instances, however, where it can be said with fair accuracy that the average buyer has certain things in mind when he purchases a certain product. In such cases this attitude of mind is one of the circumstances bearing upon the effect of the label. Another such

circumstance is the familiarity of the average buyer with the product and the label. When a certain symbol, name, mark, or label has become established in the public mind and confidence as having a certain definite quality, composition, or integrity, it is obvious that the average buyer relies thereon and ceases naturally to scrutinize the purchased package as he would in the absence of such experience. In the present case appellant and its trade predecessors have built up a large trade and a valuable good will in the public mind in "Dr. Price's Cream Baking Powder." The brand has become established in public esteem during more than 60 years. Baking powders have long been articles of wide general consumption. What has served to establish this particular brand in public favor, and what does the buying public think it is getting when it purchases "Dr. Price's Cream Baking Powder"? The excellency of a baking powder depends partially upon the skill used in manufacture and partially upon the ingredients. This record reveals that appellant has employed commendable skill in the manufacture of its product; but there is no serious basis in the evidence for a contention that this skill is superior to competitors, or, at least, so superior as to constitute the reason for the high esteem in which the buying public has long held this brand. The record is convincing that the governing inducement in the public mind was the particular acid ingredient used by appellant. The reasons for this conclusion will be later revealed in this opinion.

[10] Baking powder is a mixture, in dry form, of certain alkali and acid substances combined with a "filler." When moistened and heated, as in baking dough, a chemical reaction occurs between the acid and alkali agents, which liberates carbonic gas. This gas is the agency which "raises" or leavens bread. The "filler" is nearly always of cornstarch, and performs the passive office of preserving the acid and alkali agents inactive until release is desired. The alkali agent is usually bicarbonate of soda. The acid agent differs, and thus gives character, name, and classification to the powder. This agent is tartrate (cream of tartar or tartaric acid), phosphate, or alum. Powders are therefore classified and known generally as "cream of tartar," "phosphate," or "alum" powders. This classification is not merely technical, but is known to the purchasing public. Cream of tartar and tartaric acid are vegetable in origin, being derived from grapes; phosphates are derived from bones and certain rocks; alum is a mineral derivative. Tartrates are more expensive than either of the others. Tartrates are wholesome in food. Although by no means unchallenged, there has long existed a well-defined opinion among scientific and medical authorities that phosphates were undesirable, and that alum was unwholesome for food usage. An active competitive warfare between baking powder manufacturers has been maintained for many years. This warfare has not so much taken the form of competition between particular manufacturers on the basis of special excellence in process of manufacture, but has been almost entirely along lines of the acid ingredient used, and has been based upon the wholesomeness or unwholesomeness of that ingredient.

Appellant has, for years, sought patronage for its necessarily higher priced tartrate powder, upon the claim that tartrates were wholesome,

while phosphate was undesirable, and alum positively injurious. Manufacturers of phosphate and of alum powders have met this challenge. The result has been an extended and widespread campaign of education of the buying public along these lines. A number of advertisements of various sorts, distributed in Arkansas by appellant, convince that the "feature" held out to the buying public why this brand should be preferred, has been that it was a pure tartrate powder. When we consider that this powder was appreciably higher priced than phosphate or alum powders, and that either of those powders would release carbonic acid gas and leaven dough, we cannot escape the conclusion that appellant has been successful in its campaign of public education, and that the moving inducement in the mind of that portion of the public which patronized this brand and created the valuable good will therein, has been that tartrates were more desirable for food than phosphate or alum. We cannot doubt that the bulk of this good will rests upon the presence of tartrates, and the absence of phosphate or alum in this powder. The purchasers who created and maintain that good will expect, and have been educated by appellant to expect, a tartrate powder when they buy this brand. The attitude, therefore, of the buying public who bought this brand, prior and up to September, 1919, and so far as shown, until the institution of this proceeding, was that when they purchased it they secured a healthy, efficient tartrate powder.

In September, 1919, appellant changed this acid ingredient to phosphate, no longer using any tartrates therein. The claim is made that recent more searching analyses and experiments have proven that phosphate is not unwholesome nor undesirable for food usages. So far as this record shows, the new phosphate powder is as wholesome and as efficacious as the former tartrate powder, and possesses the added virtue of costing the public about one half. Misbranding, however, does not rest upon unwholesomeness nor adulteration. It rests upon deception of the buyer. That deception consists in inducing him to purchase, under a given mark, brand, or label, an article which is different from that which he intends to buy, and which he has a right reasonably to suppose he is getting under that mark, brand, or label. The old powder was to disappear, with the result that its users would buy some other powder. Appellant, naturally and properly, desired to secure that patronage for the new product. It might reasonably expect that a portion, at least, of that patronage, relying upon experience of the excellence of the former powder, might prefer to buy the new powder made by it to a similar powder made by others. It had a right to inform its patrons that the source of the old and new powders was the same. This it could do in any proper and effective method, but it must do it in such a way that the average buyer would acquire the information of the change, so that he could act with that information.

We are here concerned with the label. The question is, therefore, whether, having in mind the attitude of the buying public toward the old label used on the cream of tartar powder, the new label used on the phosphate powder would probably and naturally deceive the average buyer of the new package into believing that he was getting the old cream of tartar powder. The old and new labels are as here set out.

As here reproduced, red is shown by diagonal shading; yellow is shown white; black is as in original label. The medallion colors are fully described in the opinion.

As here reproduced, red is shown as diagonal shading; yellow is shown white; black is as in original label.

These labels are pasted entirely around cans containing certain weights of powder.

If there had never been a former label, the new label would be wellnigh unobjectionable. Considering the new label, alone and apart, it states with fair truthfulness and completeness all that need be upon such a label. The word "cream" might be objectionable, as suggestive of cream of tartar, in view of the education of the public as to this ingredient. There can be no doubt, however, that any one who should read the label with any care would be informed truthfully as to the origin and acid ingredient. But we cannot disregard the earlier label. The nub of the claimed deception is, not that the new label alone and of itself is such that it would deceive a purchaser who had never before heard of "Dr. Price's Cream Baking Powder," but it is that it would, by its general similarity, deceive a large patronage long familiar with the old label. It should be added that this very patronage constitutes the good will which appellant is seeking to protect and preserve. A comparison of the two labels is therefore necessary. While an inspection of the above pictures will be sufficient to support the conclusions reached, a few observations will be helpful. Because of the greater bulk, as compared to weight, of cream of tartar over phosphate, the phosphate cans were made with a slightly raised bottom. In outside size and shape the two cans are identical. The coloring of the labels, which is black, red, and yellow, is identical. The location and size of type is identical. The differences are: Omission from the new label of the medallion (which was separately pasted on the old label, and was blue in background, with white lettering and dull gold border wreath); substitution of a bunch of golden rod for the grapes formerly held in the cornucopia design; and change in certain portions of the legend relating to the acid ingredient. The general appearance of the two labels is strikingly similar. Even if placed side by side on a grocery shelf, a few feet removed from the customer, the similarity would be evident. The probability of the customer mistaking the new for the old is increased, if only the new be displayed, for then all standards of casual comparison and contrast vanish. Buyers, who have become customers of a brand, no longer give it more than the most general inspection. They become familiar with its general appearance, and having confidence in it and what it represents, they do not expect and therefore do not look for essential change either in the article or in the label. This is the attitude of the average buyer of any product or article of established reputation.

[9] If the manufacturer makes a change in the article and that change be of a character which would, considering all of the attendant circumstances, naturally affect the attitude of the purchasers of that article, fair dealing and the law require that such purchasers be effectively informed of that change. Here the acid ingredient of the baking powder was a material consideration in the mind of the purchasing public. For years that public had been educated by appellant to prefer this brand because it contained cream of tartar, and did not contain either phosphate or alum. That public had been taught to expect cream of tartar and an absence of phosphate or alum when it

purchased this brand. The label has been long employed and has become familiar to the public. Obviously, a complete change from cream of tartar to phosphate would be an important difference in the minds of the patrons of this brand. Therefore any label on the new powder must be so different from the old label, in appearance and prominent legend, that the usual buyer, familiar with the old brand and ignorant of any change, would have his attention arrested and be prompted to suspect, if not to know, that the powders were not the same, and thus be led to investigate the label. We think the present label fails in this requirement, and constitutes a misbrand, which would probably and naturally deceive the average purchasers of the former powder. It is suggested that the difference in price would excite inquiry and investigation. The advertisements in any daily paper reveal such wide and apparently unreasonable differences and reductions in prices of all character of articles that quality has largely weakened as a basis for price in the public mind. There are other reasons, unassociated with quality, which influence change in price.

The decree of the trial court is affirmed.

BRADEN v. UNITED STATES.

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

No. 5500.

1. **Criminal law ⇐369(6)—Evidence of other sales held admissible in prosecution under Narcotic Act.**
   In a prosecution under Harrison Narcotic Act, § 8 (Comp. St. § 6287n), for having such drugs in possession, evidence of sales of such drugs by defendant *held* admissible to show that he was a person required to register under section 1.

2. **Criminal law ⇐1186(4)—Instruction as to right to disbelieve witness held not reversible error.**
   In an instruction as to the discretion of the jury with respect to the testimony of a witness whom they believe to have testified falsely, the omission to state that such testimony must have been willfully or intentionally false *held* not prejudicial error affecting defendants substantial rights authorizing reversal under Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246).

3. **Criminal law ⇐29—Unlicensed person having narcotic drugs may not be convicted on separate counts for each kind of drug found in his possession.**
   Harrison Narcotic Act, § 8 (Comp. St. § 6287n), making it unlawful for an unregistered person to have in his possession "any of the aforesaid drugs," does not authorize a conviction on separate counts for each kind of drug found in defendant's possession at the same time.

4. **Criminal law ⇐1218—Imprisonment in penitentiary for one year or less unauthorized.**
   Under Rev. St. § 5541 (Comp. St. § 10527), imprisonment in a penitentiary is unauthorized unless the sentence is for a longer term than one year.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Criminal prosecution by the United States against Albert Braden. Judgment of conviction, and defendant brings error. Affirmed in part.

George Nordlin, of St. Paul, Minn., for plaintiff in error.

William Anderson, Asst. U. S. Atty., of St. Paul, Minn. (Alfred Jaques, U. S. Atty., of Duluth, Minn., on the brief), for the United States.

Before SANBORN, CARLAND, and STONE, Circuit Judges.

CARLAND, Circuit Judge. Plaintiff in error, hereafter called defendant, was indicted on an indictment containing nine counts which charged him with violations of section 8, Act Dec. 17, 1914. 38 Stat. 789 (Comp. St. § 6287n). Counts 1, 2, 3, 4, and 5 were eliminated on demurrer. Defendant was found guilty on counts 6, 7, 8, and 9, and sentenced to the penitentiary as follows: Sixth count, five years; seventh count, three years; eighth count, one year; ninth count, one year—said terms to be served "serially and not concurrently." The overruling of the demurrer to counts 6, 7, 8, and 9 is assigned as error, but the question is not argued by counsel for defendant. Counsel for the United States rightly assumed that the question was waived, and therefore presented no argument. We must act on the same assumption. The finding that the affidavit of prejudice was insufficient was not excepted to, specified as error, or argued. The assignment of error in regard to the admission of evidence does not quote the full substance of the evidence admitted or at all, and the alleged error is not argued, and, under rule 11 of this court (188 Fed. ix, 109 C. C. A. ix), must be disregarded. Assignments of error No. 7, 8, and 11 are not argued. The sufficiency of the evidence to justify the verdict was not raised at the trial, but in the exercise of our discretion we will consider alleged defects therein. It is claimed that the evidence is insufficient to show that the defendant was a person required to register under section 1 of the act. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854. Section 1 (Comp. St. § 6287g) provides that "every person who * * * deals in, dispenses, sells, distributes, or gives away" opium or coca leaves or their derivatives shall register, etc. The law does not say "carry on the business of," etc. The evidence shows that on November 13, 1918, Paddy McSheffrey introduced to the defendant Internal Revenue Agents Feimster and Anson, who represented themselves to be automobile thieves who wished to dispose of automobiles which had theretofore been stolen. Defendant wished to know what they wanted for them, cash or dope. Anson agreed to take dope for his share. Anson and McSheffrey then accompanied the defendant to his flat, No. 490 Rice street, St. Paul, Minn. On arriving at the flat defendant sold Anson morphine and cocaine, and also sold McSheffrey morphine for which Anson paid. Anson saw the defendant again on the morning of November 14, at which time the defendant delivered to one Clayton Foster a toy of smoking opium for which Anson paid. Anson met the defendant again on November 15 at defendant's apartment, and then and there Anson arranged to buy 25 ounces of morphine from defendant at $35 an ounce. Defendant on

the evening of November 15 arranged with Anson to purchase for him, the defendant, 100 pounds of gum opium at $40 a pound. The same evening Anson purchased from defendant one dram of heroin. Anson and Feimster met defendant again at his apartment on November 16, at which time defendant sold Anson a 25-ounce box of morphine for which Anson paid the defendant $875. After this sale was made Anson and Feimster disclosed their identity, and, together with a number of men who were stationed outside of the flat, placed the defendant under arrest and searched his flat. The search disclosed a large quantity of morphine, smoking opium, heroin, and cocaine hydrochloride, as set out in the indictment. Patrick Callahan testified that he had purchased morphine and cocaine from defendant on various occasions. Edmund G. McCarthy also testified that eight or ten times a month he purchased narcotics from the defendant.

[1] In view of this evidence it is idle to contend that defendant was not shown to be a person required to register under section 1 of the act. There is no merit in the contention that defendant was procured to commit the crime with which he was charged or that evidence of other crimes was erroneously admitted. It was necessary to show that defendant was one of the classes of persons mentioned in section 1 who were obliged to register and hence to show that he sold or dealt in the prohibited drugs although he was only charged with having them in his possession. Complaint is made of an excerpt taken from the charge of the court wherein the court instructed the jury as to the testimony of any witness whom the jury might believe had testified falsely. It is objected that the excerpt does not contain an instruction that the testimony must be willfully or intentionally false.

[2, 3] No exception was taken to this portion of the charge at the trial, and there is about as many decisions in support of the language given by the court as there is of the language contended for by counsel for defendant. We do not think the omission of the words mentioned affected the substantial rights of the defendant. Section 269, Judicial Code, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246). It is further contended that the sentence imposed by the trial court is excessive. This contention is based on the fact that, although defendant was convicted on four counts, the transaction upon which said four counts are based was the finding of defendant in possession on the 16th day of November, 1918, at his flat in St. Paul, Minn., of the four different drugs mentioned in counts 6, 7, 8, and 9, said drugs being morphine sulphate, cocaine, heroin, and smoking opium, all derivatives of opium except cocaine, which is a derivative of coca leaves. Counsel for the United States contend that the words "any of the aforesaid drugs," as used in section 8, permit him to base a count upon each drug found in the possession of the defendant although the drugs were all found at the same time and place. We do not think that any such significance can be given to the word "any." The use of this word simply means that, if the defendant under the required circumstances should be found in possession of any of said drugs, he would be guilty. If a person steals four horses from the barn of another, all being of different color, it would not

be competent to charge the thief with four different larcenies when the horses were all taken at the same time and place. Another illustration would be the larceny of articles of merchandise from a store. If twelve articles were all taken at the same time and place, we do not think it would be competent to charge the thief with twelve different larcenies. If the test as to whether there were four different offenses arising out of the transaction in this case or only one was as stated by this court in Munson v. McClaughry, 198 Fed. 72, 117 C. C. A. 180, 42 L. R. A. (N. S.) 302, and followed in Stevens v. McClaughrey, 207 Fed. 18, 125 C. C. A. 102, 51 L. R. A. (N. S.) 390, there would be no question in our opinion but that the facts in this case constituted but one offense. But in Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153, the Supreme Court disapproved of the test laid down in Munson v. McClaughry, supra, and stated:

"But 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"—citing Burton v. U. S., 202 U. S. 344, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392.

Again in this same case the Supreme Court used the following language:

"As to the contention of double jeopardy upon which the petition of habeas corpus is rested in this case, this court has settled that the test of identity of offenses is whether the same evidence is required to sustain them; if not, then the fact that both charges relate to and grow out of one transaction does not make a single offense where two are defined by the statutes. Without repeating the discussion, we need but refer to Carter v. McClaughry, 183 U. S. 365, Burton v. United States, 202 U. S. 344, 377, and the recent case of Gavieres v. United States, 220 U. S. 338."

See, also, Ebeling v. Morgan, 237 U. S. 625, 35 Sup. Ct. 710, 59 L. Ed. 1151, where the cutting of different mail sacks were held to be different offenses.

[4] We are of the opinion, however, that even under the rule prescribed by the Supreme Court in Morgan v. Devine, supra, the four counts upon which the defendant was found guilty charged but one offense as it would require the same evidence to sustain each of them. This is shown when we observe that there was only one set of facts which established the offense. The sentences under the eighth and ninth counts are void as being unauthorized. Section 5541, U. S. Rev. Stat. (Comp. St. § 10527); In re Bonner, Petitioner, 151 U. S. 243, 14 Sup. Ct. 323, 38 L. Ed. 149; Ex parte Karstendick, 93 U. S. 396, 23 L. Ed. 889. The section of the Revised Statutes referred to as construed by the Supreme Court of the United States only authorizes imprisonment in a penitentiary where the imprisonment is for a longer term than one year. However this defect becomes immaterial as we are of the opinion for reasons hereinbefore stated that the defendant committed but one offense, and that his sentences in excess of the five years imposed under the sixth count are void. See section 9 of the act (Comp. St. § 6287*o*).

The judgment below therefore is affirmed as to the sixth count, and the sentences on counts 7, 8, and 9 are reversed.

HOUSTON v. BROWN MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. January 7, 1921.)

No. 3435.

1. **Patents ⊂=30(1)—Immaterial improvement not patentable.**
A patent for a purported invention, which made no useful contribution to the art and would not accomplish its purpose practically when applied in industry or was so negligible in its nature as to be wholly immaterial in results, is invalid.

2. **Patents ⊂=328—853,409, claims 3 and 4, for improvements in cultivators, held not infringed.**
Houston patent, No. 853,409, claims 3 and 4, for an improvement in cultivators, if valid because the construction of the seat lever to permit vertical motion was an addition to the art, *held* not infringed by defendant's machine constructed to prevent any more vertical motion than was permitted in the prior art.

Appeal from the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Suit for infringement of a patent by George D. Houston against the Brown Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Wm. O. Belt, of Chicago, Ill., for appellant.

H. A. Toulmin, Jr., and H. A. Toulmin, both of Dayton, Ohio, for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This is an action in equity to enjoin the defendant-appellee from infringing claims 2, 3, and 4 of the United States letters patent No. 853,409 and for damages.

This patent relates to improvements in riding cultivators for plowing corn. While the petition avers that defendant-appellee has infringed and is infringing claims 2, 3, and 4 of this patent, nevertheless in this court plaintiff-appellant relies only on claims 3 and 4, which read as follows:

3. "In a cultivator, the combination of a frame, a pair of gangs, a movable arch connected to said gangs, hangers supported to swing on the frame and connected to the arch, and a lever movable vertically and laterally to shift the arch and thereby move the hangers and gangs relative to the frame and in parallel relation."

4. "In a cultivator, the combination of a frame, a pair of gangs, an arch connected to said gangs, hangers supported to swing on the frame and connected to the arch, and a seat lever pivotally mounted, to swing vertically and laterally for shifting the arch to thereby move the hangers and gangs in parallel relation."

The defendant-appellee denies infringement and avers that the patent in suit is invalid by reason of the prior art and prior use; that it is also invalid for lack of utility; that it does not constitute invention, but is only a mechanical expedient and shop adaptation; that it produces

no new effect or results, but only effects and results well known in the art to which they relate; and that the claims are a mere aggregation of old and well-known devices.

It is not only established by the evidence, but conceded by counsel, that at the time Houston applied for and obtained his patent, there were two types of cultivators old in the art; one of these had an arch-shaped hanger, the other and newer one had straight-bar pendulum hangers. In the drawings of his patent Houston shows his invention in this admittedly old arch-shaped hanger type of cultivator. However, claims 3 and 4 of the patent in suit call for "hangers" without specifying what kind or character of hangers are to be used. It is claimed on behalf of the defendant that in view of the fact that the description of the patent in suit calls for arch-shaped hangers, that the other five claims of the patent, except perhaps claim 2, specify arch hangers, and that the drawings of the patent shows the claimed invention in the arch-hanger type of cultivator; that "hanger" as used in claims 3 and 4 must be construed to mean arch-shaped hangers only; and that as neither the "Rambler" or "Easy Shift" type of cultivators manufactured by the defendant-appellee contain such arch-shaped hangers, the defendant has not infringed.

It is claimed on the part of the plaintiff, however, that the type of cultivator used to embody his invention is of no importance whatever; that the seat lever pivotally mounted to swing vertically and laterally is the novel element of these claims. That after he had constructed 50 machines of the old arch-shaped hanger type embodying his invention, he found that they were too heavy to meet with commercial success, and thereupon built 150 machines of the straight-bar pendulum type, also embodying his invention. Some of these later machines were sold, but it is admitted that no others were ever constructed or sold by Houston; that he did not enter the manufacturing business himself, and has been unable to interest or induce any agricultural implement manufacturing company to manufacture his machine upon royalty or otherwise.

There would seem to be purpose in the use in claims 3 and 4 of the word "hangers" broadly, without any limitation or specification, as in the other claims of the patent, but the evidence of Mr. Houston and description of his later patent of 1910 would indicate that Houston did not intend or understand that the term "hangers" as used in the third and fourth claims of his patent should be interpreted as meaning anything other than arch-shaped hangers, which he at that time seemed to consider essential to the proper functioning of his improvement.

It is apparent from the evidence relating to the prior patent art, and prior public use, that the plaintiff's claimed invention is in a crowded, if not an overcrowded, art. It is admitted by counsel for plaintiff that laterally swinging seat levers connected at the front to the sides of the arch, to which the gangs are attached, and which holds them in parallel relation in their forward ends, were old in the art, but it is insisted that Houston was the first to connect the front end of the seat lever to the top of the arch, and so mount or pivot this lever on the frame of the machine, and so associate it with other structural elements old

in the art, as to permit it to swing vertically as well as laterally. It is clear from the evidence that this is the only novelty, if any, of plaintiff's invention.

The defendant denies that this is novel in the art, and in support of this contention has introduced in evidence a number of prior patents, particularly Lacey, No. 48,627, issued as early as 1865; Sandelin, No. 125,087, issued in 1872; Children, No. 434,765, issued 1890; Scott, No. 578,585, issued 1897; Young, No. 598,461, issued 1898; Avery, No. 611,551, issued 1898; W. L. and W. A. Paul, No. 836,779, issued 1906, for which application was filed in April, 1905. This Paul patent covers the machines commercially known as "Little Jap" and "Tu-Ro," manufactured by the Bradley Manufacturing Company, and later taken over by Sears, Roebuck & Company, who are still manufacturing and selling the same. These are the machines largely relied upon by defendant to show prior use.

It appears from the expert testimony in this record that the Lacey patent, No. 48,627, contains the essential features found in the Houston patent; that "it shows all the essential things of the Houston machine"; that the language used in the description of the Lacey patent differs from the language used in the Houston patent, but means exactly the same thing; and that in all riding cultivators the strength of the body, as well as the legs, is applied in the operation of the gangs.

It also appears from this testimony that the essential elements of the Houston patent are found in Sandelin, No. 125,087, except the lever for controlling the gangs and moving them laterally is not a seat lever, but it is a lever operated from the seat; that in Children, No. 434,765, all of the elements of the Houston machine appear, with the exception that the seat is not located on the operating lever; that the Scott patent, 578,585, contains the arch-shaped hanger, but does not have the seat as in the Houston machine; that in the specification in the Scott patent a reference is made to the fact that a seat may be used in connection with this machine, but does not state that such seat lever may be used in operating the gangs, but that this patent does show substantially, in one form, the same means for controlling the gangs as in the Houston machine; that in Paul, 836,779, is found all the elements in the Lacey patent, but in a higher form, consisting in the pivotal seat movement and the arch connecting the front end of the gangs and holding them in parallel relation, but without the arch-shaped hanger as in the Houston machine, and that nothing is found in Houston new to the art; that while there would necessarily be some vertical movement at the end of the seat lever in the normal operation of any machine constructed under the specifications of either of the prior patents, without any expressed purpose or without any specific arrangements for accommodating that incidental and immaterial detail of the construction, that there is nothing in the patent art, in regard to that feature, except in Houston; that it is not found in the defendant's machine; and that the Houston machine is the only machine in which special provision has been made for that function.

It also appears from the evidence that this vertical movement incident to the swinging movement in the arc of a circle, in changing the

position of the gangs, was not regarded as important in the prior art; that Houston was the first to recognize its importance, if it is important, and to so pivot the seat lever to the frame of the machine to accommodate this motion.

[1] Of course, if, as claimed, this purported invention added nothing to the knowledge of the cultivator art, and would not accomplish its purpose practically when applied in industry, or was so negligible in its nature as to be wholly immaterial in results, then it is necessarily invalid. Coupe v. Royer, 155 U. S. 565, 15 Sup. Ct. 199, 39 L. Ed. 263; Besser v. Merrilat, 243 Fed. 611, 612, 156 C. C. A. 309 (C. C. A. 8); Scott v. Fisher Knitting Mach. Co. (C. C.) 139 Fed. 137–146; Carter Mach. Co. v. Hanes et al. (C. C.) 70 Fed. 859.

It is wholly unnecessary, however, in the disposition of this case, for this court to determine whether claims 3 and 4 of this patent in suit should receive the broad and liberal construction which, standing alone, they would be entitled to receive, nor is it important or necessary to determine whether the structure of the patent embodied either in the arch-shaped hanger type, or the straight-bar pendulum type of cultivator failed for lack of utility.

[2] If it were conceded that Houston's method of pivoting the seat lever to the frame in such manner as to secure the largest possible vertical movement was an advance over the prior art and of substantial utility, nevertheless it is perfectly apparent from the evidence in this case, and particularly from a careful examination of defendant's machines, that are claimed to be an infringement of plaintiff's patent, that they contain no such feature of construction as would permit of sufficient vertical movement to be of any advantage whatever in the practical operation of the same. On the contrary, in this particular they are substantially in line with the prior art and therefore do not infringe in any particular.

It is the claim of the defendant that the plaintiff's theory is a fanciful one of gravity, not justified by the facts and self-contradictory, for the reason that even if it were conceded that the weight of the operator shifts the gangs as the weight travels down in the curve of the arc, which the rear end of the seat lever describes, that when the operator gets to the extreme swing of the lever, at its lowest point, he must exert muscular force to get back to his original position, so that any helpfulness in one instance is at least counterbalanced by its hurtfulness in another.

The defendant's sincerity in reference to its own theory as to the nonutility of the vertical movement is demonstrated by the fact that in neither of the machines said to infringe, and which are exactly alike, except one has the pivoted wheels and the other has not, is the seat lever connected to the frame by the arrangement or device shown in Fig. 4 of the patent in suit, in which appears the washer "18" with the rounded lower face to permit an easy swinging movement of the seat lever. On the contrary, an attempt has been made to prevent, so far as possible, any vertical movement of the seat lever ends, by making a broad bearing so firmly connecting the seat lever to the frame that it is necessary to have ball-bearings to relieve the friction.

The machine manufactured by the plaintiff was not introduced in evidence, and for that reason the court is wholly unable to say to what extent a vertical motion may be permitted by his specific device for attaching the seat lever to the frame, as shown in Fig. 4 of his patent, but if it is as negligible a movement as that found in the defendant's machine, then it is not only not an advance over the prior art, but is necessarily void for lack of utility.

However, without deciding and without expressing any opinion whatever in reference to the validity of the patent in suit, this court is of the opinion, for the reasons above stated, that the defendant is not infringing claims 3 and 4 of the Houston patent, and the judgment of the District Court is affirmed.

SPARKS-WITHINGTON CO. v. JAY et al.
JAY et al. v. SPARKS-WITHINGTON CO.

(Circuit Court of Appeals, Sixth Circuit. January 14, 1921.)

Nos. 3311, 3312.

1. **Patents ⟸328—1,067,814, claim 1, for vacuum tank for engines, not infringed.**
   Claim 1 of the Higginson & Arundel patent, No. 1,067,814, for a vacuum tank for automobile and other internal combustion engines, not being entitled to the broad construction given a patent proving to be a pioneer in the practical art, *held* not infringed by a tank in which the fuel supply is introduced directly into the top of the vacuum chamber without using a check or return valve in the supply pipe as in the patented device.

2. **Patents ⟸53—Anticipating device does not lack invention because not brought to highest degree of perfection or not successful commercially.**
   A device described in a trade paper and relied on as anticipating a patent should be tested by the rules applicable to a patent, and does not lack invention merely because the inventor did not successfully bring his art to the highest degree of perfection, nor because without changes or additions thereto it could not be successful commercially.

3. **Patents ⟸328—1,134,457, claims 1, 2, 4, and 5, and 1,132,273, claims 1 and 3, for engine vacuum tanks, held invalid, and claim 4 not infringed, if valid.**
   Claims 1, 2, 4 and 5 of the Jay patent, No. 1,134,457, and claim 1 and 3 of the Jay patent, No. 1,132,273, for vacuum tanks for automobile and other internal combustion engines, *held* to involve no invention over the prior art; and claim 4 of the first-mentioned patent *held* not infringed, if valid.

4. **Patents ⟸328—1,132,273, claim 13, for engine vacuum tank, not infringed.**
   Claim 13 of the Jay patent, No. 1,132,273, for a vacuum tank for internal combustion engines, *held* not infringed if valid.

5. **Patents ⟸328—1,132,273, claims 9 and 14, for engine vacuum tank, held valid and infringed.**
   Claims 9 and 14 of the Jay patent, No. 1,132,273, for a vacuum tank for internal combustion engines, containing means for alternately connecting the vacuum chamber with the exhaust means and with the atmosphere, and means controlling communication between the vacuum chamber and lower tank, adapted to be opened by gravity flow, *held* valid and infringed.

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6. Patents ⟸26(1)—Combination of claims old in the art may involve invention.

That each element of a claim is old and in the same art does not necessarily preclude invention in the combination of such claims.

Appeal from the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge.

Suit by Webb Jay and another against the Sparks-Withington Company. From a judgment for plaintiffs for partial relief (258 Fed. 45), both parties appeal. Affirmed.

Lynn A. Williams, of Chicago, Ill. (Clifford C. Bradbury and Robert M. See, both of Chicago, Ill., on the brief), for plaintiffs.

Charles S. Burton and Geo. L. Wilkinson, both of Chicago, Ill., for defendant.

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

KNAPPEN, Circuit Judge. Suit for infringement of United States letters patent No. 1,067,814 to Higginson & Arundel and Nos. 1,132,273 and 1,134,457 to Jay, upon vacuum tanks for internal combustion engines (with special reference to automobile engines), by which the gasoline is raised from the main tank, located below the carburetor, to a point above the same, whence it is supplied to the carburetor by gravity. The claims in issue are No. 1 of Higginson & Arundel, Nos. 1, 3, 9, 13, and 14 of the earlier numbered Jay patent, and Nos. 1, 2, 4, and 5 of Jay's patent of later number. The District Court found that each of the claims in suit contained a degree of invention, but that each was entitled to but a narrow construction, and that, so construed, neither of the claims in suit was infringed, except claims 9 and 14 of the earlier numbered Jay patent (D. C.) 258 Fed. 45. Each party has appealed.

In reaching this conclusion, the court below followed the decision of the District Court for the Northern District of Illinois, in a suit against other alleged infringers by means of other devices, which suit involved the same patents and the same claims here in suit. Jay v. Weinberg (D. C.) 250 Fed. 469. The decree of that District Court has been later affirmed by the Circuit Court of Appeals of the Seventh Circuit. 262 Fed. 973.

Our conclusions lead to an affirmance of the decree below, but not in all respects upon the grounds which moved the District Court. In view of the history and discussion contained in the reported decisions to which we have referred (including that of the court below), we deem it unnecessary, for the most part, to do more than state without elaboration the specific conclusions we have reached and the grounds thereof.

[1] 1. The Higginson & Arundel patent was applied for May 23, 1912, and issued July 22, 1913. Its device includes, broadly, a suction chamber to which the liquid fuel is conveyed by a conduit from the main fuel tank, passing up through the bottom of the suction cham-

ber, together with a lower or auxiliary tank into which the liquid is conducted from the suction chamber and thence to the carburetor. When the suction stops, by the seating of the valve in the passage communicating with the source of suction (which may be the carburetor inlet or the engine cylinder), due to the rising of the float in the suction chamber, the air which is entering that chamber through an inlet directly communicating therewith permits the liquid fuel to flow therefrom into the lower chamber and so to the carburetor. Claim 1 contains, as an element, "means for simultaneously isolating the suction chamber from the source of suction and from the main tank, and placing it into communication with the auxiliary vessel" (the lower chamber). The means referred to is a valve in the conduit from the main supply tank to the suction tank, atmospheric pressure in the suction tank (when the suction is released) closing this valve and opening the valve in the connection between the suction tank and the lower tank. Defendant introduces the fuel supply directly into the top of the vacuum chamber (instead of passing it up through the bottom of the suction chamber), and thus has no need for, and in fact does not use, a check or return valve in the supply pipe, or its equivalent. Only that broad construction which might be given to a patent which had proved a pioneer in the practical art, as this one did not, would justify considering the high location of the conduit discharge as the equivalent of the omitted check. Such omission of this element defeats infringement. Cimiotti Co. v. American Co., 198 U. S. 399, 410, 25 Sup. Ct. 697, 49 L. Ed. 1100; Veneer Co. v. Grand Rapids Co. (C. C. A. 6) 227 Fed. 419, 142 C. C. A. 115. It is thus unnecessary to consider whether the claims in question contain invention.

2. A substantial part of the controversy relates to the extent to which the so-called Tice publication is a part of the prior art. In the June, 1911, issue of the trade paper Motor, under the title "Pressure Feed Without Pressure," Tice published an elaborate and illustrated description of a suggested two-chamber vacuum tank for automobiles, employing, for the most part, the general features found in Higginson & Arundel, disclosing, however, a float in the lower chamber as well as in the suction chamber. The article contained "data as to weights of valve spindles, valves, etc., and sizes of the floats," based on the specific gravity of the various elements concerned.

Plaintiff contends that this device is shown, by actual test, to be inoperative and useless. Tice built only one, which he used for a day or two, and then gave it no further attention. Three others have been made, one by defendant in the Weinberg Case, one by plaintiff, and one by defendant in this case; each of the three being an illustrative exhibit for the litigation. Apparently the chief infirmity of Tice's device lay in the fact that the valve in the discharge from the vacuum chamber to the lower chamber opened upwardly with the suction, instead of downwardly by gravity, and so tended to be slightly open when the suction is strong, thus theoretically tending, to some extent, to draw gasoline from the lower chamber to the vacuum chamber. The carrying of two floats, one in each chamber on a common stem, also involves difficulties. It is true that the structure as made by

plaintiff in exact accord with Tice's prescribed dimensions could be operated only under a very limited range of vacuum, and so was not adapted to normal road conditions. Defendant's reproduction of the device, which varied the size and weight of the floats sufficiently to compensate for the variation in the specific gravity of the elements actually employed, is shown to have worked well within a much broader range of vacuum, and to have been actually and successfully operated under normal road conditions on a run from Jackson, Mich., to Cleveland, Ohio, which is approximately 300 miles.

[2] We think the Tice device, as disclosed by him, cannot be pronounced inoperative in a patentable sense, although under many conditions likely to be met it would fail to function, and thus could not be successful commercially. But, testing the disclosure as we think we should by the rules applicable to a patent, the device, as described, did not lack invention merely because the inventor did not successfully bring his art to the highest degree of perfection, nor because, without changes in or additions thereto, it could not be successful commercially. Telephone Cases, 126 U. S. at page 536, 8 Sup. Ct. 778, 31 L. Ed. 863; Proudfit Co. v. Kalamazoo Co. (C. C. A. 6) 230 Fed. 120, 128, 144 C. C. A. 418. And see Loom Co. v. Higgins, 105 U. S. 580, 586, 26 L. Ed. 1177. In our opinion, the Tice disclosure contained invention. It antedated both the Jay inventions, as to which both Tice and Higginson & Arundel are part of the prior art. It is not important to determine priority as between these two last-named inventions.

[3] 3. The Jay patent, No. 1,134,457, issued April 6, 1915. The device of this patent has but a single chamber. Although the patent was issued later than the other Jay patent, it was earlier applied for. In our opinion, claims 1, 2, and 5 plainly lack invention, in view of the prior art. The elements specially stressed by plaintiff as involving invention are: (a) That the source of the suction is the engine intake; and (b) that the air inlet to the vacuum chamber is valve-controlled, as that of Higginson & Arundel was not. It seems enough to say that both these elements are distinctly found in Tice, and that each of these claims would be infringed by the Tice structure.

Claim 4, however, calls for "valve devices by which the flow of the liquid through the first-mentioned conduit is permitted only in the direction toward the carburetor." This does not impress us as involving invention over the prior art. The reference is evidently to the "check valve *S*" in the conduit *J*, leading from the vacuum tank to the carburetor; this latter conduit being treated as a constituent part of the "liquid conduit" from the fuel supply tank, "by which fuel is delivered to the carburetor." This check valve *S* would seem more naturally comparable with the check valve shown in the upper left-hand corner of Tice's diagram, which is directly in the conduit pipe and is expressly designed to prevent the fuel backing down to the main supply tank (if it cannot return to the main tank, it must go toward the carburetor, if anywhere), rather than with Tice's valve, which controls the communication between the suction tank and the lower tank; and, if this is the meaning of the claim, it would read upon Tice. But, even if claim 4 be thought to involve invention, it is not, in our opinion,

infringed. It was found in the prior art (Higginson & Arundel showed substantially the same thing, save, perhaps, in one respect, and in this Jay was compelled to destroy the distinction in order to make his device work); and the claim is at best limited to a very narrow range of equivalents. The single tank of this patent never came into use. We think that defendant's valve *19*, which when the suction stops discharges the liquid from the upper into the lower chamber, does not perform the function of plaintiff's check valve *S*, in the pipe leading directly from his single tank to the carburetor fully enough to make the close equivalency required in such a patent, and that thus defendant has no "valve devices" answering the claim in question.

[4] 4. The Jay double tank patent, No. 1,132,273, issued March 16, 1915. This patent, as before said, while issued earlier than the single tank patent, was later applied for. It seems clear that claims 1 and 3 involve no invention over the prior art. Each plainly reads upon Tice. Claim 13, however, after specifying the valve controlling the communication between the vacuum chamber and the vacuum producing means, and the valve controlling the atmospheric inlet, contains, as an element, "mechanism for their simultaneous operation, to close one when the other is opened and to open the first when the second is closed, said mechanism comprising a lever," together with other details of mechanical operative means. Assuming for the purposes of this opinion that this element distinguishes claim 13 from the prior art, the claim is not, in our opinion, infringed by defendant. Indeed, plaintiff does not seem strongly to urge such infringement.

[5] With respect to claims 9 and 14, the situation is essentially different. Claim 9 contains the elements of "means for alternately connecting said supply receptacle [vacuum chamber] with the exhaust means and with the atmosphere and means controlling communication between said [vacuum chamber] and said [lower tank], adapted to be opened by gravity flow from said supply to said auxiliary receptacle [lower tank]." Claim 14 also contains the substance of this last element. Its inclusion distinguishes both claims from anything in the prior art. It distinguishes from Tice in substituting a gravity-controlled valve for his upwardly opening suction-controlled valve, and a simple, single form for his complex and double structure. It distinguishes to an even greater extent from Higginson & Arundel, not only in substituting for the latter's continuous connection with the atmosphere through the constantly open air inlet and intermittent connection of the vacuum chamber with the source of suction, an actual and effective alternation of atmospheric pressure and vacuum, but also in substituting a gravity-operated valve in the communication between the vacuum and lower chambers for Higginson & Arundel's more complicated method of control by diaphragm and compression springs.

[6] We are not impressed with the contention that the claims we are considering involve no more than the obvious and noninventive selection of the best features disclosed by Tice and by Higginson & Arundel, together with devices previously employed in the water-lifting art. It is a mistake to suppose that the combination of these two claims was found in the water-lifting art. The vacuum lift water

pumps had no auxiliary receptacle for maintaining a gravity feed of the liquid. Their discharge was complete and always intermittent. They would have been worthless for feeding a carburetor. The mere fact, if admitted, that each element of the claim was old and in the same art would not, necessarily, preclude invention in the combination of those claims. Expanded Metal Co. v. Bradford, 214 U. S. 366, 381, 29 Sup. Ct. 652, 53 L. Ed. 1034; Kellogg Co. v. Dean Co. (C. C. A. 6) 182 Fed. 991, 996, 105 C. C. A. 545.

Jay's double tank system was an entire novelty to the automobile manufacturing world, commercially speaking. Nothing substantially resembling it had ever been offered to that market. Neither Higginson & Arundel nor Tice had been heard of by any manufacturer, so far as appears. The Jay tank met with very great, and we may reasonably say extraordinary, trade acceptance and success.[1]

As always where there has been unusual commercial success, there must be inquiry whether the merit of the article or something else was the dominant cause of the success. We are not inclined to give much force to the other causes urged here. Expensive advertising or selling effort unduly to accelerate the demand is not claimed. It is said that plaintiff was manufacturing also under later patents. This is true, but these patents are in the record, and we find nothing in them that would substantially change the operation or the utility of the device. They pertain to subordinate developments and improvements, and if plaintiff had adhered to the form first marketed with only the usual refinements and perfecting, and had successfully maintained a monopoly thereon, there is no reason to think the sales would have been substantially less.

It is also said that just before 1914 the quality of the common gasoline changed so that it became necessary to raise the carburetors close

[1] The chief engineer of the Peerless Motor Company says: "The acceptance of the vacuum feed system in the automobile industry was almost like a prairie fire. It almost swept the country. I never saw anything like it." The chief engineer of the Olds Motor Works says: "I never saw anything in the automobile line which was so quickly adopted as standard equipment." Mr. Kissel, of the Kissel Motor Car Company, says that they used the pressure system, but it gave trouble "so much that we were looking around for almost anything we could get to take its place that would operate satisfactorily." They adopted the Jay vacuum system in 1914, and put it not only on new cars, but substituted it for the other system on their cars already built. "There was such a demand for these tanks that we made a special price on them * * * so that we could ship them to our customers * * * in replacing the pressure system with the vacuum system on our previously built cars." A compilation published by one of the trade papers in 1918, shows that, out of all the different makes of American cars in 1913, 65 per cent. used the gravity feed and 35 per cent. the pressure fuel feed; in 1914 58 per cent. were gravity and 41 per cent. pressure; in 1915 (the season beginning the fall of 1914) 57 per cent. were gravity and 22 per cent. pressure and 20 per cent. vacuum feed; in 1916 32 per cent. were gravity and 12 per cent. pressure and 54 per cent. vacuum; in 1917 18 per cent. were gravity, 7 per cent. pressure, and 74 per cent. vacuum; in 1918 10 per cent. were gravity, 7 per cent. pressure, and 83 per cent. vacuum. Of tanks manufactured under the patents in suit, plaintiff and its predecessor sold, in 1914, 30,000; in 1915, 239,000; in 1916, 637,000; in 1917, 689,000; in 1918 1,596,000.

to the engine, and the styles changed so that low-hung cars became fashionable, and that these two things were what drove out the gravity feed. There is a measure of truth in both of these, but they are not controlling. It may as well be said that it was the existence of the vacuum feed system which permitted the low-hung cars to become universal.

Nor was Jay's combination the immediate and mechanical response to the thought that the suction of an engine might be used for this general purpose. This broad idea had been disclosed by Schutze in France in 1902, and Goodhart in England, and Seager in the United States, in 1908. Further applications had been attempted by Harrington in 1909, by Higginson & Arundel and by Tice, in 1911, and by Jay himself in 1913. No one had succeeded in making a device that was commercially accepted or that any one now wishes to use.

We think claims 9 and 14 marked a distinct advance, and plainly involve invention. We think also that defendant's structure infringes both these claims. Indeed, infringement does not seem to be denied except by the objection that in defendant's device the movement of the atmospheric and suction valves is not simultaneous; and this objection is answered by the fact that the call for simultaneous action found in the third and other claims is omitted from the ninth and fourteenth claims. It does not seem denied that defendant employs the atmospheric pipe called for by the fourteenth claim.

The decree of the District Court is affirmed. As both parties have appealed, the costs of this court will be divided.

SUCCESSION OF GARCIA v. HERNANDEZ et al.

(Circuit Court of Appeals, First Circuit. December 21, 1920.)

No. 1442.

1. **Courts ⇐406(1)—Decision of Supreme Court of Porto Rico on question of procedure reversed only on clear showing of error.**
   A decision of the Supreme Court of Porto Rico should not be reversed on a question of procedure which is manifestly one of purely local law, except on a clear showing of error.

2. **Executors and administrators ⇐130(2)—Action of revindication not maintainable against assignee of rights and heirs by succession.**
   The succession or estate of a deceased person may not in Porto Rico, as an entity, maintain an action of revindication against the grantee or assignee of the rights of one or more of the heirs; at least, a decision of the Supreme Court of Porto Rico so holding is not so plainly erroneous as to warrant the circuit court of appeals in reversing it.

3. **Descent and distribution ⇐84—Heir may make valid transfer before partition or liquidation.**
   An heir before partition or liquidation of the ancestor's estate may make a valid transfer or assignment of his undivided interest in the estate.

In Error to the Supreme Court of Porto Rico.

Action by the succession of Jacinto Rivera Garcia against Gregorio Hernandez and another. Judgment for defendants, and plaintiff brings error. Judgment vacated, and case remanded.

Frank Martinez and Howard L. Kern, both of New York City, for plaintiff in error.

Hugh R. Francis, of San Juan, Porto Rico (Francis & de la Haba, of San Juan, Porto Rico, on the brief), for defendants in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. This is an action of revindication or ejectment brought in the District Court of Humacao, on January 5, 1916, by the heirs and widow of Jacinto Rivera Garcia, constituting the "succession" of said Garcia, to recover about 25 acres of land (and mesne profits therefrom) owned by Garcia during his lifetime, alleged to be unlawfully in the possession of the defendants Hernandez and Martinez.

Garcia died on February 27, 1895, leaving—including one posthumous child—nine children and a wife. Some of these children were minors. Hernandez was named in Garcia's will as protutor for some of the minor children. Whether he ever acted in that capacity does not definitely appear.

The chief defenses set up by Hernandez, the principal defendant, were that he bought 14 of the 25 acres from Garcia during his lifetime, and that he obtained title to, or at any rate beneficial ownership and right of possession of, the balance by assignments or conveyances from the heirs or some of them.

On trial in the District Court of Humacao, it was found that the plaintiffs constituted the succession of Garcia; that the land in question belonged to Garcia in his lifetime; that it was worth approximately $1,200; that the mesne profits amounted to $4,000; that the defendants were in actual possession and enjoyment of the land without title; that therefore the succession was entitled to possession and to recover the mesne profits of $4,000.

The defenses above mentioned were disposed of in the District Court by a finding that Hernandez's claim of purchase of 14 of the 25 acres from Garcia during his lifetime was not proved; as to the alleged acquisition of right or title from heirs after the death of the ancestor the finding was as follows:

"True as it is that several members of the plaintiff succession assigned their rights in the estate to the defendant Gregorio Hernandez, nevertheless no division of the estate was ever made, notwithstanding the allegation thus made by the defendants in their answer to plaintiffs' complaint. And until the liquidation of the estate and the allotment of their corresponding share in the estate to each heir be made the said heirs have no title to the real property left by the testator sufficient to make a valid alienation of such property. On the other hand, several assigning heirs were minors at the time of the assignment, and this circumstance renders the act made by them null and void, and it should be taken into account that the defendant Gregorio Hernandez was the protutor of the minor heirs and that he had a share in the estate of Rivera Garcia."

This finding does not attempt to conclude the question as to what rights, if any, Hernandez obtained in the estate of Garcia through his dealings with the heirs. The decision of the District Court goes upon the theory that the succession or estate of Garcia was an entity, and that until it was settled or liquidated, that succession or estate could, as an entity, recover, as against the grantee or assignee of any of the heirs, possession of the decedent's land. On this theory the judgment ordered was "without prejudice of the rights that Gregorio Hernandez might have to be substituted in the personality of those members of the succession having made a valid transfer of their undivided interest (condominios) in favor of said Gregorio Hernandez."

The defendants appealed to the Supreme Court of Porto Rico. The opinion of the Supreme Court recites, inter alia, that Hernandez brought suit in the Municipal Court against several of the heirs of Garcia to recover $600, which resulted in an "act of conciliation" by which, in payment of this admitted debt, these heirs transferred to Hernandez all their rights to two lots of land, one of them of 40 acres, and another of 6 acres. But it does not clearly appear whether these lands included the lands the subject-matter of the revindication suit.

Some of these heirs are stated in the opinion to have made formal deeds which were recorded, although in part attacked because of the alleged minority of the grantors; others were not recorded; the record is said to be silent with relation to the rights of Alberto, the posthumous child. The opinion does not refer at all to the alleged purchase of 14 acres by Hernandez from Garcia during Garcia's lifetime. But the judgment of the court below is reversed on the ground that that court erred in holding:

"That during the time the liquidation of an inheritance of property is taking place, and until there is a distinct adjudication to such heir, the heirs lack sufficient title to make a valid alienation of such property."

The Supreme Court held, as we construe the opinion, that Hernandez as the grantee or assignee of the rights of some of the heirs, had or might be found to have all the rights that such heirs would have had, including the right of possession in common, that is, as co-owner; and that therefore an action of revindication did not lie against him. The conclusion stated was that because the plaintiffs did "not unite in themselves the whole title to the property in question, and because the adults have no claim at all, judgment must be reversed and the complaint dismissed, without costs."

The case comes here on writ of error with two assignments of error:

"First. The Supreme Court of Porto Rico erred in holding that the assignment and transfer made by some heirs of Jacinto Rivera Garcia, to wit, Josefa, Graciano, Abad, Eduarda, Cristina, Prudencia and Regalada Rivera Delgado, of their interest in the inheritance estate herein involved, to Gregorio Hernandez, was valid.

"Second. The Supreme Court of Porto Rico also erred in holding that Gregorio Hernandez is entitled to the possession of the property herein sought to be recovered and consequently that an action of revindication (ejectment) was not the proper remedy."

[1] We deal with these assignments in reverse order. The second is merely to the effect that an action of revindication or ejectment is

not the proper remedy. This question of procedure is manifestly one of a purely local law on which the decision of the Supreme Court of Porto Rico should not be reversed, except on a clear showing of error.

See Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538; Nadal v. May, 233 U. S. 447, 454, 34 Sup. Ct. 611, 58 L. Ed. 1040; De Villanueva v. Villanueva, 239 U. S. 293, 299, 36 Sup. Ct. 109, 60 L. Ed. 293; Martinez v. Mendez, 256 Fed. 596, 600, 167 C. C. A. 626; Richardson v. Fijardo Sug. Co., 237 Fed. 195, 196, 150 C. C. A. 341; Graham v. O'Ferral, 248 Fed. 10, 13, 160 C. C. A. 150.

[2] Examination of the authorities cited by plaintiff's learned counsel fails to convince us that the succession or estate of a deceased person may, as an entity, maintain an action of revindication against the grantee or assignee of the rights of one or more of the heirs.

The Supreme Court held that heirs who had, by instruments of transfer at worst only voidable, transferred their interests in the ancestor's estate, could not join in an action of revindication or ejectment against their grantee in possession. The inference is that if Hernandez had obtained title from any of the heirs, invalid because of infancy, or by reason of fraud practiced, the remedy must be sought in a court of equity or through proceedings for the liquidation or administration of the estate. At any rate, the holding of the Supreme Court that revindication or ejectment was not on the facts in this case the proper remedy of any of the heirs wronged is not a ruling so plainly erroneous on the authorities as to warrant this court in reversing it.

See Manresa, vol. 3, pp. 416, 435, 436.

Cf. Fernandez v. Gutierrez, 10 Porto Rico Rep. 59; Trinidad v. Trinidad, 19 Porto Rico Rep. 616; Vega v. Rodriguez, 21 Porto Rico Rep. 318; Rola v. Estate of Hernandez, 15 Porto Rico Rep. 738; Plantations Company v. Smith, 23 Porto Rico Rep. 365, 366.

We turn now to the first assignment of error, viz.:

"That the Supreme Court of Porto Rico erred in holding that the heirs Josefa, Graciano, Abad, Eduarda, Cristina, Prudencia and Regalada Rivera y Delgado made valid transfers of their rights to the estate of the deceased Jacinto Garcia to Gregorio Hernandez."

We are left in doubt whether the Supreme Court did hold that the heirs named had made valid transfers of their rights in their father's estate to the defendant Hernandez. Construing the opinion of the court in the light of the record, we think its fair interpretation may be that that court intended only to hold that Hernandez had obtained from some of the heirs a title which was at worst only voidable, and that as the District Court had held that all transfers by heirs before the liquidation of the estate were invalid, the judgment should be reversed without prejudice to the rights of the heirs, in a proper forum, to assert their claims, however grounded, to the land in question. But the form of the conclusion of the opinion was at least ambiguous as to the rights of adult heirs. Plainly, the Supreme Court decision did not undertake to determine, in detail, the rights of the various heirs; the opinion points out that the record is silent with respect to any transfer by Alberto, the posthumous child; it does not mention the fact that Hernandez ground his claim to 14 of the 25 acres upon an alleged

purchase by him from Garcia during Garcia's lifetime, and that the District Court found that that defense was not sustained; it comments on the contention of the plaintiff that some of the alleged transfers relied upon by Hernandez were made by minors, and therefore void, saying that "there is a good deal in favor of the theory of the appellant" that such contract made by a minor heir above the age of 14 must be disaffirmed" within four years after he comes of age—adding that the court "prefer a fuller discussion before definitely deciding this point." Counsel for the defendants apparently construe the decision of the Supreme Court as not concluding any of the questions of right and title arising out of the dealings between Hernandez and any of Garcia's heirs; for in their brief they say:

"Although the first assignment of error set forth by the plaintiff is rather general in its nature, nevertheless we presume that we are correct in assuming that the legal point as regards said assignment of error is whether or not an heir can assign his rights in an estate before there has been a distribution or liquidation of same."

[3] If, then, the first assignment raises simply the question of law as to the power of an heir, before partition or liquidation of the ancestor's estate, to make a valid transfer or assignment of his undivided interest in such estate, we are clear that it should be held not well grounded.

See Fernandez v. Gutierrez, 10 Porto Rico Rep. 59; Trinidad v. Trinidad, 19 Porto Rico Rep. 616; Vega v. Rodriguez, 21 Porto Rico Rep. 318; Rola v. Estate of Hernandez, 15 Porto Rico Rep. 738; Plantations Company v. Smith, 23 Porto Rico Rep. 365, 366.

Cf. Manresa, vol. 3, p. 436; Soriano et al. v. Rexach, 23 Porto Rico Rep. 531.

On such construction it of course follows that on another trial in a proper forum, with the proper parties, none of the rights of any of the heirs are to be regarded as prejudiced by the proceedings in this cause.

But the order of dismissal was not on its face without prejudice and was therefore wrong. It might possibly be held to conclude the rights of the adult heirs, if not of the alleged minor heirs. As the real case has never yet been tried in either court, the judgment must be vacated so that the case may either be dismissed without prejudice as well as without costs, or, if practicable, amended so as to present the real issues. Whether such amendment is, under the Porto Rican Code and practice, within the discretion of the court, is another question of local law not now before this court for its determination. It is not, however, inappropriate to say that such amendment in lieu of dismissal would be consonant with modern remedial statutes and rules of court and the established practice thereunder.

Compare section 269 of the Federal Judicial Code (Comp. St. § 1246) as amended by the Act of Feb. 26, 1919, 40 Sts. at Large, p. 1181; Fed. Eq. Rule No. 19 (198 Fed. xxiii, 115 C. C. A. xxiii).

Also, Fed. Eq. Rule No. 22 (198 Fed. xxiv, 115 C. C. A. xxiv), which provides:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side and be there proceeded with, with only such alteration in the pleadings as shall be essential."

Compare Code of Civil Procedure of Porto Rico, § 140.

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

ARONSTAM v. ALL-RUSSIAN CENTRAL UNION OF CONSUMERS' SOCIETIES, Inc.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 93.

1. **Appeal and error ⟸989, 1022(1)—Findings of referee held conclusive; only testimony in findings of referee considered.**
   On appeal from a judgment entered on report of a referee, approved by the trial court, the referee's findings of fact are conclusive, and the court cannot consider the testimony or exhibits, except in so far as included therein.

2. **Attorney and client ⟸133—Attorney cannot recover, without contract, from recipient of benefits from services.**
   One who had received benefits from services rendered by an attorney to his clients, but who had no contract for employment of the attorney, and made no request for the services, is not liable for the reasonable value of such services on quasi contract, which applies only to prevent unjust enrichment of one party at the expense of another.

3. **Appeal and error ⟸977(5)—Refusal of new trial cannot be reviewed.**
   The Circuit Court of Appeals cannot review the correctness of the refusal of the court below to grant a new trial.

4. **Stipulations ⟸13—Court may relieve party for inadvertence.**
   If injustice was done a party, because of the limitation of his proofs by a stipulation made during the progress of the trial, the court has the power to, and will, relieve the parties therefrom.

5. **Stipulations ⟸13—Party held not entitled to relief from stipulation.**
   In an action by an attorney for compensation, where he made in his pleadings no claim of express or implied contract for services prior to a stated date, a stipulation limiting the proof to services rendered subsequent to that date will not be set aside, after the referee found no contract for services was made, to enable the attorney to offer proof of services before that date.

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

Action by Charles S. Aronstam against the All-Russian Central Union of Consumers' Societies, Incorporated. Judgment for defendant, and plaintiff brings error. Affirmed.

McAdoo, Cotton & Franklin, and Charles S. Aronstam, all of New York City (William G. McAdoo, E. J. Myers, and Julius Weiss, all of New York City, of counsel), for plaintiff in error.

Simpson, Thacher & Bartlett, of New York City (Thomas D. Thacher and John W. Simpson, 2d, both of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error is an attorney at law engaged in practicing his profession in the city of New York. The efficient services which he performed in the companion cases, which grew out of his negotiations with the government, in behalf of the Union of Siberian Co-operative Unions, Incorporated, and the Union of Siberian Creamery Associations, make a record of fidelity. The services rendered were unique and unusual, and secured for clients whom he represented contracts with the federal government, in very considerable sums, for the purchase of materials. He was obliged to sue to recover his compensation. While engaged in representing the two societies above named, it is his claim in this action that he performed services for the defendant in error, and that he is entitled to payment, either under an expressed contract of retainer or by an implied promise to pay; the defendant in error having accepted beneficial services from him. After issue was joined by service of an answer, a motion was made by the defendant in error for the appointment of a referee to hear and determine the issues. This was granted. The trial proceeded before the referee appointed, and he has submitted his findings of fact and conclusions, together with his opinion. The plaintiff in error succeeded in the actions against the other two organizations and this was affirmed in this court. Union of Siberian Co-operative Unions v. Aronstam and Union of Siberian Creamery Associations v. Aronstam, 265 Fed. 1022. The referee found against the plaintiff in error in this claim, and so reported. During the progress of the trial, a stipulation was entered into reading as follows:

"It is stipulated and agreed by and between the respective parties hereto that the plaintiff rests, as to the issue of employment, upon the testimony adduced at this hearing, and the defendant shall proceed to adduce the testimony in regard to the issue of employment, and the plaintiff may thereupon rebut it by further evidence; that the question of employment shall then be determined by the referee; that, if the referee finds there was no employment, the complaint shall be dismissed; that, if the referee determines there was employment, he shall determine as to whether the services are limited to the services rendered after June 2, 1919, and, if he finds affirmatively on that issue, he shall award the compensation therefor, or require the parties to give proof in regard to that question; that, if the referee determines that the plaintiff is entitled to recover for all the services rendered by him in connection with this transaction prior to and subsequent to June 2d, he may consider the entire record in evidence in the former case."

Later the following amendment to such stipulation was made:

"Mr. Thacher: In reading the record I find that admirable stipulation that Mr. Myers drew, and which seems to me to cover the situation exactly, might perhaps be improved by a single correction at the last part of it, which reads: 'That, if the referee determines the plaintiff is entitled to recover for all the services rendered by him in connection with this transaction prior to and subsequent to June 2d, he may consider the entire record in evidence in the former case.' I suggest that that be made to read: 'He may, in determining the value of the plaintiff's services, consider the entire record in evidence in the former case.'

"Mr. Myers: No objection, sir."

Prior to the confirmation, on application made on behalf of the plaintiff in error, the referee made a certificate as follows:

"Do hereby certify that the evidence considered by the referee in determining the issues and in rendering the report and opinion herein consists of the testimony reported in the stenographer's minutes of the proceedings had before said referee in the above-entitled action, filed in the office of the clerk of this court on January 19, 1920, and of the exhibits therein referred to, together with the testimony of the witness Harold Allen, appearing on pages 256 to 303 of the stenographer's minutes of the trial before said referee of the action entitled 'Charles S. Aronstam, Plaintiff, against Union of Siberian Co-operative Unions, Inc., Defendant'; said testimony having been heretofore filed in the office of the clerk of this court with the report and decision of the referee in that case. The evidence thus considered by the referee in determining the issues and in rendering the report and opinion herein comprises all of the proofs adduced by either party on the question of employment pursuant to the stipulation which appears on pages 75, 76, and 78 of the stenographer's minutes of the proceedings had before said referee in this action."

And before the confirmation of the report of the referee the plaintiff in error obtained an order to show cause, which asked the following relief:

"Why the report of the referee in this action, together with his findings of fact and conclusions of law, should not be set aside and a new trial awarded to the plaintiff, and for such other and further relief as may be just in the premises."

The District Judge denied this application, and, in so doing, in effect denied the plaintiff in error's application to be relieved of the stipulation which was entered into on the trial. The plaintiff in error sought to have the referee either consider the proofs in the two actions above referred to, or permit the plaintiff in error to submit anew in this action the proofs as to work done and services performed prior to June 2d. The District Court thereupon, and on these findings of fact, rendered a judgment in favor of the defendant in error, dismissing the complaint. The errors assigned and argued are as follows:

"(1) The referee erred in not determining that, by necessary implication of law upon the facts found, the defendant, having accepted and enjoyed the benefits of the plaintiff's services, was obligated to pay reasonable compensation therefor.

"(2) The referee erred in not holding that there was an express contract to pay the plaintiff for services rendered by him.

"(3) The district court erred in denying the plaintiff's motion to be relieved from stipulation and for a new trial."

Our limitations in reviewing the findings of fact are fatal to the plaintiff in error's writ. The referee found as a fact that while the defendant in error, through its own representatives, was negotiating for purchases similar to the purchases made by the Union of Siberian Co-operative Unions and the Union of Siberian Creamery Associations, the plaintiff in error did not perform any act in connection with any negotiations on behalf of the defendant in error at its request, and that all the services rendered by him in connection with these government sales were in reliance upon his retainer with the two corporations above named.

At the request of the defendant in error, the referee found that the defendant in error—

"did not on June 2, 1919, either expressly or impliedly, ratify, or confirm any acts of the plaintiff, or expressly or impliedly authorize or request the plaintiff then or thereafter to perform any services on behalf of the defendant."

And further that the defendant—

"did not on June 3, 1919, or at any time thereafter, accept any service of the plaintiff in connection with its negotiations for a contract with the United States of America, or agree, expressly or impliedly, to pay for the same."

And further the defendant—

"did not on June 5, 1919, or at any time thereafter, accept any services of the plaintiff in connection with its negotiations for a contract with the United States of America, or agree, expressly or impliedly, to pay for the same."

And the referee further found that—

"While the plaintiff's services in behalf of his clients operated to benefit the defendant, the defendant did not on June 2, 1919, theretofore or thereafter, ratify or confirm any past acts of the plaintiff, or authorize or request the plaintiff then or thereafter to perform any services on behalf of the defendant."

[1] With these findings of fact thus presented to us, the only questions open to us are whether the conclusions of law are supported by the findings of fact. D., L. & W. R. v. Caboni, 223 Fed. 631, 139 C. C. A. 177. As it was said in Roberts v. Benjamin, 124 U. S. 64, 8 Sup. Ct. 393, 31 L. Ed. 334:

"The only questions open to review here are whether there was any error of law in the judgment rendered by the Circuit Court upon the facts found by the referee. The judgment having been entered 'pursuant to the report of the referee,' the facts found by him are conclusive in this court."

This court said in J. G. White v. Ball Eng. Co., 223 Fed. 618, 139 C. C. A. 286, where a trial was had before a referee:

"We can look only at the pleadings, order of reference, findings of fact, conclusions of law, and judgment of the court. We cannot consider the testimony, the exhibits (except so far as included in the findings of fact), or the refusals of the committee to find."

These are controlling authorities, and we must therefore hold that the plaintiff in error had neither an expressed contract of retainer nor one implied in law.

[2] Nor can liability be imposed on any theory of unjust enrichment. The theory of liability imposed by quasi contract is upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another. The law imposes an obligation, which it creates, in the absence of any agreement when the acts of parties have placed in the possession of one person some money or gain under such circumstances that in equity and good conscience he ought not to retain it.

"Duty, and not a promise or agreement or intention of the person sought to be charged, defines it. It is fictitiously deemed contractual, in order to fit the course of action to the contractual remedy." Miller v. Schloss, 218 N. Y. 407, 113 N. E. 339.

The law has imposed liability upon a party who has not really entered into any contract at all with another, but, in such cases, there must be

circumstances which make it just that one should have a right and the other should be subject to a liability similar to the rights and liabilities in cases of express contract. Cases of this character are where one obtains money or gain from another through the medium of oppression, imposition, or deceit, or the commission of a trespass, and such money may be recovered, for the law implies a promise from the wrongdoer to restore it to the original owner. This may have been entirely the very opposite of his intention. In view of the findings of the referee, there can be no recovery upon the theory of quasi contract.

[3] The application made before the entry of judgment was for a new trial, and involved in this motion was the application to be relieved from the terms of the stipulation entered upon the minutes before the referee. We cannot review the correctness of the refusal below to grant a new trial. Wheeler v. U. S., 159 U. S. 523, 16 Sup. Ct. 93, 40 L. Ed. 244; Clement v. Wilson, 135 Fed. 749, 68 C. C. A. 387. A stipulation which is made under misapprehension, or which tends to perpetrate an injustice, a party may be relieved from, if an application is promptly made. Such a stipulation should not be used as a pitfall.

In Carnegie Steel Co. v. Cambria Iron Co., 185 U. S. 403, it was said at page 444, 22 Sup. Ct. 698, at page 714 (46 L. Ed. 968):

"But while the stipulation is undoubtedly admissible in evidence it ought not to be used as a pitfall, and where the facts subsequently developed show, with respect to a particular matter, that it was inadvertently signed, we think that, upon giving notice in sufficient time to prevent prejudice to the opposite party, counsel may repudiate any fact inadvertently incorporated therein. This practice has been frequently upheld in this and other courts."

[4] If the facts here warrant the conclusion that an injustice was being done the plaintiff in error because of the existence of the stipulation and the limitations of the plaintiff in error's proofs thereby, this court has the power and would relieve the parties from the stipulation made during the progress of the trial. No injustice would be done the defendant in error if such a course were pursued, for the defendant in error would lose nothing if it was set aside and both parties restored to their former position, and the issues of the action could be tried and additional proof offered.

[5] While it is true that the referee, in his opinion, did state that the three contracts progressed together, and that this defendant in error obtained great benefit from the plaintiff in error's services, it is now thought that, by permitting evidence of what the plaintiff in error did in laboring for the other corporations prior to June 2d, it would be shown that benefits accrued to the defendant in error from such services. But the difficulty with the plaintiff in error's position is that there is no claim of express or implied contract until June 2d, and what was done prior to that time, as conceded by the plaintiff in error, was performed for the other corporations. The referee has found that no legal services were performed for the defendant in error on and subsequent to such date. Therefore it is apparent that, if the stipulation were vacated, the result would be the same.

Judgment affirmed.

MITCHELL et al. v. DES MOINES & F. D. R. CO. et al.

(Circuit Court of Appeals, Second Circuit. December 15, 1920. Rehearing Denied January 26, 1921.)

No. 91.

1. **Railroads ⇐123—Sale to corporation owning majority of stock held not to support inference of fraud or breach of trust.**
Under Code Iowa, §§ 2036, 2036, authorizing the owners of three-fourths of the stock of a railroad corporation to sell or convey its property, where the directors of a railroad submitted to the stockholders the question of selling its property to another company and made no attempt to coerce or influence the stockholders, and the sale was approved by three-fourths of the stock, fraud or breach of trust could not be inferred, though the buying corporation owned a majority of the selling corporation's stock, and a majority of the selling corporation's directors were also directors of the buying corporation.

2. **Corporations ⇐152—Payment of dividends rests in directors' discretion, which will not be interfered with.**
Whether a dividend shall be paid rests on the fair and honest exercise of discretion of the corporate directors, and such exercise of discretion is never interfered with by the court.

3. **Corporations ⇐152—Accumulation of net profits does not show duty to declare dividends.**
The fact that net profits of a corporation had accumulated does not show that dividends were due stockholders or that it was the duty of the directors to declare such dividends.

4. **Corporations ⇐152—Declaration of dividends not compelled unless neglect unreasonable and wrongful and without any reason.**
It is only when the directors have unreasonably and wrongfully refused or neglected to declare dividends when there are surplus profits out of which they may be declared, and there is no good reason for the failure, that a court of equity by its decree will compel the declaration of dividends.

5. **Railroads ⇐15—Mere existence of balance from rents of railroad held not to authorize decree compelling declaration of dividends.**
Where a railroad company leased its property to another for a rent consisting of the net earnings after specified deductions, the mere fact that at the date of a subsequent sale of the road to the lessee a calculable indebtedness appeared to be owing after all deductions did not warrant a decree requiring a declaration of dividends where it was not shown that this excess was not necessary to maintain the demised premises in good order and repair or in the exercise of a wise discretion was not lent or advanced to the lessee to enable it to operate the two lines of road as a unit for the advantage of both companies.

On Petition for Rehearing.

6. **Corporations ⇐417—Resolution adopted by stockholders' meeting held to have authorized directors, in selling property, to release buyer from claims.**
Where stockholders of a corporation were notified that a meeting would be held to consider a sale and conveyance of its property, and that the approval of the form of agreement would be submitted, and at such meeting resolutions were adopted approving the form of agreement, which provided that the selling corporation released the buying corporation from the payment of any and all amounts due and owing from the buying corporation, the directors were acting with full authority from the stockholders in releasing the buying corporation from the payment of such amounts.

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

Suit by William Mitchell and others, as temporary administrators of Amos F. Eno, deceased, against the Des Moines & Ft. Dodge Railroad Company and another, to enjoin the transfer of railroad property, and for a compulsory declaration of dividends. Decree for defendants, and complainants appeal. Affirmed.

Henry De Forest Baldwin, of New York City (Howard Mansfield and Thaddeus G. Cowell, both of New York City, of counsel), for appellants.

Larkin, Rathbone & Perry, of New York City (Lewis H. Freedman, of New York City, of counsel), for appellees.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Amos F. Eno in his lifetime filed this bill in equity, as the owner of 900 shares of the preferred stock of the Des Moines & Ft. Dodge Railroad Company, and sought to enjoin the proposed transfer of the railroad and property of that company to the Minneapolis & St. Louis Railroad Company, and to require the payment to the complainant of moneys which he claimed to be entitled to receive as dividends on his stock from the surplus income of that company for the years 1909, 1910, 1911, 1912, 1913, and 1914. During the pendency of the suit he died, and his temporary administrators continued the prosecution of the suit. Upon the trial appellants abandoned their claim to enjoin the transfer of the property of the Des Moines & Ft. Dodge Railroad Company to the Minneapolis & St. Louis Railroad Company. They continued, however, in their demand for relief as to the payment to them of moneys, as dividends, alleged to be surplus income of the company.

The Des Moines Company was incorporated on February 21, 1874. Its articles of incorporation were amended April 8, 1881. On February 19, 1915, there were outstanding 7,635 shares of preferred stock of the Des Moines Company amounting to a par value of $763,500, and 42,831 shares of common stock, amounting in par value to $4,283,100. The complainants' intestate, at the time that injury is claimed to have been done, was the owner of 900 shares of preferred stock, 700 of which were purchases in 1909, and 200 shares in 1911. The Minneapolis Company held 25,300 shares of the common stock from 1904, and continued thus holding the control of the Des Moines Company, with ability to nominate a board of directors of its choice. Five of the nine directors of the Des Moines Company were also five of the directors of the Minneapolis Company, and this was increased to seven in 1911 and reduced to six in 1913, 1914, and 1915. On January 1, 1905, a lease was made by the Des Moines Company of its railroad to the Minneapolis Company at a fixed rental to January 1, 1935. The rent provided for under this lease was the net earnings received by the lessee from the use and operation of the property which remained after deducting from such earnings the entire cost of the net earnings, maintenance, repairs, and renewals of the line of railroad and the oth-

er property. The lease further provided for the payment of taxes and assessments, and the payment of the corporate obligations of the Des Moines Company. It was provided that payment should be made on the 15th of January of each year. The Minneapolis Company operated, under the terms of this lease, until February, 1915. At that time it owed the Des Moines Company $442,000, arrears of rent; that is, this sum consisted of an accumulation of annual balances and surplus earnings. The books of the Minneapolis Company and of the Des Moines Company show this indebtedness as above stated. It is the contention of the appellants that these moneys should have been paid to the stockholders as dividends.

On March 31, 1914, the stockholders were notified that a meeting would be held on June 4th of that year to consider the matter of the sale and conveyance by the Des Moines Company of its property to the Minneapolis Company, and the approval of the form of agreement of such sale and conveyance would be submitted at the meeting. The meeting was subsequently held and the sale was approved by the stockholders. At the meeting resolutions were there adopted approving the form of the agreement and authorizing the sale. Three-fourths of the shares of stock were represented, and the only protest of the sale recorded was that of the 900 shares owned by the appellants' intestate. The sale was subsequently made. The statutes of the state of Iowa, under which laws the Des Moines Company was incorporated, and of the state of Minnesota, under the laws of which state the Minneapolis Company was organized, were complied with as to the sale and purchase of the property. Among other things, the agreement which was approved provided that the Des Moines Company release and discharge the Minneapolis Company "from the payment of any and all amounts which may then be due and owing from the Minneapolis Company to the Des Moines Company, not including, however, the obligations on the part of the Minneapolis Company to be performed and observed by it as provided in this agreement." The agreement provided for the sale of "all rights, powers, privileges, franchises, immunities, and other property used in connection therewith and appertaining thereto." No effort had ever been made to collect the arrears of rentals which were still owing at the time the sale was consummated, and the sale was fully consummated before this suit was instituted.

[1-3] Under the terms of the sale and the plan of organization, securities of the Minneapolis Company were given for stock and other securities of the Des Moines Company. It is apparent that the accumulated surplus—that is, the indebtedness owed by the Minneapolis Company to the Des Moines Company—was part of the consideration for which the Minneapolis Company issued its securities for the purpose of purchasing the road and other property of the Des Moines Company. The record disclosed that the directors of the Des Moines Company submitted the entire proposition to the stockholders of the Des Moines Company with recommendations only and permitted the stockholders of the Des Moines Company freedom of action, and there is nothing to indicate any attempt to coerce or influence them in their determination. The only opposition offered was that of the appellants'

intestate, and the sale met the approval of three-fourths of the outstanding capital stock of the corporation. The laws of Iowa under which the Des Moines Company was organized expressly authorize stockholders owning more than three-fourths of the outstanding stock to sell or convey all its property. Sections 2036, 2066, of the Statutes of Iowa (Railroad Law). There is no evidence of fraud in the transaction or breach of trust. We think none can be inferred from the facts disclosed. It is not a transaction where the majority of the stockholders have consummated a sale, for their own benefit, of the assets of the corporation. It is a sale made after authorization of the directors pursuant to statutory authority. At no time was this indebtedness of rent collected, and therefore there was no fund in existence which the corporation might use for the purpose of paying dividends. Whether a dividend shall be paid rests on the fair and honest exercise of discretion of the directors. Such exercise of discretion is never interfered with by the court. Union Pacific R. Co. v. Frank, 226 Fed. 906, 141 C. C. A. 510. The fact that net profits did, in fact, accumulate during the designated period, does not amount to a determination that dividends were due stockholders or a duty to declare such dividends. N. Y. & Lake Erie v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363; Staats v. Biograph Co., 236 Fed. 454, 149 C. C. A. 506, L. R. A. 1917B, 728.

[4, 5] It is only when the stockholder can satisfy a court of equity, in an action for a dividend not declared, that the directors unreasonably and wrongfully refused or neglected to declare dividends when there are surplus profits out of which it may be declared, and there is no good reason for their failure, it will compel, by decree, the declaration of dividends. The courts will not, however, interfere unless the action of the directors appears to be fraudulent, oppressive, or unreasonable. In re Brantman, 244 Fed. 101, 156 C. C. A. 529. Indeed, there is no proof here to show that such excess or net profit was not necessary for maintaining the demised premises in good order and repair, or that in the exercise of a wise discretion such moneys were not lent or advanced to the Minneapolis Company so as to enable it to operate the two lines of railroad as a unit, in a way which was advantageous to both companies. Permitting the continuance of this debt, and not collecting it, is not shown to have been unreasonable or fraudulent. All that does appear is that after the deduction of taxes, interest on bonds, cost of additions and betterments, there appears to be a calculable indebtedness owed by the Minneapolis Company to the Des Moines Company which, if collected, may have been used as dividends on the stock. On the other hand, the record disclosed that these circumstances were in fact known to the Minneapolis Company. The bookkeeping of each company records this, and these facts, standing alone, do not warrant a court of equity in interfering in what apparently was the fair discretion exercised by the directors.

Judgment below is affirmed.

On Petition for Rehearing.

PER CURIAM. [6] On this petition for rehearing, it is urged that we have failed to fully consider the claim of the appellants that the

sale of the property of the Des Moines Company to the Minneapolis Company was the physical property only, and was not intended by the stockholders to include the cancellation or satisfaction of the indebtedness owing for rent by the Minneapolis Company. This, for the reason, it is claimed, that notice of the meeting given to the Des Moines stockholders, at which meeting the sale was authorized, did not disclose to such stockholders, nor was it ever disclosed, that it was intended to sell property other than the physical property of the Des Moines Company. We fully appreciated the appellants' claims, but, as stated in our opinion, we think that the agreement for the sale of the property of the Des Moines Company to the Minneapolis Company met the approval of the stockholders. It was intended to convey, not only the physical property as such, but the stockholders intended to convey the arrears of rent or earnings. When the directors released and discharged the Minneapolis Company from the payment of "any and all amounts which may then be due and owing from the Minneapolis Company to the Des Moines Company," it acted with full authority of the stockholders, duly granted, to convey such assets or property of that company.

Motion for rehearing denied.

In re PRUDENTIAL LITHOGRAPH CO., Inc.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 80.

1. **Bankruptcy ⟸440—"Proceedings in bankruptcy" and "controversies arising in bankruptcy proceedings" distinguished.**
   As respects review by appeal or revision under the Bankruptcy Act (Comp. St. §§ 9585–9656), "proceedings in bankruptcy" relate to questions arising between the bankrupt and his creditors, and "controversies arising in bankruptcy proceedings" are distinct and separable issues raised between intervening parties and involving substantial rights.

   [Ed. Note.—For other definitions, see Words and Phrases, Second Series, Controversy Arising in Bankruptcy Proceedings; First and Second Series, Bankruptcy Proceedings.]

2. **Bankruptcy ⟸449—Denial of landlord's claim lease was forfeited by bankruptcy is appealable; "controversy arising in bankruptcy proceeding."**
   The question whether the lease to bankrupt which contained a covenant against assigning or subletting was forfeited by the bankruptcy is a controversy arising in a bankruptcy proceeding reviewable on appeal under Bankruptcy Act, § 24a (Comp. St. § 9608), since the landlord claims title to property in possession of the trustee, and a distinct and separable issue is raised thereby, and it is immaterial that the question was raised by the landlord's answer to the petition for confirmation of the sale of the lease instead of by petition filed by the landlord.

3. **Landlord and tenant ⟸76(2)—Covenant against assignment of lease not breached by bankruptcy.**
   A covenant against assignment or subletting of a lease without the written consent of the lessor is not breached by an assignment by operation of law in the event of the bankruptcy of the lessee.

4. **Landlord and tenant ⇐76(1)—Covenants against assignments not favored.**
Covenants in a lease against assignment and underletting which have the force of conditions are not favored by the courts.

5. **Landlord and tenant ⇐104—Lease can expressly provide for forfeiture by assignment by law.**
A covenant against an assignment of a lease can be so drawn as to provide for forfeiture by an assignment by operation of law, but the court will not infer such provision.

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

In the matter of the Prudential Lithograph Company, Incorporated, bankrupt. From a decree confirming a sale of the leasehold of the bankrupt over the objection of the Samuel Vernon Estate, Incorporated, landlord (265 Fed. 869), the landlord appeals. Affirmed.

Frederick Seymour, of New York City, for appellant.

Moses & Singer, of New York City (Henry B. Singer, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The receiver in bankruptcy was authorized to sell all the assets of the bankrupt's estate, including the right, title, and interest in a certain lease, dated August 27, 1919, for a term of three years commencing May 1, 1920.

The lease in question contained the following clause:

"In all other respects, except as specified below, the agreements, covenants, and conditions stated in the lease dated January 20, 1910, between said lessor and Frederick Huhn shall govern the same as if written herein, and shall apply to the whole of said top or seventh floor."

And the lease of January 20, 1910, contained the following provision:

"This lease shall not be assigned nor shall the said premises or any part thereof be let or underlet or used or permitted to be used for any purpose other than mentioned without the written consent of said party of the first part indorsed thereon to each and every assignment or underletting or use or permission to use for any other purpose."

The lease also provided that in case the rent was behind and unpaid or in case of the violation of any of the covenants, conditions, or agreements contained therein on behalf of the party of the second part the lease, at the option of the lessor, should become null and void.

On the same day that the lessor notified the receiver that it terminated the lease it served him with a second notice in which he was informed that the lessor claimed that the lease was not assignable even by operation of law, and directed his attention to the form of the covenant against such assignment. The notice also suggested that the receiver institute some proceeding for the determination of the question thus raised before accepting any bid for the property, or at least that notice be given the bidder of the claim and position of the landlord.

On March 26, 1920, the receiver in bankruptcy was notified that the lessor elected to terminate the lease. The notice stated that:

"The basis of this election is the assignment by operation of law or otherwise, whether it has already resulted or shall hereafter result from the proceedings in bankruptcy against the Prudential Lithograph Company, Incorporated, or by any act of the bankrupt or of the receiver or trustee in said proceedings."

The receiver, however, notwithstanding such notice, sold the lease on March 29, 1920.

The receiver, having been elected trustee, elected to accept the lease as an asset of the estate in bankruptcy.

The theory of the receiver and the trustee is that the lease passed by operation of law, and not by the act of the bankrupt nor by sale, and that the sale by the trustee of the bankrupt's interest was not a breach of the covenant for re-entry in case of assignment by the lessee.

Thereupon, and on April 1, a few days after the sale had taken place, but before confirmation, the receiver filed a petition in the bankruptcy court in which he called attention to the landlord's claim and alleged that it was necessary that the court should determine the validity of the lessor's claim and remove the cloud on the title caused thereby. He also asked that the sale of the lease should be confirmed, and authority given to execute the assignment.

The landlord put in an answer and demanded that the petition be dismissed, and that the alleged sale be not confirmed. The District Judge thereupon entered an order adjudging that the claim of the landlord was invalid, and that the lease passed by operation of law to the estate in bankruptcy and confirmed the sale. From that order the landlord has appealed.

The first question to be considered is whether the question sought to be raised can be brought into this court by an appeal, or whether it should have been brought here by petition to revise.

[1] The Bankruptcy Act (Comp. St. §§ 9585–9656) distinguishes between an appeal and a petition to revise, and it distinguishes between proceedings in bankruptcy and controversies arising in bankruptcy proceedings. Proceedings in bankruptcy relate to questions arising between the bankrupt and his creditors. Controversies arising in bankruptcy proceedings are distinct and separable issues raised between intervening parties and involving substantial rights.

[2] The question raised in the court below between the landlord and the trustee is a controversy arising in a bankruptcy proceeding over which this court under section 24 (a) exercises appellate jurisdiction as in other cases. The landlord asserts title to property claimed to be in the possession of the trustee and a distinct and separable issue is raised by intervention. See Hewit v. Berlin Machine Works, 194 U. S. 296, 24 Sup. Ct. 690, 48 L. Ed. 986; Knapp v. Milwaukee Trust Co., 216 U. S. 553, 30 Sup. Ct. 412, 54 L. Ed. 610. In the Berlin Case the petition was filed by the claimant. In this case it is filed by the trustee acting upon the suggestion of the claimant, who has interposed an answer. We can see no reason for supposing that the intervention of the claimant is any the less effective on that account. The distinct and separable issue is raised in either way, and in whatever way it arises it is a controversy arising in a bankruptcy proceeding, and the decree made therein may be examined on appeal.

[3] This brings us to merits of the appeal. And the sole question that presents itself is as to the legal effect of the clause in the lease which provides that it is not to be assigned which clause has been stated in an earlier part of this opinion.

A question of a very similar nature was before the Circuit Court of Appeals in the Sixth Circuit in Gazlay v. Williams, 147 Fed. 678, 77 C. C. A. 662, 14 L. R. A. (N. S.) 1199. That lease provided that:

"* * * If said lessee shall assign this lease or underlet said leased premises or any part thereof, or if said lessee's interest therein shall be sold under execution or other legal process without the written consent of said lessors, their heirs or assigns, is first had, or if said lessee or assigns shall fail to keep any of the other covenants of the lease by said lessee to be kept, it shall be lawful for said lessors, their heirs or assigns, into said premises to re-enter and the same to have again, repossess, and enjoy as in their first and former estate, and thereupon this lease and everything contained on the said lessors' behalf to be done and performed shall cease, determine, and be void."

That court held, affirming the District Court, that the transmission of the leasehold from A. to his trustee in bankruptcy was neither a voluntary assignment nor a transfer under execution or other legal process, and did not therefore authorize a forfeiture under the terms of the lease. The case went to the Supreme Court, where it was affirmed in an opinion written by Chief Justice Fuller, 210 U. S. 41, 28 Sup. Ct. 687, 52 L. Ed. 950.

In Weatherall v. Geering, 12 Vesey, Jr., 501, 513, in 1806, the Master of the Rolls said:

"The truth is that the situation in which a lessee restrained from assigning without license is placed is that he can have assigns only of two sorts—either an assign approved by the landlord, or an assign by appointment or designation of law."

In the case of In re Riggs, 1901, 2 K. B. 16, the lease contained a covenant not to assign without license, and it was laid down that a lessee's being adjudicated a bankrupt on his own petition did not operate as a breach of the covenant not to assign.

Numerous cases might be cited of similar import, but we think it quite unnecessary to do so.

In Bemis v. Wilder, 100 Mass. 446, it is said to be—

"well settled that an assignment by operation * * * passes the estate discharged of the covenant to the assignee; and this would seem to be so where the transfer arises from voluntary proceedings in insolvency, as distinguished from proceedings in invitum, and where there is no indication that the proceedings are colorable, merely for the purpose of effecting the transfer in fraud of the lessor."

[4] Covenants against assignment and underletting contained in leases having the force of conditions are not favored by the courts. In Jones on Landlord and Tenant, § 464, it is said:

"Covenants against assignment or underletting are not favorably regarded by the courts, and are liberally construed in favor of the lessees, so as to prevent the restriction from extending any further than is necessary."

In Taylor on Landlord and Tenant (9th Ed.) § 408, it is said:

"An assignment, either by the lessee or his executor, which is not voluntary, but effected by an operation of law, is not a breach of the covenant not to assign as where the assignment is in insolvency, or where the lessee assigns to a railway company which has taken the land by right of eminent domain."

And it is added that—

"* * * If the lessee makes a general assignment for the benefit of creditors, by order of court, it will be valid, and his assignees will not be bound by this covenant, but may dispose of the lease as they please."

[5] A covenant against an assignment of a lease can be so drawn as to provide for a forfeiture by an assignment by operation of law, but there is no such express provision in the lease before the court, and in its absence a court will not infer one.

The order is affirmed

EMMETT IRR. DIST. v. SEYMOUR et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

Nos. 3488, 3494.

Waters and water courses ⟸230(2)—Bonds of irrigation district valid.

Where a statute authorizing an issue of bonds by an irrigation district provided that a certain percentage of the issue should be payable on dates specified and the bonds themselves contained the same provision but followed by a recital of the numbers of the bonds maturing on each date, the fact that the bonds so numbered did not correspond in amount with the first provision, those due on the earlier date being less in amount and those on the later date greater by the same amount, *held* not to invalidate the bonds.

In Error to the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Actions at law by Edmund Seymour and others, as a committee representing bondholders, against the Emmett Irrigation District. Judgment for plaintiffs, and defendant brings error. Affirmed.

See, also, 227 Fed. 560, 142 C. C. A. 192; 253 Fed. 316, 165 C. C. A. 98.

Actions at law to recover the interest represented by coupons on outstanding bonds of the plaintiff in error, the sum of which coupons amounts to $262,410 in case No. 3488, and $53,502 in case No. 3494, total $315,912.

Wood & Driscoll, of Boise, Idaho, and Thompson & Bicknell, of Caldwell, Idaho, for plaintiff in error.

Richards & Haga, McKeen F. Morrow, and J. L. Eberle, all of Boise, Idaho, for defendants in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge. This is the third time this controversy has come before this court. It was first here in the case of Thompson

v. Emmett Irrigation District, decided August 9, 1915, and reported in 227 Fed. 560, 142 C. C. A. 192.

The present actions are brought by the defendants in error, as a committee appointed by the owners of certain bonds and interest thereon, issued by the plaintiff in error as provided in section 2397 of the Revised Codes of Idaho, to recover from the said plaintiff in error the interest on said bonds maturing and due and payable on the 1st day of January, 1914, and semiannually thereafter, to wit, during the years 1914, 1915, 1916, 1917, 1918, and 1919, and represented by interest coupons transferred to said committee amounting in the aggregate to $315,912.

In Thompson v. Emmett Irr. Dist., decided August 9, 1915, 227 Fed. 560, 142 C. C. A. 192, this court held that the bondholders had the right to maintain a suit in equity for the purpose of determining the amount of bonds and the particular bonds that had been legally issued by the irrigation district, and were then outstanding, and what coupons were entitled to share in the interest fund then held by the treasurer of the district.

The case was thereafter tried by the district court and a decree entered by that court on July 16, 1917. Before the case came on for trial in the district court, a number of bondholders were added as plaintiffs on the record, and the suit was brought, not only on behalf of those whose names appeared on the record, but also on behalf of all other bondholders of the Emmett irrigation district similarly situated.

By the decree entered in that suit, it was adjudged and decreed:

> "That the coupon bonds of the defendant Emmett irrigation district * * * with the unpaid coupons thereto belonging, being bonds numbered, * * * were legal and valid obligations of said Emmett irrigation district."

Provision was made in that decree for the payment, out of the interest fund in the custody of the treasurer of the district, of the coupons that had matured in 1914 and belonging to the bonds so declared to be legal and valid. From that decree an appeal was taken by the irrigation district to this court, and on October 7, 1918, the decree of the trial court validating certain bonds and the coupons thereto attached was affirmed. Emmett Irr. Dist. v. Thompson, 253 Fed. 316, 165 C. C. A. 98.

A petition for rehearing was denied by this court, and after the decree became final, Edmund Seymour, Dr. A. N. Gaebler, and John R. Morrow, a bondholders' committee representing the owners of bonds and coupons deposited with the committee and declared valid by said decree, brought the two present actions in the District Court, one on December 31, 1918, on the coupons maturing January 1 and July 1, 1915, 1916, 1917, and 1918, amounting to $262,410, and the other action was brought August 2, 1919, on the coupons maturing January 1 and July 1, 1919, amounting to $53,502. The actions were identical, except as to the number and date of maturity of the coupons, and the coupons involved in both actions were coupons which had been declared valid and legal obligations of the district in the decree affirmed by this

court on October 7, 1918. Both actions were tried on the 8th day of October, 1919, and outside of the introduction of the coupons in evidence and a stipulation admitting the facts, both cases were submitted on the evidence before this court in Emmett Irrigation District v. Thompson, 253 Fed. 316, 165 C. C. A. 98, subject only to the general objection on the part of plaintiffs that such evidence was immaterial.

No request for special findings was made by either party.

During the pendency of the action, a portion of the coupons involved were paid by the district so that the judgment appealed from entered in case No. 3488 amounted to the sum of $205,227, and in case No. 3494 the sum of $51,351.

From these judgments both cases are here upon writs of error.

In 1911 the Emmett irrigation district, located in Gem county (formerly Canyon county), Idaho, issued bonds to the amount of $897,000. The bonds were of the denominations of $100, $500, and $1,000, respectively, and except as to numbers, amounts, and date of maturity, were identical in form and of like tenor and effect. The form of the bond is set forth in the complaint. It recites, among other things, that the bond is one of a series of bonds aggregating $1,100,000 in amount and issued by the Emmett irrigation district by authority of an act of the Legislature of the state of Idaho, relating to irrigation districts, providing for the organization thereof and for the acquisition of water and other property and for the distribution of water thereby for irrigation purposes.

It was recited that the series were to consist of 262 bonds of the par value of $1,000 each, numbered consecutively from M–1 to M–262, inclusive; 1646 bonds of the par value of $500 each, numbered consecutively from D–1 to D–656, inclusive; and 150 bonds of the par value of $100 each, numbered consecutively from C–1 to C–150, inclusive, making the total authorized issue of $1,100,000; but as before stated the bonds actually issued and sold or otherwise disposed of amounted to $897,000. The statute of Idaho (section 4360, Compiled Statutes of 1919) under which these bonds were issued provided, among other things, that—

"The bonds of each issue shall be numbered consecutively, commencing with those earliest falling due. * * * At the expiration of 16 years, 10 per cent. * * * At the expiration of 20 years, 16 per cent."

These bonds were numbered consecutively as required by the statute and made payable in certain specified amounts commencing January 1, 1922, and ending January 1, 1931. Among other payments to be made, it was recited that on January 1, 1927, $110,000 in amount was to be paid, but this recital was followed by the specific statement as to the consecutive number of the bonds to be paid, "being bonds numbered from M–43 to M–57 inclusive, and from D–657 to D–826 inclusive." These bonds were issued in amounts of $1,000 and $500, respectively, as before stated. The bonds were therefore 15 bonds of $1,000 each, $15,000, and 170 at $500 each, $85,000, making a total of $100,000 instead of $110,000 as stated in the preliminary recital. It was also recited that on January 1, 1931, $176,000 in amount was to be paid,

but this preliminary recital was followed by the specific statement as to the consecutive number of the bonds to be paid, "being bonds numbered from M–193 to M–262 inclusive, and from D–1415 to D–1646 inclusive." The bonds were therefore 70 bonds of $1,000 each, $70,000, and 232 bonds at $500 each, $116,000, making a total of $186,000, instead of $176,000 as stated in the preliminary recital.

It will be observed that the preliminary recitals of the two aggregate amounts, viz., (1) $110,000 due and payable January 1, 1927, and (2) $176,000 due and payable January 1, 1931, amount to $286,000, that the aggregate of the bonds due and payable at the two dates named by the consecutive number and amount of each bond amounts to identically the same sum, viz., $286,000, as follows:

Due and Payable January 1, 1927.

15 bonds consecutive Nos. M–43 to M–57 at $1,000 each	$ 15,000
170 bonds consecutive Nos. D–657 to D–826 at $500 each	85,000

Due and Payable January 1, 1931.

70 bonds consecutive Nos. M–193 to M–262 at $1,000 each	70,000
232 bonds consecutive Nos. D–1415 to D–1646 at $500 each	116,000
Total	$286,000

It follows that if the recitals for these two issues are taken together there is no excess in the total of the two issues. But there is no evidence in the record that the bonds themselves have been examined and the fact determined whether $110,000 of the bonds are made payable on the 1st of January of the sixteenth year or only $100,000, nor whether $186,000 of the bonds are made payable on the 1st of January of the twentieth year or only $176,000.

All we have in the record before us are the recitals in the form of the bond in the complaint, the correctness of which is not admitted in the answer.

This state of the evidence is sufficient to justify the affirmance of the judgment. But passing this objection for the reason that the actual fact may be supplied by evidence and when supplied would not change the result, we proceed to the remaining question. Does the difference in the preliminary recitals as compared with the statement of the consecutive numbers and amounts of the bonds in detail invalidate the bonds? Where recitals in bonds are contradictory, those which are operative and in detail specifically identifying the bonds by consecutive numbers must prevail. 24 Am. & Eng. Enc. of Law, p. 59, and authorities there cited. But counsel for the plaintiff in error states the question in another form. They say the extension of the date of the payment of bonds amounting to $10,000 in excess of 16 per cent. made payable January 1, 1931, was unlawful, and the defendant in error cannot recover for any of the coupons in suit for that reason. This is not a suit on the bonds. The principal of the first bonds due and payable does not accrue until January 1, 1922, and the issue to which objection is made does not accrue until January 1, 1931. This suit is to recover the interest on coupons representing interest already due and payable. The validity and legal obligation of these coupons

depending as they do on the validity of the bonds was determined by this court in Emmett Irrigation District v. Thompson, 253 Fed. 316, 165 C. C. A. 98. We there said:

"We agree with the court below that the objections made to the form of the bonds and the manner of their issuance are without merit. The provisions of the statute under which they were issued are quite different from those of the California statute considered by this court in the case of Wright v. East Riverside Irr. Dist., 138 Fed. 313, 70 C. C. A. 603, and therefore the decision in that case is not in point."

The judgment of the court below is affirmed.

BANK OF PLANT CITY v. CANAL-COMMERCIAL TRUST & SAVINGS BANK.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1921.)

No. 3622.

1. **Guaranty ⇐35—Telegrams held to guarantee payment of draft not solvency of drawee.**
   Telegrams from one bank to another, one of which guaranteed payment of a sight draft with bill of lading covering carload of tomatoes attached and was confirmed by a letter expressing trust that the receiving bank had accepted the guaranty and would allow the draft to come direct for collection, and the other of which telegrams stated the sender would honor sight draft with bill of lading attached covering order of tomatoes, were independent guaranties of payment of the sight draft to the receiving bank, not merely guaranties of the solvency of the drawee and of his payment of the draft in case the tomatoes conformed to order.
2. **Guaranty ⇐34—Independent guarantor liable regardless of principal liability.**
   One who guaranteed the performance of an obligation by a separate and independent contract is liable on his guaranty regardless of the liability of the principal on the guaranteed obligation, especially where the obligation is a negotiable instrument and is guaranteed for the purpose of procuring its acceptance by a third person.
3. **Guaranty ⇐43—Bank held not required to inspect produce before honoring guaranteed draft.**
   A bank to which was presented a sight draft with bill of lading attached covering shipments of tomatoes already loaded was not obliged to inspect the shipments to ascertain their conformity to contract, before paying the drafts in reliance on the guaranty of payment by another bank, and the guarantor bank is liable on the guaranty even though the buyer of the tomatoes properly rejected them on arrival.
4. **Guaranty ⇐6—Formal acceptance held unnecessary.**
   Formal acceptance of a guaranty is unnecessary where it was made by telegram to insure payment of a sight draft with bill of lading attached covering a shipment of produce.

In Error to the District Court of the United States for the New Orleans Division of the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the Bank of Plant City against the Canal-Commercial Trust & Savings Bank. Judgment for defendant, and plaintiff brings error. Reversed and remanded.

Harry McCall, of New Orleans, La., for plaintiff in error.

Edwin T. Merrick and Henry P. Dart, Jr., both of New Orleans, La., for defendant in error.

Before BRYAN and KING, Circuit Judges, and ESTES, District Judge.

KING, Circuit Judge. On May 21, 1919, S. Segari & Co., of New Orleans, La., purchased from W. J. Hawkins, of Plant City, Fla., a carload of tomatoes. The sale was effected by telegrams. Hawkins on May 20th quoting a car of tomatoes, good stock, fancies $3, choice $2.75 per crate. On May 21st S. Segari & Co. accepted the offer, asking Hawkins to "wire confirmation with car number and manifest," to which on the same day Hawkins replied:

"Confirm order [is] wire money bank of Plant City. A. C. L. 38797. Heavy to fancies manifest not complete."

On May 21, 1919, bill of lading for car A. C. L. 38797 containing 534 crates of tomatoes consigned to S. Segari & Co. was issued.

On May 22, 1919, the Commercial Trust & Savings Bank telegraphed the Bank of Plant City, the plaintiff in error, as follows:

"We guarantee payment sight draft W. J. Hawkins on S. Segari Company bill of lading attached to draft covering one car tomatoes shipped yesterday fancy three dollars crate choice two seventy five."

This telegram was followed by a letter from the Commercial Bank to the plaintiff in error dated May 22, 1919, which confirmed and quoted the telegram as above and concluded:

"* * * We trust that it has been convenient for you to accept our guaranty and that you will allow this draft to come to us direct for collection, we guaranteeing prompt payment."

On May 23, 1919, the Bank of Plant City cashed a sight draft drawn by Hawkins on S. Segari & Co. for $1,502 to which said bill of lading was attached, also a bill made out by Hawkins against S. Segari & Co, for 534 crates of tomatoes in car A. C. L. 38797, showing 365 crates fancies at $3 per crate, $1,095, and 148 crates choice at $2.75 per crate, $407, total $1,502, and 21 crates XX at $2 per crate (this last sum not being included in said draft), and credited Hawkins' bank account with said $1,502.

On May 23d Hawkins offered S. Segari & Co. another car of tomatoes, and on May 24th they wired accepting car, and stated they were wiring funds, asking a confirmation, with car numbers, by wire. Later in this day they telegraphed:

"Wired guaranty early this morning. Be sure ship today. Wire numbers."

Hawkins wired:

"Shipped today. Seaboard 22538. Five thirty one tomatoes."

On the same day the Canal Bank & Trust Company wired the Bank of Plant City as follows:

"We will honor sight draft of W. J. Hawkins bill lading attached covering car tomatoes on S. Segari & Company."

On May 26, 1919, the plaintiff in error received from Hawkins sight draft for $1,566 drawn by him on S. Segari & Co., to which was attached a bill of lading issued May 23, 1919, for 531 crates of tomatoes in car S. A. L. 22538 to S. Segari & Co. and a bill from Hawkins to S. Segari & Co. for $1,566, the price of said tomatoes, and credited Hawkins' bank account with said amount. The evidence is to the effect that these sums were immediately subject to Hawkins' check; that they were not applied to any debt then due by Hawkins to the plaintiff.

Both drafts were forwarded to the Commercial Bank, which turned over the second draft and papers attached to it to the Canal Bank.

The carloads of tomatoes, on arrival at New Orleans, were rejected by S. Segari & Co. as unmerchantable and not according to order and they refused to pay the drafts. The New Orleans banks declined to pay the same on the ground that the tomatoes shipped were not such as the contract of purchase called for; also that Segari & Co. had brought two suits in which injunctions had been issued restraining them from paying said drafts. The Bank of Plant City was not a party to either suit.

The Canal Bank & Trust Company having been consolidated with the Commercial Trust & Savings Bank under the name of Canal-Commercial Trust & Savings Bank, which became responsible for all liabilities of said Canal Bank & Trust Company and said Commercial Trust & Savings Bank, this suit was brought against it by the Bank of Plant City in the United States District Court for the Eastern District of Louisiana for the sum of $3,068, the principal of said drafts.

The plaintiff's testimony showed the shipment of the carloads of tomatoes, the cashing of the drafts as above stated, that it was done entirely on the faith of said guaranties, and that the plaintiff had never been repaid. At its conclusion the defendant moved for the direction of a verdict in its favor which motion was overruled.

The defendant introduced testimony as to the failure of the tomatoes to comply with the contract, and at the conclusion of the entire testimony the plaintiff moved for the direction of a verdict in its favor.

The court denied this motion and directed a verdict in favor of the defendant, and judgment accordingly was rendered.

The plaintiff sued out a writ of error to this court to review this judgment.

Error is assigned to the direction of the verdict in favor of the defendant and also to the admission of certain evidence.

In an opinion overruling a motion for a new trial the court stated the ground of his ruling as follows:

"In my conception of the case the guaranty was given by the defendant to Hawkins to guarantee Segari's debt to him. It was intended to guarantee the solvency of Segari and protect Hawkins against any unfair and arbitrary rejection of the tomatoes, provided they came up to specifications. It is a collateral engagement on the part of the bank for the benefit of Hawkins, and not an independent contract with the Bank of Plant City guaranteeing payments of Hawkins' drafts at all events. As Hawkins did not comply with his contract with Segari, no debt was created. There being no liability on Segari's part there can be none on the part of the defendant bank."

[1] In our opinion the court erred in directing a verdict for the defendant. The guaranty in this case was not a guaranty to the seller Hawkins of the solvency of the purchaser Segari & Co. to induce the extension of credit by Hawkins to Segari & Co.

It was a guaranty made by each New Orleans bank to the plaintiff, Bank of Plant City, of the respective sight drafts which were to be drawn by Hawkins on Segari & Co. It is manifest that these guaranties were made to the Bank of Plant City to induce it to cash these drafts.

It was an independent guaranty to a third party made of two certain sight drafts to be drawn by Hawkins on Segari & Co. with a view to have the Bank of Plant City, on the strength thereof, cash such drafts and thus furnish to Hawkins the money which Segari & Co. were to wire him.

The consideration of the guaranty was not the sale of the tomatoes, but the payment by the Bank of Plant City of the money on the drafts.

That the guaranty made by the telegram of May 22d was one to the plaintiff bank is very apparent from the letter confirming it. This letter is addressed to the Bank of Plant City and says:

"We trust it has been convenient for you to accept our guaranty and that you will allow this draft to come to us direct for collection, we guaranteeing prompt payment."

It is the Bank of Plant City whose acceptance of the guaranty is asked.

The language clearly indicates that the New Orleans bank is guaranteeing payment to the Bank of Plant City of this draft which the latter bank has cashed on the faith of its guaranty.

[2] The authorities on this subject are quite clear:

"Moreover, the guarantor may be liable, despite the invalidity of the principal obligation, if the guaranty is a separate and independent transaction binding the guarantor independently of the original contract. The doctrine that the guarantor is liable on an independent guaranty of an invalid obligation applies with added reason to the guaranty of a negotiable obligation for the purpose of procuring its acceptance by a third person. In such a case the liability of the guarantor is not affected by the invalidity of the principal obligation." 12 R. C. L. 1073.

The following rule has been repeatedly followed:

"A guaranty of payment to one not a party to the instrument or claim guaranteed, made upon a valuable consideration, or made under such circumstances as would work a damage to the party guaranteed, is in effect a representation that the instrument or claim is perfectly legal and valid, as well as an undertaking to pay it in case of default of the person primarily liable, and concludes the guarantor from questioning the liability of the parties on such instrument or claim." Purdy v. Peters, 35 Barb. (N. Y.) 239, 248.

See Nelson v. Hinchman, 118 Fed. 435, 55 C. C. A. 251; McKinnon v. Boardman, 170 Fed. 920, 96 C. C. A. 136; American Nat. Bank v. Pillman, 176 Mo. App. 430, 158 S. W. 433; El Paso Bank & Trust Co. v. First State Bank (Tex. Civ. App.) 202 S. W. 522; Holm v. Jamieson, 173 Ill. 295, 50 N. E. 702, 45 L. R. A. 846.

The telegram in regard to the second draft is a direct promise by the

Canal Bank & Trust Company to the Bank of Plant City to pay such draft. It reads:

"We will honor sight draft of W. J. Hawkins, bill of lading attached covering car tomatoes on S. Segari & Company."

This telegram is in effect a special letter of credit addressed by the New Orleans bank to the Bank of Plant City.

"If the letter is addressed to a particular person, who advances goods or money on it in accordance with its tenor, the letter becomes an available promise in favor of the person making the advance. When acted on, and the advances made in accordance with its terms, a contract is created between the writer of the letter and the party who has acted upon it, upon which an action can be maintained." Amer. Steel Co. v. Irving Nat. Bank (C. C. A.) 266 Fed. 41, 43.

See Nisbett et al. v. Galbraith et al., 3 La. Ann. 690.

The facts of this case do not present the point on which Merchants' National Bank of Ocala v. Citizens' State Bank, 93 Iowa, 650, 61 N. W. 1065, 57 Am. St. Rep. 284, was ruled. In that case the language was: "Will guarantee Butts draft for car oranges from B. Arentz." Arentz had sold a car of oranges to Butts. The court, commenting on the form of undertaking, construed it as follows:

"It was not to be a guaranty of Arentz's draft, nor of a draft drawn on Butts, and not accepted by him, but of one on which he was liable, drawn for a car of oranges."

The implication is that, had the guaranty been of Arentz sight draft on Butts, the guaranty would have attached regardless of Butts' proper rejection subsequently of the oranges.

In this case the promise was to guarantee the payment of these drafts drawn by Hawkins on S. Segari & Co. The decision, therefore, is not in point.

[3] That the Bank of Plant City was not expected to inspect the car of tomatoes shipped is shown by the telegrams and by the nature of the transaction. The guaranty of May 22d states that the car had been shipped the day before. The statement therein "fancy three dollars crate, choice two seventy-five," was clearly inserted simply to indicate the amount for which the draft should be made and could not have been intended to put upon the Bank of Plant City any burden to ascertain the contents of a car already shipped. The telegram of May 23d was even plainer. It was a direct promise to honor a sight draft of W. J. Hawkins on S. Segari & Co. with bill of lading attached covering one car of tomatoes. There is no question in this case but that these two bills covered the two cars, the numbers of which had been previously wired to S. Segari & Co., and were the cars to which the telegrams to the bank related. American Nat. Bank v. Pillman, 176 Mo. App. 430, 158 S. W. 433.

So far as the proof in this case shows, the plaintiff has paid its money for these drafts on the faith of these guaranties and has not been repaid.

[4] That no formal acceptance of the guaranties was needed was conceded by the defendant on the argument, and we think properly so

under the facts of the case. F. W. Heitmann v. K. C. & S. Ry. Co., 136 La. 826, 67 South. 895; Hibernia Bank & Trust Co. v. Succession of Cancienne, 140 La. 969, 74 South. 267, L. R. A. 1917D, 402; London, etc., Bank v. Parrott, 125 Cal. 472, 58 Pac. 164, 73 Am. St. Rep. 64.

The judgment of the District Court is reversed, and the case remanded for further proceedings in harmony with this opinion.

Reversed and remanded.

POND CREEK MILL & ELEVATOR CO. v. CLARK.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1920. Rehearing Denied January 6, 1921.)

No. 2734.

1. **Sales ⇐1(1)—Failure to specify time for delivery and payment does not show incompleteness.**
   A written agreement for sale is not incomplete as a contract because it fails to specify the time of delivery and payment, since in the absence of agreement the law requires delivery within a reasonable time and payment on delivery, and those provisions are considered as incorporated in the written agreement.

2. **Limitation of actions ⇐27—Contract partly in parol is a parol contract.**
   If evidence of prior dealings between the parties is admissible to supply omitted terms of the writing in controversy, because that is incomplete, the contract then rests partly in writing and partly in parol, which under the law makes the agreement a parol contract as respects the applicable statute of limitations.

3. **Sales ⇐77(2), 79—Provision fixing price "f. o. b." does not require delivery at specified place.**
   A contract of sale, which in connection with the price employs the term "f. o. b." at a given point, does not require the seller actually to deliver the goods at indicated point; but that expression qualifies only the price, and means that wheresoever the goods may be shipped the seller will either pay freight to the indicated point, or, if the goods are not shipped there, it will deduct or permit the purchaser to deduct from the fixed price the amount of freight to the point indicated.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, F. O. B.]

4. **Sales ⇐161—Without agreement, delivery to carrier at seller's plant is sufficient.**
   Under a contract for the sale of goods to be shipped to a given point, in which nothing is stated as to the place of delivery, delivery is complete when the goods are given to a common carrier at the place the seller produces the goods or has them for sale.

5. **Sales ⇐79—Contract fixing price "basis Chicago" held not to require delivery at Chicago.**
   In a contract for the sale of flour from a miller in another state to a flour producer in Chicago, where the price was stated as basis Chicago, and the other provisions indicated that the flour was not all to be delivered in Chicago, the expression "basis Chicago" will be construed to refer to the price, and not to the place of delivery, in the absence of evidence establishing a contrary intent.

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6. Evidence ⟸457—Party cannot testify to meaning of words used in written contract.

A party to a written contract for the sale of flour cannot testify that the expression "basis Chicago," used therein, meant delivery was to be made in Chicago, although he might have testified to the meaning of those words, if there had been a prearranged or agreed meaning fixed by the parties.

7. Customs and usages ⟸19(3)—Evidence held not to show custom controlling contract.

Testimony by witnesses, who were familiar with trade terms and usage in other states, as to the meaning of the words "basis Chicago" in a sale contract, *held* not to show a general trade custom giving a special meaning to those words, so generally prevailing that both parties are presumed to have dealt in reference to it, or to show a local custom of which both parties had actual knowledge.

8. Customs and usages ⟸12(1)—Knowledge or presumption thereof necessary before custom enters into construction of contract.

A trade custom cannot aid in the interpretation of a contract, unless it was either a general custom so widely prevailing or recognized that both parties are presumed to have dealt in reference to it or a local custom of which both parties had actual knowledge.

9. Limitation of actions ⟸169—Actions on contract performable in another state held barred.

A contract for the purchase of flour from a mill in Oklahoma, which did not specify place of delivery, is performable in Oklahoma, and the right of action for breach accrued there, so that, under Hurd's Rev. St. Ill. 1919, c. 83, § 20, barring the action in Illinois if it is barred in the state where the right arises, the cause of action was barred in five years under Rev. Laws Okl. 1910, § 4657, whether it be considered an oral or written contract, though under Hurd's Rev. St. Ill. 1919, c. 83, § 16, it would not be barred until ten years if the contract was written.

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

Action by Frank G. Clark against the Pond Creek Mill & Elevator Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

The suit was for breach of contracts for sale of flour. The first contract was for 1,000 barrels, and is evidenced by the following correspondence between defendant in error, Clark, a flour dealer at Chicago, and plaintiff in error, a milling company at Pond Creek, Okl.:

Telegram, Clark to company, March 4, 1907 (decoded): "Book one thousand barrels same price."

Telegram, company to Clark, March 5, 1907 (decoded): "Booked one thousand barrels more Lily. Shipping today car Expansion in jute. We have no half barrel sacks."

Letter, company to Clark, March 5, 1907: "We are in receipt of your message asking that we book a thousand barrels more of Lily at the same price as yesterday's purchase $3.15 net bulk basis Chicago. * * *"

Letter, Clark to company, March 5, 1907: "I have your telegram of even date accepting my offer for another one thousand barrels of Expansion which is all in order, advising also shipping a car of Expansion in jute. * * * Will give you shipping instructions soon."

A second contract for 200 barrels, as follows:

Letter, Clark to company, March 8, 1907: "* * * I have several orders on the book for Clear and wish you would book 200 barrels of this Clear at $2.75 jute Chicago to go with patent. * * * You might fill and hold for

shipping directions one or two cars in half barrel sacks. * * * I have sold 125 barrels * * * to the Millers' Product Co. at $3.15 bulk Chicago. * * *"

Letter, company to Clark, March 11, 1907: "* * * Have entered your order as requested for 200 barrels of Clear at $2.75 net jute basis Chicago, shipments to be made with your Lily shipments."

A third contract for 2,000 barrels, as follows:

Telegram, Clark to company, March 30, 1907 (decoded): "Book one thousand barrels at $3.20 and one thousand barrels at $3.15 net."

Telegram, company to Clark, March 30, 1907 (decoded): "Entered your order for 1,000 barrels at $3.20 and 1,000 barrels at $3.15 net bulk Chicago."

Letter, company to Clark, March 30, 1907: "We are in receipt of your message and now confirm same to you 1,000 barrels Lily at $3.20 and 1,000 barrels $3.15; these prices net to us in bulk basis Chicago."

Letter, Clark to company, March 30, 1907: "I wired you this morning to book 1,000 barrels of Lily at $3.20 bulk and 1,000 barrels at $3.15 bulk Chicago, all of which I now confirm. I will be sending you sacks for filling, and will give you shipping directions as soon as I can get same from customers."

From time to time the total of 3,200 barrels covered by this correspondence was ordered by Clark to be shipped, but no shipment was made; the company claiming it could not get the flour. Finally Clark, unable to obtain delivery of the flour, on the following June 10th purchased flour in the Chicago market to cover these contracts, being required to pay an advance which, on the 3,200 barrels, amounted to $4,150 over the agreed prices.

The suit was begun in September, 1917 (more than six years after the cause of action accrued), in the municipal court of Chicago, and removed to the federal court. In defense it was pleaded, inter alia, that the contracts were not in writing, and action thereon was barred by the Illinois statute of limitations barring actions on oral contracts not brought within five years after right of action accrued; also that they were contracts of the state of Oklahoma, that by the statutes of that state action on oral contracts is barred in three years and on written contracts in five years after right of action accrues, and that by the statute of Illinois a cause of action barred in the state where it arises is barred in Illinois.

The replication alleged the contracts to be Illinois contracts, that the cause of action accrued in Illinois, and that action is not barred till ten years after right of action accrued.

J. D. Woley, of Chicago, Ill., for plaintiff in error.

E. C. Tourje, of Chicago, Ill., for defendant in error.

Before BAKER and ALSCHULER, Circuit Judges, and FITZHENRY, District Judge.

ALSCHULER, Circuit Judge (after stating the facts as above). Assuming that the above-recited correspondence constitutes the contract between the parties, there was no question of its breach by plaintiff in error, and the right of recovery by defendant in error is clear, unless the action is barred by limitation. In the state of Oklahoma actions on oral contracts are barred in three years, and on contracts in writing in five years, after cause of action accrues. Section 4657, Rev. Laws Oklahoma. In Illinois the statute is five years on oral, and ten years on written, contracts. Chapter 83, § 16, Hurd's Rev. Stat. Ill.

The suit having been brought more than six years after the cause of action accrued, if the statute of Oklahoma has application, the action is barred, regardless of whether the contract is oral or written; the Illinois statute providing that, where the action is barred in the state where the right of action arises, it is barred in Illinois. Chapter

83, § 20, Hurd's Rev. Stat. Ill. If the right of action arose in Illinois, the action is still barred unless the contract is in writing.

[1] It is maintained for plaintiff in error that the contract is oral, because the writing is wanting in features essential to a contract, viz. time of delivery and payment. True, neither of these conditions is specified, but the law provides that where a contract, otherwise complete, specifies no time for delivery of goods sold, the delivery must be made within a reasonable time (Minneapolis Gas Light Co. v. Kerr, etc., Co., 122 U. S. 300, 7 Sup. Ct. 1187, 30 L. Ed. 1190; In re Hellams (D. C.) 223 Fed. 460; Brick Co. v. Raymond, 219 Fed. 477, 135 C. C. A. 189; McKinnie v. Lane, 230 Ill. 544, 82 N. E. 878, 120 Am. St. Rep. 338; Driver v. Ford, 90 Ill. 595); and if it does not specify time for payment it should be on delivery (Guarantee T. & T. Co. v. First Nat. Bank, 185 Fed. 373, 107 C. C. A. 429; Audenried v. Randall, Fed. Cas. No. 644; Dwyer v. Duquid, 70 Ill. 307; Metz v. Albrecht, 52 Ill. 491). The contract is not void for want of these specifications, but will be construed as though it incorporated the elements of delivery within reasonable time, and payment upon delivery. Leis v. Sinclair, 67 Kan. 748, 74 Pac. 261; Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; and cases before cited.

[2] Some evidence appeared tending to show that in past dealings between the parties deliveries were made by the seller at Chicago, and payment was made by draft payable on arrival of goods there. But if such things could in any event be shown for the purpose of importing into the contract conditions as to these subjects, other than those which the contract provides, or, what is the same thing, the law fixes, it would be supplementing the written contract by terms not included therein, and, if this were permissible at all, we would then have a contract resting partly in writing and partly in parol, which under the law would make of the entire agreement a parol contract (Merchants', etc., Co. v. Furthmann, 149 Ill. 66, 36 N. E. 624, 41 Am. St. Rep. 265; Driver v. Ford, 90 Ill. 595; Cameron Coal, etc., Co. v. Universal Metal Co., 26 Okl. 615, 110 Pac. 720, 31 L. R. A. (N. S.) 618; Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657), and in such case the limitation statutes of either state would bar the action.

Counsel for defendant in error unqualifiedly concede that the contract is an Oklahoma contract, in that the final acceptance of it was in Oklahoma by the plaintiff in error, who resides there. But they earnestly contend that by the terms of the contract it was to be performed in Illinois, by delivery thereof the subject-matter of the contract, the flour, and that it was in Illinois, therefore, that the right of action on the contract accrued. On the other side, it is claimed delivery to the carrier in Oklahoma was delivery to the buyer there, and that this made Oklahoma the place of performance and accrual of the right of action.

Whether delivery to buyer was to be at Oklahoma or Chicago depends on the effect to be given to the words "basis Chicago" as employed in the correspondence. No cases have been cited, and we are unable to find any wherein construction has been given to the word "basis" as here employed. In the suit of Kaw City, etc., v. Purcell,

etc., decided by the Oklahoma Supreme Court, 19 Okl. 357, 91 Pac. 1022, in a contract of sale of corn by a firm at Kaw to the buyer in Indian Territory, the term "basis Kaw" was employed. It was stipulated in the case that "basis Kaw" had reference to the price, and that it meant that, regardless of the place from whence the corn was actually shipped to the buyer, he would have to pay freight charges only on the assumption that it had been shipped from Kaw. The court, however, did not pass upon this feature, merely accepting the stipulated meaning, which, if here applied, would construe the words as having reference, not to delivery, but to price.

[3] It is quite generally accepted as the law that where in a contract the price of goods is fixed, and in connection with the price is employed the term "f. o. b." at a given point, it means that this refers to and qualifies only the price, and does not indicate that the seller is actually to deliver the goods at the indicated point, and it is construed to have no reference to delivery, but that wheresoever the goods may be shipped the seller will either pay freight to the indicated point, or, if the goods are not shipped there, will deduct or permit the purchaser to deduct from the fixed price an amount equivalent to the freight on such a shipment to the point indicated. United States v. Andrews, 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185; Neimeyer Lumber Co. v. Burlington R. R. Co., 54 Neb. 321, 74 N. W. 670, 40 L. R. A. 534; Hobart v. Littlefield, 13 R. I. 341; Dannemiller v. Kirkpatrick, 201 Pa. 218, 50 Atl. 928; 23 R. C. L. p. 1339.

[4] The law is also clear that, if in a contract for purchase and sale of goods to be shipped to a given point nothing is stated as to the place of delivery, the delivery to the buyer is complete when it is made to the common carrier at the place where the seller produces them or has them for sale. Delaware, etc., Ry. Co. v. United States, 231 U. S. 363, 34 Sup. Ct. 65, 58 L. Ed. 269; United States v. Andrews, 207 U. S. 229, 28 Sup. Ct. 100, 52 L. Ed. 185; Diversy v. Kellogg, 44 Ill. 114, 92 Am. Dec. 154; Kelsea v. Ramsey, etc., Co., 55 N. J. Law, 320, 26 Atl. 907, 22 L. R. A. 415; Templeton v. Equitable Mfg. Co., 79 Ark. 456, 96 S. W. 188, 116 Am. St. Rep. 88. If, therefore, the contract contains nothing as to delivery, the law would include as part of the contract that the delivery of this flour was to be to the common carrier at Pond Creek, Okl., and that this would be delivery to the buyer. Cases supra. As indicated, had this contract, in place of "* * * basis Chicago," employed the term "f. o. b. Chicago," this would not have changed the place of delivery, which would still have remained Oklahoma, and from the stipulated purchase price there would, no matter where the flour was shipped, be deducted an amount sufficient to have paid the freight from Pond Creek to Chicago.

[5] In the correspondence there were no directions for shipment, but it was distinctly provided that shipping directions should from time to time be given by the buyer to the seller. This would indicate that no particular place of shipment was contemplated. The buyer was a flour broker, and the correspondence showed that he had customers both in and out of Chicago. But, apart from correspondence other than that which has been set forth in the statement of facts, the very

fact that shipping directions were by the contract itself from time to time to be furnished by the buyer would indicate that there was no definiteness or certainty as to where the flour would from time to time be sent, and this militates strongly against the contention that the words in question indicate an agreement on the part of the parties that the delivery of all this flour would be at Chicago.

In view of this part of the contract, and of the generally accepted significance of "f. o. b." and similar terms when used in connection with price alone, we incline to the view that the contract itself indicates that the word "basis" thus used, bears upon the price only, and would not any more than "f. o. b." and similar terms used in connection with price only, indicate that thereby was imported into the contract an undertaking by the seller to actually deliver all this flour at the place so stated. Used in connection with price, it is fair to conclude that by the words "basis Chicago" the parties intended that the price fixed was on the foundational principle or hypothesis that the flour was at Chicago; not that it was physically to be transported there, but that the price fixed should be adjusted accordingly. This being in our judgment the fair interpretation to be given the words, it would follow that this should be accepted as their contract meaning, unless either the law has given them a different meaning, or there is in the trade a generally prevailing and well-known custom or practice to regard this expression in a contract as an undertaking on the part of a seller of such merchandise to actually deliver it at the indicated place.

[6] As has been pointed out, we find nothing in the law which indicates such a construction. Some evidence was introduced on both sides on the subject of what the contract means. Defendant in error, who lives at Chicago, and who did not assume to have any knowledge of trade customs and practices at Chicago or elsewhere, stated that these words in the contract meant delivery by the seller at Chicago. But he cannot affect the contract by his own statement of what the contract means. If these words, as certain others in the contract, were code words, he might testify as to their prearranged or agreed meaning. But it is not pretended that these were code words. The telegraphic messages did employ some code words, but there is no dispute that the decoded messages, as above stated, are correct, and we must accept them as such. The words "basis Chicago" are not translations or interpretations of code words, but appear in the original correspondence. He says that the words of the message mean that the seller was to deliver "f. o. b." cars at Chicago. He gives to the word "basis," not only the meaning of "f. o. b.," but attaches delivery as a further meaning, whereas the correspondence gives the price "basis Chicago" without any reference to delivery. But even his testimony is not in itself all consistent with such meaning. For instance, on cross-examination he was asked: "Basis Chicago. Does that not mean that the mill will pay the purchaser, you, or allow you on your purchase an amount of money equal to the freight between Pond Creek and Chicago?" and he replied, "It could; Yes, sir." No other witness testified in support of the contention of defendant in error in this respect.

[7] On behalf of plaintiff in error its president testified that he was familiar with trade terms and usage in Oklahoma and Kansas, and that the words "basis Chicago" meant delivery to the buyer at Pond Creek, with deduction from the agreed price of the freight rate to Chicago, regardless of the place to which the goods were actually shipped. Another witness, qualifying in the same manner, testified to same effect. There were offered depositions of several witnesses from Oklahoma and Kansas, who, after qualifying, were asked the meaning in the trade in Oklahoma and Kansas of the words in question. Objection to their testimony was sustained, but no offer appearing as to what was expected to be proved by them, we cannot say whether the error, if any there was, in the exclusion of these depositions, was substantial.

[8] But none of the evidence on the subject of trade custom, either that which was received, or in the qualifying questions in the depositions, would indicate that any of these witnesses knew of, or that there was extant any general trade custom or practice giving a special meaning to those words, so widely and generally prevailing and recognized that both parties to this contract will be presumed to have dealt in reference to it; neither did it tend to show that there was such a local custom of which both parties to the contract had actual knowledge. Trade custom evidence cannot aid in the interpretation of a contract, unless it meets one of these requirements. Smith v. Nat. Bank, etc. (C. C.) 191 Fed. 226; New Roads, etc., Mfg. Co., 154 Fed. 296, 83 C. C. A. 1; Chilberg v. Lyng, 128 Fed. 899, 63 C. C. A. 451; Rauth v. Warehouse Co., 158 Cal. 54, 109 Pac. 839; Taylor v. Union Sawmill Co., 105 Ark. 518, 152 S. W. 150.

[9] This being so, the natural import of the contract itself, as above pointed out, has not been so far qualified by this evidence as to warrant the conclusion that the contract was for delivery of the flour elsewhere than at Pond Creek; and in this state of the record the place of performance of the contract would be regarded as Oklahoma, and the right of action there accrued, and, the action being there barred after five years, the Illinois statute will give effect to this limitation, and bar it in Illinois.

The judgment of the District Court is reversed, and the cause remanded for a new trial.

FILER & STOWELL CO. v. DIAMOND IRON WORKS.*

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

No. 2806.

1. **Patents ⇐319(1)—Profits which would have been made on sales prevented by infringement recoverable as damages.**
Where an infringer was an old customer of a patentee and it was fairly deducible that the patentee by reason of the infringement lost the sale of the machines sold by the infringer, the profits which would have been made on such sales were recoverable as damages.

2. **Patents ⇐319(1)—Profits which would have been made on sales of repair parts held recoverable as damages.**
Where repair parts supplied by an infringer for its infringing machines were essential parts of the patented machine which but for the infringement would have been supplied by the patentee, the profits the patentee would have derived from their sale were recoverable as damages.

3. **Jury ⇐13(9)—Statute authorizing recovery of damages in equity does not violate Constitution as to jury trial.**
Rev. St. § 4921 (Comp. St. § 9467), authorizing courts of equity in patent suits to assess the damages from an infringement and to increase such damages as in actions of trespass upon the case does not violate Const. Amend. 7, preserving the right of trial by jury in suits at common law where the value in controversy exceeds $20.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit by the Diamond Iron Works against the Filer & Stowell Company. From a decree for complainant, defendant appeals. Affirmed.

F. E. Dennett, of Milwaukee, Wis., for appellant.

F. A. Whiteley, of Minneapolis, Minn., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges

ALSCHULER, Circuit Judge. The appeal is from a decree awarding damages for infringement of United States letters patent No. 777,779, to Dittbenner for a sawmill hog. A prior decree in same cause finding the patent valid and infringed was affirmed by this court. 250 Fed. 454, 162 C. C. A. 524. The suit was in equity for injunction and accounting, and injunction was awarded as prayed.

Upon accounting before the master it was found and reported that appellant's total profits derived from the infringement were $25,226.83; that the total damages suffered by appellee were $22,227.73; and that appellee was entitled to recover at its election either the profits or the damages. The District Court disapproved the master's finding as to profits on the ground that the evidence thereon was not sufficiently definite, but approved the findings as to damages, increasing them by $10,000, decreeing damages to appellant in the sum of $32,227.73.

[1, 2] Appellant contends the evidence fails to show that appellee sustained damages. The damages found, apart from the exemplary damages of $10,000, can be summarized under two heads: (1) Damages from loss of sale of 74 mill hogs, $11,042.72; and (2) damages

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 534, 65 L. Ed. —.

from loss of sale of repair parts for infringing hogs, $11,185.01. Appellant was an old customer of appellee for these hogs, and in the years preceding the infringement had sold many of them, and from all the evidence it is fairly deducible that through appellant's infringement appellee lost the sale of the hogs that appellant wrongfully made and sold. There was evidence showing what profit appellee would have realized from such sales, wherefrom its damages and loss in this respect sufficiently appeared. This may also be said of the repair parts. The machines were designed for very heavy work, and in their use subject to great strain; and frequent renewal of parts was necessary. The evidence from appellant's own accounts shows what parts were supplied, and the master after rejecting the claim for some parts such as wrenches and the like, as not specially designed for such machines, designated and reported the parts made and supplied for the infringing machines by appellant, and found the profit which appellee would have made had it supplied these parts, and this finding was the basis of the decree as to the parts. The record, in our judgment, justifies the conclusion that these parts were essential parts of appellee's patented machine, which but for the infringement would have been supplied by appellee, and that through the infringement it suffered the loss of the profit it would otherwise have derived from their sale.

Our conclusion is that the decree as to the actual damages was warranted, and that the infringement, having been properly found to have been flagrant and willful, the District Court was further warranted in increasing the damages as it did, unless there is merit in appellant's further contention, going practically to all the damages beyond $20.

[3] This brings us to appellant's main contention, that under the Seventh Amendment to the Constitution appellant was entitled to a jury trial, the right to which at all stages was insisted upon. The amendment is:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

The contention involves section 4921, Rev. Stat. U. S. (Comp. St. § 9467), whereby actions arising under the patent laws are made cognizable in courts of equity, and the court is given power upon bill filed to grant injunctions according to the principles of equity, and upon finding infringement, to award the plaintiff profits and damages, with same power to the court of equity to increase damages as is provided in cases of damages found by verdicts of juries at law.

In Root v. Railway Co., 105 U. S. 189, 26 L. Ed. 975, the question was whether under that act a suit in equity was maintainable for an accounting, predicated upon infringement of a patent which had long before expired, and under circumstances wherein it was claimed an action at law for damages would have afforded adequate remedy. In the opinion the authorities are reviewed at length, and the principles fully considered. The conclusion reached was that notwithstanding the broad terms of the statute its application must be limited to such cases

wherein under the recognized principles of equity there was ground for invoking equitable jurisdiction, in which event the jurisdiction would attach to administer relief touching all incidental matters. The true scope of the statute was indicated as follows:

"The whole force of the change in the statute consists in conferring upon courts of equity, in the exercise of their jurisdiction in administering the relief, which they are accustomed and authorized to give, and which is appropriate to their forms of procedure, the power not merely to give that measure of compensation for the past, which consists in the profits of the infringer, but to supplement it, when necessary, with the full amount of damage suffered by the complainant, and which, if he had sued for that alone he would have recovered in another forum, with power to increase the amount of the actual damages, as in courts of law. But as the account of profits, previously, was the incident of the suit, and not its object, so now the power to award damages and to multiply them is added as an incident to the right to an account."

Following this case was Clark v. Wooster, 119 U. S. 322, 7 Sup. Ct. 217, 30 L. Ed. 392, wherein, 15 days prior to the expiration of a patent, a bill was filed for an injunction against infringement of patent, and an accounting. It does not appear whether an injunction was awarded as prayed, but damages (not profits) were found and decreed to the plaintiff. The contention was made that for the damages the plaintiff had adequate remedy at law, and that the equity jurisdiction through the prayer for injunction was colorable merely, because of the near expiration of the patent. The court held that, if the complainant was entitled to an injunction even for the short period the patent had to run, the jurisdiction of equity attached, and that having attached, the expiration of the patent before an injunction was granted "would not take away the jurisdiction, and preclude the court from proceeding to grant the incidental relief which belongs to cases of that sort. This has often been done in patent causes, and a large number of cases may be cited to that effect. * * * There may be damages beyond this, such as the expense and trouble the plaintiff has been put to by the defendant; and any special inconvenience he has suffered from the wrongful acts of the defendant; but these are more properly the subjects of allowance by the court, under the authority given it to increase the damages."

Some expressions in Tilghman v. Proctor, 125 U. S. 136, 8 Sup. Ct. 894, 31 L. Ed. 664, are with apparently much confidence quoted and urged by appellant's counsel as sustaining their position. But that case is not in conflict; on the contrary, it is quite in harmony with what is above stated. No question of damages was there involved. The decree was for gains and profits only, while that here is only for damages. In the opinion the scope of equity jurisdiction in such cases prior to the statute of 1870 was discussed, but further on, after quoting the damage provisions of that act, the opinion states that the statute "thus expressly affirms the defendant's liability to account for profits, as well as authorizes the court sitting in equity to award and to treble any damages that the plaintiff has sustained in excess of the defendant's profits," citing cases, including Root v. Railway Co. and Clark v. Wooster, supra.

Assuming that there was here clear infringement of an existing patent, the right of equitable interposition by way of injunction cannot well be doubted. Without it indeed, appellee could not have secured adequate relief. Story well states it in the words:

"It is quite plain that if no other remedy could be given in cases of patents and copyrights than an action at law for damages the inventor or author might be ruined by the necessity of perpetual litigation without ever being able to have a final establishment of his rights." Story, Eq. Jur. (13th Ed.) § 931.

We do not regard the statutory definement of the incidents attaching to the equitable jurisdiction, through the inclusion of damages, actual or exemplary, as in any way transgressing the Seventh Amendment.

In view of the pronouncements of the Supreme Court above referred to, followed as they have been by innumerable adjudications of damages as incidental to equitable relief accorded in cases of patent infringement, further citation of authorities or discussion will be unnecessary.

We find none of appellant's contention made against the decree to be well grounded, and it is therefore

Affirmed.

KISSEL MOTOR CAR CO. v. WALKER et al.

(Circuit Court of Appeals, Fifth Circuit. February 5, 1921.)

No. 3598.

1. **Appeal and error ⊜1008(2)—Findings of fact on trial to court by stipulation are conclusive.**
   Where an action at law by stipulation is tried by the court, its findings of fact, supported by evidence, are conclusive on the appellate court.
2. **Monopolies ⊜17(1)—Contract containing restrictions on trade in violation of state statute invalid.**
   An interstate contract for the sale of motorcars to a local dealer in Texas *held* rendered invalid by a provision imposing restrictions on resale of the cars by the purchaser in violation of the Anti-Trust Law of Texas, and to invalidate notes given for the purchase price of such cars.

In Error to the District Court of the United States for the Southern District of Texas; Joseph C. Hutcheson, Judge.

Action by the Kissel Motor Car Company against T. L. Walker and another. Judgment for defendants, and plaintiff brings error. Affirmed.

Samuel B. Dabney, of Houston, Tex., for plaintiff in error.

Sam Streetman, M. E. Kurth, and Thomas H. Ball, all of Houston, Tex., for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On August 1, 1913, the Kissel Motor Car Company, a Wisconsin corporation, entered into a contract with T. L. Walker of Houston, Tex., for the purchase and sale by him of

Kissel Kars during the year ending July 31, 1914. The contract was entered into through a branch house or representative, the Southwest Kissel Kar Branch, a corporation. The Kissel Motor Car Company had never procured a permit to do business in Texas. The Southwest Kissel Kar Branch had procured such a permit and its place of business was in Dallas, Tex. The contract was accepted and approved in writing by the Kissel Motor Car Company.

For the two preceding years Walker had had a substantially similar contract (except as to the restrictions hereinafter quoted) with said Southwest Kissel Kar Branch. The terms of payment in these contracts were stated prices "f. o. b. at Hartford, draft against bill of lading payable (with collection charges) upon arrival of goods."

In October, 1912, this contract was modified by an agreement that the bill of lading might be taken up by 90-day notes signed by Walker and J. M. West, or that, instead of signing such notes, West might write a letter stating he would be responsible for all obligations incurred by Walker with said Southwest Kissel Kar Branch. On November 2, 1912, West wrote to said branch referring to their letter to Walker and advising that he would personally guarantee all obligations incurred by Walker.

In the contract of August 1, 1913, the terms of payment were:

"All cars to be paid for by sight draft attached to bill of lading to be drawn through National Bank of Commerce at Houston, Tex., per agreement with J. M. West"

—referring to the guaranty executed by West. Said last-mentioned contract, among other provisions, contained the following:

"In consideration of the purchase of said cars, and the other agreements of the second party herein, the first party grants to the second party the exclusive sale of Kissel Kars in the following territory: Harris county—and agrees to protect the second party in such territory so far as it can. But it is not to be held liable for damages or profits on sales made therein without its knowledge and/or beyond its control. * * *"

Also:

"Second party [being defendant in error T. L. Walker] further agrees not to sell Kissel Kars in any other territory than that described herein, and in cases of unauthorized sales he is to pay to the first party a sum equal to the discount on the cars so sold."

Suit was brought by said Kissel Motor Car Company on four notes given by Walker, one payable to the order of Kissel Motor Car Company, and the others to the order of the Southwest Kissel Kar Branch and indorsed by it to the plaintiff, and also against said West as a guarantor thereof, the petition setting forth the letter of West of November 2, 1912, as containing such guaranty.

Each defendant pleaded that said notes were given for automobiles and accessories sold by plaintiff to Walker under said contract of August 1, 1913, and that the restriction therein contained on Walker's making sales outside of Harris county, Tex., was in restraint of trade, in violation of the laws of Texas, and rendered these notes null and void. Walker also pleaded that since the filing of the suit he had been adjudicated a bankrupt and discharged, and that this discharged the

debt sued on as to him. West also pleaded that prior to the giving of the notes sued on he had withdrawn his guaranty.

The case was, by written stipulation, tried before the court without a jury.

The court found in favor of Walker on his plea of discharge in bankruptcy, but that West had not withdrawn his guaranty.

The court found that each of the notes sued on was given for an automobile or automobiles purchased through the Southwest Kissel Kar Branch in pursuance of said written contract of August 1, 1913.

As to the three notes payable to the order of the Southwest Kissel Kar Branch, he found that the automobiles so purchased were delivered to the defendant Walker from the warehouse of the Southwest Kissel Kar Branch at Dallas, Tex.

He also found that no fraudulent representations were made by Walker as charged, and that therefore he was discharged from said debt by his discharge in bankruptcy.

[1] As there is evidence in the record to support such findings, they are conclusive as to such facts in this court. American Sales Book Co. v. Bullivant, 117 Fed. 255, 54 C. C. A. 287; West Virginia Northern R. Co. v. United States, 134 Fed. 198, 67 C. C. A. 220; United States v. United States Fidelity Co., 236 U. S. 512, 527, 35 Sup. Ct. 298, 59 L. Ed. 696.

[2] The court found as a matter of law that said clauses giving to Walker the exclusive sales of Kissel Kars in Harris county and restricting his right to sell elsewhere than in Harris county made said contract illegal and void as in violation of the Texas anti-trust statutes (Rev. St. 1911, arts. 7796–7799) and rendered said notes illegal, and found in favor of both defendants on this ground.

As stated by counsel for the plaintiff in error in his brief:

"On this writ of error there is before this court only these general questions: Did the sales agreement of August 1, 1913, have any application as a defense, and, if it did, was it illegal, and, if there was any illegality, did it taint the consideration of the notes so as to make them null and void?"

The main contention of the plaintiff in error in this court was that the sales of these automobiles under the contract were wholly in interstate commerce, that the restriction on the vendor to sell to others in Harris county, and of the vendee not to sell outside of Harris county, did not affect the interstate contract for purchase and sale, and that the District Judge erred in holding that the sale of the automobiles in interstate commerce was affected by the Texas anti-trust statute. It was conceded that, had the contract related to a sale of automobiles by the Kissel Motor Car Company to the defendant Walker wholly intrastate, these restrictive clauses would have rendered it and the notes void. The insistence here is that the validity of the contract of sale is not governed by the Texas statutes because it is claimed "the agreement of August 1, 1913, dealt exclusively with interstate commerce and the sale of automobiles in interstate commerce."

We are unable to agree with the plaintiff in error that the contract dealt exclusively with the sale of automobiles in interstate commerce.

The leading case of Fuqua v. Pabst Brewing Association, 90 Tex.

298, 38 S. W. 29, 750, 35 L. R. A. 241, involved the sale of beer to be transported from Milwaukee, Wis., to Amarillo, Tex. The contract contained restrictions on the use and sale of the beer in Amarillo county by the parties to the contract which violated the anti-trust statutes of Texas. To a suit against the purchaser and his guarantors the violation of this statute was pleaded as rendering the entire contract illegal. To it the reply that the sale was a transaction in interstate commerce and not invalidated by the Texas anti-trust statutes was urged. The Supreme Court of Texas answered this contention as follows:

"The parties contracted for the sale and purchase of beer to be transported from Milwaukee to Amarillo and to be there delivered to Kingsbury and become his property. So far the transaction was interstate commerce, and not subject to state regulation without the consent of Congress, nor did the statute undertake in any way to regulate or prohibit the same. But the parties by the same contract voluntarily went further and so dealt with the subject, after it had ceased to be an article of interstate commerce, as to create a 'trust,' as above shown, in violation of the statute. A portion of the stipulations of the contract being lawful and the others unlawful, the taint of illegality affects and destroys the whole. Edwards County v. Jennings, 35 S. W. 1053, 89 Tex. 618.

"The commerce clause of the Constitution was not designed to protect the contractual rights of a person who thus voluntarily intermingles an otherwise legal interstate commerce transaction with an entirely local and unlawful one."

Fuqua v. Pabst Brewing Ass'n, 90 Tex. 302, 38 S. W. 30, 150, 35 L. R. A. 241.

This is followed in J. R. Watkins & Co. v. Johnson et al. (Tex. Civ. App.) 162 S. W. 394, writ of error denied 107 Tex. 706, 170 S. W. xviii.

Nor do we think the same is a divisible covenant, but that it formed an essential part of the consideration for the making of the agreement. The contract of August 1, 1913, provided not only for the shipment and purchase of these cars, but an integral part of it related to the sale of these cars by the vendee in Texas after he had acquired the same. Without such restrictive covenant it is doubtful if the contract for sale would have been made. The contract shows affirmatively that these restrictive agreements constituted a part of the consideration for the purchase and sale of the cars.

Where notes were given for the price of goods purchased under a contract illegal under the anti-trust statutes, the court, replying to the point that the suit was founded alone on the notes, said:

"It is further contended that the illegal character of the contract should not defeat a recovery upon the notes, as no aid from such contract is required to establish plaintiff's right to recover upon such notes, citing the cases of De Leon v. Trevino, 49 Tex. 93; Pfeuffer v. Maltby, 54 Tex. 461; Brooks v. Martin, 2 Wall, 70. If these notes, as found by the court, were executed for articles purchased under and in pursuance of the terms of the contract, then the provisions in restraint of trade contained in the contract became part of the consideration, and those provisions, being in violation of our statute, tainted the transaction, and rendered the notes void. In the case of Wegner v. Biering, 65 Tex. 509, Mr. Associate Justice Robertson said: 'It is obvious that there is ample valid consideration to support the promise sued on; yet, if, to the abundance of valid consideration, there has been added a leaven

of what is illegal, the whole contract is tainted. Story, Cont. § 583; Bishop, Cont. § 471; Pollock, Cont. § 318.'" Columbia Carriage Co. v. Hatch, 19 Tex. Civ. App. 124, 47 S. W. 291.

Clearly this restrictive clause related to the carrying on of business in Texas, and its legality is to be governed by the laws of Texas. That this contract was illegal under the Texas anti-trust statutes (Rev. St. Tex. arts. 7796–7799), and that this illegality defeated any recovery of the consideration contracted to be paid for these automobiles, is settled by a long line of Texas decisions. Wood v. Texas Ice & Storage Co. (Tex. Civ. App.) 171 S. W. 497; Armstrong v. Rawleigh Medical Co. (Tex. Civ. App.) 178 S. W. 582; Rawleigh Medical Co. v. Fitzpatrick (Tex. Civ. App.) 184 S. W. 549; Penn. Rubber Co. v. McClain (Tex. Civ. App.) 200 S. W. 586; American Brewing Co. v. Woods (Tex. Com. App.) 215 S. W. 448.

The decision of this court in the case of Cole Motor Car Co. v. Hurst, 228 Fed. 280, 142 C. C. A. 572, is in accord with the present decision. The contract therein construed was made in Indiana, the cars were to be shipped to Hurst in the state of Texas, and to be paid for by Hurst as sold by him. The District Court had held the contract to be one of sale, and therefore illegal. This court said:

"The crucial question here is: Did the first and subsequent contracts, with certain typewritten addenda, continue or constitute Hurst as agent or consignee, or did they evidence the sale of the motorcars to him? See Welch v. Phelps and Byelow Windmill Co., 80 Tex. 653–656, 36 S. W. 71."

This court construed the contract to be one of consignment, and not of sale, and on this ground reversed the District Court.

The contract in the present case is clearly one of sale. It is not contended that it was one of consignment. This would seem to make the decision in Cole Motor Car Co. v. Hurst an authority in support of the finding that this contract is in violation of the Texas statute.

The judgment of the District Court is affirmed.

AMERICAN TELEPHONE & TELEGRAPH CO. v. POSTAL TELEGRAPH-CABLE CO.

(Circuit Court of Appeals, Fifth Circuit. January 4, 1921.)

No. 3500.

1. Eminent domain ⇐198(1)—Interference with existing telephone lines not to be decided before condemnation of right on railroad right of way.

In proceedings under Laws Fla. 1903, c. 5211, authorizing condemnation for a telegraph or telephone line along a railroad right of way, provided the line shall be constructed so as not to interfere with the operation of an existing telegraph or telephone line, the question whether the proposed telegraph line will interfere with an existing line owned by intervener, is not to be decided in limine, where the pleadings and evidence indicate that it could be so constructed along the proposed line as not to interfere with the existing line.

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

2. Eminent domain ⇐198(1)—Authorizing condemnation for telegraph line and requiring that it must not interfere with existing lines held not error.

In a proceeding to condemn the right to erect and operate a telegraph line along a railroad right of way, where the owner of an existing line along such right of way intervened, claiming the erection of the proposed line and its operation with petitioners' instruments would interfere with the operation of intervener's telephone line, and praying that, if the right was granted, the judgment should require petitioner to operate its line with specified instruments, which would not interfere, it was not error to enter judgment for condemnation which required the construction of the line so as not to interfere with an existing line.

In Error to the District Court of the United States for the Southern District of Florida, Rhydon M. Call, Judge.

Condemnation proceeding by the Postal Telegraph-Cable Company against the Florida East Coast Railway Company to condemn the right to erect a telegraph line upon the railroad right of way, in which proceeding the American Telephone & Telegraph Company intervened. Judgment condemning the right of way prayed for (258 Fed. 493), and intervener brings error. Affirmed.

See, also, 255 Fed. 850, 167 C. C. A. 178.

Fred T. Myers, of Tallahassee, Fla., and Charles M. Bracelen, of New York City, for plaintiff in error.

Richard P. Marks and Sam R. Marks, both of Jacksonville, Fla., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On September 18, 1917, the Postal Telegraph-Cable Company, a corporation chartered under the laws of Delaware and a citizen of said state, filed a petition in the United States District Court for the Southern District of Florida against the Florida East Coast Railway Company, a corporation chartered under the laws of Florida and a citizen of said state, to condemn the right to erect its poles and lines upon the railroad right of way of said company for the purpose of establishing a telegraph and telephone line between East Palatka, Miami, and intermediate points. Said petition was filed under chapter 5211 of the Laws of Florida (1903), known as the telegraph act, entitled:

"An act to aid in the construction of telegraph or telephone lines, and prescribing the mode of procedure for the exercise of the powers of eminent domain by them against railroad companies for the right to construct, maintain and operate their lines upon their right of way."

Said act provided that any telegraph or telephone company organized under the laws of Florida or any other state should have the right to construct, maintain and operate its lines along and upon the right of way of any railroad of the state, and was granted thereby all powers for the exercise of the right of eminent domain, provided—

"the ordinary travel or use of said railroad is not interfered with by reason thereof and provided further that no pole shall be erected nearer than twenty feet from the outer edge of the track, unless by the consent of the railroad company."

If the consent of the railway company could not be acquired provision was made for condemnation by filing a petition in the office of the clerk of the circuit court of any county through which the railroad ran, unless its principal office or other place of business was in a county into which a portion of the right of way sought to be condemned extended, in which event the condemnation proceedings were to be had in said last mentioned county. The case was to be docketed on the chancery docket and to be tried by the judge, who should, however, provide a jury to whom should be submitted the assessment of the damages, which said verdict, judgment, and decree thereon should be recorded in the chancery order book of said court. Said statute further provided:

"Said judgment and decree shall provide that such telegraph or telephone line shall be constructed, as set out in the petition, and so as not to interfere with the operation of the trains of said defendant, or any telegraph or telephone line already upon such right of way, and, furthermore, that, if, at any time the railroad or railway company shall desire, for railroad purposes, the immediate use of any land occupied by said telegraph or telephone company, then the telegraph or telephone company shall, upon reasonable notice in writing by such defendant, at its own expense remove its line to some other place adjacent thereto on such right of way, so as not to interfere with the track or use of said railroad, or any telegraph or telephone line already on said right of way. * * *" Section 3.

A portion of section 1 of the above act of 1903 provides:

"Any person or corporation other than the defendant railroad or railway company made a party defendant shall if a resident of this state, be served with process," etc.

By section 7 it is provided:

"* * * and only the interest of such parties as are brought before the court shall be condemned in any such proceedings."

Prior to the adoption of said statute in 1903 there existed a general statute entitled:

"An act prescribing the mode of procedure for the exercise of the powers of eminent domain, by cities, towns, counties, corporations, public and private, and individuals." Laws 1901, c. 5017.

Said statute contained the following provision:

"Any person interested in or having a lien upon the property, not made a party, may become a party as of course by filing his petition of intervention setting forth under oath his interest, before the return day, or afterward by order of the judge." Section 5; Gen. St. 1906, § 2012.

On November 3, 1917, the American Telegraph & Telephone Company presented a petition praying to be allowed to intervene in, and become a party defendant to, said proceedings. It alleged that it had entered into a contract with the defendant railway company in January, 1916, whereby it had acquired the right to construct its telephone lines upon the right of way of the railroad of said railway company upon the side opposite to that occupied by the lines of the Western Union

Telegraph Company and the International Ocean Telegraph Company and that it had constructed its lines thereon. This contract was to continue in effect 25 years from February, 1916, with an option to the intervener to extend the period for a further 25 years. It set up that the operation of the proposed line of the Postal Telegraph-Cable Company would result in inductive interference with its telephone currents, which would seriously impair, if not destroy, the service to the public furnished by it over said lines—

"unless in the use of its said lines the said Postal Telegraph-Cable Company shall be strictly limited to particular kinds of apparatus designed to obviate and prevent said interference, and unless the said Postal Telegraph-Cable Company shall refrain and be prevented from using and shall not use in connection with the operation of the said line types of telegraph apparatus now in use by the said Postal Telegraph-Cable Company and other telegraph companies in connection with the transmission of messages over their lines."

It prayed for leave to intervene and answer and—

"that the said Postal Telegraph-Cable Company be prohibited from proceeding with this condemnation in such manner as to in any wise interfere with the use of the telephone line of your intervener already on said right of way, and that the rights of your intervener in its said telephone line be in all respects fully protected."

Leave to intervene was granted on November 3, 1917. Said intervener then filed an answer in said condemnation proceedings, setting up the same facts as set up in its petition to be allowed to intervene, averring that the petition for condemnation proceedings did not disclose that the right of way on the side of the railway opposite that upon which the lines of the Western Union Telegraph Company and the railway company were erected was occupied by the telephone lines of intervener, averring that the construction of the line of the character or location described in said petition—

"would physically interfere substantially and materially with defendant's said telephone line and its operation, and the operation of petitioner's proposed line and the use in connection therewith of types of telegraph apparatus now used by said petitioner and other telegraph companies in connection with the transmission of messages over their lines would result in inductive interference with the telephone current essential to the transmission of speech over the lines of this defendant which would seriously impair if not entirely destroy, the service to the public furnished by defendant over its said line"

and averring that the statute of Florida authorizing the exercise of eminent domain in behalf of telegraph companies on the right of way of the railway companies could not be invoked, where the result of the construction and operation of the proposed line would interfere with the operation of the trains of the railway company, or the operation of any telegraph or telephone lines already upon such right of way, and the intervener prayed that before proceedings to assess the damages therefor by a jury the court could determine the extent of interference with defendant's service resulting from such construction and operation and—

"whether the right to condemn should be refused or granted, and, if granted, the restrictions and conditions that shall be incorporated in said grant in

order to fully protect this defendant's line and prevent the impairment of the efficiency of defendant's service over its said line."

The railway company answered said petition, incorporating therein a demurrer attacking the constitutionality of said statute of 1903, setting up causes why the petition should not be granted—among other things that no necessity for such condemnation exists; that it had entered into a contract with the intervener by which the right to construct telephone lines over its right of way had been granted, and pursuant to its contract such line had been built; that about 13.3 per cent. of the right of way was only 50 feet wide or less; that the poles of the intervener, where the right of way is 100 feet wide, are located approximately 27 feet from the center of the track on the side opposite to that on which the Western Union Telegraph Company's and the railroad company's poles are erected; that these distances are not uniform, but vary at many points on account of the variation in width of the right of way, and on account of switches, structures upon the right of way, etc.; that at the time of filing the petition three separate and distinct lines of wires were on its right of way, strung on two lines of poles, one line on each side of its roadbed; that the erection of petitioner's line would interfere by induction with the operation of the other lines already built and in operation.

On April 21 and following days testimony was taken on the issues presented by the answers. On April 25, 1919, petitioner filed a motion that the court find in its favor and refer the case to a jury for the assessment of damages. The court, on June 13, 1919, filed its opinion, in which it sustained the right of defendant to condemn, as against the railroad company, an easement for the construction of its lines upon the railroad company's right of way.

As to the American Telephone & Telegraph Company, after reciting that considerable testimony, expert in its nature, had been introduced both for and against the contention that the operation of the petitioner's lines would interfere with the lines now operated by the intervener, the court held that this question was not at that time properly before it for consideration, and sustained the contention of the petitioner that the act of 1903 did not contemplate condemning the property right of any one except the railroad company; that it might become necessary for the court on another proceeding to decide whether the line, if constructed, interfered with the operation of an existing telegraph or telephone line; but that it could not be decided in limine in this statutory proceeding.

The case was thereupon submitted to the jury, which assessed damages in favor of the defendant railway company at $3,042, and on October 31, 1919, a judgment was entered, condemning the right of way, described in said petition, excepting two certain places where the right of way was only 35 feet in width.

"It was further ordered, adjudged, and decreed by the court that petitioner's said telegraph and telephone line shall be constructed as aforesaid, and so as not to interfere with the operation of the trains of said defendant railway company or with any telegraph or telephone lines already erected upon said right of way."

Said railway company having declined to join in an appeal, a judgment of severance of said defendant was on December 11, 1919, ordered, and a writ of error sued out by the intervener on said day to the United States Circuit Court of Appeals for the Fifth Circuit. No supersedeas of said judgment was applied for, presumably because section 4 of said act of 1903 provides that such an appeal in no case operates as a supersedeas, where the petitioner has paid the amount of the verdict of the jury into court as aforesaid, so as to prevent, hinder, or delay petitioner in the construction of its lines.

The sole question thus presented is whether the action of the court below in declining, in this proceeding under the Florida statute of 1903, to determine whether the intervener could defeat the condemnation of an easement on the railway company's right of way is reversible error, the judgment being conditioned on the petitioner constructing the line for which the right of way is condemned, so as not to interfere with the operation of the intervener's telephone line.

[1] The intervener does not own any interest which is sought to be condemned, and does not intervene in order to ask for compensation for any property or right which it says will be taken. It is to be noted that the statute does not confer any right to condemn any part of the already occupied easement of the intervener. By its title the statute is confined solely, in its provision for procedure, to—

"prescribing the mode of procedure for the exercise of the powers of eminent domain, by them [telegraph and telephone companies] against railroad companies, for the right to construct, maintain, and operate their lines upon their right of way."

The statute would seem to contemplate the filing of proceedings against the railroad company, or other owner of an interest in the right of way, which interest is sought to be condemned. It does not allow the condemnation of, or a payment for, a right to interfere with an existing line of a telephone or telegraph company; but it permits the condemnation, subject to a continuing provision in the judgment that there shall be no interference with such existing line or lines.

The existing line has secured to it, by the condemnation permitted, a priority of right against interference. The act provides that the condemnation may be had, provided it does not interfere with the ordinary operations of the railway company. This, the court below held, raised a question to be settled in limine. But there is no such proviso as to existing telegraph and telephone lines. There the mandate of the statute is that the judgment of condemnation shall provide that the new line, to be built on the condemned easement, shall not interfere with an existing telegraph or telephone line, and the construction is undertaken subject to this requirement.

The court below held that under the statute he was not required to pass on the question of such interference before permitting the condemnation. We do not think that the statute of 1903 made it a condition to permitting this condemnation that the court must pass in limine in this proceeding on the question of whether a line could be

built which would not interfere, and find this issue in favor of the petitioner.

[2] Again the intervention in this case did not seek absolutely to defeat the condemnation. The prayers of the intervening petition were:

"That the said Postal Telegraph-Cable Company be prohibited from proceeding with this condemnation in such manner as to in any wise interfere with the use of the telephone line of your intervener already in such right of way and that the rights of your intervener in its said telephone line be in all respects fully protected."

The allegations of the petition for intervention intimated that there were certain appliances by the use of which such protection would be given. The answer filed by intervener prayed that the right of condemnation, if granted, should be with such restrictions and conditions incorporated in the order as to fully protect the intervener's line, and prevent the impairment of the efficiency of its service thereon.

Even if the court had power under the act of 1903 to pass on the question in limine of whether it was possible to build the line of petitioners without interference with that of the intervening defendant, we do not think the judgment in this case under the pleadings herein is erroneous. The court found that the evidence was conflicting on the subject of such interference, and, in accordance with the statute, provided in the judgment of condemnation:

"That petitioner's said telegraph and telephone line shall be constructed, as aforesaid, and so as not to interfere with the operation of the trains of said defendant railway company, or with any telegraph or telephone lines already upon such right of way."

In his findings and opinion he says:

"And, if so constructed, certainly there can be no cause of complaint by such telephone or telegraph company, and no right of such company, property or otherwise, invaded, by the proceeding."

We therefore are of the opinion that the court afforded to intervener sufficient protection to its rights under this statute, and the statutory proceeding had thereunder, by the provision in the judgment that the line should be constructed so as not to interfere with any telegraph or telephone line already upon such right of way, and by reserving jurisdiction for the purpose of enforcing the provisions of said judgment.

The judgment is therefore affirmed.

In re NESTO.

Appeal of ELLIS.

(Circuit Court of Appeals, Third Circuit. February 2, 1921.)

No. 2583.

1. Sales ⟸296—**After delivery or after commencement of transportation to another destination, right of stoppage in transit is gone.**
Under Act Pa. May 19, 1915, P. L. 558, § 57, and also independent of that act, a seller's right to stop goods upon the buyer's insolvency is restricted to the transit, which terminates with the delivery; and if the goods are moved towards another destination under fresh directions by the purchaser, the seller's right to stop is gone.

2. Sales ⟸162—**Delivery may be actual or constructive.**
Delivery, in the law of sales, may be either actual or constructive.

3. Sales ⟸162—**"Actual delivery" and "constructive delivery" defined.**
"Actual delivery," in the law of sales, consists in giving the buyer or his accredited agent the real possession of the goods sold, while "constructive delivery" comprehends those acts which, though not truly conferring real possession, are held by construction of law equivalent to acts of real delivery, and includes symbolical or substituted delivery.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Actual Delivery; Constructive Delivery.]

4. Sales ⟸156—**Actual or constructive delivery both contemplate change of control and custody.**
Both actual and constructive delivery contemplate the absolute giving up of the control and custody of the goods on the part of the seller and the assumption thereof by the buyer.

5. Sales ⟸296—**Reconsignment by buyer to himself held not to prevent stoppage in transit.**
Where a buyer of goods shipped to him by carrier, without assuming their possession, or even seeing them, had them reconsigned to himself under a fictitious name at a new destination a few days before a bankruptcy petition was filed, there was no delivery, actual or constructive, preventing the seller from exercising his right of stoppage in transit, as the law will not hold that there has been a constructive delivery in aid of an obviously fraudulent transaction.

6. Sales ⟸296—**Permitting reconsignment not acknowledgment by carrier that it held for buyer, so as to prevent stoppage in transit.**
Under Act Pa. May 19, 1915, P. L. 559, § 58, subsec. 2 (b), providing that goods are no longer in transit when, after their arrival, the carrier acknowledges to the buyer that he holds them on his behalf, and continues in possession as bailee for the buyer, a carrier did not make such acknowledgment and continue in possession as bailee for the buyer, by permitting the buyer to reconsign the goods to himself at another destination.

7. Sales ⟸296—**Carrier's refusal to surrender without security held not wrongful, so as to prevent stoppage in transit.**
Under Act Pa. May 19, 1915, P. L. 559, § 58, subsec. 2 (c), providing that goods are no longer in transit if the carrier wrongfully refuses to deliver them to the buyer, a carrier's refusal to deliver goods to the buyer's receiver in bankruptcy without security against liability to the seller, arising from its notice of its exercise of the right of stoppage in transit, was not wrongful, where the seller's right was sustained.

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

Bankruptcy proceeding against R. Nesto. From an order requiring the payment of the proceeds of certain property to the Connellsville Macaroni Company, A. C. Ellis, receiver, appeals. Affirmed.

Lowrie C. Barton, Jacob Roe, and A. H. Kaufman, all of Pittsburgh, Pa., for appellant.

E. C. Higbee and John Duggan, both of Uniontown, Pa., for appellee.

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

WOOLLEY, Circuit Judge. This case turns on one fact, which—though later controverted by the pleadings—was established by the appellant's admission. We therefore regard the facts as undisputed. They are these:

Connellsville Macaroni Company sold R. Nesto a carload of macaroni on credit and consigned it to him at Pittsburgh. The car arrived at Pittsburgh on November 12, 1919. Nesto at once reconsigned the car to R. Ferri at New York, where it arrived on November 20. On the same day an involuntary petition in bankruptcy was filed against R. Nesto in the District Court of the United States for the Western District of Pennsylvania and A. C. Ellis, the appellant, was appointed Receiver. On the next day the court issued an order in the nature of a writ of seizure, directing the Pennsylvania Railroad Company, the carrier under both consignments, to deliver the car to the Receiver, and restraining delivery to any one else. The carrier, while obeying the injunctive feature of the order, refused to surrender the car without security. On November 24, the Macaroni Company exercised a claimed right of stoppage in transitu by serving notice upon the carrier at New York not to deliver the carload of goods to R. Ferri, the named consignee, but to reconsign the same to it at Connellsville, Pennsylvania. On November 25, the Receiver petitioned the court for authority to give the carrier the security it required. On December 1, the Macaroni Company filed a petition praying the court to modify its order by directing the carrier to reconsign the car to it under its claimed right of stoppage in transitu, and for a rule on the Receiver to show cause why the same should not be done. The rule issued. Before its return, the Receiver was granted leave to execute a bond of indemnity to the Director General of Railroads; and on its delivery he obtained possession of the carload of goods. By arrangement of the parties the macaroni was sold and the proceeds retained to await the outcome of this controversy. On hearing, the court made the rule absolute and ordered the Receiver to pay the proceeds of the sale to the Macaroni Company. From this order the Receiver appeals.

[1] On these facts alone there can be no dispute as to what the law is or what the decision should be. The law briefly stated is this: In the sale of goods to one becoming insolvent, the vendor's right to stop them is restricted to their transit. After their arrival at the appointed destination and their delivery to the purchaser the transit is at an end; and if later, the goods are moved toward another destination under fresh directions by the purchaser a new transit is begun,

which is no part of the original transit, and the vendor's right to stop is gone. Benjamin on Sales, Rule 48–C. This principle of law is embodied in the Sales Act of Pennsylvania (Act of May 19, 1915, P. L. 543, 558) where it is said:

"Sec. 57. Subject to the provisions of this act, when the buyer of goods is or becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit; that is to say, he may resume possession of the goods at any time while they are in transit, and he will then become entitled to the same rights in regard to the goods as he would have had if he had never parted with the possession."

In aid of the exercise of this right, the statute defines affirmatively when the goods are in transit and negatively when they are not. Of these several provisions, the only ones pertinent to this issue are the following:

"First. Goods are in transit, within the meaning of section fifty-seven—

"(a) From the time when they are delivered to a carrier by land or water, or other bailee, for the purpose of transmission to the buyer, until the buyer, or his agent in that behalf, *takes delivery* of them from such carrier or other bailee.

* * * * * * * * * * * *

"Second. Goods are no longer in transit, within the meaning of section fifty-seven—

* * * * * * * * * * * *

"(b) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent; and it is immaterial that further destination for the goods may have been indicated by the buyer;

"(c) If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf." Laws 1915, P. L. 558, § 58.

In a word it appears from both the general rule and its statutory embodiment that a seller's right of stoppage in transitu upon discovery of the buyer's insolvency rests on the fact that the goods are in transit; and the fact of transit turns on the question whether or not delivery has been made to the buyer. Applying this test to the surface facts of this case (which show that Nesto, the buyer at Pittsburgh, although he never assumed actual possession and therefore never took actual delivery of the goods, rebilled the goods to an ostensibly new purchaser at a new destination), it would seem that Nesto had acquired such dominion and had exercised such control over the goods as to establish a new transit and defeat the seller's right of stoppage therein. In re W. A. Paterson Co., 186 Fed. 629, 108 C. C. A. 493, 34 L. R. A. (N. S.) 31; Lickbarrow v. Mason, 2 East, 63; Harris v. Pratt, 17 N. Y. 249.

But these are not all the facts. The controlling one, which we now state, came into the case in this way:

On November 25, 1919, the day following the exercise by the Macaroni Company of its claimed right of stoppage in transitu, the Receiver of Nesto filed the petition in the District Court to which we have already referred, reciting the carrier's refusal to turn over to him the merchandise without securing it against liability therefor, and asserting a Receiver's right to the bankrupt's goods, prayed for authority to execute a bond of indemnity to the Director General of Railroads. If

the reconsignment of the goods by Nesto at Pittsburgh to Ferri at New York was made pursuant to a bona fide resale thereof by Nesto to Ferri, obviously Nesto's Receiver in bankruptcy could have no right to them. In order, we apprehend, to show that the goods belonged to the bankrupt and therefore to establish a receiver's right to their possession, the Receiver, in his petition to the court for leave to execute the bond in question, averred the following fact:

"The said Romeo Nesto (the bankrupt) *consigned to himself* as R. Ferri, the following cars of merchandise (eight in number) via the Pennsylvania Railroad and are now held by said Pennsylvania Railroad at New York City and said cars contain macaroni, olive oil and other groceries."

The car in controversy was one of the number. At this juncture Nesto absconded.

Assuming it to be a fact on the Receiver's admission that Ferri, the consignee in what purported to be the second transit, was no other than Nesto, the consignee in the first transit, and that the two nominal consignees were one and the same person (but for which we surmise, the Receiver could not have made a valid claim to possession of the bankrupt's property) there at once arose the question whether Nesto ever took delivery of the goods at Pittsburgh, and whether, accordingly, the seller's right to stoppage in transitu was lost at Pittsburgh or continued to New York. This question, as in every case of stoppage in transitu, turns on the fact of delivery.

[2-4] Delivery in the law of sales may be either actual or constructive. Actual delivery consists in giving the buyer, or his accredited agent, the real possession of the goods sold. Constructive delivery comprehends those acts which, although not truly conferring real possession of the goods sold, are held constructione juris equivalent to acts of real delivery. In this sense it includes symbolical or substituted delivery. 35 Cyc. 188, 189; 24 R. C. L. 144, 145, 146. Both actual and constructive delivery, however, contemplate the absolute giving up of the control and custody of the goods on the part of the seller and the assumption of the same by the buyer. Brown v. Dickerson, 2 Marv. (Del.) 119, 121, 42 Atl. 421; Swafford v. Spratt, 93 Mo. App. 631, 67 S. W. 701. Applying this unquestioned rule to the facts in this case, as completed by the Receiver's admission that Ferri and Nesto were but different names for the same person, what do we find as to the fact of delivery?

[5] That there was no actual delivery is not seriously disputed. When the car reached Pittsburgh the carrier notified Nesto of its arrival. Without assuming possession of the same, and, so far as we are shown, without seeing the car, Nesto immediately reconsigned it to himself under a new name at a new destination. From the very nature of the transaction there was no actual delivery to Nesto at Pittsburgh. His reconsignment of the car to himself, although under an assumed name, was a declination by him to accept delivery at Pittsburgh and an affirmation of his intention to accept delivery at New York. Was there constructive delivery? While ordinarily the law would raise a delivery by construction under circumstances which brings the goods within the dominion of the purchaser, In re W. A.

Paterson Co., supra; Diehl, Adm'r, v. McCormick, 143 Pa. 584, 22 Atl. 1033; 24 R. C. L. 146; where he has exercised full control over them by bona fide reconsigning them, the law will not hold a delivery as constructive—that is, the law will not construe as done that which was really not done—in aid of an obviously fraudulent transaction, Rosenthal v. Dessau, 11 Hun (N. Y.) 49.

Therefore we hold that at the time the Macaroni Company notified the carrier at New York of its right to stop the shipment in transitu, delivery, either actual or constructive, had not been made to the buyer, under either his real or fictitious name, and therefore, as against Nesto, the Macaroni Company's right to stoppage in transitu was preserved.

[6, 7] The remaining questions concern rights claimed by the Receiver of the bankrupt under other provisions of the Sales Act of Pennsylvania. The first arises under subsection b of section 57 which defines goods as no longer in transit, if, after their arrival at destination the carrier "acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer." As there is no averment that the carrier made such acknowledgment, resort to this provision of the statute is without avail. The second question arises under subsection c of section 58 defining goods as no longer in transit "if the carrier or other bailee wrongfully refuses to deliver the goods to the buyer, or his agent in that behalf." This provision is invoked to meet the carrier's refusal to deliver the goods to the Receiver without security to protect itself against liability, inter alia, arising from the notice of the Macaroni Company, previously given, of its right of stoppage in transitu. As this right has been sustained, the carrier's refusal was not wrongful.

The order of the court below is affirmed.

DAHLGREN v. PIERCE et al.*

(Circuit Court of Appeals, Sixth Circuit. January 17, 1921.)

No. 3291.

1. **Wills ⇐439—Intention given effect, if lawful.**
In construing a will, the court is required to ascertain the testator's intention and to give effect to his intended disposition of the estate, if that is lawful.

2. **Wills ⇐470—Intention gathered from language of entire will.**
The intention of testator must be ascertained from the entire will, but must be extracted from the language used by him, and not by conjecture based upon extraneous facts.

3. **Wills ⇐81—Unlawful portion of scheme of disposition disregarded.**
If the disposition intended by testator is not lawful, the court will follow his scheme of disposition, so long as that is consistent with the rules of law, and, when that consistency ends, will distribute the property according to the rules of law.

4. **Wills ⇐682(1)—Child of deceased grandchild held entitled to share income.**
Under a will giving testator's property to trustees, to hold during the lives of testator's daughter and two grandchildren, and to pay the in-

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied and appeal dismissed 254 U. S. —, 41 Sup. Ct. 534, 65 L. Ed. —.

come in equal shares to them, with provision that, if the daughter shall remarry and die leaving issue by a future marriage while either of the two grandchildren survive, the income should be, during the continuance of the trust, equally divided among all the children of testator's daughter, the children living when that contingency happened did not constitute a fixed class entitled to the property, since it was not then to be finally distributed, so that the share of one of those children who died leaving a son is to be paid to the son during the continuance of the trust.

5. **Perpetuities ⟸4(1)—Lives in being not limited to beneficiaries.**
Within the rule against perpetuities, invalidating an estate unless it must vest within a life or lives in being and 21 years thereafter, plus the usual fraction, the lives in being need not be those who are entitled to take the property.

6. **Perpetuities ⟸4(21)—Income of trust not a perpetuity may be shared by child of person unborn at testator's death.**
Where the trust created by the will was to terminate at the death of the survivor of three living persons, so that it was not a perpetuity, the payment of a share of the income of the trust to a son of an after-born grandson of testator does not violate the rule against perpetuities.

7. **Perpetuities ⟸4(21)—Statute restricting devises of realty does not apply to bequests of income therefrom.**
Gen. Code Ohio, § 8622, prohibiting gift of an estate in lands or tenements except to persons in being or their immediate descendants, does not apply to a bequest of the income from lands and tenements devised in trust, nor the payment of such income to the child of a grandson born after testator's death.

8. **Trusts ⟸271½—Distribution of corpus not determined in proceedings as to right to income.**
In proceedings to determine the right to share in the income from a trust estate, the rights to share in the corpus after the termination of the trust will not be determined, since the persons interested in the distribution of the corpus may not be the persons then before the court, and the interests of the parties, if not mere expectancies, are only contingent interests.

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

Supplemental and ancillary bill by Ulrica D. Pierce, trustee under the will of Samuel F. Vinton, deceased, against John V. Dahlgren, Jr., and others. From an order of the District Court, the named defendant appeals. Reversed and remanded.

This is the second chapter of this appeal. After the first opinion herein (263 Fed. 841) was filed, and before a mandate thereon was issued, the parties stipulated that "the case may be decided by the court upon the present record, the appellees withdrawing their petition for rehearing, and appellant waiving the objection that the order of the District Court, entered January 23, 1915, for service under section 57 of the Judicial Code [Comp. St. § 1039], was not served upon him until after the date fixed by said order for him to appear and plead, and withdraws that ground of his motion, filed April 7, 1917, to set aside said service, and agrees that the court may consider and determine the appeal upon the record with the same effect as if said order had been served in time, as provided therein." This stipulation was approved by the court.

Some additional facts need to be stated to present clearly the questions of law now decided. Samuel F. Vinton, the testator, died in May, 1862. He had lately been domiciled in Ohio, but was then domiciled in Washington, D.

C. His will is dated the 31st day of March, 1862. He owned real estate in Washington, D. C., in Iowa, and in Ohio, but the larger part of his estate is derived from Ohio land. His will in part provides as follows:

"And I do hereby further constitute and appoint the said Charles B. Goddard the trustee of the estate, both real and personal, hereinafter devised and bequeathed to him to hold the same for the uses and trusts hereinafter declared.

"And I do hereby devise unto the said Charles B. Goddard, his heirs and assigns for the said uses and trusts hereinafter declared, all of the real estate wheresoever situated and not hereinbefore devised, which I now own, or may die seized and possessed of in law or equity.

"And I do hereby further give and bequeath unto the said Charles B. Goddard, as such trustee, all of the railroad bonds, railroad, bank and other stocks and securities of which I may die possessed, or which may be purchased by said executor as above directed. * * *

"It is my will and direction that the trustee, for the time being of said trust estate, shall manage and take care of all of said estate held in trust under any provision of this will, and collect and receive the rents, interest, dividends and income arising therefrom, and after paying out of the same all taxes, and necessary charges of managing and keeping the property in repair, including his own compensation to be allowed yearly by the proper court as hereinafter provided, he shall dispose of the residue, or net annual income of said trust estate, in the manner, and for the purposes and uses following; that is to say, he shall during the joint lifetime of my said daughter, Sarah Madelaine Goddard, and her two children, Romaine Goddard and Vinton Goddard, annually, and if practicable, semiannually, or quarterly, pay one-third part of the whole of such net annual income to each of them for their maintenance and support.

"But if my said daughter shall die leaving no issue by a future marriage, her said two children surviving, or if either of said two children shall die leaving no lawful issue the other child and my said daughter surviving, then in such case, the whole of said net annual income shall be thereafter equally divided between the two survivors during their joint lives; and if one of said two remaining survivors shall die leaving no lawful issue, then the whole of said net annual income shall thereafter be paid over to the sole survivor during his or her natural lifetime. But if said Vinton Goddard and Romaine Goddard, or either of them, shall die leaving lawful issue, then there shall be paid to such issue of him or her during the continuance of this trust, the share of said net annual income that would have been paid to their deceased parent if living. And if my said daughter shall die leaving lawful issue by a future marriage, said Romaine and Vinton Goddard, or either of them surviving her, then and in that case, the said net annual income shall be, during the continuance of said trust estate equally divided among all the children of my said daughter, share and share alike, the surviving children of my said daughter to take per capita in making the distribution of said income, and the issue of such children as may be deceased shall take per stirpes. My object in creating the trusts of this will being to provide usual support, during their several lives, for my said daughter, and her two children, Romaine Goddard and Vinton Goddard, I do hereby declare that so soon as my said daughter and her said two children shall have all died, the trust estate hereinbefore created shall cease and determine; and the said trust property, both real and personal, is herein and hereby devised and bequeathed to, and shall then be conveyed and distributed to and among such of the lawful issue and descendants of my daughter, their heirs and assigns in fee as would in law be entitled to the same, if I had lived until the death of my said daughter and of said Romaine and Vinton Goddard, and had myself died intestate. And it is my will and direction that the trustee, for the time being of said trust estate, shall, at the expiration of said trust, make, execute and deliver to the parties that may, under the last foregoing devise and bequest, be entitled thereto, all and every such transfers, assignments, conveyances in fee and other instruments in writing, as may be necessary and proper to carry into full effect the foregoing provision for the

last and final disposition of said trust property, both real and personal."

Other provisions of the will do not aid in construing it and need not be quoted. Provision is made therein for the successive appointment of trustees. In the event of the refusal of Charles B. Goddard to accept the trust or to appoint a successor in the manner provided in the will, or in case of his death without making such appointment of another trustee, or his inability to act, it is provided that "the court within whose proper jurisdiction and duty it may be to see that the trusts herein created are put into execution, shall appoint a trustee and renew the appointment as often as need be." Goddard having died without appointing another trustee, the original bill herein was filed pursuant to this clause in the court below April 6, 1864. The trustees thus appointed by the court are by the will made subject to the court's orders and directions, and are required to file annual reports with the court. It is further provided that, "before the court is called upon to approve the same, the trustee shall give to all the parties interested herein, due and reasonable notice in writing or such other mode of personal service as said court may direct, that he has placed said report on file of the court—that the same is open to inspection and that on the day specified in said notice, he will move the court to approve of and confirm said report."

The testator left surviving him his widowed daughter, Sarah Madelaine Goddard, hereinafter referred to as Madelaine, and her two children, Romaine Goddard and Vinton Goddard. Madelaine in 1865 was remarried to Admiral John A. Dahlgren. Of this marriage were born three children, Eric B. Dahlgren, Ulrica Dahlgren (now Pierce), and John V. Dahlgren. Vinton Goddard died unmarried and without issue in 1877. Madelaine died May 28, 1898. John V. Dahlgren died August 10, 1899, leaving surviving him John V. Dahlgren, Jr., the appellant herein, who was born June 26, 1892. Romaine Goddard married Baron Gustav von Overbeck, and is still living, being the last survivor of the three persons living at the time of the testator's death, during which the trust created by the will should continue.

"The controversy on the merits involves the right of John V. Dahlgren, Jr., to participate in the distribution of income during the continuance of the trust. The several contentions on this proposition are sufficiently stated in the opinion. When John V. Dahlgren, Sr., died, and the right of his son to participate in the income first arose, Evan J. Jones was trustee. His first report, filed May 22, 1900, shows payment of $2,044.49, a full share of the net annual income, to Eric B. Dahlgren, guardian of John V. Dahlgren, Jr. Notices were given and accepted by Ulrica D. Pierce, Romaine von Overbeck, and Eric B. Dahlgren, both individually and as guardian of John V. Dahlgren, that this annual report had been placed on file and would stand for hearing on the 1st day of July, 1900, "or as soon thereafter as counsel can be heard." On January 31, 1901, a decree was entered showing that a hearing was had on this report, and reciting that notices had been served on and acknowledged by the said beneficiaries, and ordering that the report be approved and confirmed. Jones made in all four annual reports similar in form, and of which like notices were given and upon which like hearings were had and orders of confirmation made. Martin F. Morris, his successor as trustee, who was appointed December 29, 1903, filed three annual reports with respect to which like proceedings were had. Ulrica D. Pierce, his successor and the present trustee, who was appointed January 21, 1907, has filed six annual reports and one special report with respect to which like proceedings were had. Nearly all of these reports show that a full, proportionate share of the income was paid to Eric B. Dahlgren as guardian of the appellant. Prior to October, 1910, royalties from coal lands in Ohio had accumulated in the hands of the trustee in the sum of $115,000. Upon application to the trustee, and after hearing, it was held and decreed that these royalties thus accumulated were income subject to distribution, and were in fact distributed in the same manner, after notice, to all the beneficiaries, and the special report showing this had been done was approved by a decree formally entered.

The present trustee, Ulrica D. Pierce, filed, October 20, 1913, the supplemental bill referred to in the former opinion. It is upon this bill that the

present controversy has arisen. It raises for the first time any question of the right of John V. Dahlgren, Jr., to participate in the annual distribution of income. Briefly stated, the relief sought is a construction of the will, and particularly a determination as to whether or not the appellant had at any time, or has now, or will have at any time, any interest in or right to any part of the trust estate, and if the finding is that he has not, that his guardian may be required to pay back to the trustee for proper distribution the income previously paid to him. The appellant had then arrived at full age, but his guardian still had possession of all income previously received.

Lawrence Maxwell, of Cincinnati, Ohio (Joseph S. Graydon, of Cincinnati, Ohio, and Coudert Bros., of New York City, on the briefs), for appellant.

J. Warren Keifer, of Springfield, Ohio (Keifer & Keifer, of Springfield, Ohio, on the briefs), for appellees.

Before WARRINGTON and DENISON, Circuit Judges, and WESTENHAVER, District Judge.

WESTENHAVER, District Judge (after stating the facts as above). [1-3] Our first task is to construe this will. This requires us merely to ascertain the testator's intention, and, if his intended disposition of his estate is lawful, to give effect to it. This intention must be ascertained from a consideration of the entire will, but must be extracted from the language used by the testator, and not by conjecture based upon extraneous facts. If the disposition intended by the testator is not lawful, then, as has been well said, the court—

"will follow the scheme of the testator so far and so long as that scheme is consistent with the rules of law, and when that consistency ends, the law seizes hold of the property, and distributes it according to its own rules." Dayton v. Phillips, 28 Wkly. Law Bul. 327, 330.

The will devises and bequeaths all the testator's property, real and personal, to trustees, to be held by them during the life of Madelaine, Romaine, and Vinton Goddard, or the last survivor of them, all of whom were persons in being at the time the will was made and when the testator died. Power is conferred to convert, sell, and reinvest, but no direction so to do is given, such as would operate as an equitable conversion of land into money. The title is vested in the trustees during the longest life of these three persons, and is then to vest and be transferred and conveyed. In the meantime the annual income only is to be distributed. Our present inquiry has to do with the intended disposition of that annual income.

Three contingencies appear to be provided for in distributing this income. The first has to do with the distribution to Madelaine, Romaine, and Vinton Goddard, during their joint lives, and is an equal distribution. The second has to do with the distribution of the income, if Madelaine dies without leaving other issue by a future marriage, and for the distribution in the event either Romaine or Vinton shall in the meantime die without issue. The third has to do with the distribution in the event Madelaine shall remarry and shall die leaving issue by a future marriage. It is this third contingency which has actually happened. The language of the will providing for this contingency is as follows:

"And if my said daughter shall die leaving lawful issue by a future marriage, said Romaine and Vinton Goddard, or either of them surviving her, then and in that case, the said net annual income shall be, during the continuance of the trust of said estate, equally divided, among all the children of my said daughter, share and share alike, the surviving children of my said daughter to take per capita in making the distribution of said income, and the issue of such children as may be deceased shall take per stirpes."

The contention of the appellees is that a class of beneficiaries is created by this clause, and that this class is to be ascertained and is finally closed as of the date of the death of Madelaine. The class thus ascertained, and if finally closed, would consist of the testator's four living grandchildren, Romaine, Ulrica D., Eric B., and John V., Sr., being all the surviving children of Madelaine. If Vinton, who had previously died, had left children, or if any of these four had died before Madelaine, leaving issue, that issue would become members of the class and take per stirpes. Consequently it is argued that, once this class of beneficiaries is ascertained and closed, it does not open to let in other persons, and that, inasmuch as there is no devise or bequest over on the subsequent death of any member of the class, the issue of such deceased member does not participate, but those remaining in the class take thereafter during the continuance of the trust the entire income. In support of this contention are cited numerous authorities holding that the members of the class who are to take are presumed to be those who answer the description at the time the event happens upon which depends their right to participate, and that upon the death of any member of the class, and if there was no bequest or devise over of that member's share the survivors take the entire estate.

[4] This construction of the will is plausible and not unsupported by considerations of substantial weight. It is not, however, in our opinion, a correct exposition of the will, or a correct determination of the intention of the testator. If the class were to be ascertained for the purpose of vesting the estate, or of making distribution of the corpus of the fund, the authorities cited, as well as certain settled rules of construction, might require us to assent to this contention; but our primary duty is to ascertain the testator's intention without regard, at this time in the discussion, to whether or not his intended disposition is lawful. The testator had in mind, it seems to us, a continuing distribution of the income until the last survivor of three living persons should die. He intended that income to be divided annually, and, if practicable, semiannually, or quarterly, throughout that entire period. He did not have in mind the ascertainment and final closing of a class of beneficiaries at specific times or upon definite contingencies. He realized the probability, if not the certainty, that some one or more of the beneficiaries would die during that period. His intended scheme of distribution seems obviously to provide for equality in distribution, first to his daughter and two grandchildren then living, during the life of his daughter, taking care of the contingency of either of his living grandchildren dying in the meantime with or without issue; and, second, on the death of his daughter, equally to all of his grandchildren, including grandchildren by a future

marriage of his daughter, taking care, also, of the contingency of the death, during the continuance of the trust, of any one of them dying leaving issue. This scheme of equal distribution, it seems to us, was intended to operate throughout the entire period, and to be applied each year to the situation then existing, in making distribution, having regard continuously to changes produced by death. The words "issue of such children as may be deceased shall take per stirpes" are not to be limited to the situation as it existed on the death of his daughter. They are rather to be applied to the situation as it existed from year to year in making annual distributions. The words "as may be deceased" are not to be construed as if they read "as may then be deceased." They are referable to the direction to distribute annually rather than to the death of Madelaine.

Upon a consideration of the whole will, as well as of this specific clause, such seems to us to have been the testator's obvious intention. The scheme of disposition provided at the termination of the trust supports this conclusion. The trustees are then to transfer and convey the estate to all the living issue and descendants of his daughter. It seems improbable that he intended in the meantime to drop out some of his daughter's descendants, whom he was so careful to bring back for a full and equal share in the corpus.

Nor are we impressed with the view of the learned District Judge, nor with the argument made here, that the "testator's solicitude was exclusively for his daughter and her Goddard grandchildren, his grandchildren whom he knew and loved, and only incidentally and contingently extended to other of his grandchildren, if it should so happen that his daughter would marry again." In support of this view, reliance is placed on the expression in the will:

"My object in creating the trusts of this will being to provide usual support during their several lives for my said daughter and her children, Romaine Goddard and Vinton Goddard."

This expression does not, it seems to us, support, much less require us to adopt, that view. This expression was used not in connection with the distribution of the annual income or the persons who were to take it, but in connection with the termination of the trust and for the purpose of giving greater certainty to the time when it was to terminate. The language of the will, particularly the clause disposing of the income after the death of his daughter, discloses no intent to discriminate against any of his grandchildren or their issue. The only discrimination against his grandchildren by his daughter's future marriage is during the life of his daughter. In this period they do not participate in a distribution of the income. On the death of his daughter, all of them are brought in. They are then placed on a footing of exact equality with his other grandchildren, and nothing appears to indicate any intention that they or their issue should thereafter be treated differently. The share of the Goddard grandchildren is cut down by bringing them in at that time. It is not probable that the testator had in mind increasing that share by the subsequent death of any of the Dahlgren grandchildren.

Our conclusion is that the testator's intention was, and that the true interpretation and construction of this will are, that on the death of the testator's daughter all of his grandchildren then living, and the issue of such as were dead, were entitled to participate in the income, and that annually thereafter from time to time, as any one should die leaving issue, that issue becomes entitled to participate in the distribution per stirpes throughout the continuance of the trust estate.

Our next task is to determine whether this intended scheme of distribution is unlawful. One contention of the appellees is that it comes in conflict with the common-law doctrine of perpetuities, in that it would be a limitation of the estate to the unborn issue of a person unborn at the testator's death. This contention, it seems to us, is based upon a misapprehension either of the terms of the will or of the law. The entire estate, real and personal, as has been said, was devised and bequeathed to trustees. It is to be held in trust by them during certain lives then in being, and it is to vest at the death of the last survivor. The trust thus created was not one for accumulation, but to provide the usual support during the several lives of such living persons. The estate is not tied up or made inalienable, except during the period of lives then in being. This offends against no rule of law known to us or to which our attention has been called.

[5] Whether the common-law rule as to perpetuities is in force in Ohio, or what it is in Ohio, except as found in the Act of December 17, 1811, now section 8622, G. C., seems not to have been declared by any decision of its Supreme Court. Certainly no rule has been declared by decision different from the general doctrine. That general rule is familiar. No bequest or devise is good unless it must vest, if at all, not later than 21 years and the usual fraction after some life or lives in being at the death of the testator; if it must vest within that period, then it is good. Gray on Perpetuities, § 201; Dayton v. Phillips, 28 Wkly. Law Bul. 327; McArthur v. Scott, 113 U. S. 382. 5 Sup. Ct. 652, 28 L. Ed. 1015. This doctrine was invented by the courts to meet the new device of executory devises and springing uses. By this doctrine the testator may select any number of living persons as fixing the period during which the vesting of an estate may be postponed. Peter Thelusson, whose will gave rise to the famous case of Thelusson v. Woodford, 4 Ves. Jr. 227, selected all his children, grandchildren, and great-grandchildren living at the time of his death, who were 14 (page 236) in number. This doctrine has reference exclusively to the time during which an estate may be tied up, or, in other words, to the time within which it must vest, and not to the right of any person to enjoy the same in the meantime. As was said by Mr. Justice Gray in McArthur v. Scott, 113 U. S. 383, 5 Sup. Ct. 663, 28 L. Ed. 1015:

"The rule of the common law, by which an estate devised must in all events vest with a life or lives in being and 21 years afterwards, has reference to time and not to persons. Even the 'life or lives in being' have no reference to the persons who are to take, for the testator is allowed to select, as the measure of time, the lives of any persons now in existence; and the '21 years afterwards' are not regulated by the birth of the coming of age of

any person, for they begin, not with a birth, but with a death, and are 21 years in gross, without regard to the life, or to the coming of age, of any person soever." [1]

[6] This being so, the appellees' contention comes down merely to this: The testator may not, under shelter of the legal period within which an estate may be tied up, direct a payment by the trustees in the meantime of any part of the income to an unborn child of a person not in being at the testator's death. We have been cited to no case which, rightly considered, so holds. The application of this rule depends upon the possibility, not upon the actual fact. It would be surprising if, under wills like that of Peter Thelusson, it did not often happen that some unborn child of a person not then in being might come into life and participate before the end of the life or lives in being and 21 years afterwards. In Fitchie v. Brown, 211 U. S. 321, 29 Sup. Ct. 106, 53 L. Ed. 202, the will was construed to show an intent that the income was to be distributed annually to more than 40 annuitants until 21 years after the death of the last survivor, and in case any annuitant died during the period his heirs were to be substituted. Upon final distribution, the corpus was to be divided among those who were then annuitants. It is plain that the child of a person unborn at the testator's death not only might, but probably would, be found among the eventual annuitants and the final distributees. The trust was held valid, though the effect of this remoteness was not urged. In trusts for accumulation, the entire income may be tied up and paid to no one, provided the final period of vesting or distribution does not violate this rule against perpetuities. This is so obvious that it is assumed as the starting point of all discussions whether particular trusts for accumulation are good. Gray on Perpetuities, § 671; Thorndike v. Loring, 15 Gray (Mass.) 391; 30 Cyc. pp. 1477, 1478, note 67. Certainly, if the final vesting of the estate is not postponed beyond the permitted period, and if in the meantime income need not be distributed at all, the testator may direct such interim disposition of it as he sees fit, unless it comes in conflict with section 8622, G. C.

An examination has been made of the authorities cited in support of appellees' contention. In the brief, Gray on Perpetuities, § 375a, and Coggins' Appeal, 124 Pa. 10, 16 Atl. 579, 10 Am. St. Rep. 565, appear to be relied upon as most nearly in point. In order to make clear our view and to disclose why the cases cited are not in point, we shall refer more at length to the case last mentioned. In that case the testator had bequeathed his estate in trust for the benefit of his wife and children. At the death of his wife, the trustees were to distribute the net income to each of his four children during their respective lives. Upon the death of any one of his children the trustees were to pay that child's share of the corpus to his children who have attained or shall attain the age of 25 years. The case turned on the point as to whether the estate vested in the grandchildren at the death of

[1] It is worthy of note that the will considered in this case was written by the testator, Samuel F. Vinton.

the testator's children, with the enjoyment in possession merely postponed until they should become 25 years of age, or whether the vesting was postponed until they had reached the age of 25 years. In the former event the court's view was that the disposition would not violate the rule against perpetuities, but in the latter event it would, because of the possibility that a longer period than 21 years and a fraction might elapse after the death of the persons in being at the testator's death before the estate vested. It is only because the court was of opinion that the testator intended to postpone the vesting until the end of the 25-year period that the testator's disposition failed. It is clear that, had he postponed it only for 21 years, the disposition would have been sustained. In determining whether the testator intended the estate to vest at the death of his children, with the enjoyment of it in possession only postponed until their children should become twenty-five years of age, it is intimated that if during the intervening period provision had been made for the payment of income, and the corpus only was to be retained and distributed at the end of the 25-year period, a contrary conclusion would have been reached. Thus this case, like all others that we have examined, shows that the rule has nothing to do with the persons who are to take or enjoy, but only with the period during which the vesting is postponed. The policy of the law is to forbid tying up of estates for a longer period than a life or lives in being and 21 years and the usual fraction. It is only when it appears from the provisions of the will that the vesting of the estate cannot happen within that period of time that the disposition fails.

Nor does the rule of Whitby v. Mitchell, 44 L. R. Chan. Div. 85, have any application. It has to do exclusively with the feudal doctrine relating to the creation and limitation of estates in remainder in real estate, which require intervening particular estates to support the remainder. It forbids the creation of a remainder in real estate limiting a possibility upon a possibility; that is, a remainder to the unborn issue of a person unborn at the time the estate is created. It has never been applied to executory devises such as we are now dealing with and to meet which the doctrine of perpetuities was invented. Furthermore, it is much criticized by English judges, and is said not to be the American rule on the subject. In re Clark's Settlement, 1 L. R. Chan. Div. 467 (1916).

The testator's disposition is also said to be void because in conflict with the Ohio statute against perpetuities (Act December 17, 1811, now section 8622, G. C., cited in the margin).[2]

The contention is that John V. Dahlgren, Jr., is not the immediate issue or an immediate descendant of a person in being at the time this will was made, because his father was born after the testator's death, and outlived his mother, Madelaine, and died at a later time.

[2] Sec. 8622. No estate in fee simple, fee tail, or any lesser estate, in lands or tenements, lying within this state, shall be given or granted, by deed or will, to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail.

In this view, John V. Dahlgren, Sr., is the immediate issue of Madelaine, the person in being at the testator's death, and John V. Dahlgren, Jr., is her remote issue or descendant. As a result, it is contended that no annual income can be distributed to John V. Dahlgren, Jr., without violating the statute above quoted. If this be true, it is needless to observe that the same result would follow with respect to the issue of Ulrica D. Pierce and Eric B. Dahlgren, if either of them should die before Romaine. In support of this proposition (that John V. Dahlgren, Jr., is not immediate issue or descendant) are cited Dayton v. Phillips, 28 Wkly. Law Bul. 327, affirmed on another ground, and for a different reason, Phillips v. Herron, 55 Ohio St. 478, 45 N. E. 720; McArthur v. Scott, 113 U. S. 340, 383, 5 Sup. Ct. 652, 28 L. Ed. 1015; Stevenson v. Evans, 10 Ohio St. 307; Turley v. Turley, 11 Ohio St. 173.

[7] Whether these authorities support this contention, or hold what is claimed for them, or just what is the true meaning of this section, we deem it unnecessary to decide in disposing of any matter now before the court. This statute is expressly limited to estates in lands or tenements. It has no application to personalty; nor, in our opinion, has it any application to the gift or bequest of a share in the annual income. All the estate in these lands is devised to the trustees. They are invested with the title thereto in fee simple upon certain trusts. At the time fixed for terminating these trusts the real estate, including the proceeds of any that has been sold, and the corpus of the personalty, are bequeathed and devised to certain persons. The question now put arises, if at all, only at the termination of the trust. No estate in lands is in the meantime devised to the testator's grandchildren or to their issue. What is given them is a gift or bequest of income coming into the hands of the trustees. If the period during which the vesting of the estate is postponed does not violate the rule against perpetuities, as we have found it does not, so likewise this section is not violated by a direction to the trustees to divide the income in their hands annually which might have been lawfully accumulated during the entire period and divided only at its termination.

[8] No determination will or should now be made as to the devolution of the trust estate after the death of Romaine. No decision on this point was made by the court below, for the reason that it would be premature so to do in advance of her death. We concur in this view. A sufficient reason therefor is that the persons now before the court may not be the same persons who will be interested therein at the death of Romaine, and a decision now upon that proposition would not bind the persons who might then be the interested parties. The interests therein of the persons now in court, if more than an expectancy or a mere chance that they may be the persons then interested, is at most only a contingent interest. Sinton v. Boyd, 19 Ohio St. 30, 2 Am. Rep. 369; Richey v. Johnson, 30 Ohio St. 288, 294; Barr v. Denney, 79 Ohio St. 368, 87 N. E. 267.

The conclusion to which we have come renders unnecessary any consideration or decision of the contention made and earnestly pressed upon us on behalf of appellant that the decrees made from time to

time upon the annual reports of the trustee operate as a bar against the appellees, or that in any event payments heretofore made with the approval of the other beneficiaries are voluntary payments, made under a mistake of law and not of fact, and cannot be recovered back.

The decree of the court below will be reversed, with costs to the appellant, and the cause remanded for further proceedings in conformity herewith.

PRESSED STEEL CAR CO. v. UNION PAC. R. CO.

SAME v. SOUTHERN PAC. CO.

(Circuit Court of Appeals, Second Circuit. December 22, 1920.)

Nos. 4, 5.

1. **Evidence ⟸450(5)—License to use designs held unambiguous, so as to exclude evidence that unpatented designs were covered.**
   A contract reciting that a car company was the owner of patents covering devices and designs used in the construction of freight cars, that a railroad company had used certain designs and patented devices owned by the car company and referred to in the previous paragraph, that it desired to arrange to build under royalty freight cars containing such designs and patented devices, and authorizing it to build freight cars containing the designs and devices covered by patents owned by the car company, and providing for the payment of a royalty, etc., *held* unambiguous, so that prior correspondence and conversations during the prior negotiations were not admissible to show that all of the car company's designs, whether patented or unpatented, were covered.

2. **Damages ⟸40(2)—Evidence held to supply measure of damages for breach of contract, not unreasonable or conjectural.**
   Where a license to a railroad company to use patented designs or devices in the manufacture of freight cars required such company, in contracting for the construction of cars outside its own shops, to give the patentee a preference at $10 per car in excess of the price bid by other car builders, evidence that the patentee, if given an opportunity to bid on cars, would have done so at the price offered by other builders plus $10, and would have built them at a profit, supplied a measure of damages not unreasonable or too conjectural to be admitted.

3. **Patents ⟸211(1)—Recitals in license that licensee would not evade patent held contractual.**
   A recital, in a license to a railroad company to use patented devices and designs in the construction of freight cars, that the railroad company had agreed not to evade or attempt to evade such patented devices, though contained in the preamble, instead of the body of the contract, was contractual.

4. **Patents ⟸211(1)—Agreement by licensee not to evade patent does not support recovery, in absence of infringement.**
   An agreement by railroad company, licensed to use patented devices and designs in the construction of freight cars, not to evade or attempt to evade such patented devices, merely meant that it would not resort to colorable differences of construction to escape infringement, and did not support a recovery, in the absence of proof of infringement.

5. **Patents ⟸129, 211(3)—Licensee may refer to prior art to show noninfringement.**
   While a licensee under a patent may not refer to the prior art for the purpose of showing that the patent is anticipated or invalid, he may do so to show that what he uses does not infringe the patent.

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6. Patents ⊂=218(3)—**Licenses held not to change general rule that royalty ceases on termination of patent.**
A license to a railroad company to use patented devices and designs in the construction of freight cars *held* not to change the general rule that liability to pay royalties terminates on the expiration of the patent.

7. Patents ⊂=212(1)—**Licensee held liable for royalty on freight cars constructed for it by another licensee.**
Where a license to a railroad company to use patented devices and designs in the construction of freight cars required it to pay a royalty of $10 on each car built or caused to be built by it, it was liable for such royalty on cars built for it by a third party, also holding a nonexclusive license from the patentee, notwithstanding the general rule that an article purchased of a licensee may be used and sold free of the patent.

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

Two actions by the Pressed Steel Car Company against the Union Pacific Railroad Company and against the Southern Pacific Company. Judgment for plaintiff for an insufficient amount (254 Fed. 316), and it brings error. Reversed.

See, also, 240 Fed. 135; 241 Fed. 964.

Kiddle & Margeson, of New York City (John B. Stanchfield, Alfred W. Kiddle, Charles A. Collin, and Wylie C. Margeson, all of New York City, of counsel), for plaintiff in error.

Henry W. Clark, George Adams Ellis, and James R. Sheffield, all of New York City, and James I. Kay, of Pittsburgh, Pa., for defendant in error Union Pac. R. Co.

Gordon M. Buck, of New York City (G. A. Ellis, of New York City, of counsel), for defendant in error Southern Pac. Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a writ of error taken by the plaintiff Car Company to a judgment in its favor for $9,150.06 in an action tried by the court without a jury. The case of the Pressed Steel Car Co. v. Southern Pacific Railroad Co., exactly similar in point of law, was argued at the same time.

November 1, 1905, the Pressed Steel Car Company and the Union Pacific Railroad Company entered into the following contract:

"Agreement made the 1st day of November, 1905, between Pressed Steel Car Company, a corporation organized and existing under and by virtue of the laws of the state of New Jersey (hereinafter called the 'Car Company'), of the first part, and Union Pacific Railroad Company, a corporation organized and existing under and by virtue of the laws of the state of Utah (hereinafter called the 'Railroad Company'), of the second part:

"Whereas, the Car Company is *the owner of certain patents covering various devices or designs* used by the Railroad Company in the construction of 'common standard' freight cars, a partial list of which is enumerated in Schedule A hereto attached (but it may be that there are other devices or designs owned by the Car Company which are so used and are not specified in said schedule), which 'common standard' freight cars are known by the following type;

* * * * * * * * * *

"Whereas, the Railroad Company admits the use by it in the construction of its 'common standard' freight cars of *certain designs and patented devices owned by the Car Company,* and *referred to in previous paragraph, and admits* the validity of the patents embodied therein, and has agreed not to evade or attempt to evade said patented devices recited in the schedule hereto annexed, as embodied in its 'common standard' freight cars; and

"Whereas, the Railroad Company is desirous of making an arrangement with the Car Company whereby it may build or cause to be built, under royalty, *freight cars containing such designs and patented devices* for its own use and the use of the various railroad companies now or hereafter owned or controlled by it by the ownership of a majority of the capital stock therein or otherwise, or leased or operated by it, but not for sale; and

"Whereas, the Railroad Company has since the 1st of June, 1904, built and caused to be built 'common standard' freights cars *in which the devices covered by said patents of the Car Company have been used:*

"Now, therefore, in consideration of the sum of one dollar by each to the other in hand paid, the receipt whereof is hereby acknowledged, and the mutual covenants contained herein, and other good and valuable considerations, it is agreed as follows between the parties hereto:

"First. From the date of the execution of this agreement until the 31st day of December, 1914, the Railroad Company shall have a right and license to construct or have constructed for its own use and the use of the various railroad companies now or hereafter owned or controlled by it, by the ownership of a majority of the capital stock therein or otherwise, or leased or operated by it, and to use and to permit to be used by and upon the lines of the various railroad companies so owned, controlled, leased, or operated by it, *freight cars containing the designs and devices covered by patents now owned or controlled or which may during the said period be acquired, owned, or controlled by said Car Company:* Provided, however, that if the Railroad Company shall hereafter acquire the control of any railroad company by lease, ownership of a majority of the capital stock therein, or otherwise, it shall advise the Car Company of such control before the Railroad Company builds or causes to be built any cars for the use of such company.

"Second. For each car heretofore built or caused to be built by the Railroad Company since June 1, 1904 (except cars built by the Car Company or by the Western Steel Car & Foundry Company), known as 'common standard' freight cars, containing *certain of the designs or devices enumerated in Schedule A,* the Railroad Company agrees to pay to the Car Company within thirty days from the date of execution of this agreement, the sum of ten dollars ($10) per car in cash as a royalty.

"Third. For each car hereafter built or caused to be built during the period of this contract by the Railroad Company (except cars constructed for the Railroad Company by the Car Company or by the Western Steel Car & Foundry Company) *containing any of the designs or devices covered by patents now owned or controlled or which may hereafter be owned or controlled by said Car Company,* the Railroad Company shall pay as royalty to the Car Company, within ninety (90) days after completion of such car, ten dollars ($10) per car in cash.

"The Railroad Company covenants and agrees that at the expiration of two months from the execution of this agreement, and at the end of every succeeding period of three months thereafter during the life of this contract, it will furnish to the Car Company a correct statement of the number of freight cars which the Railroad Company has built or has caused to be built or ordered to be built during the said preceding quarter.

"Fourth. The Railroad Company hereby gives to the Car Company and/or to a corporation known as the Western Steel Car & Foundry Company, a corporation organized and existing under and by virtue of the laws of the state of New Jersey, and for which company the Car Company in this regard will act as agent, a preference (provided they can make reasonably prompt or similar deliveries, under the same plans and specifications) over any other car builders in the construction of any or all freight cars *containing designs and devices covered by patents now owned or controlled or which may here-*

after be owned or controlled by the Car Company, caused to be built by the Railroad Company outside of its own shops, at the price of ten dollars ($10) per car in excess of the price bid by such other car builders for the construction of any freight cars embodying such designs and devices; the Railroad Company, however, reserves the right to build such cars in its own shops, in which event the Railroad Company agrees to pay to the Car Company a royalty of ten dollars ($10) per car for each car so built.

"Fifth. It is further agreed that if the Railroad Company abandons its present 'common standard,' and adopts instead thereof a new design, which it contends does not embody any of the *designs and devices covered by the patents now or hereafter owned or controlled by the Pressed Steel Car Company,* and if such contention is disputed by the Car Company, then the question whether or not such new design does embody any design or device of patent owned by the Car Company shall, upon written request of either party to the other, be referred to two arbitrators—one to be selected by the Car Company and one by the Railroad Company—who shall proceed within thirty (30) days from the date of such written request; and if such arbitrators shall agree, then their decision shall be final. In case such arbitrators shall not agree within sixty (60) days after their selection, then the two arbitrators shall select a third arbitrator and the decision of a majority of the arbitrators thus chosen shall be final and binding on the parties hereto. The expense of such arbitration shall be paid by the party against whom the award is made.

Pressed Steel Car Company,
"By F. N. Hoffstot, Pres.
"Union Pacific Railroad Company,
"By W. V. S. Thorne, Director of Purchases."

We have italicized portions to be presently considered.

November 13, 1917, the Car Company filed an amended complaint containing three causes of action, in each of which it described itself as the owner "of certain letters patent of the United States covering various devices or designs relating to freight cars":

First, that between May 1, 1909, and December 31, 1914, the Railroad Company built or caused to be built 21,896 freight cars containing one or more of the Car Company's designs or devices upon which the Railroad Company became liable to pay the Car Company $218,960, which it has neglected and refused to do.

Second, that the Railroad Company had caused to be built 21,896 freight cars outside of its own shops embodying the Car Company's designs or devices, without notifying the Car Company of the prices bid by the other builders, and without giving it a preference, as agreed, to build the cars at those prices plus $10; that the Car Company could have built and would have built the cars at that price, and has been damaged in the sum of $1,094,800.

Third, that the Railroad Company between May 1, 1909, and December 31, 1914, had built 21,896 freight cars embodying designs or devices which were evasions of the Car Company's designs or devices, in violation of its agreement not to evade or attempt to evade the said designs or devices, to the Car Company's damage in the sum of $218,960.

As to all the cars the trial judge held that the patents relied upon by the Car Company had either expired or had not been infringed, except 700 work and 200 gondola cars, which did embody one or more of the Car Company's patented devices, and for these he awarded the Car Company judgment for royalties amounting to $9,000, with costs. To

the judgment the Car Company has taken this writ of error.

[1] Under the first cause of action the Car Company contended that the contract covered its designs, whether patented or unpatented, and offered to show this by correspondence and conversations during negotiations which led up to the contract and occurring after it was executed, which the trial judge excluded upon the ground that the contract is unambiguous and must be enforced as it reads. In this conclusion we concur.

The first preamble of the contract recites that the Car Company "is the owner of certain patents covering various devices or designs." The second recites that the Railroad Company admits the use by it of certain designs and patented devices "referred to in the previous paragraph." The third recites the Railroad Company's desire for an arrangement whereby it may build or cause to be built cars "containing such designs and patented devices." Then the first article covers "designs and devices covered by patents now owned or controlled, or which may during the said period be acquired, owned, or controlled by said Car Company."

Obviously in this article and in the fourth and fifth articles the parties are speaking of exactly the same designs and devices theretofore mentioned as covered by patents. So in the amended complaint filed November 13, 1917, eight years after the contract was executed, the Car Company describes itself in each of the three causes of action as "owner of certain letters patent of the United States covering various devices or designs relating to freight cars." It is quite impossible, in the face of such unmistakable language in the contract and in the complaints, to admit prior correspondence or conversations to show that the Car Company's unpatented designs were intended to be covered. What ownership has it in its unpatented designs? Any one may copy them.

Counsel seem to rest its title upon the decision of the Supreme Court of Pennsylvania in Pressed Steel Car Co. v. Standard Steel Car Co. and others, 210 Pa. 464, 60 Atl. 4, in which the Standard Car Company was required to surrender to it certain original drawings and blueprints which it had loaned to railroad companies for which it was building cars, and which these companies handed to the defendant, a competing car-building company. This was a surreptitious and inequitable use by the defendant of property belonging to the plaintiff. Its title was confirmed in the actual pieces of paper, and not to the ideas expressed by them. All that was asked for, or was granted, was an injunction.

[2] As to the second cause of action, the trial judge refused the Car Company's offer to prove by its books and testimony of its officers that it could have built the 700 cars as to which it was given no opportunity to bid; that it would have done so at the price offered by the other car builders plus $10 royalty, and would have built them at a profit. We think this was error. Such proof, if the Car Company could have made it, would have supplied a measure of damages not at all unreasonable, nor too conjectural to be admitted. Obviously the preference promised was a property right, and the manufacturing profit was likely to be much larger than the $10 royalty. The contract did not contem-

plate that the Railroad Company should advertise for sealed bids, the lowest bidder to get the order. While it may not have been good business for the Railroad Company to tell the Car Company the amount bid by another builder and allow it to take the order at that price plus $10, still that was the contract. Under this cause of action the trial judge awarded 6 cents damages.

To support the ruling below, the Railroad Company relies solely on Laundry Co. v. Dolph, 138 U. S. 617, 11 Sup. Ct. 412, 34 L. Ed. 1083, and undoubtedly the resemblance between that litigation and this is very great. Nevertheless it is true that the principal subject or main purpose of the contract there in suit was to secure to one party a customer for its patented article, and for both parties a partnership arrangement by which they were to divide profits derived from manufacturing both the patented and unpatented articles.

It is certain that the Supreme Court itself regarded that portion of the Dolph contract which resembles the part of the agreement at bar now under consideration as subordinate and incidental to the "main purpose of the contract," and in applying the decision we have heretofore so treated it, saying that the Dolph Case held that—

"Damages could not be recovered for the breach of indefinite provisions in respect to an option in favor of one party as to a matter merely incidental and subordinate to the main contract." Allen v. Field, 130 Fed. at page 655, 65 C. C. A. at page 33, certiorari refused 201 U. S. 649, 26 Sup. Ct. 762, 50 L. Ed. 905.

The damages claimed in the Dolph Case were the profits Dolph would have made at "such price for other washing machines as may be bid for them in open competition for equal quality of goods by any responsible manufacturers other than said Dolph, and these prices shall constitute and be designated as the manufacturer's prices for these machines." The provisions in the instant case are much more precise, viz. the car is special, i. e., one embodying the Car Company's patented designs and devices, and the price is special, i. e., the price offered by a particular builder which the Railroad Company is willing to accept.

To the breach of such a contract we regard the later ruling of the Supreme Court in Hetzel v. Baltimore, etc., R. R. Co., 169 U. S. 38, 18 Sup. Ct. 255, 42 L. Ed. 648, as applying, and consider the more generous rule of damages there laid down strongly upheld by Dowagiac v. Minnesota Moline Plow Co., 235 U. S. 641, 35 Sup. Ct. 221, 59 L. Ed. 398, and Hamilton v. Wolf Bros., 240 U. S. 251, 36 Sup. Ct. 269, 60 L. Ed. 629. The court pointed out in the Hetzel Case that—

"In all civil actions the law * * * endeavors to give a just indemnity for the wrong done to the plaintiff, and whether the act was of the kind designated as a tort or one consisting of a breach of contract is on the question of damages an irrelevant inquiry."

And further:

"In using the words 'uncertain,' 'speculative,' and 'contingent,' for the purpose of excluding that kind of damage, it is not meant to assert that the loss sustained must be proved with the certainty of a mathematical demonstration to have been the necessary result of the breach of covenant by the de-

fendant; * * * certainty to reasonable intent is necessary, and the meaning of that language is that the loss or damage must be so far removed from speculation or doubt as to create in the minds of intelligent and reasonable men the belief that it was most likely to follow from the breach of the contract and was a probable and direct result thereof. Such a result would be regarded as having been within the contemplation of the parties and as being the natural accompaniment and the proximate result of the violation of the contract."

Nor is it an objection to recovery that the Car Company seeks to obtain compensation for loss of profits in allowing which it has been said that—

"No more definite or certain method of estimating profits could well be adopted than to deduct from the contract price the probable cost of furnishing the materials and doing the work." Guerini v. Carlin, 240 U. S. at page 280, 36 Sup. Ct. at page 307, 60 L. Ed. 636.

[3, 4] The third cause of action, based on the evasion clause, is contractual, though found in a preamble, instead of in the body of the contract. It expressly recites that the Railroad Company has agreed not to evade or attempt to evade said patented devices. Still we think that this is only another way of saying that it will not hereafter resort to colorable differences of construction with a view to escaping infringement. This cause of action was rightly dismissed, because no infringement was proved.

[5] Certain other errors assigned may now be briefly considered. We remain of opinion that, while a licensee under a patent may not refer to the prior art for the purpose of showing that the patent is anticipated or invalid, he may do so to show that what he uses does not infringe the patent. H. D. Smith Co. v. Southington Manufacturing Co., 247 Fed. 342, 159 C. C. A. 436. Therefore the trial judge was right in receiving such evidence.

The Car Company relies greatly on the case of United States v. Harvey Steel Co., 196 U. S. 310, 25 Sup. Ct. 240, 49 L. Ed. 492, decided January 16, 1905. That case has never been cited in any federal court, except in an opinion of the same court in an action between the same parties on the same contract, 227 U. S. 165, 33 Sup. Ct. 258, 57 L. Ed. 464, and in Smoot v. United States, 237 U. S. 38, 35 Sup. Ct. 540, 59 L. Ed. 829, upon another point. There was no reference to the prior art in either opinion. As to the Harvey Case, what the court held in the first case was that the government's defense that it was not using the patented process was bad, even though it used a lower heat in making armor plate than the patent called for, because it was using the process known as the Harvey process, which was the actual process it had contracted for. In the subsequent case the court remained of the same opinion, in face of the additional objection that the government, in making armor plate, omitted some of the elements called for in the patent.

Since the opinion in 196 U. S. 310, 25 Sup. Ct. 240, 49 L. Ed. 492, was handed down, it has been held that a licensee may refer to the prior art for the purpose of construing the patent, and of showing that what is complained of is not covered by it, in the Circuit Court of Appeals for the Second Circuit in Western Electric Co. v. Robertson et al., 142

Fed. 471, 73 C. C. A. 587, Standard Plunger Elevator Co. v. Stokes, 212 Fed. 941, 129 C. C. A. 461, Robinson v. Pay-As-You-Enter Car Corporation, 221 Fed. 943, 137 C. C. A. 513, and H. D. Smith & Co. v. Southington Manufacturing Co., 247 Fed. 342, 159 C. C. A. 436; in the Fourth Circuit in Leader Plow Co. v. Bridgewater Plow Co., 237 Fed. 376, 150 C. C. A. 390; in the Sixth Circuit in Babcock & Wilcox Co. v. Toledo Boiler Works Co., 170 Fed. 81, 95 C. C. A. 363; in the Eighth Circuit in Moon-Hopkins Billing Machine Co. v. Dalton Adding Machine Co., 236 Fed. 936, 150 C. C. A. 198; and in the Ninth Circuit in Leather Grille & Drapery Co. v. Christopherson, 182 Fed. 817, 105 C. C. A. 249. The conclusion is very strong that the Harvey Steel Case must be limited to its own particular facts and is not generally applicable.

[6] The trial judge was right in holding that the Railroad Company was not required to pay royalties on cars built after the expiration of the patent or patents relied on. Although the general rule is that liability to pay royalties terminates upon the expiration of the patent, the parties may contract to the contrary. We discover nothing in the contract to the contrary.

[7] September 22, 1909, four years after the contract of November 1, 1905, had been executed, the Car Company gave a nonexclusive license to the Bittendorf Company to make and sell cars embodying the Streib patent. The general rule is, of course, that an article purchased of a licensee under a patent may be thereafter used and sold free of the patent. Keeler v. Standard Bed Co., 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848. But the Railroad Company has agreed to pay $10 to the Car Company on every car "built or caused to be built by it," embodying any of the Car Company's patented devices, and though it may use cars bought of the Bittendorf Company, which has a license from the Car Company to make and sell cars embodying the Streib patent, it cannot escape its contract to pay the Car Company $10 each on 200 gondola cars which it caused to be built by the Bittendorf Company.

The judgment is reversed.

BOSTON, C. C. & N. Y. CANAL CO. v. SEABOARD TRANSP. CO. (two cases).*

(Circuit Court of Appeals, First Circuit. January 21, 1921.)

Nos. 1472, 1473.

1. Canals ⇐29—Facts to be proved to show negligence in taking steamer through canal stated.

A finding that the sheering of a steamship while passing through a canal, causing her to strike the bank, was due to the negligence of the canal company in attempting to take it through the canal without the help of tugs, cannot be sustained, unless the steamship owner has sustained the burden of proving that the accident was not due to usual and unavoidable dangers of using such a waterway, or to defective steering gear, that the danger of taking the vessel into the canal was sufficiently

⇐For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Certiorari denied 254 U. S. —, 41 Sup. Ct. 534, 65 L. Ed. —.

obvious, so that men of ordinary prudence, with the knowledge possessed by the canal officials, would not have permitted the attempt, and that the use of a tug would have so obviously lessened the danger as to make it negligence not to use a tug.

2. **Canals ⊜29—Company not negligent because accident shows steamer should not have been taken through canal without tug.**
A canal company cannot be charged with negligence in attempting to take a steamship through the canal without the help of tugs merely because canal officials and other prudent people would now conclude, from the occurence of an accident, that vessels like the one in question should not make the attempt.

3. **Evidence ⊜571(3)—Mere conclusion on conflicting expert evidence held not to show negligence.**
A conclusion, on conflicting expert evidence, that in taking a steamship through a canal a tug would have been a safeguard, does not show negligence on the part of the canal company in not using a tug, unless there is such a consensus of opinion among competent and prudent men as to the use of a tug as to make it negligence not to use it.

4. **Canals ⊜30—Evidence held insufficient to show negligence in not using tug for steamship.**
Evidence *held* insufficient to show negligence on the part of a canal company in attempting to take a steamer through the canal without the help of tugs.

5. **Negligence ⊜1—Definition of "negligence."**
"Negligence" is failure to conform to the standard of the reasonably prudent man, or, broadly speaking, a departure from the normal, or what should be the normal.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Negligence.]

6. **Negligence ⊜1—Failure to reach on doubtful question same conclusion as court not necessarily negligence.**
It is not necessarily negligence to fail to reach on a doubtful question the same result that the court reaches, after carefully weighing the conflicting opinions of equally honest and competent witnesses.

7. **Negligence ⊜1—Act in doubtful situation not negligence.**
When prudent and careful men, equally competent to judge of a difficult and doubtful situation, hold diametrically opposite views as to which of two courses is safer, the adoption of either course cannot be negligence.

8. **Canals ⊜30—Evidence held insufficient to show negligence in admitting particular steamship on particular tide.**
Evidence *held* insufficient to show that a canal company was negligent in allowing a steamship of a particular type to go through the canal on a favoring full moon flood tide.

9. **Negligence ⊜134(1)—Proof essential.**
Negligence must be proved by a fair preponderance of the evidence, and must not be guessed, because of the absence of other fully satisfactory explanation of an accident.

Appeals from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Cross-libels in admiralty by the Boston, Cape Cod & New York Canal Company against the Seaboard Transportation Company and by the Seaboard Transportation Company against the Boston, Cape Cod & New York Canal Company. Decree for the Transportation

Company in each case, and the Canal Company appeals. Decrees vacated, and cases remanded, with directions.

Thomas H. Mahony and Samuel H. Pillsbury, both of Boston, Mass. (Currier & Young, of Boston, Mass., on brief), for appellants.

Edward E. Blodgett and Albert T. Gould, both of Boston, Mass. (Blodgett, Jones, Burnham & Bingham, of Boston, Mass., on brief), for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

ANDERSON, Circuit Judge. These cross-libels in admiralty grew out of the stranding and sinking in the Cape Cod Canal of the steamer Chisholm on July 16, 1916. The Canal Company contends that the accident was due to a break in the pintle which held the lower part of the ship's rudder in place. The ship's owner contends that the accident was caused by the negligence of the canal officials in taking the ship into the canal on a full moon flood tide running about 4 knots an hour, without a tug. In the court below the owner prevailed; the Canal Company was held liable for a total loss of $321,740.87, besides costs. Both cases are here on appeal, on a record of some 800 pages. In the view we take of the cases the controlling facts may be briefly stated:

The Chisholm was an old coal freighter, built in 1884, about 246 feet long, 37 feet wide, drawing about 18 feet loaded, with a normal speed of about 8 knots. She had a bluff bow, straight sides, heavy bilges, a flat bottom, with a rather short and sharp run to the stern. Her rudder hung supported from the deck, and was held in place at the lower end by a pintle running through a projecting skeg. Such vessels, so equipped, are common. She arrived loaded at Wing's Neck, the western entrance of the approach to the canal, about 5 p. m., July 16, anchored and signaled for a pilot. Pilot Rochester, in the employ of the Canal Company, was sent to take her through the canal. Rochester had been a United States licensed pilot for inland waters for 35 years, and was the most experienced pilot in the employ of the company. He had taken the Chisholm through, loaded, in the same direction, 45 days before. He had also several times piloted the Devereaux, a sister ship of practically the same build. Both ships had handled well. He had never had an accident. He regarded the condition of the tide as proper for the passage of the Chisholm. He—and practically all the other witnesses agree with him—stated that a favoring tide is better and safer than a head tide. They also agree that a slack tide is better than either a head or a favoring tide. The weather was pleasant, with a gentle southwest wind. Everything was most favorable for the passage, excepting that the tide was, because of the full moon, running with somewhat more than its average strength. But such tides occur twice each month. The pilot took charge, and the Chisholm proceeded towards the Buzzards Bay entrance of the canal with Rochester and Capt. Pierce on the bridge. Rochester gave the orders; Pierce repeated them through a hole in the bridge to the steers-

man below. As they approached the entrance proper, both the captain and the pilot noticed that the tide was running rather strong, and mentioned taking a tug, two of which lay available for use, without extra charge, near the Buzzards Bay entrance; but neither thought a tug was necessary. Rochester regarded a tug as undesirable. In effect they agreed not to take a tug. So far the ship handled perfectly. She passed into the canal proper, and through the railroad bridge and the Bourne highway bridge safely. A few hundred feet beyond the highway bridge she took a sheer toward the north bank. The helm was ordered aport, and the vessel resumed her proper course. But 500 to 1,000 feet further along she took another sheer. The helm was again ordered aport, but, the vessel not obeying, the order to hard aport was given. Not obeying, the engines were ordered reversed; but the Chisholm kept her sheer and struck her bow against the north bank. The tide then swung her stern across the canal, striking the south bank heavily. About that time, as we think—the evidence does not show clearly just when—the rudder chain parted; the vessel was then entirely unmanageable. Tugs were signaled for, and with their assistance she was finally tied up at some dolphins, but sank about two hours later. Afterwards she was examined by divers; the pintle was found broken. Still later she was blown up by dynamite as a total loss. The skeg, which was found bent, and the broken pintle, have been produced. They were the subject-matter of much evidence. This evidence shows, as the court below found, that the pintle had a flaw or "fatigue break." The Canal Company contended, and there was persuasive evidence to sustain this view, that this "fatigue break," or crystallization break, had been in process for a long while, and that, in the absence of other adequate and satisfactory explanation, the completed fracture of the pintle was the probable cause of the vessel's failing to respond to her helm, and thus of the accident. The District Court reached the conclusion that the break was probably due to the stranding blows or to the dynamiting; that it did not precede the fatal sheer and cause the accident. The final conclusion of the District Court is stated as follows:

"On all the evidence I find and rule that the Canal Company was negligent in attempting to take the Chisholm through the canal at the time in question without the help of tugs and is solely at fault for her loss."

The gist of this finding is that a vessel of that type should not be taken into the canal with a favoring 4-knot tide without the use of tugs. Whether, apart from the failure to use tugs, the court below intended to find negligence, is not entirely clear.

[1–3] In the view we take of this case, an elaborate discussion of the evidence is not necessary. It is plain that the finding below, that the loss was due to the sole fault of the Canal Company, cannot be sustained, unless we find that the owner has sustained the burden of proving four propositions:

(1) That the accident was *not* due to the usual and inevitable dangers of using such a waterway, assumed by all vessels.

(2) That the accident was *not* due to defective steering gear.

(3) That the danger of taking a vessel of that type into that canal was, before the accident, sufficiently obvious, so that men of ordinary prudence, with the knowledge that the canal officials then had concerning the currents in the canal and the steering qualities of vessels of this type, would not have permitted the attempt. It is not enough in the light of hindsight, to find that the canal officials and other prudent people would now conclude that vessels like the Chisholm should not make the attempt.

(4) That the use of a tug would have so obviously lessened the danger of passage as to make it negligence not to use a tug. It is not enough to conclude, on conflicting expert evidence, that a tug would have been a safeguard. The finding must be of such a consensus of opinion among competent and prudent men as to the use of a tug under such conditions as to make it negligence not to use a tug.

Manifestly a chain of evidence is no stronger than its weakest link.

[4] As to the use of a tug—on this point there is a sharp conflict of opinion among honest and competent witnesses. Several pilots testified that, in their view, a tug would have increased, and not decreased, the danger of taking a vessel like the Chisholm through on a favoring flood tide. They contend that a tug immediately ahead of the steamer would create a suction, and make the steamer sheer more and oftener; that, if on a long hawser, she would be of no possible benefit in case of a sheer; that, if alongside, the wash from the tug would increase the likelihood of sheering, besides making extra width to be steered through this narrow channel.

The court below, on this conflicting evidence, concluded that a tug would have been of material assistance in preventing such an accident as occurred. How such assisting tug should in that court's view have been used is not quite clear.

[5, 6] Undoubtedly there is evidence tending to support this conclusion. But it does not, we think, follow that it was negligence for the Canal Company or Capt. Pierce not to reach the conclusion that the court, on doubtful and conflicting evidence, reached. Negligence is failure to conform to the standard of the reasonably prudent man. Broadly speaking, it is departure from the normal, or what should be the normal. But it is not necessarily negligence to fail to reach on a doubtful question the same result that a court reaches after carefully weighing the conflicting opinions of equally honest and competent witnesses.

"Negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done." Railroad Co. v. Jones, 95 U. S. 439, 441, 24 L. Ed. 506.

[7] Obviously, when prudent and careful men, equally competent to judge of a difficult and doubtful situation, hold diametrically opposite views as to which of two courses is safer, it cannot be negligence to adopt either course. In such cases, there is no normal from which to depart. We think, therefore, that the court below erred in finding negligence on the part of the Canal Company in not causing a

tug to be used to assist the Chisholm through the canal. We find that the fair preponderance of the evidence on that question is in favor of the Canal Company.

This conclusion on this part of the case makes it unnecessary for us to determine whether the responsibility for not using a tug was solely that of the pilot, or was as matter of law, or as matter of fact, or both, assumed or shared by the captain. But we do not overlook the authorities which indicate that, under conditions not radically different from those presented by this record, the responsibility as to the use of a tug rests upon or is shared by the captain, and does not rest solely upon the pilot. A regulation of the Canal Company was to the effect that the pilot should explain to the captain that tugs were available at no extra expense, so that the captain might, if he chose, ask for a tug. As above noted, when the Chisholm was coming up from Wing's Neck, Capt. Pierce and Pilot Rochester talked concerning the use of a tug, and agreed, at any rate tacitly, that such use was not necessary or desirable. Plainly, Capt. Pierce knew more about the steering qualities of his ship than the pilot could know. Although less familiar with the canal and its currents than the pilot, he had been through it twice. It might well be contended that the captain was in as good a position as the pilot to judge of the behavior of his ship in a favoring tidal current in a narrow waterway, and as to whether a tug would help or hinder in its passage.

In Marsden's Collisions at Sea (7th Ed.) 208, it is said:

"The responsibility for the employment of a tug in ordinary cases rests with the master, whether the ship is in charge of a pilot or not."

Compare The Julia, Lush. 224, 226; Boston, Cape Cod & N. Y. Canal Co. v. White Oak Transportation Co. (C. C. A.) 265 Fed. 538, 544; The Oregon, 158 U. S. 186, 15 Sup. Ct. 804, 39 L. Ed. 943.

We refer to this question concerning the responsibility of the captain and of the pilot as to the use of a tug simply in order to make it clear that we limit our present decision to finding as a fact that, under the circumstances of this case, the Canal Company is not chargeable with negligence in not causing a tug to accompany the Chisholm on this attempted passage through the canal.

[8] Eliminating the tug factor, the finding below is left to rest entirely on the proposition that it was negligence to allow a vessel of that type to go through the canal with a favoring full moon flood tide. As already indicated, navigators were practically unanimous that a favoring tide is safer than a head tide. If it was negligence to take a vessel through on a favoring tide, a fortiori it would have been negligence with a head tide. This leads to the conclusion that the canal was available for such vessels as the Chisholm only at the slack of the tide. This falls little short of holding that the Canal Company might not, without negligence, operate its canal in its then condition, except in comparatively brief intervals of slack tides. Possibly with head tides the opinions as to the use of tugs would have been different. Certainly no such far-reaching conclusion ought to be reached, except on evi-

dence which is far more clear and convincing than we find in this record.

The fact that the New York boats and other vessels much larger than the Chisholm had been using the canal with apparent satisfaction and safety, that the Chisholm and her sister ship, the Devereaux, had been through several times without the slightest difficulty, were facts upon which the canal officials had a right to rely as a basis for their judgment as to conditions under which the canal was safe for operation. Careful examination of the evidence as to the experience that the canal officials had had up to the time of this accident of the effect of the currents upon the safety of vessels passing through the canal at all states of tides—and without waiting for any particular condition of the tide—forces our minds to the conclusion that it was not negligence for the canal officials to admit the Chisholm at the time in question.

Compare Cleveland v. N. J. S. Co., 125 N. Y. 299, 26 N. E. 327; Hubbell v. Yonkers, 104 N. Y. 434, 10 N. E. 858, 58 Am. Rep. 522; Beltz v. Yonkers, 148 N. Y. 67, 42 N. E. 401; Marx v. Ontario Beach Co., 211 N. Y. 33, 105 N. E. 97.

[9] We repeat that the burden is on the owner to establish that its loss was caused by the Canal Company's negligence. The natural reluctance of the mind to admit that the problem of the real cause of the accident has not been satisfactorily solved must not drive us to accept an unsound solution. Negligence must be proved by a fair preponderance of the evidence. It must not be merely guessed, because of the absence of other fully satisfactory explanation of the accident. This has been ruled in numberless personal injury cases. It is a doctrine as sound and as applicable in cases of damage to property as to persons.

The conclusion of the learned District Judge that a man of ordinary prudence would not have permitted the Chisholm to go through the canal with a full moon flood tide seems to rest in large part upon the testimony of Superintendent Geer. Geer testified in substance that, when he received by telephone word that a freighter was at Wing's Neck, he supposed it was the Mohawk, a much smaller vessel than the Chisholm, and that, if he had known that it was the Chisholm, he would not have allowed her in the canal at that state of the tide. But this evidence of Geer was much discredited. At the time of the trial he was no longer in the Canal Company's employ. It clearly appeared on his own cross-examination that immediately after the accident he stated, and also reported to his employers, that, in his opinion, the accident was caused by the breaking of the pintle; that he never, until just before the time of the trial, had stated to any one his theory that the Chisholm ought not to have been allowed in the canal at that state of the tide. The District Judge commented upon the criticism of Geer's testimony, but stated that he impressed him "as being a truthful witness."

We recognize fully the importance and validity of the rule that great weight is to be attached to the finding of the trial judge on all questions involving the credibility of witnesses. But, giving full effect to this rule, we remain, on all the evidence, unconvinced that reasonable and prudent men would, in the light of the experience had with

the navigation of the canal prior to this accident, have regarded it as negligence to undertake the passage of the Chisholm at that time. Assuming that Geer's testimony as to his own opinion concerning the hazard was truthful testimony, we regard that opinion as entirely outweighed by equally competent opinions from other witnesses whose testimony is entirely unimpeached.

While we are not prepared to hold that the court below was in error in finding that the Canal Company had not sustained the burden of showing that the accident *was* caused by the break in the pintle, and that the shipowner knew, or ought to have known, of its defective condition, we are unable to reach any confident conclusion that such was *not* the cause of the accident. The truth is that this record affords no basis for any dogmatic or confident finding as to the real cause of this accident. But it is impossible to free the mind from suspicion that the unprecedented and otherwise almost inexplicable failure of the Chisholm at this particular time to obey her helm may have been due to trouble then developed in her steering gear. There is no evidence of any cross-current or eddy to account for the sheer. There is no satisfactory explanation of why the vessel behaved in this unaccountable fashion, unless there was trouble—at this moment or just before developed—in her steering gear. It is true that there is evidence that vessels like the Chisholm did not, as the District Court found, handle "as sharply, nor as well, as those having finer lines, and need greater depth under the keel in order to steer well." But it is also true that both the Chisholm and her sister ship had made several trips through that canal and had been found to steer well, and that no witness offers any convincing and satisfactory explanation of why, on this occasion, this vessel absolutely refused to obey her helm.

As noted above, to sustain a finding against the Canal Company, the owner must support the burden of showing that defective steering gear, whether known or unknown, was *not* the proximate cause of the accident. We think that burden has not been sustained.

The conclusions we have reached on these points made it unnecessary to discuss whether the accident might not be held due to the usual and unavoidable dangers assumed by all vessels in using such a waterway.

To conclude, we think neither libelant has sustained the burden of proving its case against its libelee. The result is that both libels should be dismissed, without costs, both in this court and in the court below.

In each case, the decree of the District Court is vacated, and the case is remanded to that court, with directions to enter a decree dismissing the libel without costs; neither party recovers costs of appeal.

CANOE PASS PACKING CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3507.

1. **Indictment and information ⇐110(57)—Indictment for unlawful fishing, in language of statute and regulation thereunder, held sufficient.**
Under Comp. Laws Alaska, 1913, § 264, and an order of the Secretary of Commerce, promulgated thereunder, regulating fishing in Alaskan waters, an indictment, charging that on a specified date and at a described point defendants unlawfully fished with a set net within 600 feet laterally of another set net, was sufficient, as it charged the offense in the language of the statute and the regulation, especially in view of section 2159, providing that no indictment is insufficient because of defects in matters of form not prejudicing defendants' substantial rights on the merits.

2. **Indictment and information ⇐121(2)—Bill of particulars should be demanded, when further information needed by defendants.**
Where an indictment for unlawfully fishing with a net within 600 feet of another net was sufficient, if defendants needed further information for their defense, their remedy was to demand a bill of particulars.

3. **Customs and usages ⇐4—Custom modifying statutory regulation in force for only a few months not established.**
Where an order of the Secretary of Commerce, under Comp. Laws, Alaska, 1913, § 264, prohibiting fishing nets within a lateral distance of 600 feet, had only been in force a few months, no custom or usage giving the fisherman first on the ground, making his location and putting up location notices, a prior right to fish, could have been established.

4. **Fish ⇐3—No exclusive right of fishing or using nets at specified points under Alaskan laws.**
The laws and regulations concerning fishing in Alaskan waters do not give exclusive rights of fishing or of using set nets at specified points, and there remains in the general public a common right to fish in all the public waters of the territory.

5. **Fish ⇐13(2)—Persons placing nets within prohibited distance of others violated law, though on their locations before the other fishermen.**
Under a regulation of the Secretary of Commerce, pursuant to Comp. Laws Alaska 1913, § 264, prohibiting fishing nets within 600 feet of each other, and prohibiting fishing prior to 6 a. m. of June 5th of each year, parties placing a set net after that hour within the prohibited distance of another lawfully there violated the law, though they had made locations and posted location notices several weeks earlier, and before any other fishermen were at the lake.

6. **Fish ⇐13(2)—Placing of net held to violate statute, whether or not fish were caught; "fishing."**
Under a fishing regulation prohibiting set nets within 600 feet of each other, parties who laid a set net within 600 feet of another were "fishing," within the meaning of the statute, and violated the regulation, whether or not they caught any fish.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fishing.]

7. **Fish ⇐13(2)—Where parties simultaneously placed nets within prohibited distance, one replacing his net held to have violated law.**
Under a fishing regulation prohibiting set nets within 600 feet of each other, parties simultaneously placing their nets 25 feet apart were both violators of the law, and defendants, who replaced their net after it had been carried away by the ice, were guilty of violating the law.

In Error to the District Court of the United States for the Third Division of the Territory of Alaska; Charles E. Bunnell, Judge.

The Canoe Pass Packing Company and another were convicted of unlawful fishing, and they bring error. Affirmed.

Bogle, Merritt & Bogle, of Seattle, Wash., and B. O. Graham and Edward F. Medley, both of Cordova, Alaska, for plaintiffs in error.

William A. Munly, U. S. Atty., of Valdez, Alaska.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiffs in error were convicted under four counts of a joint indictment, each count charging them with the crime of fishing with a set net in Miles Lake, Alaska, within 600 feet laterally of another set net. By section 264 of the Compiled Laws of Alaska for 1913 the Secretary of Commerce and Labor was empowered in his discretion to set aside streams or lakes in which fishing might be limited or entirely prohibited, and to establish a closed season; all persons interested to be given a hearing, after notice by publication or otherwise. After such a hearing the Secretary of Commerce promulgated an order, to be effective January 1, 1918, one of the provisions of which was that commercial fishing was prohibited in waters of Miles Lake from 6 a. m. on January 1 to 6 a. m. of June 5 of each year. Said the order:

"All fishing in Miles Lake shall be limited to stake nets and set nets. No such nets shall exceed 600 feet in length, and only one such net shall be extended out from shore from one location. No offshore nets shall be permitted in the lake. The lateral distance interval between all nets in Miles Lake shall be not less than 600 feet."

Section 271 of said Compiled Laws provides the punishment for violation of any regulation established in pursuance of the act. The counts of the indictment are identical, except as to the points on Miles Lake at which the offenses are alleged to have been committed. The first count charges that the plaintiffs in error on June 10, 1918—

"at a point three-quarters of a mile northeast of the entrance of the Copper river into Miles Lake, on the north shore of said Miles Lake, * * * did unlawfully fish with a set net in Miles Lake in said territory and division, within 600 feet laterally of another set net, contrary to the form of the statute in such case made and provided, and of the regulations duly promulgated, and against the peace and dignity of the United States of America."

[1] A demurrer was interposed on the ground that the indictment in each count is not direct and certain as regards the particular circumstances of the crime charged, and omits particular circumstances necessary to constitute a complete crime, that it does not substantially conform with section 2158 of the Compiled Laws of the territory, in that the acts sought to be charged are not clearly or distinctly set forth in ordinary and concise language in such a manner as to enable a person of common understanding to know what is intended, and that the defendants were deprived of the right to be informed of the nature and cause of the accusation, contrary to the provisions of the Sixth Amendment to the Constitution.

[2] The demurrer was properly overruled. The indictment charg-

ed the offense in the language of the statute and regulation which define it. Such an indictment is ordinarily sufficient, and we see no reason why it should be held insufficient in the present case. If the defendants needed further information for their defense, their remedy was to demand a bill of particulars. Each count of the indictment apprised them of the nature of the offense with which they were charged, and the date when and the place where it was alleged to have been committed. The Compiled Laws of Alaska by section 2159 provide that no indictment is insufficient by reason of a defect or imperfection in matter or form "which does not tend to the prejudice of the substantial rights of the defendant upon the merits." United States v. Simmons, 96 U. S. 366, 24 L. Ed. 819; Peters v. United States, 94 Fed. 127, 36 C. C. A. 105; Booth v. United States, 197 Fed. 283, 116 C. C. A. 645; Thlinket Packing Co. v. United States, 236 Fed. 109, 149 C. C. A. 319.

[3-5] The evidence was that on May 17, 1918, three fishermen in the employment of the defendants arrived at Miles Lake, and erected stakes and posted notices at the four points mentioned in the four counts of the indictment, claiming such sites as location for set nets for fishing; that they erected tents at each of the locations, and remained and occupied the same until after June 5, 1918. At the time when they took possession of the locations and posted notices, they were the only occupants of the shore around the lake, but a day or two later certain fishermen employed by the Abercrombie Packing Company appeared on the ground and drove similar stakes within 600 feet of those previously driven for the defendants. The defendants rely upon the acts of their employés in thus taking possession and posting notices as giving them a prior right to the use of the points so selected for the purpose of setting fixed nets.

The rulings of the court below, in denying that contention and in excluding testimony offered to show a custom adopted by the fishermen in that section of Alaska for securing fishing locations, are assigned as error. The offer was to prove a custom and usage that, when a fisherman went on the ground and made his location, by putting up a stake with location notices and attaching a net thereto, and thereafter living on that location, he acquired a right to fish there. But it is obvious that no such custom or usage could have been established in the few months of the life of the statute. The laws and regulations concerning fishing in Alaskan waters do not undertake to give exclusive rights of fishing, or to license the use of set nets at specified points on the shores of streams or lakes, and there remains in the general public a common right to fish in all the public waters of the territory.

"As a general proposition a claim of an exclusive right to fish in a certain part of navigable waters must be based on some statutory enactment of the state having jurisdiction over such waters, though, if the right is one which may be granted, a legal grant may be presumed from a prescriptive user." 11 R. C. L. 1026.

We think that the court below correctly ruled that—

"The law provides no method by which, through occupation or attempted occupation prior to said hour and date, one can initiate any exclusive right to a designated place or point on the shore of said Miles Lake."

The defendants rely upon the rule of the court of Alaska in Columbia Salmon Co. v. Berg, 5 Alaska, 538, Harris & Co. v. Thlinket Packing Co., 5 Alaska, 493, and Thlinket Packing Co. v. Harris & Co., 5 Alaska, 471. The statute on which the rights of the defendants in those cases depended did not relate to a closed season of fishing. It related only to the nature of permissible fixed fishing appliances and the location thereof. It provided that it should be unlawful—

"to drive or construct any trap or any other fixed fishing appliance within 600 yards laterally or within 100 yards endwise of any other trap or fixed appliance."

The court held that as to fishing traps actually constructed the law of possession applies, and that he who is prior in time should be adjudged to be prior in right, for, said the court in the case last cited:

"Any one who actually incloses a space of water, and is in the actual use and occupation of it for fishing purposes, may maintain his inclosure as against any one who cannot show a better right; but this is so because he has an actual possession, a possession which, if it were land, would be called a pedis possessio. He has his foot upon that part of the ocean, and he is using it for the purpose for which it is fit, and consequently he has a superior right, because he is there first."

It is to be observed there is no time limit in the statute which the court there construed, and that the only way in which a right to maintain a fishing trap could be acquired was by taking possession and constructing the trap. But, under the law which we have to consider in the present case, no right could begin prior to a specified day and hour, and he who after that hour placed in the water a set net within the prohibited distance from another set net which was lawfully there was guilty of a violation of the law.

[6] Error is assigned to instructions, in which the jury were told that the defendants were charged with violation of fishing regulations, and that if they set or laid a set net simultaneously with the laying or setting of a set net by any other corporation or person within 600 feet laterally thereof, at or after 6 a. m. of June 5, 1918, then the defendants would be guilty of an offense, and to further instructions of a similar nature, which it is said were erroneous for the reason that the jury were not told that they must also find that the defendants fished with these nets so set or laid; the contention being that the offense of fishing is not committed merely by setting or laying set nets in the lake. We find no merit in the contention. In order to violate the law, it was not necessary to prove that the defendants caught fish. They were fishing, within the meaning of the statute, when they placed the nets in the water for the purpose of taking fish. Moses v. Raywood, 2 K. B. 271, Ann. Cas. 1912A, 311.

[7] As to count 3, the undisputed evidence was that the employés of the defendants and the employés of the Abercrombie Company started out at 6 o'clock a. m. of June 5 from points on the shore about 25 feet apart and rowed with their boats simultaneously, that immediately after the defendants' net was anchored it was carried away by ice and was lost, and that within a few hours thereafter the defendants replaced their net. The court was requested to instruct the jury that

if they found from the evidence that the defendants had a prior right to maintain a set net at the place described in count 3, and that within a short time after erecting a set net at that place it was carried away by ice, but was replaced by another net within a reasonable time, they did not lose their prior right to such site. There was no error in denying that instruction. When the defendants and the Abercrombie Company simultaneously placed nets 25 feet apart, both nets were placed in violation of the law, and thereafter, when the defendants, having lost their net, placed another within the prohibited distance of the Abercrombie net, they committed the offense which was charged.

It is contended that there was no evidence sufficient to convict under counts 1, 2, and 4. As to count 1, there was testimony that, at the time when the defendants' net was set out, another net had been set out by the Abercrombie Packing Company, a distance of 50 feet therefrom. As to the second count there was testimony that the Abercrombie Company set out a net at about 8:30 o'clock of June 5, and that about half an hour later the defendants put out a set net 200 feet therefrom. There was conflict in the testimony as to which of these nets was first set out, but the jury found the facts adversely to the defendants. As to count 4, there was testimony that on June 5 the defendants set out a net between two nets of the Abercrombie Company, each about 400 feet away from the defendants' net, and that the Abercrombie nets were set out about 10 minutes before that of the defendants.

We find no error. The judgment is affirmed.

THE TAMPICO.

SUDDEN & CHRISTENSON v. CROSSETT WESTERN LUMBER CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3533.

1. **Shipping ⇐56—Subcharterer held entitled to rely on statements of charterer as to term of original charter in arranging for voyage.**
Where a subcharter was made subject to the conditions of redelivery of the original charter and the subcharterer, not knowing the terms of the original charter, before exercising an option for an additional voyage, asked the charterer for a copy of the original charter, and was told that it was practically the same as another charter, except that redelivery was to be made about June 15, and nothing was said about a provision of the original charter authorizing the owner to terminate it before June 15, the subcharterer had a right to rely on the information furnished, and to believe that there was no provision for termination in the charter, and to act on such belief in arranging for another voyage.

2. **Estoppel ⇐106—Proving estoppel to defeat defense to cross libel held not to make it basis of affirmative relief.**
Where a charterer sued the subcharterer for unpaid hire, and the subcharterer, by cross-libel, sought to recover damages because it was not permitted to complete a voyage, and, in answer to the cross-libel, the

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

libelant pleaded that the subcharter was subject to the provisions of the original charter authorizing the owner to terminate it, the cross-libelant, by proving the charterer's representations as an estoppel against such defense to the cross-libel, was not making the estoppel the basis of affirmative relief, contrary to the rule that estoppel cannot be so used.

3. **Estoppel ⇐83(1)—Representations need not be made with fraudulent intent.**
Estoppel may be predicated on representations not made with fraudulent intent, if of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on.

4. **Shipping ⇐56—Subletting by subcharterer held not to defeat recovery, when not objected to.**
It was not a defense to a cross-libel by a subcharterer of a vessel that it sublet the vessel without the consent of the charterer, where the charterer was advised, before the subcharterer exercised an option for an additional voyage, that the vessel was to be used in performing an obligation to the company to which the subcharterer was claimed to have sublet, but no objection was made by the charterer.

5. **Shipping ⇐56—Subcharterer not entitled to contract for use of steamer after learning that owner had demanded possession.**
Though a charterer represented to the subcharterer that the original charter called for delivery about a certain date, without mentioning the owner's right to terminate the charter, the subcharterer had no right to contract for the use of the vessel in reliance upon such representations, after learning that the owner had demanded possession under the rights reserved to it in the original charter.

6. **Estoppel ⇐87—Change of possession in reliance on representations to party's injury necessary.**
To establish estoppel, based on the representations of the charterer of a vessel as to time for redelivery under the original charter, the subcharterer must show that, relying on such representations, it changed its position to its injury.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Suit by the Crossett Western Lumber Company against the American steamship Tampico, claimed by Sudden & Christenson, owners. From a decree for the libelant, claimants appeal. Reversed and remanded, with instructions.

On April 15, 1915, the Pacific Coast Steamship Company, the owner of the steamship Tampico, chartered the vessel to the appellee. The charter party provided for redelivery of the vessel to the owner not later than July 1, 1916, unless the time of redelivery should be extended by the owner for a further period of 60 days; but it contained the further provision that the owner might, if it should so elect, require that the vessel be redelivered to it at Seattle, Wash., on or about May 15, 1916, upon its giving to the appellee, on or before February 1, 1916, a written notice to that effect, and it provided that on such notice being given the vessel might be redelivered at any time between April 1, 1916, and May 15, 1916. On October 18, 1915, the appellee subchartered the steamship to the appellant. The subcharter party gave to the appellant the use of the steamship for a stipulated voyage, with the option to use the same for a second voyage upon the same terms and conditions as the first. It contained a marginal provision as follows: "Subject to the conditions of redelivery as per charter between Crossett Western Lumber Company and Pacific Coast Company."

The appellant performed the first voyage, and thereafter, on December 31, 1915, it duly notified the appellee in writing that it intended to exercise its

option for a second voyage. The notice was required to be in writing, and to be given 20 days at least before the second voyage was undertaken. On January 3, 1916, the appellee acknowledged receipt of the notice. On January 7, 1916, the Pacific Coast Steamship Company notified the appellee that it required a redelivery of the vessel by May 15, 1916. On January 11, 1916, the appellee telegraphed the appellant as follows: "Our charter has clause Tampico must be delivered May fifteenth if notified by February first. Pacific Coast served notice to-day. We there notify you." On the following day the appellant replied, directing the attention of the appellee to its previous statement that the appellee's charter on the Tampico expired not later than June 15, and stating that the appellee expected "to be able to redeliver at an Atlantic port on or about May 4th, if canal be open, or, if canal be closed, on Pacific Coast port on or about May 10th next. * * * We do not understand your telegram under date of January 11th, and we would like you to advise us at once on what ground the Pacific Coast S. S. Co. claims the right to notify you that the Tampico must be redelivered by May 15, 1916." To that letter the appellee answered, referring to the terms of its charter from the owner.

The second voyage was begun on February 22, 1916. The vessel went to the coast of South America, and there loaded a cargo of nitrate, and thence started northward, and arrived at the Pacific entrance to the canal about April 29, 1916. The canal was then open for navigation. The captain of the vessel had received instructions from the owner prior to loading "to proceed as charterer's agent directed, but to load for San Francisco." Pursuant to these instructions he proceeded to San Francisco, where the vessel was redelivered to the appellee on May 19, 1916. The appellant withheld the charter hire of the vessel from April 23, 1916, to May 19, 1916, amounting to $8,492.88, contending that it had the right to complete the voyage through the canal to the Atlantic Coast, and then make redelivery of the vessel prior to June 15, 1916, in accordance with the terms of the charter party.

The appellee filed its libel to recover the unpaid charter hire. The appellant answered, setting up the defense that the appellee had failed to perform the conditions of the charter party, and that the appellant had been damaged thereby; and the appellant filed a cross-libel, setting up the facts with regard to the second voyage, and claiming damages in the sum of $14,871.57. Answering the cross-libel, the appellee pleaded the defense that the charter party between the appellee and the appellant was subject to the condition for redelivery contained in the charter party between the appellee and the owner. Upon the pleadings and the evidence, the court below found that the condition for redelivery contained in the charter party from the owners to the appellee was binding upon the appellant, and judgment was entered for the appellee for the unpaid charter hire from April 23, 1916, to May 19, 1916, and the cross-libel was dismissed.

Ira S. Lillick, of San Francisco, Cal., for appellant.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The conclusion of the court below was based upon the rule which was applied by this court in Conner v. Manchester Assur. Co., 130 Fed. 743, 65 C. C. A. 127, 70 L. R. A. 106, where we held that an insurance certificate, containing the provision that its terms were subject to all the terms and conditions of a certain open policy in the possession of the insurance company, bound the insured to the provisions of such open policy, although he had no knowledge of the contents thereof. The facts in the present case, we think, take the controversy out of the

rule there announced. The appellee held the Tampico under a charter from its owner. It entered into a charter party with the appellant for a prescribed voyage, giving it the option to use the vessel for a second voyage of a similar nature. The contract was expressly made subject to the provisions of the original charter from the owner to the appellee. The appellant sent the vessel on her first voyage. At that time it had not determined whether or not it would exercise the option for a second voyage. On December 17, 1915, the appellee wrote to the appellant, inquiring whether it would want the vessel for another voyage. On December 20 the appellant answered, saying:

"Will you please send us copy of your contracts with the Pacific Coast Company with reference to this steamer. We have a copy of the Eureka contract, but not of the charter of the Tampico. * * * As soon as we have this information, we hope to be able to answer promptly as to whether or not we will want to use the vessel for another trip."

At that time the appellant was negotiating with W. R. Grace & Co. for the use of the Tampico for a second voyage. The letter of December 20 was sent in order to ascertain the date of the appellee's redelivery obligation to the owner. On December 27, 1915, the appellee answered, saying that its charter of the Tampico from the owner "reads practically the same as that of the Eureka, except that we are to make redelivery about June 15," and the letter closed with the request that on receipt thereof the appellant advised the appellee of its decision as to the option. Upon receipt of that letter the appellant closed its negotiation with W. R. Grace & Co. and fixed the vessel for the second voyage. On December 31, 1915, the appellant wrote to the appellee:

"We will exercise our option of the second voyage of the steamer Tampico."

On January 3, 1916, the appellee acknowledged receipt of that notice and said:

"As we formerly wrote you, the charter of this boat expires not later than June 15, 1916."

These communications from the appellee answered the appellant's inquiry as to the term of the original charter party. The appellant had asked for a copy of that charter, for the purpose of ascertaining the length of time for which the owner had parted with the right of possession. The letters conveyed that information fully and completely. The appellant had the right to rely on the information so furnished. It had the right to believe that there was no provision in that charter party by which the term thereof could be abbreviated at the option of the owner. The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon, and the appellant in acting upon it exercised such reasonable diligence as the circumstances required. The situation is the same as it would have been, had the appellee sent the appellant a copy of that charter party, with the optional provision in favor of the owner inadvertently omitted therefrom. The appellee knew for what purpose the information was sought, and it was advised of the

voyage which the appellant had in contemplation. For further information it referred the appellant to the charter which the appellee had from the owner of the Eureka, a copy of which was in the possession of the appellant. That charter party contained no provision by which the term thereof could be abbreviated at the option of the owner.

[2] The appellee asserts, as to the case made by the cross-libel, that estoppel cannot be used as a basis of affirmative relief, and cites Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618, where the court said that estoppel—

"is available only for protection, and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man, and is not permitted to go beyond this limit."

That was an action of ejectment. The defense was based upon equitable estoppel, and was held sufficient; the court ruling that the action involved both the right of possession and the right of property, and, as the facts indicated that the plaintiff was not in equity and conscience entitled to disturb the possession of the defendants, the latter might rely upon the doctrine of equitable estoppel to protect their possession. In the present case estoppel is not made the basis of the relief sought by the cross-libel. The relief sought is based only upon the terms of the contract between the appellant and the appellee, and estoppel is asserted only as against the defense which the appellee pleaded thereto, and we see no reason why it is not available for that purpose.

[3] It is contended that there can be no estoppel in cases where, as here, the representations were made without fraudulent intent. But the rule is well established that it is not necessary that the representations shall have been made with such an intent. It is sufficient if they are "of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on." 21 C. J. 1121; 10 R. C. L. 691.

[4] One of the defenses asserted by the appellee to the damages claimed upon the cross-libel is the fact that the appellant sublet the Tampico to W. R. Grace & Co. without the consent of the appellee; the charter between the appellant and the appellee having provided, "Charterers to have the option of subletting the steamer, provided consent of owners obtained," and Mitchell, the manager of the appellee, having testified that the appellee never consented to any subcharter. To this it is to be said that it does not appear from anything in the record that the appellant did in fact subcharter the vessel to W. R. Grace & Co., or that it entered into any agreement with that company other than a contract of affreightment. It appears, also, that the letter of the appellant to the appellee of December 20, 1915, advised the appellee that the appellant proposed to use the Tampico in performing its obligation to W. R. Grace & Co. and that no objection was made by the appellee.

[5, 6] The record presents the question of the rights and obligations between the appellant and the appellee from and after the time when the former received, on January 11, 1916, notice that the Pacific

Coast Steamship Company demanded possession of the vessel on or before May 15, under the right which was reserved to it in the original charter. We think that from and after that date the appellant had no right to enter into contracts for the use of the Tampico in reliance upon the appellee's said representations. The vessel was then on her way home from her first voyage. She was not sent out upon the second voyage until February 22, 1916. What the contractual relations were between the appellant and W. R. Grace & Co. on January 11 does not appear from the record. It is not shown that there was then a binding contract between them. The appellant's testimony that at that time the vessel was fixed for the second voyage may mean only a fixed intention in the minds of the appellants to use the vessel for a second voyage. The appellant's defense to the original libel and its claim for damages in the cross-libel rest upon estoppel, and to establish estoppel it must show that, relying upon the representations of the appellee, it changed its position to its injury. "The whole office of an equitable estoppel is to protect one from a loss which, but for the estoppel, he could not escape." 10 R. C. L. 698.

We think the decree of the court below should be reversed, and the cause remanded to that court, with instructions to ascertain and adjudge the amount, if any, to be awarded to the appellee upon the issues created by the libel and the answer thereto, and the damages, if any, to be awarded to the appellant under the issues arising upon the cross-libel, and to enter a decree accordingly. The parties to have permission to take further testimony upon the issues so to be determined.

It is so ordered.

BESTWALL MFG. CO. v. UNITED STATES GYPSUM CO.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

No. 2764.

1. **Patents ⇐16—Invention not determined by extent of advance.**
   Invention is not determined by the extent of advance which the inventor makes in the art.

2. **Patents ⇐328—1,029,328 and 1,034,746, for process for making plaster board and its product held to disclose invention.**
   The Utzman patents, No. 1,029,328, for a process for making plaster board, and No. 1,034,746, covering the product, *held* to disclose invention in turning over and sealing the edges of the bottom layer of paper.

3. **Patents ⇐328—1,029,328 and 1,034,746, for process for making plaster board and its product, held infringed.**
   The Utzman patents, Nos. 1,029,328 and 1,034,746, covering process for making plaster board and the product thereof, *held* infringed, although defendant did not use several layers of paper and plaster as described in the claim of the process patent.

4. **Patents ⇐157(1)—Product patent may be considered in considering scope of process patent.**
   Where a process and product patent were the result of a division, the product patent may be examined to ascertain the scope of invention of the process patent and to define better the equivalents that may fairly be recognized.

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

Suit for the infringement of patent by the United States Gypsum Company against the Bestwall Manufacturing Company. Decree for complainant (258 Fed. 647), and defendant appeals. Affirmed.

Clarence E. Mehlhope, of Chicago, Ill., for appellant.

Edward Rector and John W. Hill, both of Chicago, Ill., for appellee.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. Two patents, one No. 1,029,328, covering a process for making plaster board, and the other, No. 1,034,746, covering the product, the plaster board, are here under consideration. Patentee originally sought his claims in one application, but a division was ordered, and thereafter he proceeded separately with his process and product applications.

Describing the subject-matter of his patent, patentee says:

"Plaster board of various kinds have been made prior to my invention, some of which have been made in molds and others of which have been made by a continuous process consisting in applying alternate layers of plaster and paper or other fibrous material upon a traveling base sheet. The mold method of making plaster board is objectionable, however, for the reason that the size of each slab of board is necessarily limited and, furthermore, for the reason that this method of making boards is a slow, tedious and expensive operation. In the continuous method of making plaster board, it has been the practice to superimpose the alternate layers of plaster and paper and then to trim the edges of the board leaving the raw edges of the plaster and the raw edges of the paper at each side of the board. The paper or covering material in this construction is very easily torn and the edges of the board are readily chipped or broken so that after repeated handlings the boards when ready for use are usually mutilated to a considerable extent.

"My present invention aims to obviate the disadvantages of the boards previously employed and to construct a board, *the edges of which will be entirely enclosed by a sheet of covering material and in which there will be no free or exposed edges of covering material* which will be liable to be torn, loosened, or peeled back in the handling of the board."

Claim 1 of the process patent reads:

"The method of making plaster board which consists in advancing a bottom sheet of covering material, superimposing upon said sheet alternate layers of plastic material and fibrous material, holding the plastic material away from the edges of the covering material so as to leave a portion of said material exposed at each side of said layers, folding the exposed edge portions of said covering material over onto the upper surface of the upper layer of plastic material, applying a separate sheet of covering material over the upper surface of plastic material, said upper sheet being of a width sufficient to partially cover the inturned edges of said bottom sheet, applying pressure to said upper sheet to cause the plastic material to flow between the edges of said sheet and the inturned portions of the bottom sheet, and preventing said plastic material from escaping at the edges of said upper sheet."

Claim 1 of the product patent reads:

"A plaster board comprising a body, a covering of fibrous material adhering to one face of the body folded to inclose an edge of the body and overlie a portion of the opposite face thereof, and a covering of fibrous material for said

opposite face of the body overlying said folded-over portion of the first-mentioned covering but having its edge spaced from the edge of the board."

Referring to the italicized words quoted from the specifications, it is apparent that the virtue of the patent is found in the protection which the covering over the edges affords. Evidence was received tending to support appellee's claim that such covering protected the exposed edge of the gypsum body, prevented waste, strengthened the finished board, increased the output, improved the appearance of the finished product, and reduced cost of production. A very large increase in the production of plaster board followed the appearance of this patented article.

It is unnecessary to separately consider the two patents. Under the facts disclosed in this suit, they fall or stand together.

Plaster boards of the two-ply and of the composite type were old and well known at the time of this discovery. The improved product differs from the product formerly manufactured chiefly in the protection afforded the edges of the gypsum.

Counsel describes the process as follows:

"The patented method consisted, broadly, in pouring a mass of semi-liquid flowing material upon a rapidly moving continuous sheet of paper, folding the edges of such strip upward and inward over the edges of the layer of plastic material, superimposing a narrower continuous sheet of paper upon the bottom sheet and the layer of plastic material thereon, and passing the whole between a pair of pressure rollers, whereby the layer of plastic material is compressed to a uniform thickness throughout the width of the paper where its edges are confined and bound by the in-turned edges of the bottom sheet, whereby the superimposed upper sheet is secured to the layer of plastic material and to the in-turned edges of the bottom sheet by the adhesiveness of said material itself."

We consider it unnecessary to discuss the prior art in detail. Nor do we deem it advisable to discuss the evidence showing the extensive use that immediately followed the appearance of the new board. On these issues the record amply supports the claims of the patentee. On this one issue only may debate arise: Does the contribution spell invention?

This issue we resolve in appellee's favor following the determination of the patent office and the conclusion of the district judge. An elaborate statement of the reasons why we reach this conclusion is neither necessary nor helpful. Utility, increased output, improved product, reduction in cost, are all factors that have been thrown into the scale and are somewhat determinative of this issue.

[1] We may not, and in fact do not, agree with counsel for patentee that this was a "broad novelty," nor with its expert witness that this was a "daring conception." But invention is not determined by the extent of the advance in any art which the inventor makes. Nor can we ignore the presumption which the grant of the patent and the adjudication of the district judge creates in any close case.

[2] In the present suit we find that the use of a covering as a retaining member with its resulting advantages heretofore enumerated was novel. Moreover, to utilize the plastic material thus inclosed as an adhesive material, in securing the edges of the retaining member and to attach the top cover member to it as described in the process, was

novel and somewhat ingenius. Such double use of the plastic material together with the retaining member permitted the manufacturer to increase its output, to lessen the cost of production, to make a more sightly board which "chipped" less readily than the board previously used; and under all of the circumstances we find the novelty was invention.

[3] *Infringement.*—Appellant's claim of noninfringement is based in part on the assertion that its product contains no "alternating layers of plastic material" and alternating layers are not used in its process. Judge Sanborn in disposing of this case aptly said:

"One defense is that defendant's board is not made in alternate layers, but in a single plastic one. Plaintiff insists that the building up of the body of the board in alternate layers of plaster and paper was not of the essence of the invention, but that the really new things discovered by Utzman was the upturning of the edges of the bottom layer of paper, and then sealing or impressing the top layer of paper, a little shorter than the completed board, over the upturned ends of the bottom layer, and into the layer of plaster. Plaintiff's counsel contend that the case falls within the rule of Adam v. Folger, 120 Fed. 260, 56 C. C. A. 450, in this circuit, to the effect that an element of a claim not essential to the result which the inventor desired to accomplish is not absolutely requisite in an infringing device. The construction in alternate layers not being essential to the result which Utzman wished to reach, the fact, it is said, that defendant does not use alternate layers in their board is immaterial.

"It appears by looking at the prior patents that it was old and common to make 'sandwich' board of alternate layers. Utzman did not attempt to claim this as a new feature, but rested his title to invention solely on the turned-over edges, and the impressing of the shorter upper sheet of paper into the plaster, so as to seal up the finished board, and secure the edges against abrasion of the paper. His whole right to invention lies in the new method of binding and sealing the edges, and finishing the board with the top covering of paper. * * *

"The alternative layer feature not being of the real spirit of the invention, a wider range of equivalents is applicable, so as to make the defendant's layer process and board equivalent. Jones v. General Fireproofing Co., 254 Fed. 97, 100, 165 C. C. A. 507."

[4] In addition to the reasons thus named, it is worthy of note that the two patents are the result of a division and therefore the product patent may well be examined to ascertain the scope of the invention and to better define "the equivalents" that may fairly be recognized.

No claim of this patent requires a plurality of plastic layers. One suffices to meet each claim. The process patent does use the term "alternate layers of plastic material," but the solicitor was describing the process rather than the elements that entered into the product. In some plaster boards there are alternating layers of gypsum between which paper or other material is laid. The presence or absence of several layers, however, has nothing to do with the process which patentee was describing in this patent. The covering for the edges of the gypsum was the heart of the discovery.

Contention also is made that appellant does not apply "pressure to the top layer of covering material until its proper surface lies flush with the exposed surface of said inturned portions" as required by claim 2 of the process patent. This denial creates an issue of fact. The district judge was in a better position than we to make a finding thereon.

He found for the appellee and our examination of the drawing and testimony confirms this finding.

Other differences are pointed out and stressed so as to defeat infringement. While it is true that in some of appellant's boards infringement does not appear it is likewise apparent that there are other boards that do infringe.

The decree is affirmed.

WUSTUM et al. v. KRADWELL.

(Circuit Court of Appeals, Seventh Circuit. December 20, 1920.)

No. 2799.

1. **Trusts ⟸44(1)—In suit to establish title to stock in another's name, evidence held to support finding as to part only of the stock claimed.**
   In a suit by one who purchased corporate stock which was subsequently held in the name of defendant's deceased husband to establish plaintiff's title to part of the stock as purchased in his own behalf, evidence *held* to support a finding in his favor as to stock for which he exchanged an interest in a business, but insufficient as to stock for which he paid cash, as he did for that purchased for defendant's husband.

2. **Trusts ⟸35(1)—Agreement to account for stock owned by another binding only to extent of stock owned, though larger amount was mentioned.**
   Where part of the stock in a corporation standing in the name of defendant's husband at the date of his death belonged to plaintiff, defendant's promise to account to plaintiff if he would permit the stock to appear in her name for some time was binding on her only to the extent of plaintiff's ownership, though in their negotiations a larger amount than that owned by plaintiff was mentioned.

3. **Courts ⟸356—Under equity rule exclusion of evidence not assignable as error when character not stated.**
   Under equity rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi) and rules 11 and 24 of the Circuit Court of Appeals for the Seventh Circuit (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii), the exclusion of a witness and the exclusion of questions asked other witnesses was not assignable as error where the character of the proffered evidence was not stated.

4. **Courts ⟸356—Failure to state character of evidence excluded not cured by affidavit on motion for new trial.**
   Where the character of evidence offered was not stated as required by equity rule 46 (198 Fed. xxxi, 115 C. C. A. xxxi), the omission was not cured by an affidavit filed about two months after the decree in support of a motion for rehearing or a new trial.

5. **Witnesses ⟸181—Admission of evidence of transaction with decedent not error when bar waived by common consent.**
   The admission of plaintiff's testimony concerning the contents of a lost instrument, if contrary to St. Wis. 1919, §§ 4069 and 4070, respecting testimony concerning transactions with parties since deceased, was not error where by common consent the bar of the statute was waived and evidence introduced as though there were no statute on the subject, especially where such testimony was of little weight on the matters involved.

6. **Witnesses ⟸183—Testimony of transactions with decedent carefully scanned, though received without objection.**
   Testimony by interested parties concerning their transactions with deceased persons, even if received without objection, must be carefully scanned and received with caution.

Baker, Circuit Judge, dissenting in part.

Appeal from the District Court of the United States for the Eastern District of Wisconsin.

Suit by Frank A. Kradwell against Jennie Wustum and another. From a decree for complainant, defendants appeal. Modified and affirmed.

Bernard V. Brady and Lawrence A. Olwell, both of Milwaukee, Wis., for appellants.

Edward M. Smart, of Milwaukee, Wis., for appellee.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. Appellant Jennie Wustum complains of a decree of the District Court which requires her to turn over to appellee Frank Kradwell 191¾ shares of the stock of Lakeside Hotel Company of Racine, Wis., which came to her under the will of her deceased husband, C. A. Wustum.

Wustum was a man of ample means, aged about 66 at death, in March, 1916, and for some years had practically retired from business. Appellant, his wife, was nearly the same age, and, save for an adopted son who did not reside with them, they were childless. Appellee Kradwell, about 20 years younger, unmarried, was engaged in the drug business with his brothers, under the name of Kradwell Drug Company, operating some stores in and about Racine, where all concerned resided. For some years the Wustums had taken a very great interest in appellee, who was often at their home, frequently slept there, in a room which was known as "Frank's" room, and came to be regarded by them very much as would be a son. From time to time during several years, both before and after the transactions herein referred to, they made him gifts, some of them quite expensive, and at Wustum's funeral he seemed, next to the widow, to be the chief mourner.

Somewhere about 1911, after some years of this intimacy, Wustum conceived the idea of acquiring the stock of the Lakeside Hotel Company, which owned the largest hotel at Racine, but which had not theretofore proved profitable. To what extent this conception was influenced by a desire to benefit appellee does not definitely appear; at least the evidence thereon is contradictory, some witnesses indicating a purpose expressed by Wustum to establish Kradwell in a good business, into which Wustum seemed to have faith the hotel could be developed. In the presence of a number of friends and associates, including Kradwell, the proposition of acquiring the stock was discussed. Wustum did not deem it best that it should appear he was after the stock, as this might incline holders to raise their price. He suggested that the work be done by Kradwell, and the stock as acquired be transferred to one Bacon as trustee, and this was the general plan adopted. Something over 300 shares—a considerable majority of the outstanding stock—was acquired, practically all except 143½ shares which were held by two men who declined to sell, and who, so far as the record shows, still hold their stock. The stock as acquired was turned over to Bacon and certificates issued to him, and later when

all obtainable had been acquired he surrendered his certificates, and new certificates for all of it were taken out by Wustum. Bacon held one share and Kradwell two shares in their names respectively to qualify them as directors; Wustum retaining physical possession of the certificates. For a number of years up to March 6, 1916, when Wustum suddenly died, Kradwell was a director and the secretary of the company, and latterly had more or less to do with the management of the hotel. He received a salary most of the time, having quit the drug business. The theory of the bill is that certain of the stock so acquired and passing to Wustum was in fact acquired by Kradwell for himself with Wustum's knowledge and consent, and that on Wustum's death his widow, who knew all the facts, but being desirous of controlling for a time all the stock as her husband had done, agreed with Kradwell that all the stock should be issued in her name, and that she would in time transfer to him that which was his.

[1] The main controversy here is in regard to 163½ shares of the stock owned or controlled by one Carpenter. As to this the undisputed facts are that, with the knowledge of Wustum, Kradwell entered into negotiations with Carpenter for the exchange of his (Kradwell's) interest in the Kradwell Drug Corporation for this hotel stock. Carpenter was willing to enter into such a deal provided he could dispose of the drug store interest. Further negotiations were had which resulted in a three-cornered deal whereby Kradwell's interest in the drug company should pass to Kradwell's brother, who in turn was to give his notes therefor to Carpenter's bank for $10,000; and these 163½ shares of hotel stock were to pass to Kradwell. This deal was consummated, and the certificates of the hotel stock were delivered to appellee, who turned them over to Bacon, who later transferred them to Wustum.

That originally the entire consideration for this Carpenter stock was supplied by Kradwell out of his own property is not an issue in the case. It was conceded and does not depend upon the testimony of Kradwell respecting transactions between himself and the deceased. We quite agree with the District Judge, who in his opinion stated:

"I was impressed with the idea that the plaintiff made a prima facie showing in establishing the transactions to which he was in fact a party where certain stock which has been referred to as the Carpenter-Robinson stock in fact came into his hands under circumstances establishing a title to the stock to him regardless of any transactions which he may have had with the deceased person; and that transaction * * * is in a way the point upon which this case in my judgment must turn."

Plaintiff in error undertook to show that Kradwell agreed with Wustum to take $3,000 for his drug store interest, notwithstanding his brother had obligated himself to pay Carpenter's bank $10,000 for it, and that Wustum actually paid him this much money therefor; but we believe the District Court was warranted in its conclusion that the evidence failed to establish such a transaction or such payment. We do not deem it unreasonable that Wustum was willing Frank Kradwell should have an interest in the hotel, nor that at first Wustum did not wish to be known in the transaction, and after all the then obtainable

stock had been acquired that he desired for the time being that the records show all the stock to be in him (Wustum).

Supplementing the influential fact that the consideration for this stock was supplied by Kradwell is the evidence of numerous disinterested witnesses that thereafter Wustum at different times stated Kradwell had a large interest in the hotel; such statements being shown to have been made from time to time quite up to Wustum's death. The apparent interest in the hotel company which Kradwell's trading for this stock would seem to have raised in him was evidently recognized by Wustum as subsisting in Kradwell; and as to these 163½ shares we believe the District Court was warranted in its finding that at the time of Wustum's death they really belonged to Kradwell.

Two other blocks of stock are involved, viz. Heinrichs, 26¼ shares, and Rowley, 3 shares. As to these all the evidence upon the subject is by Kradwell himself to the effect that they were bought with his own money. In corroboration of this assertion there appears nothing whatever except that Rowley testified Kradwell paid him in cash for his shares. This, however, does not distinguish this from most of the other purchases by Kradwell, admittedly for Wustum. In practically all Kradwell paid the seller cash, which he had by check or otherwise obtained from Wustum. His own account of these transactions is far from convincing. He says he had from time to time saved money while in the drug business, and that these savings, together with the surrender value of two life insurance policies which he cashed, amounting in all to about $4,800, he had kept in the drug store safe during all the time of the accumulation, and that he did not have any bank account. This, from a business man, does not carry conviction, and, if offered separate and apart from the other transaction, would far from sustain the undertaking to have declared as his own, corporate stock which some years before had been acquired and placed in the name of another. It cannot be said that, because the evidence requires the conclusion that the Carpenter stock belonged to him, therefore any other of the stock which he may say he paid for must likewise be decreed to him.

The testimony of the various persons as to statements made by Wustum, which would well be applicable to the large block of Carpenter stock, is not so definite or all-inclusive as necessarily to include other stock holdings which Kradwell claims. It is true some of these witnesses made mention of 187 shares, or about that many, but most of them were not definite or certain as to the number. Coupled with this is the fact that the sum total of these shares is not 187½, as was talked about, but is 192¾ shares. Kradwell's explanation that Wustum made a mistake in the addition and wrongfully assumed it to be 187½ shares is far from convincing. The employment by a few of these witnesses of the number 187 or thereabout is in all probability a matter of deduction reached by them, doubtless in all honesty, from having subsequently heard this figure spoken of, rather than through the mention of any definite number by Wustum. The most that can be said of the evidence of such witnesses is that Wustum had told them

in various ways and at different times that Kradwell had a large interest in the hotel, which indeed was the fact, if he owned this Carpenter stock. We do not therefore regard the evidence of these declarations by Wustum as necessarily corroborative of Kradwell's claim of ownership of the Heinrichs and Rowley stock; and as to these shares we are satisfied that the clear and manifest weight of all the evidence, with all the reasonable inferences therefrom, negatives the claim. Under these circumstances we feel constrained to disapprove the decree of the District Court respecting the Heinrichs and Rowley stock, notwithstanding the persuasiveness ordinarily attaching to a chancellor's findings upon issues of fact. American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129 (7 C. C. A.).

[2] The complaint charges that shortly after Wustum's death appellant represented to him that it was highly desirable that all of the stock continue for a time to appear in her name, and that, if he would execute a paper declaring he had no interest in the stock, the executors would transfer it all to her, and that she would account to him for the shares he claimed to own, namely, 187½ shares, and that he was by her persuaded to sign and did sign such a paper. The answer denied any such promises or representations on her part, but admitted the signing of such paper by appellee, and stated that such paper was freely signed by him to make manifest the fact that he had no claim for any of such stock. Much evidence was adduced by both sides in support of their respective claims. Where the truth lies on the many controverted propositions it is difficult, indeed, to say. The District Court had of course the advantage of hearing and seeing the witnesses, and its conclusions on the controverted facts are entitled to very great weight.

In view of the long and close relation between the parties, it is not at all unreasonable that appellant might have asked, and appellee have given, what the latter says was requested, and for the purpose indicated. It is true there are other circumstances which make it seem very strange that the one should ask, or the other give, such a paper, especially in view of the charges and countercharges they respectively make, that immediately after the death of the deceased each proceeded to lay the foundation—the one for asserting an unfounded claim to the stock, and the other for defeating a just claim thereto—each accusing the other of having improperly taken keys, and abstracting from private apartments and the hotel safe papers and documents which the other claims would have substantiated his or her contentions in regard to the stock in question. But, accepting the view of the District Court that it is more likely that the disclaimer was signed under the circumstances and for the purposes indicated by appellee, and that there was in fact some promise by appellant of the general nature asserted by Kradwell, we do not believe that this promise would be binding any further than to the extent of Kradwell's ownership in the stock, and that, even though 187½ shares were mentioned in these oral talks between Kradwell and Mrs. Wustum, if his provable interest at the time of Wustum's death did not in fact exceed 163½ shares, the undertaking should not be held binding beyond that number.

[3, 4] Complaint is made of the alleged exclusion by the court of one Gittens as a witness. It seems that he as attorney for appellant was conducting the hearing of the cause. When his testimony was offered the court stated that, being attorney in the case, he could not be a witness, and further said that he ought not to wish to be a witness. In response Mr. Gittens, acting as attorney, said "No," and this ended the incident. From this it would appear that the undertaking to have him testify was abandoned. But, even if persisted in, the assignment of error in this respect is not in compliance with equity rule 46 of the Supreme Court (198 Fed. xxxi, 115 C. C. A. xxxi), which requires the character of the proffered evidence to be stated, nor with rules 11 and 24 of this court (150 Fed. xxvii, xxxiii, 79 C. C. A. xxvii, xxxiii), substantially to like effect. See, also, Herencia v. Guzman, 219 U. S. 44, 31 Sup. Ct. 135, 55 L. Ed. 81. The affidavit of Gittens, filed with a number of others some two months after the decree, in support of a motion for rehearing or a new trial in the cause, does not supply this omission. A rehearing or new trial was, at best, in the discretion of the court. But we may say in passing that, if what was there disclosed be considered as the proffered testimony of Gittens, we do not consider it of such significance as would in any event warrant reversal on account of its exclusion.

The court refused to permit certain witnesses on behalf of appellant to testify to statements to them by Wustum as to who owned the hotel stock; such statements not being in the presence of appellee. The error assigned on such action of the court is subject to the same objection as the proffered Gittens' evidence. Nothing appears to indicate the nature of the rejected evidence, and for this reason alone such assignment of error must fail.

[5] It is maintained that serious error against appellant intervened in permitting Kradwell to testify to the contents of an alleged lost paper signed by Wustum agreeing to transfer 187½ shares of stock to Kradwell. The latter testified to having drawn such a paper, which both signed a few months before Wustum's death, and that it was given to Kradwell who put it in a small lock box in the hotel safe to which he (Kradwell) had the only key, although the box contained other papers in which Wustum had an interest, namely, hotel insurance policies and plans for improvement of the hotel. It was as to the key of this compartment that there was much testimony offered on both sides primarily with the view to raising the presumption that, in the interest of Mrs. Wustum, papers were abstracted therefrom which were of benefit to Kradwell, notably the alleged paper under consideration. It was testified by him that he had searched for the paper and that it was lost, and against objection he was permitted to state the contents thereof as follows:

"For the sum of $1 and other valuable considerations I hereby assign, transfer, and turn back to F. A. Kradwell certain shares of stock in the Lakeside Hotel Company."

It is claimed the admission of this evidence was in contravention of sections 4069 and 4070 of the Wisconsin Statutes, respecting testi-

mony concerning transactions with persons since deceased. The competency of the testimony is asserted on the ground that the proof of the existence and contents of a lost instrument, which but for the loss would be admissible in evidence, is not evidence of a personal transaction with the deceased, the admission of which the statutes exclude, and in support of the position there is cited Daniels v. Foster, 26 Wis. 686, and Sawyer et al. v. Choate, 92 Wis. 533, 66 N. W. 689. Appellant, however, relies on the decision of the Supreme Court of Wisconsin in Felz v. Felz's Estate reported in 170 Wis. 550, 174 N. W. 908, wherein it is ruled that one who is by the statute prohibited from testifying to transactions with the deceased may not by his testimony establish the existence and show the contents of a lost instrument of writing executed by deceased, concerning such transactions with the deceased. It is pointed out, however, that this last decision was not rendered until after the decree in this case, and that the federal court must be governed by the law of Wisconsin as it was interpreted before the Felz Case.

In our view of the situation, however, it is not necessary to go into these various propositions. We gather from an examination of the entire record that it was quite as important to appellant, and possibly more so, to give evidence of all that had transpired with the deceased, as it was to appellee, and after this particular piece of evidence had been adduced counsel on both sides, without objection, went very fully into many transactions with the deceased other than that relating to this paper. When it became apparent that, as to the Carpenter stock, appellee had by undoubtedly competent evidence made a prima facie case, it was likewise apparent that appellant, to establish her claim that Wustum had paid Kradwell $3,000 for his drug store stock, might also wish to adduce testimony which the statutes would bar. The court suggested that, as transactions with the deceased had been gone into both with and without objection, it might be well to have the entire matter gone into, and thereupon counsel for appellant said:

"I do not want to hold anything away from the court. I want to assist the court in getting at the facts. * * * We have no objections at all."

One can scarcely study the record without concluding that, notwithstanding the initial objection referred to, each side assumed it would reap the greatest advantage from going into all the transactions with the deceased, and that by common consent the bar of the statute was waived, and the evidence proceeded as though there were no statute on the subject.

[6] Appellee's right to the 163½ shares was established quite independently of his testimony concerning the paper. Indeed, there are some discrepancies and inconsistencies as to the alleged paper which, to say the least, lend little, if any, corroboration to appellee's contention. The quite general existence of statutes of this nature is not out of whim or caprice of the Legislature, but is presumably based on wise policy, justified by long experience; and such testimony by interested parties concerning their transactions with deceased persons, even if received without objection, in the very nature of things, must be carefully

scanned and received with caution. It happens that the paper as testified to does not state any number of shares. Kradwell's testimony of what subsequently transpired between him and Mrs. Wustum wherein he did state the number of shares would not be proof of anything beyond what he then told her. It would not establish the contents of the alleged lost instrument, which Kradwell said was drawn and signed about January 1, 1916, and which he had not since seen. We can say of the instrument as testified to that it does not of necessity refer to other than the Carpenter stock, any more than do most of the statements of the deceased to the various witnesses; and, while serving neither to sustain nor defeat appellee's case as to the Carpenter stock, it does not tend materially to establish his claim to the other stock.

We conclude that the decree of the District Court should be modified by excluding from its operation the Heinrichs and Rowley shares, and including therein only stock representing the Carpenter shares. This will award to appellee the two shares already issued and standing in his name, and 161½ shares in manner and form as in the decree provided. The cause will be remanded for such modification of the decree, and, as so modified, the decree is affirmed. Appellant and appellee shall each pay one-half the costs of the appeal.

BAKER, Circuit Judge (concurring in part, dissenting in part). Questions of law arising on assignments of error respecting admission and rejection of evidence are correctly decided, in my judgment; but I protest most earnestly against the majority's action in setting aside certain findings of fact made by the chancellor after he had heard the parties and their witnesses in open court.

When Wustum died, certificates for over 300 shares were standing in his name. Appellee's claim was that he was the owner of 191 of those shares during the last five years of Wustum's life. Appellant, Wustum's widow, had new certificates made out in her own name. The chancellor found that this was done with knowledge on her part that appellee owned the Carpenter, the Heinrichs, and the Rowley stock (erroneously taken by Wustum and these parties as aggregating 187 shares instead of 191), and with her promise to assign the certificates to appellee after they had served her show purpose. Appellant's position was that appellee had no interest in any of the stock standing in Wustum's name. Credibility was necessarily the determining factor. The tension of the courtroom, the eyes, voices, hands of those testifying are not preserved in the printed record.

My Brethren accept the finding that appellee owned the Carpenter stock; but they reject his oath that he paid for the Heinrichs and the Rowley stock with his own money. It is admitted that he paid cash for these shares. If it was not true that he surrendered two life insurance policies to get his own cash for this purpose, astute counsel for appellant would have followed the trail and exposed him. Nothing in the record impeaches his having the money unless it is his confession that he kept his cash in his safe and had no bank account. However prudent it may be to bank one's cash, it is a harsh rule that my Brethren

are imposing upon the trial court, namely, that a person who keeps his cash in his own safe has no cash.

But appellee is corroborated in many ways.

If his claim to the Carpenter stock was false, the chancellor would have looked askance at his other claims, recalling the maxim, "Falsus in uno, falsus in omnibus." Of course it is not inevitable that the testimony of a witness who is wrong in one respect must be totally discarded. And of course my Brethren are right in saying that appellee's claim to the Heinrichs and the Rowley stock was not necessarily to be accepted by the chancellor simply because his claim to the Carpenter stock was supported by what the chancellor deemed the preponderance of the testimony. But the truth of the Carpenter claim bore upon the truth of the other claims, not as a principle of law, but as a psychological consideration to which the chancellor was entitled to give weight.

Credible witnesses, unimpeached on the record, whose impressiveness of manner we cannot know, testified that Wustum had repeatedly declared that appellee owned 187 shares or about that number. Their testimony, accepted by the chancellor, is rejected by my Brethren. 187 and 162 are not idem sonans. If Wustum said 162 or about that number, these witnesses could not have understood him as saying 187. But their testimony is rejected on the conjecture that it "is in all probability a matter of deduction reached by them, doubtless in all honesty, from having subsequently heard this figure spoken of, rather than through the mention of any definite number by Wustum." This strikes me as an unwarranted reflection on the intelligence and veracity of the witnesses and on the integrity of appellee and his counsel.

Appellee had the opening of the evidence. He testified to the contents of lost or stolen documents which he said would show his ownership of the 187 shares, meaning the Carpenter, the Heinrichs, and the Rowley shares. A witness who contemplated perjury might feel some degree of safety in narrating a parol transaction. If he intended to state falsely the contents of a document, which he was implying had been stolen by his adversary, he would have to face the possibility of being destroyed by the production of the document while he was yet on the witness stand.

But why pursue further the question of credibility on the printed record? The burden is not mine to demonstrate my Brethren's error. The findings of the chancellor are presumptively correct. They are supported by evidence. The burden is on my Brethren to establish clearly that the chancellor erred in weighing conflicting testimony, giving him the benefit of the fact that he saw and heard the witnesses in open court. As to the weight to be given to a chancellor's finding so made, see Davis v. Schwartz, 155 U. S. 631, 15 Sup. Ct. 237, 39 L. Ed. 289, and numerous prior cases therein cited; Adamson v. Gilliland, 242 U. S. 350, 37 Sup. Ct. 169, 61 L. Ed. 356; Estep v. Kentland Coal & Coke Co., 239 Fed. 617, 152 C. C. A. 451; Semidey v. Central Aguirre Co., 239 Fed. 610, 152 C. C. A. 444; United States v. Grass Creek Oil & Gas Co., 236 Fed. 481, 149 C. C. A. 533; Columbia Graphophone Co. v. Searchlight Horn Co., 236 Fed. 135, 149 C. C. A. 345;

Wilson v. Sands, 231 Fed. 921, 146 C. C. A. 117; Conkling Mining Co. v. Silver King Coalition Mines Co., 230 Fed. 553, 144 C. C. A. 607; American Rotary Valve Co. v. Moorehead, 226 Fed. 202, 141 C. C. A. 129.

In Adamson v. Gilliland, supra, the trial judge heard the conflicting oral testimony of the parties and their witnesses and resolved that conflict in favor of the plaintiff. On the printed record the Circuit Court of Appeals for the Eighth Circuit (227 Fed. 93, 141 C. C. A. 641) found that the testimony of the defendant and his witnesses sustained the defense beyond any reasonable doubt; and the Supreme Court reversed that finding on the ground that, when the finding of the judge who saw the witnesses "depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable."

PACIFIC LIVE STOCK CO. v. WARM SPRINGS IRR. DIST.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3512.

1. **Eminent domain ⇐191(6), 241—Complaint need not allege nature of estate sought to be acquired, and judgment need not specify estate acquired.**
   Under Or. L. § 7099, providing that the complaint in a suit to condemn land shall describe the land, right, or easement sought to be appropriated, and section 7103, providing that the court shall give judgment appropriating the land, rights, property, easement, etc., the complaint need not allege whether plaintiff seeks to acquire a fee-simple title or an easement, and the judgment need not specify the nature of the estate acquired.

2. **Eminent domain ⇐262(5)—In condemnation suit refusal to have complaint or judgment specify nature of estate held not injurious.**
   In a condemnation suit, if the refusal to require the complaint to allege the nature of the estate sought to be acquired or the failure of the judgment to specify the nature of the estate was erroneous, the error was not injurious to defendant, where it brought another suit to have the nature of the estate determined in which the court held, as contended by it, that plaintiff acquired only an easement.

3. **Evidence ⇐546—Qualification of experts as to value held a question for the court.**
   In a suit to condemn part of a ranch detached from other like properties, the qualifications of witnesses concerning the value of the property *held* a question for the court, though the witnesses lived over 100 miles from the land and never saw it until they examined it for the purpose of forming a judgment as to its value.

4. **Evidence ⇐543(3)—Witnesses living at some distance from land not necessarily disqualified to testify as to value.**
   That expert witnesses lived at a distance of 100 miles or more from land sought to be condemned did not necessarily disqualify them to express opinions as to its value.

5. **Eminent domain ⇐262(5)—Testimony on direct examination as to sales of other property not reversible error.**
   In a condemnation suit it is not reversible error to permit witnesses to testify on direct examination respecting their knowledge of other sales of like property.

6. **Eminent domain ⊜205—Damages on account of removal of hay stacked on property condemned held too conjectural under the evidence.**
Where the owner of land sought to be condemned had 1,000 tons of hay stacked thereon, and there was evidence that the cost of moving it would be from $5 to $10 a ton, and that it would be necessary to construct a field, fences, and accommodations for the men engaged in feeding cattle at the place to which it was moved at an expense of $7,500, but other testimony that the hay could be advantageously fed where it was before it would be necessary to remove it, damages on account of the hay *held* too conjectural and uncertain for recovery.

7. **Eminent domain ⊜205—Court not bound to accept estimates of value of engineers.**
In a condemnation suit, the court was not bound to accept the valuation placed on the property for reservoir purposes for an irrigation project by engineers.

8. **Eminent domain ⊜262(4)—Finding on conflicting evidence as to damages from condemnation not assignable as error.**
Where there was evidence that portions of defendant's ranch which would be isolated by the condemnation of part of the ranch would be decreased in value and other evidence that there would be no decrease, a finding that such lands had not been damaged was not assignable as error.

In Error to the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the Warm Springs Irrigation District against the Pacific Live Stock Company to condemn property. Judgment fixing the value of the property at an insufficient amount, and defendant brings error. Affirmed.

John L. Rand, of Baker, Or., P. J. Gallagher and W. H. Brooke, both of Ontario, Or., and Edward F. Treadwell, of San Francisco, Cal., for plaintiff in error.

Ed. R. Coulter, of Weiser, Idaho, H. C. Eastham, of Vale, Or., and Allen H. McCurtain, and Thomas G. Greene, both of Portland, Or., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The parties hereto will be named plaintiff and defendant as in the court below. The Warm Springs irrigation district brought an action to condemn, for use as a reservoir site, a portion of the ranch owned by the defendant, known as the Warm Springs ranch. The plaintiff alleged the making of surveys, the location of a dam site and reservoir at a point 1,400 feet south of the south line of the defendant's property, the organization of the plaintiff as an irrigation district, and its intention to irrigate 30,000 acres or more of land. It alleged the offer to the defendant of $55,000 for the 2,500 acres which it sought to appropriate and the offer of the defendant to accept $143,000 and their inability to agree. Upon the evidence the court below fixed the value of the property at $90,000, and awarded the defendant $5,000 as attorney's fees.

[1, 2] Error is assigned to the denial of the defendant's motion that the complaint be made more definite and certain so as to show whether the plaintiff sought to acquire the fee-simple title to the land described in the complaint, or an easement therein, and error is also

assigned to the entry of the judgment in the cause for its omission to specify whether the plaintiff acquired thereby the fee-simple title or an easement. We find no error in either assignment. The Oregon statute (Olson's Oregon Laws, § 7099) declares that the complaint in such a case "shall describe the land, right, or easement sought to be appropriated with convenient certainty," and in section 7103 it is provided:

"Upon the payment into court of the damages assessed by the jury, the court shall give judgment appropriating the lands, property, rights, easement, crossing or connection in question, as the case may be, to the corporation, and thereafter the same shall be the property of such corporation."

The court below ruled that—

"It is not necessary, nor do I deem it proper, to determine at this time whether such appropriation will amount to the taking of the fee or only an easement. The judgment will follow the language of the statute appropriating the property for reservoir purposes. The legal effect can be determined when the question arises, if it ever does."

In 20 C. J. 947, it is said:

"Where the statute provides what shall be set out in the petition, nothing more need be alleged."

And in 20 C. J. 857, it is said:

"The interest which the petitioner seeks to acquire, whether as easement or a fee, need not be stated."

Among the cases so holding are Dexter & N. R. Co. v. Foster, 64 Misc. Rep. 500, 119 N. Y. Supp. 731, and In re Metropolitan El. Ry. Co. (Sup.) 12 N. Y. Supp. 506. But, if there was error in said rulings, it resulted in no injury to the defendant, for in a subsequent suit between the parties brought to determine the nature of the estate so condemned, the court below held that the right acquired by the plaintiff was but an easement, and that decision has been affirmed by this court in Warm Springs Irrigation District et al. v. Pacific Live Stock Co. (C. C. A.) 270 Fed. 560.

[3, 4] It is contended that the witnesses Hunt, Greig, and Weaver, who testified for the plaintiff as to the value of the property in question, were not qualified to give evidence on that question, and that it was error to admit their testimony. The land a portion of which was sought to be condemned was operated as a cattle ranch. It was a tract of about 5 miles in length and varying in width from one-quarter of a mile to more than a mile lying along the middle fork of the Malheur river in Malheur and Harney counties. The defendant had owned it 25 years. It was not a simple matter to obtain satisfactory evidence of its value detached as it was from other like properties situate at considerable distances apart on streams in Central and Western Oregon. The three witnesses so named had not seen the defendant's ranch, nor were they acquainted with its value before they went there in December, 1918, and spent 2 days thereon examining the same for the purpose of acquiring knowledge and forming a judgment as to its value. This they did at the instance of the plaintiff. In November, 1919, they again spent a day upon the ranch for the same

purpose. Hunt lived in Malheur county at a distance of 116 miles from the land in question. He had lived there 19 years. His occupation was farming. He had had experience in farming irrigated lands. He had handled stock on a hay ranch. Weaver also lived in Malheur county; had lived there the most of the time since 1883. He owned land on Willow creek. He had bought and sold land in Malheur county, and had raised cattle on such lands, and he had run cattle on the range. Greig also lived in Malheur county. He was engaged in operating three ranches, and at times he did "a little real estate business," and since 1905 he had been in the land business, buying and selling land for himself and associates, and in the irrigation business, all generally in the eastern part of Malheur county. The mere fact that these witnesses lived at a distance of 100 miles or more from the land in controversy does not necessarily disqualify them, and aside from that fact there is nothing in the evidence to show that they lacked full qualification to testify as witnesses to the value of the land in question. It was for the court below to determine whether they were qualified to testify. In Stillwell Mfg. Co. v. Phelps Railroad Co., 130 U. S. 520, 527, 9 Sup. Ct. 601, 603 (32 L. Ed. 1035), Mr. Justice Gray said:

"Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law."

And in Montana Railway Co. v. Warren, 137 U. S. 348, 353, 11 Sup. Ct. 96, 97 (34 L. Ed. 681) Mr. Justice Brewer said:

"It is difficult to lay down any exact rule in respect to the amount of knowledge a witness must possess; and the determination of this matter rests largely in the discretion of the trial judge."

That rule was followed by this court in Union Pac. Ry. Co. v. Novak, 61 Fed. 573, 580, 9 C. C. A. 629. In 10 R. C. L. 218, it is said:

"Opinion evidence is also usually admitted from persons who are not strictly experts, but who from residing and doing business in the vicinity have familiarized themselves with land values, and are more able to form an opinion on the subject at issue than citizens generally. This rule is liberally applied in the case of farm lands, as other evidence is often not easily obtained. A neighboring farmer will be able to judge value with reasonable accuracy if acquainted with the physical surroundings and the character of the soil"

—citing Montana Railway Co. v. Warren, supra, where Mr. Justice Brewer, in speaking of objections similar to those which are here urged, said:

"It has often been held that farmers living in the vicinity of a farm whose value is in question may testify as to its value, although no sales have been made to their knowledge of that or similar property. Indeed, if the rule were as stringent as contended, no value could be established in a community until there had been sales of the property in question, or similar property. * * * It is fully open to the adverse party, if not satisfied with the values thus given, to call witnesses in the extent of whose knowledge and the weight of whose opinions it has confidence."

[5] We are not convinced that it was reversible error to permit certain witnesses for the plaintiff to testify on their direct examination respecting their knowledge of other sales of like property. Some courts have ruled otherwise for the reason of the tendency of such a practice to inject side issues into the case. But the weight of authority is that the admission of such testimony on the direct examination is not ground for reversing the judgment, and this court has so held in Lynch v. United States, 138 Fed. 535, 71 C. C. A. 59. See, also, 10 R. C. L. 221; 22 C. J. 590; C. & W. I. R. R. Co. v. Heidenrich, 254 Ill. 231, 98 N. E. 567, Ann. Cas. 1913C. 266; St. L., K. & N. W. Ry. Co. v. Clark, 121 Mo. 169, 25 S. W. 192, 906, 26 L. R. A. 751; and Manda v. Orange, 82 N. J. Law, 686, 82 Atl. 869, Ann. Cas. 1913D, 581.

[6] The defendant by its amended answer alleged that for the purpose of feeding its live stock during the winter of 1919–20 it had 1,000 tons of hay which had been cut and stacked upon the premises sought to be condemned; that in order to preserve said hay from anticipated flooding by the reservoir the defendant would be required to remove the same a distance of three miles to a point where in order to feed the same it would be necessary to construct a field for the purpose of separating and classifying the cattle to be fed, and to construct fences and proper accommodations for the men engaged in the feeding, all of which would entail an expense of $7,500. The court below, in denying this item of damages, said:

"I have not included the hay now on the property. It is not sought to be condemned. It is personal property and will be no more affected by the judgment in this case than any other personal property belonging to the defendant now on the ranch."

There was evidence that the hay, if it could be used where it was, was worth $18 a ton, and that to move it would cost sums variously estimated at from $5 to $10 a ton. On the other hand, there was testimony tending to show that the hay could be advantageously fed where it was, before the necessity of removing it should arise. It is the general rule that expenses arising from the removal of property which is necessitated by the appropriation of land does not constitute an element of the damages to be allowed. 20 C. J. 782; C. P. R. R. Co. v. Pearson, 35 Cal. 247; New York, etc., Railroad v. Blackner, 178 Mass. 386, 59 N. E. 1020; Becker v. Phila. & Reading R. Co., 177 Pa. 252, 35 Atl. 617, 35 L. R. A. 583; Railroad v. Schweitzer, 173 Mo. App. 650, 158 S. W. 1058; St. L., K. & N. W. Ry. Co. v. Knapp, Stout & Co., 160 Mo. 396, 61 S. W. 300. We do not assert that the rule so stated is a hard and fast one. There may be circumstances under which the expense of removing personal property from land which is sought to be condemned is a legitimate item of damages. But the damages here sought to be recovered on account of the hay were too conjectural and uncertain to form the basis of recovery at the time of the judgment of condemnation.

[7] It is contended that the court below erred in denying the defendant the full value of its ranch based on the adaptability thereof to use as a reservoir site; the testimony being undisputed that the value

of the property for that purpose was $250,000. The court in fixing the defendant's compensation at $90,000 took into consideration the property as a whole, the improvements, the relation of the several parts to each other, its location, situation, character, and adaptability to the various uses to which it could be put. It is true that two engineers estimated the value of the property for reservoir purposes for an irrigation project to be $250,000. But the court was not bound to accept that valuation. 20 C. J. 992; City of Kansas v. Butterfield, 89 Mo. 646, 1 S. W. 831; McReynolds v. B. & O. R. Co., 106 Ill. 152; Beveridge v. Lewis, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188.

[6] It is said that it was error to deny the defendant damages which would be caused by the separation of the ranch from 1,000 acres of isolated tracts situated from 2 to 4 miles therefrom. To this it is to be said that, while there was evidence tending to show that those outlying tracts would be decreased in value from one-third to one-half, there was testimony, on the other hand, that they would not be rendered less valuable. The court below said:

"In my judgment such lands will not be specially damaged nor injured by the taking."

That finding, supported as it is by competent evidence, is not assignable as error.

We find no error. The judgment is affirmed.

WARM SPRINGS IRR. DIST. et al. v. PACIFIC LIVE STOCK CO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3602.

1. **Eminent domain ⇐58—Statutes to be strictly construed as to interest to be taken.**
   Statutes authorizing the exercise of the power of eminent domain are in derogation of the common law, and their provisions with respect to the interest to be taken are to be strictly construed.

2. **Eminent domain ⇐317(2)—Presumed that easement only is taken if sufficient to satisfy purpose of taking.**
   Where the interest to be taken by condemnation is not expressly stated in the statute, the condemnor is presumed to take no greater interest than an easement if an easement is sufficient to satisfy the purpose of the taking.

3. **Eminent domain ⇐58—Statute held not to authorize acquisition of fee-simple title for reservoir site; "lands."**
   Or. L. § 7335, authorizing irrigation districts to acquire lands, rights of way, etc., by condemnation and Laws 1919, p. 193, authorizing the sale of "lands" acquired by condemnation or otherwise, does not show a legislative intent to authorize the taking of a fee-simple title for a reservoir site, as "lands" includes easements as well as lands held by fee-simple title.

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

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

4. Eminent domain ⇐317(2)—Easement only acquired for reservoir site.
Under Or. L. § 7103, providing that in condemnation proceedings the court shall give judgment appropriating the lands, easements, etc., and section 7335, authorizing irrigation districts to acquire lands, easements, etc., by purchase or condemnation and to acquire lands and appurtenances for reservoirs, the district acquires an easement only in land taken for a reservoir site.

Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

Suit by the Pacific Live Stock Company against the Warm Springs Irrigation District and others. From a decree in favor of plaintiff, defendants appeal. Affirmed.

On January 30, 1920, the appellee filed in the court below its bill against the appellants setting forth the judgment that had been entered in the same court on November 22, 1919, in the condemnation suit brought by the Warm Springs irrigation district, which judgment on writ of error this court has just reviewed (270 Fed. 555), and alleging that the right acquired by the irrigation district in said suit was an easement only over said land, and that the judgment gave the district no right or title to the property other than the right to flood the same for reservoir purposes, whereas the said district claimed to own all the improvements on said land and the fee-simple title thereto, and the right to demise and lease said land. The appellee alleged further that the appellants were about to remove said improvements and to use the premises for their own use and benefit; that during a large part of the year a considerable portion of said land will not be flooded by the waters of the reservoir and a large amount of valuable feed and pasture will grow thereon which can be used by the appellee without interfering with the easement of the irrigation district. The answer of the appellants put in issue the claim of the appellee to rights in the premises, and alleged that the judgment in the condemnation suit gave to the irrigation district all the lands described therein in fee simple, and that the district in the exercise of that right had leased to the appellant Stanfield the lands lying above the water line of the reservoir. The court below sustained the appellee's contention as to the construction to be placed on the judgment in the condemnation suit and granted an injunction as prayed for.

Ed. R. Coulter, of Weiser, Idaho, H. C. Eastham, of Vale, Or., and Allen H. McCurtain and Thomas G. Greene, both of Portland, Or., for appellants.

W. H. Brooke and P. J. Gallagher, both of Ontario, Or., and Edward F. Treadwell, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). The appeal presents the single question whether the condemnation of the appellee's lands for a reservoir site and the payment of the sum adjudged to be due it therefor has given to the irrigation district an absolute title to the property or only an easement. The condemnation proceedings were had under general laws of the state of Oregon. Section 7103, Olson's Oregon Laws, provides that in condemnation proceedings upon the payment into court of the damages assessed "the court shall give judgment appropriating the lands, properties, rights, easements," etc., "to the corporation, and thereafter the same shall be

the property of such corporation." The act approved February 21, 1917 (Olson's Oregon Laws, § 7335), declares that an irrigation district created under the laws of the state shall have—

"the right to acquire, either by lease, purchase, condemnation, or other legal means, all lands and waters and water rights, rights of way, easements and other property, including canals and works * * * constructed and being constructed by private owners, necessary for the construction, use, supply, maintenance, repair and improvement of any canal or canals and works proposed to be constructed by said board, and shall also have the right to so acquire lands, and all necessary appurtenances for reservoirs, and the right to store water in constructed reservoirs, for the storage of needful waters, or for any other purposes reasonably necessary for the purposes of said district."

[1, 2] Such statutes are in derogation of the common law, and their provisions with respect to the interest to be taken are to be strictly construed. 20 C. J. 1222. Where the interest to be taken is not expressly stated, the condemnor is presumed to take no greater interest than an easement where an easement is sufficient to satisfy the purpose of the taking. 20 C. J. 1223. In 15 Cyc. 1018, it is said:

"And although a taking of the fee may be authorized where necessary, in the absence of express words the statute will not be so construed where its purposes will be satisfied by the taking of an easement."

In Nichols on Eminent Domain, § 150, it is said:

"It necessarily follows from the principle that property cannot constitutionally be taken by eminent domain except for the public use, that no more property can be taken by eminent domain than the public use requires, since all that might be appropriated in excess of the public needs would not be taken for the public use. * * * If an easement will satisfy the public needs, to take the fee would be unjust to the owner, who is entitled to retain whatever the public needs do not require. * * * It is universally recognized that a grant of the power of eminent domain will not be extended by implication, and that when an easement will satisfy the purpose of the grant the power to condemn the fee will not be included in the grant unless it is so expressly provided."

These principles expressed by the text-writers are abundantly supported by numerous adjudications.

[3] The appellants point to the amendment of March 3, 1919 (section 7335, Olson's Oregon Laws), which gives power to the board "to acquire either by lease, purchase, condemnation, or other legal means all lands and waters and water rights, rights of way," etc., and also to the act of February 25, 1919 (Laws 1919, c. 138) which provides that, whenever any irrigation district "shall have acquired any lands by gift, purchase, or by the right of eminent domain or otherwise," it shall have the right to sell or dispose of the same, and they contend that the omission from the second clause of the word "easements" and other interests less than the fee, and the use therein of the word "lands" alone, in connection with the grant of the power to acquire a reservoir site, shows a legislative intent to distinguish between the power given to condemn lands or any less estate in lands and the power to condemn for a reservoir site; "lands" in the latter case being used in the sense of fee simple or the entire estate in lands. We concede

that the Legislature has the absolute power to specify what interest or estate shall pass to the condemnor, and that chapter 138 of the Laws of 1919 is to be taken in conjunction with other laws of the state on the same subject. But we cannot assent to the conclusion which the appellants draw that the Legislature has by said act of 1919 distinguished between the meaning of "land" with reference to reservoirs for irrigation districts and the meaning of the same word with reference to canals and works. Chapter 138 of the Laws of 1919 was obviously not intended to define the interest in reservoir sites which a district might obtain by condemnation. Its whole purpose was to authorize a district to sell and dispose of its property, whether acquired "by gift, purchase or by the right of eminent domain." It designated all property so authorized to be sold as "lands," a comprehensive term which includes easements as well as lands held by fee-simple title. Pacific P. Telegraph-Cable Co. v. Oregon & C. R. Co. (C. C.) 163 Fed. 967.

[4] This is not to say that a fee-simple title to land may in no instance be taken by irrigation districts in condemnation proceedings under the Oregon laws, nor to say that for a dam site it may not become necessary to condemn the title to land. But for a reservoir site there can be no question that the demands of necessity are met by the condemnation of an easement. In the present case the dam site is at a distance from the appellee's land, and the land is subject only to use as a reservoir site. The ultimate question when all is said, is: What interest in land did the Legislature intend should be taken for a reservoir site? The answer, in the absence of a clearly expressed intention to the contrary, is that the intention was that there should be taken no greater interest than that which might be necessary for the purpose intended. Here there is no clearly expressed intention to the contrary.

The decree is affirmed.

BEN C. JONES & CO. v. WEST PUBLISHING CO.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1921.)

No. 3611.

1. **Evidence ⟸43(2)—Judicial notice taken on demurrer of prior steps in case.**
   On a consideration of a demurrer or exception, the court may take judicial notice of the former steps taken in the case.

2. **Evidence ⟸43(2)—Pleading ⟹216(2)—On exception on ground of limitations, judicial notice properly taken of prior proceedings.**
   Where an exception to the petition raising the question of limitation showed that a petition in equity was filed June 23, 1912, and subpœna returned unserved on September 11, 1912, and no further attempt at service was had until January 31, 1918, and service was made February 15, 1918, the court, in passing on the exception, could take judicial notice of the entries of its officers, the date of the citation and summons, the returns of its officers, and the orders taken by plaintiff in respect to the service.

3. Courts ⇐375—State limitation law held to apply to action in federal court under Sherman Law.

In a suit brought in a federal court sitting in Texas for injuries resulting from alleged violations of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), the Texas statute of limitations of four years, applicable to causes of action not otherwise specially provided for, applies.

4. Limitation of actions ⇐119(3)—Not suspended for more than six months by filing of suit, when service not made for years.

Where a petition in equity for damages from alleged violations of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830) was filed, and a subpœna returned unserved in 1912, when the period of limitation had almost run, and no further attempt at service was made until 1918, when the case was transferred to the law side of the docket, though the service finally made was authorized by Clayton Act Oct. 15, 1914, the running of limitations was not stopped by the filing of the petition under the law of Texas.

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

Suit by Ben C. Jones & Co. against the West Publishing Company. Judgment for defendant, and plaintiffs bring error. Affirmed.

R. H. Cousins, of Austin, Tex., for plaintiffs in error.

James H. Hart, of Austin, Tex., and Henry E. Randall, of St. Paul, Minn., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This suit was instituted by Ben C. Jones & Co., alleged to be a partnership composed of three individuals, against the West Publishing Company, a corporation chartered under the laws of Minnesota, to recover from it for injuries which are alleged to have resulted to the plaintiffs from acts done by the West Publishing Company, claimed to be forbidden by the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830). A recovery herein is sought under section 7 thereof (26 Stat. 209; Comp. St. § 8829).

The original petition was filed on June 23, 1912, in the United States District Court for the Western District of Texas. It was entered on the equity docket, and on June 28, 1912, a subpœna was issued for service upon the defendant, directed to be served on J. E. Abbott, who was alleged in the petition to be the agent of the defendant in the state of Texas, and alleged to reside at Austin. This process was returned on September 11, 1912, by the marshal, as not served, for the reason, stated in said return, that said Abbott could not be found within said district.

No further proceeding or attempt at service was had until on January 31, 1918, when, on motion of the plaintiffs, the case was transferred from the equity to the law side of the docket by order, under equity rule 22 (198 Fed. xxiv, 115 C. C. A. xxiv), and on the same day, upon plaintiffs' motion, the court ordered a citation or process to be issued by the clerk of the court for service upon the defendant at its place of residence, under section 12 of the Clayton Act (38 Stat. 730; Comp. St. § 8835k). This summons was served upon the de-

fendant at its place of residence, at St. Paul, in the state of Minnesota, on February 15, 1918.

The defendant filed its original answer on June 19, 1918, after its plea to the jurisdiction of the court had been overruled. On June 9, 1919, it filed its "first amended original answer." In this amended answer defendant moved to dismiss the petition, because upon the face thereof it was barred by the Texas statute of limitations barring actions of trespass in two years, and also by the general statute of limitations of Texas barring all causes of action, not otherwise specially provided for, in four years. The court overruled these motions.

By paragraph 4 of its amended answer defendant moved to dismiss said petition as barred by said statutes of limitation because, though filed on the equity side of the court on June 26, 1912, and the return of no service of the subpœna was made by the marshal on September 11, 1912, no further service was attempted until January 31, 1918, when the cause was transferred to the law side of the docket, and a summons issued and served on February 15, 1918. The court sustained this exception and dismissed the case.

The plaintiffs say the court erred in considering the record in the case showing the several steps taken as to process and service; that the case could only be dismissed on demurrer, or exception, if the allegations of the petition showed that more than four years had elapsed between the date of filing, June 26, 1912, and the conspiracy and wrong charged in said petition; that the other proceedings shown by the record in the case, if relevant to the question, could only be considered, if offered in proof, or support, of a plea of the statute of limitations.

They further insist that the filing of the petition on June 26, 1912, stopped the running of the statute, and that the failure to procure an order for service until January 31, 1918, or to effect service until February 15, 1918, had no effect on the running of the statute.

[1] That the court, on the consideration of a demurrer or exception, may take judicial notice of the former steps taken in the case, has been frequently decided.

[2] The court could, therefore, in this case take judicial notice of the entries of its officers and of the date of the citation and summons, the returns of its officers thereon, and of the orders taken by the plaintiff in the cause in respect to said service. Bienville Water Supply Co. v. Mobile, 186 U. S. 212, 22 Sup. Ct. 820, 46 L. Ed. 1132; Dimmick v. Tompkins, 194 U. S. 540, 24 Sup. Ct. 780, 48 L. Ed. 1110; Slater v. Roche, 148 Iowa, 413, 126 N. W. 925, 28 L. R. A. (N. S.) 702; Haaren v. Mould, 144 Iowa, 296, 122 N. W. 921, 24 L. R. A. (N. S.) 404; Dupree v. State, 56 Tex. Cr. R. 562, 120 S. W. 871, 23 L. R. A. (N. S.) 596, 133 Am. St. Rep. 998. The court, therefore, properly took judicial notice of the several steps taken in said cause, as shown by the record of said case.

The court below, in sustaining the exceptions stated in paragraph 4 of said amended answer, after reciting the facts as shown by the record as to the filing of said case and the service made therein, said:

"Considering said facts, the court is of opinion that the action of plaintiffs in filing said petition in this court on June 26, 1912, and causing said subpœna in chancery to issue thereon, did not stop the running of the statutes of limitation for a longer time than six months after the date of the marshal's return of said subpœna showing that he had not effected service of same on defendant, to wit, after September 11, 1912, and that beginning at a period of six months from September 11, 1912, the plaintiffs having failed to take any further action seeking to obtain service on defendant, limitations against plaintiffs' cause of action again began to run, and that said cause of action is now barred by both the two and four years statutes of limitation of the state of Texas, and that plaintiffs have been guilty of such negligence in failing to prosecute their said cause of action that they are now barred from prosecuting the same."

In this case this suit was filed on June 26, 1912; the attempted service was returned as fruitless on September 11, 1912. The service finally made was authorized by the Clayton Act, approved October 15, 1914 (Comp. Stat. § 8835k). No attempt to effect service under this act was made until January 31, 1918, and no service made until February 15, 1918.

[3] The statute of limitations of four years applied to this case. Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 27 Sup. Ct. 65, 51 L. Ed. 241.

[4] Taking the most favorable view of the plaintiffs' petition, as the District Court evidently did, the cause of action was nearly barred when the petition was filed. Taking the time elapsing from the return of the marshal, showing a failure to serve the defendant, or even the time after the passage of the Clayton Act, no service of the suit was attempted for years.

We think the finding of the court is in accordance with the law as declared by the decisions of the appellate courts of Texas and is in harmony with the trend of decisions. These decisions are to the effect that the filing of a suit will not stop the running of the statute of limitation unless it is followed by service within a reasonable time, and that where a delay in service supervenes, such as is shown by the official record in this case, the running of the statute is not stopped by such filing.

"All the elementary writers agree that, in order to stop the running of the statute of limitations by a suit, not only must the initial step required by the statutes be taken, but there must also be a bona fide intention that the process shall be served at once upon the defendant, * * * and such is practically the ruling in this court. Veramendi v. Hutchins, 48 Tex. 532." Ricker v. Shoemaker, 81 Tex. 22, 28, 16 S. W. 645, 647.

To the same effect are the cases of Hughitt v. Trent (Tex. Civ. App.) 209 S. W. 445; Estes v. McWhorter (Tex. Civ. App.) 182 S. W. 887; Faires v. Loessin, 46 Tex. Civ. App. 551, 102 S. W. 924; U. S. v. Miller (C. C.) 164 Fed. 444; Wolfenden v. Barry, 65 Iowa, 653, 22 N. W. 915.

Affirmed.

MER ROUGE STATE BANK v. EMPLOYERS' LIABILITY ASSUR. CO., LIMITED, OF LONDON, ENGLAND.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1921.)

No. 3561.

1. **Insurance ⇐425—Policy held to cover robbery from unlocked safe within locked vault.**
An insurance policy covering loss by robbery of money and securities within the safe or vault insured, by compelling, under threat of personal violence, an officer of the assured to unlock the safe or vault, covers a robbery committed by taking securities from an unlocked safe, which was within a locked vault, where the robbers compelled the cashier to open the vault, although the loss could not have been covered, if the vault had also been unlocked.
2. **Insurance ⇐146(3)—Policy construed most strongly against the insurer.**
An insurance policy is to be construed most strongly against insurer and liberally in favor of the insured.

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the Mer Rouge State Bank against the Employers' Liability Assurance Company, Limited, of London, England. Suit dismissed, after exception to the amended petition for no cause of action was sustained, and plaintiff brings error. Reversed.

John C. Hollingsworth, of New Orleans, La. (Madison & Madison, of Bastrop, La., on the brief), for plaintiff in error.

Edward Rightor, of New Orleans, La., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the plaintiff in error, an incorporated Louisiana State Bank, on two policies of insurance providing it indemnity protection against losses of money or securities, through burglary and robbery. The petition as amended contained averments to the following effect:

After 4 o'clock p. m. of a named day, while each of the policies was in force, and while the petitioner's cashier was within the banking inclosure reserved for the use of the assured's officers or office employees, and was engaged in performance of his duties as cashier, unknown burglars, robbers, and hold-up men, by the use of force, and at the point of a pistol or pistols, held up said cashier, within the banking inclosure, and while keeping him covered with a revolver, by the use of force and threats compelled him to unlock the door of the bank's locked vault, and thereupon, while continuing to use force and threats, secured a stated sum of money from an unlocked safe within such vault. An exception to the amended petition on the ground that it set forth no legal cause of action was sustained, and the suit was dismissed.

By the policies sued on the defendant in error agreed to indemnify the plaintiff in error:

"A. For all loss of money and securities in consequence of the felonious abstraction of the same during the day or night from the safe or safes (or from the vault, if contents of same are specifically insured) after said safe or safes or vault have been duly closed and locked, described in said schedule, while located in said banking room, also described in said schedule hereinafter called the premises, by any person or persons after forcible entry into such safe or safes or vault, or by any accomplice of such person or persons. In the event that the said safe or safes or vault are not locked by time lock, the corporation shall not be liable for loss of said money and securities feloniously abstracted therefrom, unless said forcible entry is made therein by the use of tools, explosives, chemicals or electricity directly thereupon.

"B. For all loss by damage to said money and securities, and to said safe or safes or vault, described in said schedule, or to the premises, or to the office furniture and fixtures therein, caused by such person or persons while making or attempting to make such entry into said premises, vault, safe or safes.

"C. For all loss by robbery (commonly known as hold-up) of money and securities: (1) From within the banking inclosure reserved for the use of the officers or office employés of the assured, while at least one officer or office employé of the assured is present and regularly at work in the premises; (2) from an officer or office employé of the assured while transferring the same during the assured's regular office hours, either way between the said banking inclosures and any safe or vault described in the schedule as located in the premises outside of the said inclosures; (3) from within that part of the safe or safes or vault insured hereunder, caused by robbers during the day or night, by compelling under the threat of personal violence an officer or office employé of the assured to unlock and open the safe or safes or vault."

The policies covered a described safe located within a described vault. The safe and vault mentioned in the petition were those described in the policies. The form of the policies sued on is the same as that of the Maryland Casualty Company policy which was construed by this court in the case of Franklin State Bank v. Maryland Casualty Company, 256 Fed. 356, 167 C. C. A. 526. The facts of the case cited were different from those of the instant case, in that the alleged robbery which was in question in the former was a taking of money from an unlocked safe within an unlocked vault, while the robbery alleged in the latter was effected by getting access to money within a locked vault by forcing, under threat of personal violence, the cashier to unlock it. It was decided in the cited case that on the state of facts disclosed therein the insurer was not liable. Language used in the opinion in that case is to be read in the light of the state of facts it dealt with, which, as above stated, was different from the state of facts disclosed in the instant case. The cited case cannot properly be given effect as a decision on a question not raised by the facts of it, namely, whether such a policy as those now sued on covers a loss of money by a robbery which was effected by getting access to the contents of a locked vault by forcing, under threat of violence, the bank's cashier to unlock it.

[1] The analysis of the provisions of the policies sued on found in the opinion in the above-cited case dispenses with the necessity of considering in this case any of those provisions, except the one of the above-quoted subdivision C which makes the insurer liable—

"for all loss by robbery (commonly known as hold-up) of money and securities: * * * (3) From within that part of the safe or safes or vault insured hereunder caused by robbers during the day or night, by compelling

under the threat of personal violence an officer or office employé of the insured to unlock and open the safe or safes or vault."

The just quoted language equally covers a loss of money or securities, caused in the way stated, from within either a safe or a vault which is insured under the policy.

[2] Nothing in the language of the provision, which is to be construed most strongly against the insurer and liberally in favor of the insured, indicates an intention to exclude from the protection stipulated for money within a locked vault, if such money is in an unlocked safe within such vault, access to which is obtained in the way stated. No distinction is made between a loss from a safe and a loss from a vault. The averments of the amended petition show that the robbers were enabled to get to the money mentioned by compelling the cashier under threat of personal violence to unlock the vault containing that money. We are not of opinion that the fact that the money, before access to it was so obtained, was in an unlocked safe within the locked vault, had the effect of making the loss, caused as alleged, one which was not insured against.

The conclusion is that the averments of the petition as amended show a loss within the terms of the last-quoted provision of the policies sued on, and that the court erred in ruling as above stated. Because of that error the judgment is reversed.

THE JOHN E. BERWIND.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 72.

1. **Towage ⇐15(2)—Evidence insufficient to show collision between tow and another boat.**
   In a suit by the owners of a scow against a tug, evidence *held* insufficient to show any contact between the scow and another boat, as the scow was being put into a slip.
2. **Towage ⇐11(6)—Tow cannot recover for reasonable rubbings and contacts with other boats.**
   A scow must expect and be able to withstand reasonable rubbings and contacts with other boats during harbor navigation, particularly when making landings and lying at piers, and cannot recover against a tug for such contacts.
3. **Towage ⇐15(2)—Claimants of tug had burden of showing unfitness of tow to withstand ordinary rubbings against other boats.**
   In a suit by the owners of a scow against a tug for damages to the scow, the burden was on the claimant of the tug to show that the scow was not fit to withstand reasonable rubbings and contacts with other boats, to be expected in harbor navigation.
4. **Towage ⇐15(2)—Evidence held to show scow not fit for ordinary contacts with other boats.**
   In a suit against a tug for damages to a scow 25 years old, evidence *held* to show that the scow was not able to withstand reasonable rubbings and contacts with other boats, such as should be expected in harbor navigation.

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

Libel in admiralty by Robert Forsyth and another against the steam tug John E. Berwind, her engines, etc., claimed by the Pennsylvania Railroad Company. From a decree for libelants, claimant appeals. Reversed and remanded, with instructions.

In the early evening of a day apparently fair and calm the tug Berwind, with libelants' scow Edna on her port side, endeavored to put that scow in the slip between Thirty-Sixth and Thirty-Seventh street, East River. The tug had come from Thirty-Second street, and, the tide being strong flood, she rounded to, and, herself coming in contact with the Thirty-Seventh street pier, "began to wedge [her] way over to the Thirty-Sixth street side with the Edna."

On the south side of Thirty-Seventh street pier lay four boats at rest near the pier end; therefore the "wedging" process just referred to meant that the Berwind would pass, and probably touch, these boats while endeavoring to swing the Edna into the slip, whose entrance was much narrowed by the flotilla on the south side of Thirty-Seventh street.

The most southerly of the four boats aforesaid was the Price, and this action grew out of an occurrence thus related by the Edna's master: "Q. What happened to your boat when the Berwind brought you up to the mouth of the slip? A. They was coming in the slip, and then the current took her a little, and swung the tug clear around, so as it hit my boat, right in the middle of the boat, on the corner of the Price. Q. That is, the tide swung the Edna and the Berwind, so that it brought your starboard side amidship against the corner of the Price? A. Yes, sir."

This explanation is based on the scow captain's recollection that he was being towed stern first—a matter very uncertain on the evidence. The Edna was put in her berth, and between two and four hours later was found to be leaking, leaked increasingly, and sank five hours after her condition was observed.

Action is on the theory that the Edna's sinking was caused by hitting the Price. The defense is: (1) She did not hit the Price; (2) if she did, it was a blow of no consequence; and (3) the Edna was old and unseaworthy. The trial court awarded a decree to libelants; claimant appealed.

Burlingham, Veeder, Masten & Fearey, of New York City (John L. Galey, of New York City, of counsel), for appellant.

Macklin, Brown, Purdy & Van Wyck, of New York City, for appellees.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] That the tug scraped along, touching the boats (or some of them) lying one outside the other near the end of Thirty-Seventh street pier, is very likely; indeed, this ordinary harbor contact was intended. That the Edna touched the Price is more doubtful, and that any contact occurred as the Edna's master says it did seems to us physically impossible.

The Edna projected considerably beyond the tug's bow, and she may have touched the Price; but the only result to the Price of whatever contact occurred was to "bulge in" her bustle strap "in the neighborhood of half an inch." This strap is an iron band of half or five-eighths of an inch in thickness. How much of a blow would be necessary to produce such indentation we are not informed, but it is

certain that no mark indicative of such contact was ever found on the Edna. We regard it as unproven that the Edna, rather than the tug, came in contact with the Price.

[2] Harbor navigation requires vessels, especially of the Edna's class, to expect and be able to withstand reasonable rubbings and contacts, particularly when making landings and lying at piers. The maneuver of the Berwind was most ordinary, and it is quite beyond experience that a vessel equipped for the business reasonably to be expected could be sunk by such contact as is proven.

[3] The burden of showing that libelants' boat was not fit for the very ordinary harbor episode above described was on claimant, and we are of opinion that by evidence largely uncontradicted that burden has been borne.

[4] The Edna was admittedly at least 25 years old, the master in charge was making his first trip on her, and, though he denies it, there is persuasive evidence that he had spent a great deal of time pumping, and complaining to those near him in the tow of the necessity of so doing.

The surveyor's report is uncontradicted to the effect that some of the Edna's "bottom planking" was very loose and "open in the seams, with hardly any oakum." The oakum generally in the bottom and sides was "very old and rotten," the knees and beams were "very old, some of them decayed, some of them split," and the spiking on the bottom was partly corroded off."

We are persuaded that this case requires an application of the "ancient practice of the admiralty to scrutinize closely claims resting on the loss of old or weak vessels" (The Bordentown [D. C.] 16 Fed. at page 273), and the evidence above summarized leads us to apply the language of Judge Addison Brown in The S. O. Pierce (D. C.) 40 Fed. 767:

> "The libelant's boat was a very old one. Under the evidence it is very doubtful even whether the blow was more than one of the ordinary contacts of navigation. Under such circumstances as [we] have named, there is too much doubt as to any substantial injury caused by the blow to warrant any decree. The entertainment of such demands, and any attempt to give damages for the comparatively slight blow that this must have been [if there was any blow] would be more likely to result in injustice, and lead to the multiplication of suits on ill-grounded and fictitious claims, than to promote the cause of substantial justice."

The decree appealed from is reversed, and the cause remanded, with instructions to dismiss the libel, with costs in both courts.

PAYNE, Director General of Railroads, et al. v. SHEARER.

(Circuit Court of Appeals, Fifth Circuit. February 10, 1921.)

No. 3632.

Carriers ⇐238—Person entering sleeping car only to use lavatory is not a "passenger" of sleeping car company.

A passenger in an ordinary coach, who entered a lavatory in a sleeping car with the conductor's consent solely for the purpose of using the lavatory, did not become thereby a passenger of the sleeping car company, since she was not seeking transportation in the sleeping car.

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

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

Action by Mrs. Minnie Lee Davis Shearer against John Barton Payne, Director General of Railroads, and another. Judgment for plaintiff, and defendant Payne brings error. Reversed and remanded for new trial.

Robert H. Thompson and J. Harvey Thompson, both of Jackson, Miss., and A. S. Bozeman, of Meridian, Miss., for plaintiff in error.

Gabe Jacobson and Harden H. Brooks, both of Meridian, Miss (William B. Lucas, of Macon, Miss., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Defendant in error (herein called plaintiff) recovered judgment against plaintiff in error as Director General of Railroads (herein called defendant), operating the Pullman Company, for $5,000, in an action for damages arising out of the alleged conduct of a porter of the Pullman Company.

Plaintiff, a lady passenger on a train of the Pennsylvania Railroad, was traveling in an ordinary passenger coach from St. Louis, Mo., to Columbus, Ohio. The train included a dining car and a sleeping car of the Pullman Company. Plaintiff and two lady companions applied to the sleeping car conductor, who was at the time in the dining car, for permission to enter the sleeping car and make use of the dressing room and lavatory facilities therein, and offered to pay for the privilege.

Testimony on behalf of the plaintiff was to the effect that the sleeping car conductor granted the permission desired, but declined to accept anything in payment for use of the dressing room; that thereupon plaintiff and her companions proceeded into the said dressing room; that while there the sleeping car porter, in a rude and insulting manner, ordered them to leave; that a member of plaintiff's party told the porter to get out of the dressing room, and stated to him that they were there by permission of the conductor, and that, if he did not leave them alone, they would send for their husbands; and that the

porter replied, in substance: "Send your damn husbands back. I would like to see them, and will settle with them." Plaintiff testified that her health was greatly impaired as a result of the porter's conduct. The testimony for defendant was in direct contradiction of that for plaintiff.

At the close of all the evidence the defendant moved for a directed verdict in his favor, on the ground that it affirmatively appeared that plaintiff was not a passenger of the Pullman Company. The trial court denied this motion, and instructed the jury that, if they believed plaintiff's evidence, that would constitute her a passenger, and entitle her to the care due to a passenger. Defendant assigns error upon the denial of his motion for a directed verdict, and also upon the overruling of his exception to the court's charge submitting to the jury the question of whether plaintiff became a passenger.

The duty which the defendant owed to a licensee or a trespasser was not, and is neither alleged nor claimed to have been, violated. Unless plaintiff was a passenger, she has no case.

While the question whether, as a matter of law, the relation of carrier and passenger exists, is often a difficult one, and in many cases is one of mixed law and fact, nevertheless such relation does not exist, if neither party intended to create it. Sleeping car companies are engaged in the business of transportation of passengers. The dressing rooms, lavatories, and other conveniences and facilities contained in the cars which they furnish are incidental to their business of transportation, and are provided exclusively for the use of those who become their passengers. One who enters a sleeping car for the sole purpose of making use of these conveniences and facilities does not thereby become a passenger. Plaintiff and her companions were not seeking passage or transportation; they did not enter the sleeping car with the intention of riding from one station to another, or for any particular length of time, or for the purpose of riding at all. The use of the dressing room was the principal thing with them, and riding in the sleeping car was a mere incident. It would have suited their purpose just as well if the train had been standing still at a station.

The plaintiff was not in a situation similar to one who without a ticket enters a sleeping car intending to pay if required to do so. She had obtained the consent of the conductor before she entered the car, and, according to her own testimony, she did not enter with the intention of paying for the privilege of riding in the sleeping car, or for that purpose. We are of opinion, therefore, that the trial court erred in refusing to direct a verdict in favor of defendant. The cases of Williams v. Pullman Palace Car Co., 40 La. Ann. 87, 3 South. 631, 8 Am. St. Rep. 512, and Cassedy v. Pullman Palace-Car Co. (Miss.) 17 South. 373, cited by counsel for defendant, sustain this view.

The other assignments of error need not be considered.

The judgment is reversed, and the cause remanded for a new trial.

DUSOLD v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. February 3, 1921.)

No. 2926.

Intoxicating liquors ⇐242—Imprisonment may be imposed for first offense of illegal selling.

A defendant convicted for the first time of selling whisky in violation of National Prohibition Act Oct. 28, 1919, tit. 2, § 6, *held* subject to a sentence of imprisonment under section 29 of that title.

In Error to the United States District Court for the Eastern District of Wisconsin.

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

D. S. Rose, of Milwaukee, Wis., for plaintiff in error.

H. A. Sawyer, of Milwaukee, Wis., for the United States.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

PER CURIAM. Error is assigned because the court imposed a jail sentence on plaintiff in error who was convicted for the first time of violating sections 3 and 6, tit. 2, of the National Prohibition Act. Section 29, tit. 2, of the act reads as follows:

"Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months, and for a second or subsequent offense shall be fined not less than $200 nor more than $2,000 and be imprisoned not less than one month nor more than five years.

"Any person violating the provisions of any permit, or who makes any false record, report, or affidavit required by this title, or violates any of the provisions of this title, for which offense a special penalty is not prescribed, shall be fined for a first offense not more than $500; for a second offense not less than $100 nor more than $1,000, or be imprisoned not more than ninety days; for any subsequent offense he shall be fined not less than $500 and be imprisoned not less than three months nor more than two years. It shall be the duty of the prosecuting officer to ascertain whether the defendant has been previously convicted and to plead the prior conviction in the affidavit, information, or indictment. The penalties provided in this act against the manufacture of liquor without a permit shall not apply to a person for manufacturing nonintoxicating cider and fruit juices exclusively for use in his home, but such cider and fruit juices shall not be sold or delivered except to persons having permits to manufacture vinegar."

Plaintiff in error, having violated the act by selling whisky, relies upon section 4, tit. 2, to justify a construction that would relieve him of a jail sentence punishment. It is contended that a fair construction of the entire act discloses the congressional intent to limit jail sentences to those first offenders only who have violated section 4. All other offenders must be punished, so it is urged, as provided in the omnibus provision of the second paragraph of section 29.

It is apparent to us that Congress, not having specifically provided penalties for violations of certain sections of the statute (3, 4, 6, and

10), made provision for the punishment in a single section, namely, 29. By the first paragraph of this section, the maximum and minimum penalties were prescribed for those who violated the law either by the manufacture or by the sale of "liquor." By the second paragraph, the other offenses for which no specific penalty had been fixed were covered. The second paragraph cannot apply to sales of liquor because a specific penalty therefor has already been prescribed in the preceding paragraph.

Section 4 does not aid plaintiff in error. It merely provides:

"Any person who shall knowingly sell any of the articles mentioned in paragraphs a, b, c, and d of this section for beverage purposes, or any extract or sirup for intoxicating beverage purposes, or who shall sell any of the same under circumstances from which the seller might reasonably deduce the intention of the purchaser to use them for such purposes, or shall sell any beverage containing one-half of 1 per centum or more of alcohol by volume in which any extract, sirup, or other article is used as an ingredient, shall be subject to the penalties provided in section 29 of this title."

This provision, in view of section 29, was inserted ex industria, perhaps due to an overabundance of caution. That it could not restrict the very clear and express provision of the first paragraph of section 29 is, we think, manifest. If the penalty reference in section 4 was referrable solely to the first paragraph of section 29 (an unjustifiable assumption in itself), it could not have been intended to define the only prohibited act to which this paragraph of section 29 applied. For the above-quoted part of section 4 refers only to violators who "sell," whereas paragraph 1 of section 29 includes those who manufacture as well as those who sell.

If the reference to section 29 found in section 4 of the act limited the scope of the penalty section to sales in violation of section 4, then to what did the punishment for manufacturing liquor, found in the same paragraph, apply? Certainly, one section cannot be limited in its application to instances referred to in another section when the language of the former is more comprehensive than the instances enumerated in the latter.

But it is idle to pursue the discussion further. The language of section 29 is so clear and free from uncertainty and ambiguity that we waste time and space in considering theories which, if adopted, would necessarily do plain violence to clear and unequivocal English. When the language is clear and unambiguous, there is no occasion for the invocation of any aids such as rules of construction, for the ascertainment of the legislative intent. 25 R. C. L. 962.

The judgment is affirmed.

PERFECTION MFG. CO. v. B. COLEMAN SILVER'S CO.
B. COLEMAN SILVER'S CO. v. PERFECTION MFG. CO.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1921.)

Nos. 2816, 2852.

Trade-marks and trade-names ⟸85(1)—Dishonest business methods bar equitable relief against infringement.

A complainant who made and sold an article under a trade-mark *held* barred from relief in equity against infringement and unfair competition by its own conduct in falsely representing to the trade that its article was protected by patent, and defendant *held* barred from cross-relief by its grossly dishonest business methods.

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

Suit in equity by the Perfection Manufacturing Company against the B. Coleman Silver's Company, and cross-bill by defendant. From a decree dismissing the bill and cross-bill, both parties appeal. Affirmed.

Appellant, Perfection Manufacturing Company, charges appellee with infringing its trade-mark No. 117,590 covering the word Rock-A-Bye, adopted May 3, 1916, and used on a canvas swing for babies which it manufactured and sold to the trade, and also charges appellee with unfair methods of competition. Appellee denies the validity of appellant's trade-mark, denies unfair methods of business, and in a cross-complaint charges appellant with unfair business practices.

From a decree dismissing the bill and the cross-bill both parties appeal.

Howard G. Cook, of St. Louis, Mo., for Perfection Mfg. Co.

Samuel W. Banning, of Chicago, Ill., for B. Coleman Silver's Co.

Before BAKER, ALSCHULER, and EVANS, Circuit Judges.

EVAN A. EVANS, Circuit Judge. There is but one question—a a question of fact—requiring our consideration: Has appellant so conducted its business as to justify the court in refusing it relief against appellee's misconduct?

As to the appellee's position, no possible view of the evidence can support any of its various grounds for relief. Its business practices are so unworthy as to leave no alternative for the court. To it certainly the doors of a court of equity should be closed. For, not satisfied with copying appellant's swing and putting it on the market as its own, it simulated appellant's name and finally resorted to gross misrepresentations to the trade that find no semblance of justification in its explanations.

But appellee's gross misconduct will avail the appellant nothing if in the operation of its business, it, too, resorted to misrepresentations concerning a patent not justified in fact. Dishonest business practices by an unscrupulous competitor cannot justify a resort to similar methods by one honestly conducting a legitimate business that has been worthily

developed. For dishonest or unworthy methods are not purged of their impropriety because they are adopted as a method of retaliation.

And this is unfortunately what occurred. Appellant resorted, in a milder way, to the unworthy practices of its rival. It tried to bulldoze the trade by misrepresentations concerning patent protection which did not exist. It circularized the trade asserting control of the baby swing that it sold when in fact no patent had been issued. In other ways which we need not recite it forfeited its right to the court's protection against the unfair and unworthy methods of its rival.

"He who comes into equity must come with clean hands." This maxim applies to the business man who has a legitimate business as well as to the business parasite who first steals another's name, then his business, and finally attempts to deceive the retail trade by false and fraudulent representations respecting the existence and the protection of a patent.

Appellant's misrepresentations heretofore referred to dealt with an article (a baby swing) which was also manufactured by a competitor and to which appellant applied its trade-mark. The defense of unclean hands, therefore, extends not only to the unfair methods of competition, but also to the alleged infringement of the trade-mark. Clinton E. Worden & Co. v. California Fig Syrup Co., 187 U. S. 516, 528, 23 Sup. Ct. 161, 47 L. Ed. 282; Manhattan Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436, 27 L. Ed. 706; Pidding v. Howe, 8 Simons, 477; Leather Cloth Co. v. American Leather Cloth Company, 4 De G., J. & S. 137, 142, affirmed 11 H. L. Cases, 523; Hogg v. Maxwell, L. R. 2 Ch. 316; 26 R. C. L. 902-906.

The decree is affirmed.

MORRELL v. BAKER, Superintendent of Immigration Station.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 68.

1. **Aliens ⇐54—Hearing before immigration officers in deportation proceeding may be summary.**
   Hearings before administrative bodies, like the immigration authorities, are not subject to the rules governing judicial proceedings, and, while in a deportation proceeding the alien must be given a fair hearing, the hearing may be summary.
2. **Aliens ⇐54—Hearsay evidence admissible in deportation proceedings.**
   In a deportation proceeding before the immigration authorities, hearsay evidence is admissible.
3. **Aliens ⇐54—Finding in deportation proceeding, supported by evidence, binding on habeas corpus.**
   In a habeas corpus proceeding to review an order for the deportation of an alien, where the alien had a fair trial, and there was evidence to support the finding that he had imported a woman for immoral purposes, such finding is binding on the court.

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

Habeas corpus by Leon Morrell against Percy A. Baker, as Superintendent of Immigration Station, to review an order for the deportation of the petitioner. From an order dismissing the writ, the petitioner appeals. Appeal dismissed.

Almy, Van Gordon & Evans, of New York City (D. Almy, of New York City, of counsel), for appellant.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. [1-3] Hearings before administrative bodies, like the immigration authorities, are not subject to the rules governing judicial proceedings. The alien must be given a fair hearing, but the hearing may be summary. Hearsay evidence is admissible, and the findings of fact by the commissioners conclusive, if there is any evidence to support them. In re Diamond (C. C. A.) 266 Fed. 34; In re Rakics (C. C. A.) 266 Fed. 646.

In this case the alien had a fair trial, and there was evidence to support the finding that he had imported a woman for immoral purposes, and, that finding being binding upon us, the appeal is dismissed.

UNITED STATES v. KRAUS et al. SAME v. JOSEPH AJELLO CO., Inc., et al. SAME v. BORNSTEIN et al.

(District Court, S. D. New York. February 1, 1921.)

1. **Criminal law ⇐395—Searches and seizures ⇐5—Papers seized in unlawful search must be returned.**
   When papers of parties subsequently indicted are seized upon an illegal search, the papers and all copies taken while the officers retained their illegal possession must be returned, and any information obtained therefrom must not be used at the trial or in its preparation.

2. **Intoxicating liquors ⇐244—Prohibition agents not authorized to make forcible entry.**
   The right of prohibition agents under Volstead Act, tit. 2, §§ 10, 34, and Rev. St. § 3318 (Comp. St. § 6100), to inspect records of wholesale liquor dealers, gave them no right to make a forcible entry for the purpose of such inspection or to seize such records.

3. **Searches and seizures ⇐5—Order for return of papers unlawfully seized to provide against use as evidence.**
   Where papers of parties subsequently indicted were seized during an unlawful search, the order for their return will provide that no testimony or other evidence of any transaction recorded in such papers shall be offered upon the trial unless shown to have been obtained independently of the wrongful possession of the papers.

4. **Searches and seizures ⇐5—On return of papers illegally seized, reference held necessary to prevent use of information.**
   In ordering the return of defendant's papers seized during an unlawful search, a reference will be made to a master for the purpose of having a record made of the transactions recorded in such papers so that they may be identified if evidence is offered of them at the trial and proof thereof excluded unless independent proof not derived from such papers is produced at the reference.

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

5. **Costs ⟸304—Expense of reference to exclude information from papers unlawfully seized to be borne by government.**
The expenses of a reference for the purpose of making a record of purchases and sales of liquor recorded in papers illegally seized in order that evidence thereof may be excluded at the trial must be borne by the prosecution.

6. **Intoxicating liquors ⟸256—Issue of consent to search to be brought on for trial before order for return of papers seized.**
On a petition by the defendant for the return of papers claimed to have been seized during an unlawful search by prohibition agents, where respondents allege a consent to the searches and seizures, they have a right to the trial of such issue before any order for the return of the papers, and it may be brought on for trial before the judge at any convenient time.

7. **Searches and seizures ⟸7—Papers taken from person of one arrested who was violating law held not entitled to protection.**
Where a person arrested as he was leaving the premises of a wholesale liquor dealer was searched and found to have concealed on his person government permits for the withdrawal of liquor, and invoices for liquor, such papers were not within the constitutional immunity against unlawful searches and seizures, as the person arrested was assisting in violating Volstead Act, tit. 2, § 34, and guilty of a crime under section 29, and under Rev. St. § 3318 (Comp. St. § 6100).

8. **Intoxicating liquors ⟸256—Search warrant not assumed void on application for return of papers seized.**
On petition by the defendant for the return of papers claimed to have been seized during an unlawful search by prohibition agents, a search warrant will not be assumed void on loose allegations of its insufficiency where neither it nor its supporting papers are presented.

9. **Intoxicating liquors ⟸249—Failure to make return is only an irregularity and does not make warrant void.**
The failure to make a return of a search warrant under the Volstead Act is only an irregularity which may be corrected on motion and does not invalidate the warrant.

10. **Intoxicating liquors ⟸246—Documents showing transactions which should be recorded by wholesale liquor dealer held subject to search.**
Under Volstead Act, tit. 2, § 35, making the regulations of that act complementary to the Revised Statutes, and section 3318 of the Revised Statutes (Comp. St. § 6100), making it a felony for a wholesale liquor dealer to fail to keep a record of sales and purchases of liquor, documents showing sales and purchases that should have been, but were not, recorded, are proper subjects of a search warrant under Espionage Act, tit. 11, § 2, subd. 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496¼h), as "property used as means to commit a felony."

11. **Intoxicating liquors ⟸249—Seizure under search warrant illegal when warrant based on information derived from illegal search.**
A search warrant issued on information obtained at the time of a previous illegal search by prohibition agents does not authorize the retention of documents seized under it.

Separate criminal prosecutions by the United States against Arthur Kraus and others, against the Joseph Ajello Company, Incorporated, and others, and against Nathan Bornstein and others. On petitions by defendants in each case for the return of papers claimed to have been illegally seized. Order in accordance with the opinion.

In each of these cases indictments have been found for violations of title 2 of the Volstead Act (41 Stat. 305), and these proceedings arise upon petitions by one of the defendants in each case for a return of papers seized by cer-

tain prohibition agents under the circumstances set forth, which occurred before the indictments were found. The petitions allege that the agents, without search warrants (there is a partial exception in Kraus' case), entered buildings occupied by the petitioners, which they searched, and while there seized a large number of unidentified documents of various kinds which they carried off and which are now in the possession of their superiors and of the United States Attorney, who are the respondents in each proceeding, and who purpose using them in evidence upon the trials.

The answering affidavits allege a consent of the persons in charge of the premises to the searches and seizures, and further justify because each of the petitioners was a licensed wholesale liquor dealer, whose records, which must be kept under section 10 of title 2 of the Volstead Act and section 3318 of the Revised Statutes (Comp. St. § 6100), were open to the inspection of the officials at all times. Among the papers seized were some permits to withdraw and to sell liquor (form 1410) and records of sales and purchases (forms 52–A and 52–B) required to be kept by Revised Statutes, § 3318, but the greater part of the papers were bills and the like, constituting records of sales and purchases which had never been properly entered. These provisions justified the entry of the agents to search and seize the documents, which must be kept under the law, and, if they are not kept, justified them in searching and seizing any documents containing evidence of sales or purchases which should have been entered as prescribed.

George L. Donnellan, of New York City, for petitioners.

David V. Cahill and Robert A. Peattie, both of New York City, for the United States.

LEARNED HAND, District Judge (after stating the facts as above). [1] Except for the character of the documents seized, the law in cases of unlawful searches is now well settled. 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; Silverthorne Lumber Co. 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; Veeder v. U. S., 252 Fed. 414, 164 C. C. A. 338; United States v. Mills (C. C.) 185 Fed. 318. When seized, they must be returned, with them all copies taken while the officers retained their illegal possession. Furthermore, the prosecution may not use at the trial or in its preparation any information obtained from their scrutiny. Unless, therefore, the respondents can justify, the documents must be returned. They do justify: First, on the ground of the petitioners' consent, which presents an issue of fact; and, second, on the ground that, as the petitioners were wholesale liquor dealers and had taken out basic permits, the records kept by them were subject to inspection under sections 10 and 34 of title 2 of the Volstead Act and section 3318 of the Revised Statutes, and, if to inspection, then to the enforcement of that right without process, even to the extent of seizure. Farther they insist that, because the records were not properly kept, those papers were included within their powers which should have been transcribed into the records.

It is quite true that the officers had the right to inspect the records, and therefore the right to enter the place where they were kept. I shall for argument's sake further assume that, if the records were not kept as required, they had the right to inspect such other papers on the premises as recorded transactions which should have been transcribed into the records It does not, however, follow from these

concessions that they had the right to break and enter, though the petitioners wrongfully refused to allow them to inspect, nor does it either follow that they had the right to seize the records and papers after an inspection.

[2] To take up the last first, it is clear that the right to inspect did not give the right to seize, and this is enough to require a return of the papers, though not of any copies taken or of any other information obtained from their custody. Since Silverthorne Lumber Co. v. U. S., supra, and Weeks v. U. S., supra, this right to retain copies is the nub of the case. There are sections of the Revised Statutes of long standing, e. g., sections 3276, 3065 (Comp. St. §§ 6016, 5768), authorizing similar officers to enter buildings, not dwellings, for the purpose of search, and at least in the case of persons situated as the petitioners there is no need to question their validity. Had this been a distillery, another question would arise. R. S. § 3276. The difficulty I find here is that there was no provision of law purporting to justify a forcible entry, and that without some such a search warrant was necessary. The officers' right to examine the records was to be enforced, so far as the statutes show, only by penalties; they had no right to enforce the duty specifically by force.

The distinction is authoritatively settled by Silverthorne Lumber Co. v. U. S., supra, where the records, being all corporate as I read the report, were subject to subpœna. Hale v. Henkel, 201 U. S. 43, 26 Sup. Ct. 370, 50 L. Ed. 652; Wilson v. U. S., 221 U. S. 361, 31 Sup. Ct. 538, 55 L. Ed. 771, Ann. Cas. 1912D, 558. The right to seize them in one way did not justify their violent seizure. U. S. v. Distillery No. 28, Fed. Cas. No. 14,966, and some language of In re Meader, Fed. Cas. No. 9,375, do indeed support the respondents' contention that the records at least, and perhaps the other papers, would be subject to subpœna, and nothing in Boyd v. U. S., 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746, not even the dictum touching searches, contradicts it. But the Fourth Amendment does not touch the competency of proof, but the means used to get it, and here, therefore, the means are everything.

[3-5] It is apparent, therefore, that not only must the papers be returned, but any copies now in the possession of the respondents. A more difficult question arises to prevent any use of the information derived from their possession, a question which must not be interjected into the trial. Adams v. N. Y., 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575. The officials made the first unlawful move, and any confusion resulting from it they must undertake to clear up. The order must therefore provide that no testimony or other evidence of any transaction recorded in any of the papers seized shall be offered upon the trial unless the respondents can show that they got it independently of their wrongful possession. To settle this before trial some reference will be necessary to a master, who will make a record of all purchases and sales of liquor recorded in any of the papers surrendered, so that they may be identified if evidence is offered of them at the trial. No such transactions may be proved unless the respondents show before the master that they have independent proof not

derived from information contained in the papers. The expenses of that reference will be borne by the prosecution, through whose wrong the difficulty arose.

[6] I have throughout taken the issue of consent against the respondents. Obviously they must have the right to try it, and the issue cannot be decided upon affidavits. In the case at least of U. S. v. Bornstein they dispute the petitioner's version, and the trial of the issue must precede any order. It may be brought on at the criminal term on any convenient day and will be tried before the presiding judge without a jury.

[7] In the case of U. S. v. Kraus certain papers were seized on the person of one Kurtzmann, who was arrested while leaving the premises, carry concealed upon his person a number of papers, among them some of the government permits and invoices for liquor. In so doing he was assisting in the violation of section 34 of the Volstead Act and was guilty of a crime under section 29, as well as under Revised Statutes, § 3318. There can, I think be no question as to the government permits, and for reasons I shall state in a moment I make no distinction as to the other papers which showed the sales and purchases of liquor, even though not entered in a book as required by Revised Statutes, § 3318. The agents had the right to search Kurtzmann's person, having properly arrested him. This has always been a recognized incident of an arrest (Weeks v. U. S., supra, 232 U. S. 392, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177), and does not properly fall within the right of search and seizure at all. The officers need not stand by and see the evidence of crime carried off under their noses. The immunity from search presupposes that the evidence remains within the possessor's tenement, and it is that alone which "the king may not enter." The respondents need return none of these papers.

[8-10] As to the search warrant, though the petition contains loose allegations of its insufficiency, neither it nor its supporting papers are presented here, and I cannot assume that it is void. The failure to make return is only an irregularity which the petitioner may correct on motion; it is not like the failure to execute it within 10 days as required by section 11 of title 11 of the Espionage Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 10496¼k). Therefore the only question is of the right to seize the documents taken. This must rest upon subdivision 2 of section 2 of title 11 of the Espionage Act, or upon some section of the Revised Statutes of which the nearest perhaps is section 3462 (Comp. St. § 6364). Under section 35 of title 2 of the Volstead Act the regulations of that act are made complementary to the Revised Statutes, of which section 3318 prescribes that the failure of a wholesale liquor dealer to keep a book showing all sales and purchases of liquor shall constitute a crime punishable by three years' imprisonment, and therefore a felony. The books so required by section 3318 (forms 52–A and 52–B), if kept inaccurately or filled only in part, are certainly "property used as means to commit a felony" and subject to search warrant. It must be owned that the case is not so clear as to evidences of sales and

purchases that should have been transcribed into such books but were not. Yet it appears to me that documentary records used in the business, but not transcribed, are means used to avoid keeping the books, which is the crime itself. They become necessary, or at least convenient, in evading those entries which should be made. Therefore I hold that, when the books required under section 3318 are not kept or are kept insufficiently, all documents showing transactions which should be so recorded may be seized on search warrant under the pertinent provisions of the Espionage Act.

[11] It would follow that all documents seized on August 5th may be retained, except for one circumstance. Apparently the information on which the warrant was issued was obtained on August 3d at the time of the illegal search. If so, the warrant itself falls under Silverthorne Lumber Co. v. U. S., supra, and the respondents may not hold any documents seized under it. The validity of that warrant will therefore in the end turn upon the outcome of the issue as to whether the first search was by consent, and the information on which it was based was voluntarily got.

The petitions are, therefore, disposed of as follows: The respondents may notice for trial in the case of any one of them the issue whether the search was made with the consent of the person having actual possession of the premises or of some one authorized by him. In any case in which this issue goes against the respondents, or in which they do not choose to go to trial, an order will pass directing them to return all documents seized by them, and copies of the same, except such documents as were found on the person of Kurtzmann on August 3, 1920, at the search of Kraus' premises. After the issues are disposed of the causes will be referred to William Parkin, Esq., to examine and report on all sales and purchases of liquor recorded in all documents seized, and the prosecution will be limited in its proof of the indictments to other transactions. At the same time the respondents may show before the master, if they can and wish, that they have independent evidence of such transactions, as to which the master will report, and the order of limitation will not preclude their offer of such evidence. The costs of the reference will be borne by the respondents, and the trial of the indictments will be stayed till the final order is entered.

Enter order on notice.

CHICAGO PORTRAIT CO. v. CITY OF BELLINGHAM et al.

(District Court, W. D. Washington, N. D. October 27, 1920.)

No. 207.

1. **Injunction ⟸85(2)—May test validity of penal laws.**
The validity of penal laws may be tested by injunction.

2. **Commerce ⟸40(2)—Sale of frames held interstate commerce, not subject to license.**
Where a nonresident corporation, through its agent, took orders for portraits to be enlarged at stated prices and to be delivered in frames, which the customer might purchase at a reasonable price, fixed by the portrait company, or might refuse to purchase, the purchase of the frames was a part of the transaction, and a city ordinance requiring a license for the transaction of such business was invalid, as imposing a burden on interstate commerce.

In Equity. Suit for injunction by the Chicago Portrait Company against the City of Bellingham and others. Injunction granted.

Will J. Griswold, of Bellingham, Wash., for complainant.
T. D. J. Healy, of Bellingham, Wash., City Atty., for defendants.

NETERER, District Judge. The Chicago Portrait Company, having its only place of business in Chicago and being engaged in the business of making and enlarging portraits from photographs and in manufacturing of picture frames, solicited orders in the city of Bellingham, state of Washington, without paying the license tax provided by the city ordinance. Its agent was arrested, and further arrest was threatened, and an injunction is sought against the defendant city for interfering with the complainant's constitutional right.

[1] Validity of penal laws may be tested by injunction. St. Louis, Iron Mountain & Sou. Ry. Co. v. Williams et al., 251 U. S. 63, 40 Sup. Ct. 71.

[2] The orders taken by the complainant's representative were in writing, for a portrait of the size and kind wanted, which specified the price, cash on delivery, and further provided, "The above price is without frame or glass," and continued:

"This order is given you upon the further condition that your company will deliver the portrait so ordered in a suitable frame, which the undersigned is entitled to accept upon payment of a reasonable price if the frame is satisfactory. In the event the undersigned does not accept this frame and pay for same, it is to be delivered forthwith to your company's deliveryman."

The agent of the company gave back a written acceptance. The pictures and frames were to be sent to the agent at Bellingham, and remained the property of the company until delivered and paid for. It is manifest from this order, as well as the testimony, that there was no obligation on the part of the purchaser to take the frame.

A similar case was before the Supreme Court in Dozier v. Alabama, 218 U. S. 124, 30 Sup. Ct. 649, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264.

The only difference in that case and this case is that the price of the frames was "at factory prices," while in the instant case it is a "reasonable price." The agent testified:

"All these frames are made in Chicago, which is the largest market in the world. Labor and one thing or another sometimes goes up and sometimes goes down. We put a reasonable price on them—as reasonable as we could sell these frames—as reasonable as any large department store could afford to sell them."

And it is shown that the only time when the amount of price was mentioned was when the frames were delivered. In Dozier v. Alabama, supra, 218 U. S. at page 128, 30 Sup. Ct. at page 650, 54 L. Ed. 965, 28 L. R. A. (N. S.) 264, it is said:

"It was agreed that the frame should be offered along with the picture. The offer was a part of the interstate bargain, and as it was agreed that the frame should be offered 'at factory prices,' and the company and factory were in Chicago, obviously it was contemplated, if not agreed, that the frame should come on with the picture."

In the instant case the frame did come with the picture from Chicago. Continuing, the court says:

"In fact, the frames were sent on with the pictures from Chicago, and were offered when the pictures were tendered, as part of a transaction commercially continuous, and one at prices generically fixed by the contract for the pictures, and by that contract represented to be less than retail or usual prices, in consideration, it is implied, of the purchase already agreed to be made. *We are of opinion that the sale of the frames cannot be so separated from the rest of the dealing between the Chicago Company and the Alabama purchaser as to sustain the license tax upon it.* Under the decisions the statute as applied to this case is a regulation of commerce among the states, and void under the Constitution of the United States (article 1, § 8). Robbins v. Shelby County Taxing District, 120 U. S. 489; Caldwell v. North Carolina, 187 U. S. 622; Rearick v. Pennsylvania, 203 U. S. 507." (Italics ours.)

The offering of the frame was a part of the interstate bargain. The purchaser could take it or leave it.

The word "reasonable," as contradistinguished from "factory," price, does not take the instant case out of the principal announced by the Supreme Court in Dozier v. Alabama, supra, and upon the authority of that case the injunction is granted.

UNITED STATES v. KEIDANZ.

(District Court, S. D. New York. January 25, 1921.)

Poisons ⇐4—Physician wrongfully issuing prescription for opium chargeable with unlawful sale.

A physician *held* chargeable with the offense of selling opium, in violation of Harrison Anti-Narcotic Act, § 2 (Comp. St. § 6287h), where for a consideration he issued an order or prescription for opium, not in the regular course of his practice, but to an addict, for a prohibited use, although the prescription was filled by a dealer who acted in good faith and without knowledge that it was wrongfully issued.

Criminal prosecution by the United States against Emil H. Keidanz. On demurrer to indictment. Demurrer overruled.

Griffiths, Sarfaty & Content, of New York City, for defendant.

DIETRICH, District Judge. The one question submitted is whether an offense is charged against the United States under section 2 of the Harrison Anti-Narcotic Act of December 17, 1914 (38 Stat. 785 [Comp. St. § 6287h]), where it appears that for a consideration the defendant issued an order or "prescription" for opium, not in the regular course of his professional practice, but to an "addict," for a prohibited use, and that thereupon, as was intended, the addict presented the prescription to and had it filled by a dealer, who had no reason to believe that it had been wrongfully issued. The act makes it unlawful for any one to "sell, barter, exchange or give away" opium, except in a case, among others, where it is dispensed or prescribed by a physician "in the course of his professional practice only," and admittedly, under the construction recently placed upon these provisions by the Supreme Court in Jin Fuey Moy (No. 44, December 6, 1920) 254 U. S. 189, 41 Sup. Ct. 98, 65 L. Ed. —, the physician as well as the dealer may be convicted, where both have the requisite criminal intent.

The real contention of the defendant, therefore, is that while he set on foot a plan for the commission of a crime, and performed the first act towards its accomplishment, he cannot be held responsible, because, as was intended, the offense was consummated through an innocent agency. To such a view I am unable to assent. The injunction of the statute has been violated by the defendant's willful procurement and participation, and the quality of his act is not affected by the fact that another agency innocently co-operated. In the Jin Fuey Moy Case it is expressly held:

"That one may take a principal part in a prohibited sale of an opium derivative belonging to another person by unlawfully issuing a prescription to the would-be purchaser."

Such a part the indictment here alleges the defendant took, and he cannot claim immunity upon the ground that the dealer accepted the prescription in good faith and filled it without knowledge of its unlawful purpose. In so far as this view conflicts with United States v. Foreman (C. C. A.) 255 Fed. 621, and Doremus v. United States (C. C. A.) 262 Fed. 849, the conclusions there reached are thought to be out of harmony with the Jin Fuey Moy Case.

Demurrer overruled.

NYE TOOL & MACHINE WORKS v. CROWN DIE & TOOL CO.

(District Court, N. D. Illinois, E. D. February 3, 1921.)

No. 1514.

1. **Patents ⟸193, 286—Patentee may assign rights against particular infringer, and assignee may sue.**
Under Rev. St. § 4898 (Comp. St. § 9444), providing that "any patent, or any interest therein, shall be assignable in law by an instrument in writing," the owner of a patent may assign his rights thereunder against a particular infringer, without more, and such an assignment vests the assignee with an interest in the patent, which will support a suit against such infringer.

2. **Patents ⟸313—Suit for infringement dismissed.**
A suit for infringement dismissed for the purpose of enabling the parties to obtain a speedy decision from the appellate court of the question of complainant's right to maintain the suit.

In Equity. Suit by the Nye Tool and Machine Works against the Crown Die & Tool Company. On motion to dismiss bill. Motion granted.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for plaintiff.
Florence King, of Chicago, Ill., for defendant.

CARPENTER, District Judge. Plaintiff sues for infringement of United States patent No. 1,033,142, and for an accounting.

[1] The right and title of plaintiff in the patent, as shown in the bill, is based upon the following agreement:

"Whereas, Reed Manufacturing Company, a corporation of Pennsylvania, is the owner of letters patent of the United States, No. 1,033,142, for a machine for forming screw thread cutting devices, granted July 23, 1912, on an application of Wright & Hubbard; and

"Whereas, under said patent said Reed Manufacturing Company has the right to exclude others from manufacturing, using and selling the devices of said patent; and

"Whereas, it is believed by the parties that Crown Die & Tool Company, a corporation of Illinois, has been manufacturing and using devices in infringement of said patent; and

"Whereas, Nye Tool & Machine Works is engaged in the manufacture of dies with which the dies made by said Crown Die & Tool Company, by the use of said infringing machine, are in competition; and

"Whereas, Nye Tool & Machine Works is desirous of acquiring from Reed Manufacturing Company all of its rights of exclusion under said patent, so far as the same may be exercised against the Crown Die & Tool Company, together with all rights of the Reed Manufacturing Company against the Crown Die & Tool Company arising out of the infringement aforesaid:

"Now, therefore, in consideration of one thousand dollars ($1,000.00), and other good and valuable considerations, the receipt of which is hereby acknowledged, the Reed Manufacturing Company hereby assigns and sets over to the Nye Tool & Machine Works all claims recoverable in law or in equity, whether for damages, profits, savings, or any other kind or description, which the Reed Manufacturing Company has against the Crown Die & Tool Company arising out of the infringement by the Crown Die & Tool Company of the Wright & Hubbard patent No. 1,033,142, and for the same consideration, assigns and sets over all the rights which it now has arising from said patent of excluding the Crown Die & Tool Company from the practice of the inven-

tion of said patent, the intention being that, in so far as concerns the exclusion of the Crown Die & Tool Company under said patent, the Nye Tool & Machine Works shall be vested with as full rights in the premises as the Reed Manufacturing Company would have had had this assignment not been made, and that the Nye Tool & Machine Works shall have the full right to bring suit on said patent, either at law or in equity against said Crown Die & Tool Company, and for its own benefit, to exclude the Crown Die & Tool Company from practicing the invention of said patent, and for its own use and benefit to collect damages which may arise by reason of the future infringement of said patent by the Crown Die & Tool Company; but nothing herein contained shall in any way affect or alter the rights of the Reed Manufacturing Company against other than the Crown Die & Tool Company, and for the same consideration, all rights as are herein given against the Crown Die & Tool Company are given as against any successor or assignee of the business thereof.

Reed Manufacturing Company,
"By P. D. Wright, its President."

The defendant has moved to dismiss because:

(1) The bill charges infringement of a patent in which plaintiff has no title.

(2) The owner of the entire or any part of the legal title to the patent sued on is not made a party to the suit.

(3) The bill shows on its face that the plaintiff has no interest in the patent sued on.

(5) The court is without jurisdiction.

Three other grounds for dismissal are assigned, but relate to matters outside of the present record.

Plaintiff has acquired every right which the patentee ever had under his patent as against the defendant, and the record does not disclose that plaintiff has received, by license or otherwise, any immunity from suit by the patentee under the patent involved. An examination and study of a patent grant necessarily leads one to the conclusion that, inasmuch as the patentee has the natural right to make, use, and sell everything which he makes, the only thing he receives by virtue of his patent is the right to exclude others from exercising his natural rights. The right to exclude, being in reality all that the patentee receives from the government, which he did not have before, it is difficult to perceive why, under section 4898 of the Revised Statutes (Comp. St. § 9444), providing that "any patent, or any interest therein, shall be assignable in law by an instrument in writing," the assignment in the instant case does not convey substantial rights upon which action may be based.

The patentee's right to exclude may be subdivided territorially. This has long been settled. If the right to exclude from all of the states west of the Mississippi river is in the patentee, why not the right to exclude in any one state; if in any one state, why not in any one city; if in any one city, why not in any one street; if in any one street, why not in any one building; if in any one building, why not in any office in that building; if in any office, why not any one individual in that office. It would seem, if the statute provides that "any interest" in the patent may be assigned, the mere question of the size of that interest is unimportant.

The real question here involved cannot be lost sight of by even the most careful consideration of cases with reference to exclusive and non-

exclusive licenses. There is a vast difference between a mere grant of immunity—a covenant not to sue—and the absolute conveyance of a part of the patent. The latter passes title; the former provides merely that the patentee shall exercise his rights of exclusion on behalf of the licensee.

I cannot see that any question of public policy is involved. On the argument it was suggested that grants of this nature would lead to innumerable suits. On the other hand, there can never be more suits on a patent than there are infringers, and if there are a million infringers, having no joint interest in their infringements, separate suits must be maintained against each, if they persist in their wrongdoing. The test should be rather from the standpoint of the defendant, and if he can be sued once only for his tort, the law is satisfied.

The defendant in this case would have been liable to suit by Reed Manufacturing Company, and would have been obliged to defend for any infringement. How, then, can it complain if the Reed Manufacturing Company sells its right to exclude the defendant from using the patented rights. From the defendant's standpoint it is no better nor worse off than if the original patentee were plaintiff. The patentee has wholly divested itself of all its rights as to the defendant in this case, and any action between the parties here would be a complete defense to any suit brought by the Reed Manufacturing Company.

Questions of public policy do not seem to militate against such a conveyance. The purpose of the patent law is exclusion, and the declared policy seems to permit these exclusive rights to be subdivided and transferred at will. The public is not in the slightest degree interested in whether the plaintiff, to accomplish its lawful purpose of exclusion, bought more of the patent than was needed, or only just enough. Clearly, it does not lie with the infringer to urge matters of public policy as to the method in which his wrongdoing is to be stopped.

The real party in interest has brought the suit. Defendant claims that the owner of the patent is not a party. Such is not the fact. The owner of all the patent rights may not be a party, but the owner of all the patent rights necessary for a determination of this suit is the plaintiff. Equity rule 37 (198 Fed. xxviii, 115 C. C. A. xxviii) would seem to settle all difficulties on this point.

[2] I am of the opinion that as a matter of law the motion to dismiss should be overruled. There are, however, serious considerations which lead me to a different result in this case. I have felt that Congress long ago should have invested in the judges of the federal courts of first instance the power to certify questions of law to the various courts of appeal, in order that serious legal differences between the parties might be settled in advance of a great expenditure of time and money. Many cases in chancery have gone to a reference before the master, and prolonged hearings had on the merits, and after final decree the court of review has settled legal issues which, if known in advance, would have prevented the reference.

In this case it was admitted in the argument that the interest of the plaintiff was acquired for the sole purpose of anticipating a possible

adverse decision in a suit on another patent. This was stated openly. The parties understood it. If they know now their exact legal status in the present case, their course of conduct in the other litigation, so far as these matters are concerned, will be determined. I am very much disinclined, however positive I am in my views as to the motion to dismiss here, to let them go to final hearing without knowing exactly what their rights are.

For the purpose of enabling the parties to have justice speedily, and without any more purchase than is absolutely necessary, I believe the motion to dismiss should prevail; and it is so ordered.

UNITED STATES v. ONE BAY HORSE et al.

(District Court, N. D. Georgia. February 5, 1921.)

Internal revenue ⊂=46—Horse and vehicle used in moving distilling apparatus subject to forfeiture.

A horse, wagon, and set of harness, used for the removal of a still and other distilling apparatus, proper and intended to be used for the making of distilled liquors on which a tax was imposed, with intent to defraud the United States of such tax, *held* subject to forfeiture under Rev. St. § 3450 (Comp. St. § 6352), although not used for the removal or concealment of the liquors themselves on which the tax was imposed; a rifle, siezed with the other articles, *held* not subject to forfeiture.

Libel for Forfeiture. Suit by the United States against one bay horse and other property. Decree of forfeiture ordered.

J. W. Culpepper, of Fayetteville, Ga., for claimant.
John W. Henley, Asst. U. S. Atty., of Atlanta, Ga.

SIBLEY, District Judge. A horse, a wagon, a set of harness, and a rifle are libeled, to be forfeited because used in 1918 for the removal and deposit of a still and other distilling apparatus, proper and intended to be used for the making of distilled liquors on which a tax was imposed, with intent to defraud the United States of the tax. The contention of the claimant is that R. S. § 3450 (Comp. St. § 6352), under which the libel proceeds, does not authorize the forfeiture. The material part of the section is:

"Whenever any goods or commodities for or in respect whereof any tax is or shall be imposed, or any materials, utensils, or vessels proper or intended to be made use of for or in the making of such goods or commodities are removed, or are deposited or concealed in any place, with intent to defraud the United States of such tax, or any part thereof, all such goods and commodities, and all such materials, utensils, and vessels, respectively, shall be forfeited; and in every such case all the casks, vessels, cases, or other packages whatsoever, containing, or which shall have contained, such goods or commodities, respectively, and every vessel, boat, cart, carriage, or other conveyance whatsoever, and all horses or other animals, and all things used in the removal or for the deposit or concealment thereof, respectively, shall be forfeited."

It is said that this language is to be strictly construed against the forfeiture and that in the provision "every vessel, boat, cart, carriage * * * and all horses, * * * and all things used in the removal or for the * * * concealment thereof, respectively, shall be forfeited," the word "thereof" is to be taken as referring only to its last immediate antecedent, "such goods or commodities," and that no forfeiture results of the vehicles and other things used for the removal or concealment, unless it is the removal or concealment of the goods and commodities themselves on which the tax is imposed. A strict construction would warrant this conclusion, but in construing allied portions of the revenue laws it was said, in United States v. Stowell, 133 U. S. 1, 12, 10 Sup. Ct. 244, 245 (33 L. Ed. 555):

"By the now settled doctrine of this court, * * * statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are to be fairly and reasonably construed, so as to carry out the intention of the Legislature."

In construing a penal statute, where the question was whether the word "cattle" would include sheep, it was said:

"The admitted rule that penal statutes are to be strictly construed is not violated by allowing their words to have full meaning, or even the more extended of two meanings, where such construction best harmonizes with the context, and most fully promotes the policy and objects of the Legislature." Ash Sheep Co. v. United States, 252 U. S. 159, 40 Sup. Ct. 241, 64 L. Ed. 507.

One of the cases therein cited is United States v. Hartwell, 6 Wall. 385, 18 L. Ed. 830. The statute there under consideration, in a single involved sentence, first declared certain unauthorized loans to be embezzlement, then declared certain remittances by vouchers for credit to be a conversion of the amount represented by the voucher, and then added, "Any officer or agent of the United States and all persons participating in such act" should be punished as stated. The contention that only the last act named, to wit, the conversion, was to be so punished, was overruled, and the more remote unlawful loan was held to be included also.

In the present case we have a long and involved single sentence to construe. The general purpose to suppress an intended fraud on the revenue by forfeiture on removal, deposit, or concealment, both of the articles taxed and certain things connected with them, is evident. The forfeitures prescribed may be referred to as primary and secondary. The things primarily forfeited on the conditions named are those in the first clause and are (1) the taxed goods and commodities, and (2) materials, utensils, and vessels proper and intended for use in the making of the goods and commodities. As to the last named it is not necessary that any goods or commodities should have actually been produced from or with them. The next clause, being that specially for construction, provides the secondary forfeitures, that is, those consequent on the forfeitures previously declared. It begins "and in every such case." These words plainly mean that, whenever either goods and commodities or materials and utensils are forfeited under the preceding clause, the

matter is not to end, but as consequences thereof (1) the vessels, casks, or packages containing the goods and commodities, and (2) the vessels, boats, carts, carriages, etc., used in the removal, deposit, or concealment of the things previously forfeited are also to be forfeited.

Now the stilling apparatus, which was with fraudulent intent removed and deposited in the wagon, was forfeited under the first clause, and is not in question here. It is therefore one of the instances covered by the words "in every such case," and these words must be satisfied by something that follows them in the statute. They cannot be satisfied by the forfeiture of casks, vessels, and cases, for stills involve no such, and indeed these things are limited to such as contained the goods and commodities. The secondary forfeiture, following the forfeiture of utensils, must therefore relate only to the boats, carts, carriages, etc., used in deposit and removal, and the word "thereof" following them must be held to refer to all the articles mentioned in the first clause as forfeited by fraudulent removal, deposit, or concealment. As to the wagon, horse, and harness, therefore, a cause of forfeiture is set forth.

The rifle is not a thing that could naturally and ordinarily be used in the way alleged and no special use thereof is shown. The allegations as to it are insufficient.

STOKELY v. MATHER.

(District Court, D. Massachusetts. February 11, 1921.)

No. 96.

Witnesses ⇐29—Mileage allowable from actual residence.

In the federal courts in actions at law, mileage is allowable to a witness from his actual place of residence.

At Law. Action by Hattie N. Stokely against John L. Mather. On appeal from clerk's taxation of costs. Affirmed.

Kent & Wales, of Jacksonville, Fla., for plaintiff.

Hollis R. Bailey, of Boston, Mass., for defendant.

MORTON, District Judge. This is an appeal from the clerk's taxation of costs. The dispute is as to the allowance of travel for witnesses who attended and testified. One of them resided in Florida and came to Boston to attend the trial; the clerk allowed travel for 2,500 miles. The other witness was allowed travel for 314 miles. The clerk's computations are not objected to.

The question is whether travel can properly be allowed for a greater distance than 100 miles. It is an old question in this circuit. As early as 1842, Mr. Justice Story allowed travel from the actual place of residence (more than 100 miles), saying:

"Unless my memory deceives me, the same question has been presented to this court in several instances before the present, and it has uniformly received the same determination." Prouty v. Draper, 2 Story, 199, Fed. Cas. No. 11,447.

In 1886 the question was raised again in U. S. v. Sanborn (C. C.) 28 Fed. 299), and Mr. Justice Gray and Judge Colt, in a careful opinion, adhered to Mr. Justice Story's decision. The question was next raised in The City of Augusta, 80 Fed. 297, 25 C. C. A. 430, decided in 1897, in which the Court of Appeals for this Circuit approved the decision in U. S. v. Sanborn, supra. In 1910 the question was again presented to the Court of Appeals for this circuit in The Gov. Ames, 187 Fed. 40, 109 C. C. A. 94, and the court said, "It is time we should cease to hear from each of these propositions"—one of "these propositions" being the present contention of the appellant. The court adhered to its previous decision.

If any question can ever be regarded as settled by judicial decision, it would seem that the present one has been settled as far as the courts of this circuit are concerned.

Clerk's taxation affirmed.

NOTE.—The new Rules in Admiralty promulgated by the Supreme Court of the United States on December 6, 1920, provide that in admiralty cases travel shall not be allowed for more than 100 miles (rule 47, 40 Sup. Ct. xvii), and will operate to change the practice in admiralty cases; but those rules do not apply to actions at law, and the present case went to judgment and the costs were taxed before the rules were promulgated.

I. T. S. RUBBER CO. v. ESSEX RUBBER CO.

(District Court, D. Massachusetts. November 27, 1920.)

No. 1008.

1. **Patents ⇐288—Nonresident defendant must have place of business, and commit infringement, within district, to give court jurisdiction.**
   Under Judicial Code, § 48 (Comp. St. § 1030), it is essential to the maintenance of an infringement suit in a district other than that of defendant's residence that defendant have a regular and established place of business in such district, and that it shall have committed acts of infringement therein.

2. **Patents ⇐313—Where validity was admitted and infringement denied, case may be disposed of on motion to dismiss.**
   Where plaintiff sued a nonresident, alleging that it had a place of business within the district and had committed acts of infringement therein, and the validity of the patent was admitted, but the infringement denied, the case may be disposed of on motion to dismiss, which has supplanted a demurrer, on the theory that the alleged infringing articles did not infringe; it being proper, even in patent cases, to dispose of the issues without the usual mass of extraneous testimony.

3. **Patents ⇐313—Where earlier proceedings in Patent Office immaterial, case may be disposed of on motion to dismiss.**
   Where the validity of a patent was admitted, but infringement denied, defendant contending that the specified articles did not in fact infringe, the earlier patents and the proceedings in the Patent Office, as well as other piracies, were immaterial, and the case may be disposed of on motion to dismiss without a consideration of such matters.

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4. Evidence ⊂=518—Where language used is intelligible to the court, expert testimony not considered; "contract."

As a patent is a contract, and should have the same construction as any other contract, expert testimony need not be received, where the language used is such that the trial judge can determine the scope and extent of the patent.

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

5. Patents ⊂=157(1)—"Patent" is contract between government and inventor.

A "patent" is a contract between the government and the inventor, whereby the latter is granted the exclusive right to make, use, and vend his invention for a specified time, after which such right is to inure to the benefit of the public.

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

6. Patents ⊂=157(1)—Patents should be construed as other contracts.

The specification and claims of a patent constitute a contract between the government and the patentee, and they should be read and construed together in the same way and by the same rules by which other contracts are interpreted.

7. Patents ⊂=101—Patent must show what is still open to public.

The object of the patent law in requiring the patentee to particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery is not only to secure to him all to which he is entitled, but is to apprise the public of what is still open to them.

8. Patents ⊂=165—Patent is limited by language used.

An inventor can use any language he wishes in describing his invention, and in stating his claims, but is bound by the phraseology used, and cannot add to or subtract from the language used; an accurate description of the invention being necessary, so that the government may know what is granted, that licensed persons may know how to use the invention, and that other inventors may know what part of the field is still unoccupied.

9. Patents ⊂=328—No. 14,049, for concavo-convex heels, held not infringed by flat heels.

Tufford patent, No. 14,049, reissued January 11, 1916, claims 5 to 10, for a heel lift of substantially nonmetallic resilient material having its body portion of concavo-convex form on every line of cross-section, the concave upper face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, construed, and *held* limited to a heel lift, the concave surface of which is below a plane passing through the rear upper edge and breast corners, and so was not infringed by a straight-edged heel.

10. Evidence ⊂=518—Where claims held understandable, expert testimony inadmissible.

The claims of the Tufford reissue patent, No. 14,049, for resilient heel lifts, *held* understandable, and hence expert testimony as to the meaning of such claims was inadmissible.

11. Patents ⊂=328—No. 14,049, for concave heels, not infringed by straight-edged heels; "line;" "edge."

The Tufford reissue patent, No. 14,049, for a concavo-convex heel lift of resilient material, having its body portion of concavo-convex form, the concave upper face lying entirely below a plane passing through the rear upper edge and breast corners of the lift, cannot be infringed by a straight-edged heel; for an "edge" is a line where two surfaces meet, and a line has length, but no breadth or thickness; so, if the upper concave surface

lies entirely below the plane passing through the three points where the surface ends, they must fall below the plane; otherwise, the edge would be a series of positions projected through empty space.

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

12. **Patents ⇐327—Decisions in patent cases by courts in other districts are not binding.**
While it is highly desirable that there be unformity of decision between the federal courts of the various districts, and one court will defer to another on principles of comity, comity persuades, but it does not command; so adjudications in one district construing a patent in cases where its validity was attacked are not conclusive as to the scope of the patent in a subsequent infringement suit brought in another district.

13. **Patents ⇐328—No. 14,049, for resilient heel, held not to include straight-edged heels on theory of equivalents.**
The Tufford re-issue patent, No. 14,049, having its body portion of concavo-convex form, the concave upper face lying entirely below a plane passing through the rear upper edge and breast corners of the lift cannot on the theory of equivalents be deemed to include straight-edged heels.

14. **Patents ⇐328—No. 14,049, for resilient heels, held not to include straight-edged heels.**
While a patent should be construed so as to cover the entire inventive thought of the patentee, yet, the patentee is bound by the language used, and the Tufford reissue patent, No. 14,049 for a resilient heel lift having its body portion of concavo-convex form, the concave upper face lying entirely below a plane passing through the rear upper edge and breast corners of the lift, cannot by construction be deemed to include straight-edged heels.

15. **Judgment ⇐675(1)—One not party to default judgment is not estopped.**
Although defendant, which manufactured heels claimed to infringe plaintiff's patent, participated in suits brought in other districts against its jobbers, and advised its jobbers to submit to decrees pro confesso, defendant paying the damage or profits, yet where it did not actually participate in any trial of the case on the merits as to infringement, such default decrees will not estop defendant in another proceeding from denying infringement.

16. **Judgment ⇐707—Default decree is not estoppel as to stranger to record.**
A default decree cannot be an estoppel as to a stranger to the record.

17. **Patents ⇐327—Defendant not concluded, because it might have had question litigated.**
Though defendant might in other litigation have had its day in court on the question of infringement, yet where it was not made a party and did not appear, it is not estopped by decrees pro confesso, and may later litigate that question.

In Equity. Suit by the I. T. S. Rubber Company against the Essex Rubber Company. On defendant's motion to dismiss. Motion granted, and bill dismissed.

Frederick A. Tennant and Nathan Heard, both of Boston, Mass., and F. O. Richey and E. D. Fales, both of Elyria, Ohio, for plaintiff.

Emery, Booth, Janney & Varney, of Boston, Mass., and Lucius Varney, of New York City, for defendant.

ANDERSON, Circuit Judge. The defendant moves to dismiss for want of jurisdiction this patent infringement suit, brought by an Ohio

corporation against a New Jersey corporation for alleged infringement of the Tufford patent on resilient heels, No. 14,049, reissued January 11, 1916.

[1] The jurisdiction in this district, if any, is grounded on section 48 of the Judicial Code, the relevant parts of which are as follows:

"In suits brought for the infringement of letters patent the District Courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant * * * shall have committed acts of infringement and have a regular and established place of business."

As the defendant is not an inhabitant of this district, unless (1) it has a regular place of business within this district, and (2) has committed at least one act of infringement in this district (compare Westinghouse Electric Co. v. Stanley Electric Co. [C. C.] 116 Fed. 641), this court is without jurisdiction, even although the defendant may elsewhere have committed acts of infringement. Plaintiff has duly pleaded both grounds of jurisdiction. Defendant admits the requisite place of business here, but denies any act of infringement within the district.

After motion by the defendant for particulars, a stipulation was filed that certain attached heels (Plaintiff's Exhibits 1 and 2, and Defendant's Series A and B) were sold by the defendant in this district, and constituted the sole acts of infringement within this district relied upon to give this court jurisdiction.

The defendant thereupon moved to dismiss, on the ground that it appears on the record thus made that there was no infringement in this district.

[2] The question thus presented is essentially the same as though the plaintiff had in its bill set up its patent with the usual allegations, plus the claim that the defendant had been guilty of infringement by selling within this district certain attached samples of heels. The defendant might, under the old practice, have demurred to such a bill, assigning as cause for the demurrer that it appeared from the bill that the alleged infringing structures were not infringements.

Obviously such brief and summary method of disposing of a patent case—generally distinguished for length, prolixity, and presence of extraneous and immaterial matter—is not usual. It calls for and has had careful consideration. There seems to be no reason why the principles used in the labor and money saving device of demurrer should not be utilized in patent litigation as well as elsewhere.

Moreover, if the defendant is correct in its contention that, if this motion is sustained, an appeal may (and probably must) take the questions involved directly to the Supreme Court, there are obvious practical advantages in having an early construction of this patent by that court. The case relied on for this contention is W. S. Tyler Co. v. Ludlow-Saylor Wire Co., 236 U. S. 723, 35 Sup. Ct. 458, 59 L. Ed. 808. That was a patent infringement suit, brought in the Southern district of New York by an Ohio corporation against a Missouri corporation. The trial court held that the plaintiff had neither established that it had the requisite place of business in that district, nor had committed

an act of infringement by making a sale there. The Supreme Court held that the case was properly before it on appeal, and that certiorari should therefore be denied.

It is difficult to distinguish that case from the case at bar. American Electric-Welding Co. v. Lalance & Grosjean Mfg. Co., 249 Fed. 968, 162 C. C. A. 166, is another recent case, closely in point, in which Judge Bingham, for the Court of Appeals for this circuit, cites numerous cases concerning appellate jurisdiction, holding that in such case the Court of Appeals has no jurisdiction.

The procedure here invoked is consistent with that adopted by the Court of Appeals for the Seventh Circuit, affirming a decision by District Judge Carpenter, in Bronk v. Charles H. Scott Co., 211 Fed. 338, 128 C. C. A. 17. In that case, answering interrogatories, the plaintiff admitted that the alleged infringement consisted solely in defendant's manufacture and sale of certain articles identified and described in the interrogatories. The defendant's motion to dismiss, on the ground that the answers disclosed that there was no infringement, was sustained; the court saying:

"* * * The principles that are applicable to a demurrer should be applied, for the reason that appellant's answers to the interrogatories are the same in effect as if she had charged in her bill that appellee's infringement consisted solely in the manufacture and sale of the protectors which were identified and described in the interrogatories."

In that case pleadings had also put the validity of the patent in issue, and the defendant had tendered the file wrapper and copies of numerous patents of the prior art. But the file wrapper and these patents were disregarded by the court, which disposed of the case on the single issue of noninfringement.

In Krell Auto Grand Piano Co. v. Story & Clark Co., 207 Fed. 946, 949, 125 C. C. A. 394, is a collection of patent infringement cases in which the scope and function of demurrers are discussed. Compare Lange v. McGuin, 177 Fed. 219, 101 C. C. A. 389.

There are many cases in which the courts have held that both validity and infringement might be properly determined on demurrer. See American Fiber Chamois Co. v. Buckskin Fiber Co., 72 Fed. 508, 18 C. C. A. 662, a decision in 1896 by the Circuit Court of Appeals for the Sixth Circuit—Judges Taft, Lurton, and Hammond. Judge Taft says (72 Fed. 511, 18 C. C. A. 665):

"The rule is now well settled that a defendant to a patent infringement bill may raise the question on demurrer whether the alleged invention, as disclosed by the specifications of the patent, is devoid of patentable novelty or invention. Richards v. Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831; West v. Rae, 33 Fed. 45. It is also well settled that, in considering the question of the validity of a patent on its face, the court may take judicial notice of facts of common and general knowledge tending to show that the device or process patented is old, or lacking in invention, and that the court may refresh and strengthen its recollection and impression of what facts were of common and general knowledge at the time of the application for the patent by reference to any printed source of general information which is known to the court to be reliable, and to have been published prior to the application for the patent. Brown v. Piper, 91 U. S. 38. The presumption from the issuance of the patent is that it involves both novelty and invention. The effect of dismissing

the bill upon demurrer is to deny to the complainant the right to adduce evidence to support that presumption. Therefore the court must be able, from the statements on the face of the patent, and from the common and general knowledge already referred to, to say that the want of novelty and invention is so palpable that it is impossible that evidence of any kind could show the fact to be otherwise. Hence it must follow that, if the court has any doubt whatever with reference to the novelty or invention of that which is patented, it must overrule the demurrer, and give the complainant an opportunity, by proof, to support and justify the action of the patent office. This is the view which has been taken by the Supreme Court, and the most experienced patent judges upon the circuit. New York Belting & Packing Co. v. New Jersey Car-Spring & Rubber Co., 137 U. S. 445, 11 Sup. Ct. 193; Manufacturing Co. v. Adkins, 36 Fed. 554; Blessing v. Copper Works, 34 Fed. 753; Bottle-Seal Co. v. De La Vergne Bottle & Seal Co., 47 Fed. 59; Industries Co. v. Grace, 52 Fed. 124; Goebel v. Supply Co., 55 Fed. 825; Hanlon v. Primrose, 56 Fed. 600; Dick v. Well Co., 25 Fed. 105; Kaolatype Co. v. Hoke, 30 Fed. 444; Coop v. Development Inst., 47 Fed. 899; Krick v. Jansen, 52 Fed. 823; Manufacturing Co. v. Housman, 58 Fed. 870; Davock v. Railroad Co., 69 Fed. 468; Henderson v. Thompkins, 60 Fed. 758."

See, also, the discussion by Judge Blodgett in Manufacturing Co. v. Adkins (C. C.) 36 Fed. 554.

In Brown v. Piper, 91 U. S. 37, 44, 23 L. Ed. 200, a case that went after a trial on appeal from this district, the court, by Mr. Justice Swayne, said:

"We think this patent was void on its face, and that the court might have stopped short at that instrument, and without looking beyond it into the answers and testimony sua sponte, if the objection were not taken by counsel, well have adjudged in favor of the defendant."

In Slawson v. Grand St. R. R. Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576, the Supreme Court cited with approval the foregoing quotation from Brown v. Piper, and approved the practice of dismissing a patent infringement bill for want of patentability, even when the answer does not allege such defense. Mr. Justice Woods said concerning patents:

"If they are void because the device or contrivance described therein is not patentable, it is the duty of the court to dismiss the cause on that ground whether the defense be made or not."

In Richards v. Chase Elevator Co., 158 U. S. 299, 15 Sup. Ct. 831, 39 L. Ed. 991, Mr. Justice Brown says:

"While patent cases are usually disposed of upon bill, answer, and proof, there is no objection, if the patent be manifestly invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue so formed. We have repeatedly held that a patent may be declared invalid for want of novelty, though no such defense be set up in the answer"—citing Dunbar v. Myers, 94 U. S. 187, 24 L. Ed. 34; Slawson v. Grand Street Railroad Co., 107 U. S. 649, 2 Sup. Ct. 663, 27 L. Ed. 576; Brown v. Piper, 91 U. S. 37, 23 L. Ed. 200.

Ordinarily—certainly in this case—infringement is a sharper, narrower, and cleaner-cut issue than patentability.

I conclude on principle and authority that it is the duty of the court to grant this motion, unless it appears that the heels relied upon as an infringement within this district are or may be found to be an infringement of the plaintiff's patent. But if, on this issue, expert testimony

or other extraneous evidence be requisite to assist in the construction of the patent or to determine whether the defendant's products infringe, the case must stand for hearing.

[3] Plaintiff's counsel, pursuant to the common custom in patent litigation, has sought to put before the court a vast mass of extraneous matter—referring to the file wrapper; to contentions made by Tufford or his counsel during the proceedings in the Patent Office; to earlier patents held in other litigation not to anticipate; to the alleged commercial success of the patent; to numerous piracies of infringers, rich and arrogant, as well as poor and humble. In my view, none of these matters have anything to do with the case before me. They are thrown in merely to give color. The plaintiff has set up a patent which, for present purposes, is admitted to be valid. It alleges that this defendant has, by sale within this district of certain heels which are before this court, infringed this admittedly valid patent. I cannot see how earlier patents, the proceedings in the Patent Office, the commercial career, successful or unsuccessful, of the plaintiff, or the piracies of other heel manufacturers, have anything to do with the question that this court must now decide.

[4-8] A patent is a contract; to that all agree. It should be construed as other contracts are construed. In construing any other contract than a patent, no lawyer or judge thinks of asking consideration of the confused mass of extraneous and impertinent material commonly inflicted upon courts in patent litigation. Plaintiff's counsel himself in his brief conceded that—

"* * * In such matters as considering the file wrapper and other preliminary proceedings courts have in patent cases drifted beyond any practice that should be tolerated in construing contracts. * * *"

The place, frequently the improper place, held by expert testimony in patent litigation, is admirably dealt with in the very recent opinion of the Court of Appeals for the Second Circuit; Judges Rogers, Manton, and Learned Hand affirming District Judge Augustus N. Hand in Kohn v. Eimer (C. C. A.) 265 Fed. 900. What seems to me the sound view is so much better said there than I can state it that I quote at some length:

"We have not the slightest wish to minimize the vital importance of expert testimony in patent suits, or to suggest that we are not absolutely dependent upon it within its proper scope; but that scope is often altogether misapprehended, as the appellant has misapprehended it here. Specifications are written to those skilled in the art, among whom judges are not. It therefore becomes necessary, when the terminology of the art is not comprehensible to a lay person, that so much of it as is used in the specifications should be translated into colloquial language; in short, that the judge should understand what the specifications say. This is the only permissible use of expert testimony which we recognize. When the judge has understood the specifications, he cannot avoid the responsibility of deciding himself all questions of infringement and anticipation, and the testimony of experts upon these issues is inevitably a burdensome impertinence.

"Now the question whether the judge needs the assistance of experts to understand the specifications is for him to decide. Doubtless he ought to be chary of assuming too readily that he does understand what he may not; but, if he is too confident, his mistake eventually transpires. The important point is that it is he who must determine when he needs the help of experts and

when he does not, and that decision, except in the clearest case, we should not be disposed to disturb. Waterman v. Shipman, supra, was written when no judges presided at the trial and when, therefore, there was no one to decide whether or not expert testimony was necessary. It has no application whatever since the new equity rules (198 Fed. xix, 115 C. C. A. xix), the whole purpose of which, in this regard, was to render suits in equity less oppressive to suitors by some control over the admission of evidence. One of the chiefest scandals of the old procedure was the interminable examination of experts, to extract their opinions upon the very issues which the courts alone could decide. The logomachy which resulted from the cross-examination of an expert by the opposing lawyer was arid beyond belief. No one read it, every one was annoyed by it, and some one paid for it.

"In the case at bar we see no reason whatever to differ from the learned District Judge in his conclusion that the specifications of all these patents speak a language comprehensible enough, without experts, for the disposal of the case. As this was all that he ought to have used it for in any event, we do not see how he could have done differently."

The present case seems to me emphatically one in which elementary and well-settled, but frequently disregarded, rules of construction should be applied. The principles I am endeavoring here to apply are illustrated in the following cases and excerpts:

In Denning Wire & Fence Co. v. American Steel & Wire Co., 169 Fed. 793, at 799, 95 C. C. A. 259, 265, the Court of Appeals for the Eighth Circuit said:

"A patent is a contract between the government and the patentee, whereby the latter is granted the exclusive right to make, use, and vend his invention for a specified time after which such right is to inure to the benefit of the public. Seymour v. Osborne, 11 Wall. 516–533, 20 L. Ed. 33. And the rule for the construction of contracts generally controls in its interpretation, and when its terms are plain and the intention of the parties clearly manifest therefrom, they must prevail."

This doctrine is again well stated in O'Brien-Worthen Co. v. Stemple, 209 Fed. 847, 852, 128 C. C. A. 53, 58:

"The specification and claims of a patent constitute a contract between the United States and the patentee, and they are to be read and construed together in the same way and by the same rules by which other contracts are interpreted. The specification which forms a part of the same petition or application as the claims must be read and interpreted with them, not for the purpose of limiting, or of contracting, or of expanding, the latter, but for the purpose of ascertaining from the entire agreement, of which each is a part, the actual intention of the parties."

In construing a patent, it sometimes seems to be overlooked that the public as well as the patentee has rights. See McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800, where the court said:

"The object of the patent law in requiring the patentee to 'particularly point out and distinctly claim the part, improvement or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them. The claim is the measure of his right to relief, and while the specification may be referred to to limit the claim, it can never be made available to expand it."

Compare, also, Evans v. Hall Co., 223 Fed. 539, 541, 139 C. C. A. 129, 131:

"The inventor can, of course, use any language he wishes in describing his invention and in stating his claims. Having done so, however, he must abide by the phraseology chosen. It is then too late to reconstruct his claims by adding to or subtracting from the language used. This rule may result in hardship in many cases *but a contrary rule would work a far greater injustice and would enable the patentee to hold as infringers those who have invested their capital in what they supposed, relying on the plain language of the patent, to be a perfectly legitimate business.* When the language of the claims of a patent is clear and distinct, the patentee is bound by it. Keystone Bridge Co. v. Phœnix Iron Co., 95 U. S. 274, 24 L. Ed. 344; Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235."

Another pertinent statement by the Supreme Court is found in Bates v. Coe, 98 U. S. 31, 25 L. Ed. 68:

"Accurate description of the invention is required by law for several important purposes: (1) That the government may know what is granted, and what will become public property when the term of the monopoly expires. (2) That licensed persons desiring to practice the invention may know during the term how to make, construct, and use the invention. (3) That other inventors may know what part of the field of invention is unoccupied."

See, also, the statement of Mr. Justice Miller in Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235, where, in 1876, he said:

"The growth of the patent system in the last quarter of a century in this country has reached a stage in its progress where the variety and magnitude of the interests involved require accuracy, precision, and care in the preparation of all the papers on which the patent is founded. It is no longer a scarcely recognized principle, struggling for a foothold, but it is an organized system, with well-settled rules, supporting itself at once by its utility, and by the wealth which it creates and commands. The developed and improved condition of the patent law, and of the principles which govern the exclusive rights conferred by it, leave no excuse for ambiguous language or vague descriptions. The public should not be deprived of rights supposed to belong to it, without being clearly told what it is that limits these rights. The genius of the inventor, constantly making improvements in existing patents—a process which gives to the patent system its greatest value—should not be restrained by vague and indefinite descriptions of claims in existing patents from the salutary and necessary right of improving on that which has already been invented. It seems to us that nothing can be more just and fair, both to the patentee and to the public, than that the former should understand, and correctly describe, just what he has invented, and for what he claims a patent."

The language of Mr. Justice Bradley in Keystone Br. Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344, is exactly applicable to the plaintiff's contentions in this case:

"When the terms of a claim in a patent are clear and distinct (as they always should be), the patentee, in a suit brought upon the patent, is bound by it. Merrill v. Yeomans, 94 U. S. 568. He can claim nothing beyond it. But the defendant may at all times, under proper pleadings, resort to prior use and the general history of the art to assail the validity of a patent or to restrain its construction. The door is then opened to the plaintiff to resort to the same kind of evidence in rebuttal; but he can never go beyond his claim. As patents are procured ex parte, the public is not bound by them, but the patentees are. And the latter cannot show that their invention is broader than the terms of their claim; or, if broader, they must be held to have surrendered the surplus to the public."

It is the plaintiff—the patentee—that in this case desires to go outside the patent in order to find support for its claim as to the scope

of its monopoly. The defendant here is content to concede that the plaintiff has the full extent of the monopoly that the language of the patent is reasonably capable of defining, and, so conceding, objects to expert or other extraneous evidence to extend its limits. Defendant contends that, in construing patents, the court should put itself, so far as possible, in the position that competent counsel are in when asked for advice by clients as to their rights and duties. It argues that such counsel, before advising as to the scope of a patent, is not required carefully to compare all earlier patents in the same general field, study in detail the proceedings in the Patent Office, and resort to expert advice as to simple structures and functions. It is conceded that, if proposing to attack the validity of the patent, such thorough study may be necessary. But when, as in this case, a defendant concedes the validity of the patent, and simply undertakes to construe it in order to avoid encroachment upon its field of conceded monopoly, it is argued that the patent must speak for itself; that otherwise we are in grave danger of disregarding the fundamentally important principle stated by the Supreme Court in McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800, quoted above, to wit:

"The object of the patent law, in requiring the patentee to 'particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery,' is not only to secure to him all to which he is entitled, but to apprise the public of what is still open to them."

This contention must prevail.

When we consider that a patent is nothing but a contract between the nation and the patentee, in the main couched in the patentee's own language, granting the inventor a monopoly, it is utterly inadmissible to extend this monopoly beyond the limits fairly defined by the inventor himself. What an inventor does not plainly claim he cannot have—unless we are to make patent construction a trap—a fraud upon the general public. Compare Keystone Br. Co. v. Phœnix Iron Co., 95 U. S. 274, 278, 24 L. Ed. 344; Railroad Co. v. Mellon, 104 U. S. 112, 118, 26 L. Ed. 639; Merrill v. Yeomans, 94 U. S. 568, 24 L. Ed. 235; Burns v. Meyer, 100 U. S. 671, 25 L. Ed. 738; Sargeant v. Hall, etc., Lock Co., 114 U. S. 63, 5 Sup. Ct. 1021, 29 L. Ed. 67.

[9, 10] I turn, now, to the patent in suit. The defendant is charged with infringing claims 5 to 9, inclusive. In the earlier part of the specification it is stated that the invention relates to an improvement in elastic lifts adapted for the ordinary heel. The patentee then describes the defects in the flat heels in common use, and states that he is aware that it has been proposed to use a cushion lift, having a concave upper face, but does not believe that any practical or satisfactory means has yet been discovered for attaching such lift permanently. He then points out that the common methods of attaching such concave lift by nails and screws, or by an imbedded plate, are defective, because the plate tends to flatten out and cut through the heel, and the nails and washers in a shoe are in a short time exposed by wear.

One stated object of his invention is therefore to provide a lift such that, when applied to a shoe heel, the edge portions will not project beyond the sides of the heel. Another is so to arrange the at-

taching devices that they will be relatively remote from the edge of the heel. Another is so to form the upper concave side of the cushion that, when the lift is subjected to pressure, any tendency of the edge portions to crowd beyond the sides will be counteracted, and there will be equally as great a tendency to crowd or compress toward the center thereof. This last result is alleged to be in part accomplished by forming separate and distinct suction areas. The invention further aims to construct the lift and the attaching means, so as not to destroy or impair the suction action resulting upon the use of a lift having a concave upper surface, which, as already noted, the specification points out as not being new.

The specification then describes a new method of fastening through washers buried in the heel and so arranged as to hold down the center of the concavo-convex heel, without leaking and thus destroying the suction incident to such concave type of heel.

I agree with defendant's counsel that the specification indicates that the inventor regarded his invention as mainly related to the attaching means and the independent suction areas. He plainly recognizes that concave heels had been previously used, but, as he alleges, not with entire satisfaction, because of the ill-adapted means of attachment. His main conception, as he describes it, is an improved fastening device. None of the claims for covering or fastening devices are here in suit. It is necessary to refer to them only to view the whole patent in proper perspective.

After describing the advantages of the new fastening devices, among which are that the suction accruing from the use of a concave lift will not be destroyed, the specification goes on to refer to the drawings, as to which it is stated:

"It will be seen that the concave upper face of the lift lies entirely below a plane passing through the rear upper edge and breast corners of the lift, whereby to cause the entire margin of said lift to exert a uniform pressure on the heel of a shoe, when the lift is positioned on the heel and the convex face thereof depressed to flatten said lift. In other words, owing to the curvature of the concave attaching face of the lift, the rear upper edge and breast corners of said concave attaching face are disposed in a plane above the upper side edges and the breast edges of the lift."

The drawings conform very closely to this description.

After a further description of the separate suction areas, come the claims, of which now material are 5–9, as follows:

"5. A heel lift of substantially nonmetallic resilient material having its body portion of concavo-convex form on every line of cross-section, the concave upper face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift.

"6. A heel lift of substantially resilient material, having its body portion of concavo-convex form on every line of cross-section, the concave upper face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, said lift being provided with nail receiving openings located near the center thereof.

"7. A heel lift of substantially resilient material, comprising a body portion, the attaching face of which is concave and the tread face of which is convex on every line of cross-section, and normally held in such form by its own inherent resiliency, the concave attaching face lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, whereby

to cause the entire margin of said lift to exert a uniform pressure on the heel of a shoe when said lift is positioned on the heel and the convex tread face thereof depressed to flatten said lift.

"8. A heel lift of resilient material, comprising a body portion of uniform thickness throughout its entire area and of concavo-convex form on every line of cross-section, the concave upper face of the lift lying entirely below a plane passing through the upper edge and the breast corners of said lift.

"9. A heel lift of resilient material, comprising a body portion, the attaching face of which is concave and the tread face of which is convex, the concave face of the lift being unbroken and lying entirely below a plane passing through the rear upper edge and the breast corners of the lift, whereby when the convex tread face is depressed to flatten said lift a suction will be created between the lift and the heel, to hold the attaching face of the lift throughout its entire extent in contact with the exposed face of the heel."

In every one of these five claims the upper face is referred to as "lying entirely below a plane passing through the rear upper edge and the breast corners of the lift." The repeated word "entirely" has significance.

Claim 10 is as follows:

"10. A heel lift of substantially resilient material, comprising a body portion, the attaching face of which is concave and the tread face convex on every line of cross-section, the rear upper edge and breast corners of the concave attaching face of the lift being disposed in a plane above the upper side and breast edges of said concave attaching face."

In this claim the plane which runs through the rear upper edge and breast corners (the same three points) is referred to as a "plane *above* the upper side and breast edges of said concave attaching face." This describes in reverse order the same relation of the plane to the three points. The specification, the drawings, and this language in the six claims, 5 to 10, inclusive, all seem to me to show that the plaintiff's conception was that of a heel, concavo-convex, which, when laid down upon a plane surface touches only at the rear and two breast corners —referred to in some of the cases as the "three-point contact heel." This heel, when pressed down upon a plane surface, adheres by suction.

Reading, as I must, the specification, claims, and drawing together, not for the purpose of enlarging or narrowing the scope of the claims, but for the purpose of determining what the patentee meant by the language used, my mind is forced to conclude that this shape-defining language concerning the concave upper face "lying *entirely* below a plane passing through the rear upper edge and breast corners" is of the very essence of the invention, so far as shape and not attaching devices is concerned. In my view, the patentee regarded the three-point contact shaped heel as the shape and structure of a heel which would effect the new and advantageous functional purposes he was seeking to achieve. Eight times in identical or equivalent words the patentee says this concave surface is *entirely* below the three points. He must be held to have meant what he said.

It therefore seems to me clear that, so far as these claims in suit are concerned, no heel having along the sides and rear a straight edge —all in one plane—can be held an infringement of the plaintiff's patent.

Now, the defendant's heel is a straight-edged heel. Other very substantial differences between it and the plaintiff's heel need not I think, be discussed. But the defendant's heel, when laid upon a plane surface, touches, not at three points, but at all points except between the breast corners; there it is curved. Otherwise stated, it is scoop-shaped, or nearly scoop-shaped. It is not spherical-shaped. If and in so far as the suction test has any bearing upon the questions involved, the defendant's heel does not, at least when tested by or before me by suction, adhere to a plane surface when pressed down. I doubt the value of this test; but it has been referred to in other litigation, and, if it is a ground of distinction, the distinction seems to exist. It certainly is of a shape very different from the patentee's heel. Pressure exerted when it is attached causes it to function differently from the heel of the patent.

In effect, plaintiff's counsel admits that the defendant's heels do not infringe the Tufford patent, unless that patent is to be construed as broad enough to cover heels with edges straight, except between the two breast corners. In that aspect, the essence of the present question is merely one of construction of the patent. It is not seriously contended that expert or other extraneous testimony, directed simply to the question of infringement, as distinguished from the question of the proper construction of the plaintiff's patent, is admissible. In other words, the plaintiff's contentions are: (1) The Tufford patent, as it reads, may be construed as broad enough to cover the defendant's admittedly straight-edge heels; and (2) that, if this is not so, expert testimony, proceedings in the Patent Office, and the prior art should be admitted to extend by construction the scope and effect of the plaintiff's patent, so as to cover defendant's straight-edge heels.

In this patent there is no terminology or phraseology of an art not comprehensible to a lay person, which needs to be translated into colloquial language in order to be fully comprehended. Compare Kohn v. Eimer, supra. All the terms used are plain and simple.

In my view, in such a case, to admit expert testimony or other extraneous evidence would be error. I cannot believe it admissible, even as matter of judicial discretion. But, even if admissible as matter of discretion, it seems to me impossible to hold it error for a trial court to say he needs not the assistance of experts in order to understand the language of the patent, and therefore to exclude it. See Kohn v. Eimer (C. C. A.) 265 Fed. 900. This is not, however, saying that the question of infringement of this patent, properly construed under settled rules of law, is not, in the language of Judge Taft in American Fiber Chamois Co. v. Buckskin Fiber Co., 72 Fed. 508, 511, 18 C. C. A. 662, 665, a question the result of which is "so palpable that it is impossible that evidence of any kind could show the fact to be otherwise."

If, therefore, it be held that the gist of the case is the question of infringement—always a question of fact (Walker, Patents, § 339)—the result is the same; the record as it stands is complete, and shows that there was no infringement in this district.

[11, 12] Plaintiff's counsel also contends that this motion should be

denied, as inconsistent with an alleged vast mass of judicial opinion elsewhere expressed concerning this patent. But, on analysis, there is no such mass of inconsistent judicial opinion as plaintiff's counsel asserts. Most of the discussion concerning the Tufford patent has been on the question of its validity, and its relation in that aspect to the prior art and to earlier patents. With those controversies this court has nothing to do. The patent is here admitted to be valid. None of the distinctions made in these opinions between it and earlier patents have any possible application to the question before me, except so far as, if at all, they bear upon the construction of the patent. Compare United States Rubber Co. v. I. T. S. Rubber Co., 260 Fed. 947, 171 C. C. A. 589; Fetzer & Spies Leather Co. v. I. T. S. Rubber Co., 260 Fed. 939, 171 C. C. A. 581; Elyria Co. v. I. T. S. Rubber Co. (C. C. A.) 263 Fed. 979; Tee Pee Rubber Co., Inc., v. I. T. S. Rubber Co., 268 Fed. 250, a decision by the Circuit Court of Appeals for the Sixth Circuit, July 15, 1920; I. T. S. Rubber Co. v. United Lace & Braid Mfg. Co. (D. C.) 266 Fed. 375, a decision by Judge Brown, dated June 11, 1920. See, also, I. T. S. Rubber Co. v. Panther Rubber Mfg. Co., 260 Fed. 934, 171 C. C. A. 576, in which the patent for molding the Tufford heels was before the Court of Appeals for this circuit.

In all these cases the issues were in essence different from that which is now before the court. In Judge Westenhaver's opinion, printed in 260 Fed. 941 et seq., dealing mainly with the validity of the patent, I find nothing whatever inconsistent with the views I have formed and expressed. Moreover, if the opinion of the Court of Appeals in the Sixth Circuit, reversing Judge Westenhaver's in Tee Pee Rubber Co. v. I. T. S. Rubber Co., 268 Fed. 250, decided July 15, 1920, has any bearing at all on the present litigation, it makes in favor of the defendant, and not in support of the plaintiff's contentions.

But in the per curiam opinion of the Sixth Circuit in United States Rubber Co. v. I. T. S. Rubber Co., 260 Fed. 947, 171 C. C. A. 589, views are expressed to the effect that the upper edges of the lift are not a part of the face, and that therefore these edges need not be "entirely below a plane passing through the rear upper edge and the breast corners of the lift." Judge Brown disagrees with the reasoning of the court in the Sixth Circuit, but seems to reach the same result.

With great deference to the opinions of both courts, I cannot bring my mind to accord on this particular point. As I understand it, an edge is a line where two surfaces meet. A line has length, but no breadth and thickness. If the concave upper surface lies "entirely below the plane passing through" the three points, the line where that surface ends seems to me necessarily to fall below the same plane. Otherwise the edge would be a theoretical series of positions projected through empty space. I cannot understand how an edge can be anything but the edge of a surface. If the surface is "entirely" below points, the edge must also be all below the same points; otherwise, the edge would not be the terminus of the surface; it would be beyond it. At any rate, whether I am right or wrong, I cannot view it differently. This I regret, for I regard comity, which is closely related to highly

desirable uniformity of decision, as a very important principle in the administration of the law. See Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 488, 20 Sup. Ct. 708, 710 (44 L. Ed. 856). In that case the court said:

"Comity persuades; but it does not command. It declares not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts."

Compare, also, Baldwin Co. v. Abercrombie & Fitch Co. (D. C.) 227 Fed. 455; Abercrombie & Fitch Co. v. Baldwin Co., 245 U. S. 198, 38 Sup. Ct. 104, 62 L. Ed. 240.

[13] Two other points call for brief consideration. The plaintiff's counsel contends that under the doctrine of equivalents plaintiff's patent covers straight-edge heels as well as curved edge heels, citing as his chief reliance Winans v. Denmead, 15 How. 330, 14 L. Ed. 717, and Reece Button-Hole Co. v. Globe Button-Hole Co., 61 Fed. 958, 10 C. C. A. 194.

I can find no real analogy between either of these decisions and the case at bar. The Winans Case involved a patent on a coal car made in the form of the frustrum of a cone. The alleged infringing car was octagonal, but in all other respects plainly involved the essence of the plaintiff's invention. A bare majority of the court held the question of infringement to be one of fact for the jury, saying:

"Where form and substance are inseparable, it is enough to look at the form only. Where they are separable; where the whole substance of the invention may be copied in a different form, it is the duty of courts and juries to look through the form for the substance of the invention—for that which entitled the inventor to his patent, and which the patent was designed to secure; where that is found, there is an infringement; and it is not a defence, that it is embodied in a form not described, and in terms claimed by the patentee."

As I construe the patent in this case, form and substance are inseparable. As already indicated, I cannot read the patent, with its repeated assertions that the concave upper face must lie "entirely below a plane passing through" the three points, in connection with the specification and the drawings, without regarding that form as of the very essence of the improved function that the patentee contended his improved heel performed. It hardly need be pointed out that the doctrine stated in these two cases has been pretty carefully limited by the courts in other cases. Compare McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800; State Bank of Chicago v. Hillman, 180 Fed. 732, 736, 104 C. C. A. 98; Long v. Pope Mfg. Co., 75 Fed. 835, 839, 21 C. C. A. 533.

[14] Nor is this a case to which the doctrine invoked by the plaintiff's counsel that "a patent should be construed, when it can be so con-

strued, to cover the entire inventive thought of the patentee" has any proper application. See American Shoe Co. v. Hoadley (D. C.) 222 Fed. 327; same case on appeal (C. C. A.) 227 Fed. 90. Compare Malignani v. Jaspar Marsh Co. (C. C.) 180 Fed. 442. The construction here adopted does not "strike down the plaintiff's patent." It leaves it vital, operative, commercially valuable for all purposes fairly covered by the patentee's own language. What the plaintiff is really attempting to do is to extend its field of monopoly by unwarranted construction into a field which the language of the patent itself shows was in the prior art, and which the plaintiff did not by his patent even claim. He seeks to get much more than his "entire inventive thought."

Indeed, if the straight-edged heel is the equivalent of the curved-edge heel, it is very difficult to see what limit is to be placed on the plaintiff's claim of monopoly. Where does it stop? What heel manufacturer is safe, however inferior such manufacturer's product may be? At any rate, as I consider the argument and brief of plaintiff's learned counsel, I am utterly unable to form any judgment as to what limit he sets upon his client's claim of monopoly in the field of resilient heels having any approximation to the concavo-convex form. His contention that straight-edge heels are in patent law the equivalent of curved-edge heels drives him to the extraordinary proposition that "after all, a straight line is an arc of a circle whose center is at infinity." We are not now dealing with infinity, but with a very finite, simple, practical thing—the heel of a shoe.

His doctrine would make a patent an undefined and indefinable monopoly. No layman or lawyer, reading it, could form any reasonably safe and intelligent concept of its scope and meaning.

[15, 16] Finally, the plaintiff's counsel contends that the defendant here is estopped from denying infringement because it is alleged to have participated in certain litigation in the Sixth Circuit, involving the validity and infringement of the patent, in which "default decrees" were entered. Assuming that the present defendant participated in suits brought in other districts against its jobbers, and in that litigation advised its jobbers to submit to decrees pro confesso, and that the defendant paid the damages or profits, but did not actually participate in any trial of the case on the merits as to infringement, there is, as I understand the law, no estoppel. Of course, if the defendant here had actually made a defense in another court, the final decree in that court would be res adjudicata here; but I know of no case in which a so-called default decree has been held to be an estoppel to strangers to the record. Compare Stromberg Motor Device v. Zenith Carbureter Co. (D. C.) 220 Fed. 154; Westinghouse Co. v. Jefferson Co. (C. C.) 128 Fed. 751.

[17] That the defendant might have had its day in court elsewhere on the question of infringement is immaterial. The fact that in the other litigation it was neither made a party defendant, nor chose, by assuming with the assent of the real defendant, to take control of the litigation and to try the merits, in my view concludes the matter.

The result is that the motion must be granted, and, for want of jurisdiction, the bill dismissed.

THE JANE PALMER. THE SINGLETON PALMER. FRANCE & CANADA S. S. CORPORATION v. FRENCH REPUBLIC.

(District Court, S. D. New York. December 28, 1920.)

1. **Admiralty ⇐36—Affirmative relief cannot be awarded on answer.**
In admiralty, a decree awarding affirmative relief in favor of a claimant or respondent cannot be made in the original suit; but the answer can go only so far as may reduce or completely set off the award in favor of libelant.

2. **Admiralty ⇐36—Set-off must arise out of same transaction.**
In a suit in rem for damage to cargo, a claim for detention of the vessel by libelant, after discharge on completion of the voyage cannot be made the subject of a set-off or counterclaim, although arising out of the same contract of affreightment.

3. **International law ⇐10—Sovereign nation as litigant subject to law and rules of court.**
A sovereign, which comes into an admiralty court of the United States, does so subject to the substantive law and the procedure of such court, and since it could not avail itself of an arbitration clause in a contract to oust the jurisdiction of the court, neither can such a clause be availed of against it.

In Admiralty. Suits by the French Republic against the schooner Jane Palmer and against the schooner Singleton Palmer; the France & Canada Steamship Corporation, claimant and cross-libelant. On exceptions to answer and cross-libel. Exceptions sustained.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (William H. McGrann, of New York City, of counsel), for libelant.

Patterson, Eagle, Greenough & Day, of New York City (J. Culbert Palmer and C. D. Francis, both of New York City, of counsel), for claimant and cross-libelant.

MAYER, District Judge. The libel in the first cause of the title is in rem and alleges that on or about April 16, 1917, there were shipped on board the schooner Jane Palmer 956 bales of bleached cotton linters, the property of libelant, in good order, to be carried to St. Nazaire, France, and there to be delivered to libelant in like good order, in consideration of an agreed rate of freight, and under the bill of lading issued by the agent of the Jane Palmer after the shipment had been placed on board; that during May, 1917, the Jane Palmer arrived at St. Nazaire and there made delivery of the goods in a damaged condition, due to the negligence (in certain respects set forth) of the Jane Palmer; that by reason of the premises libelant sustained damages in the sum of $54,482.02.

The answer denies the essential allegations of the libel, and alleges inter alia that, after the Jane Palmer arrived at St. Nazaire, libelant delayed the discharge of the cotton for 48 days, but that libelant has paid claimant demurrage for the delay. Up to this point it appears that the voyage upon which it is alleged libelant's goods were damaged had ended. The controversy thus far is solely with respect to damage to cargo on a particular voyage.

For a cross-libel, counterclaim, and set-off claimant alleges, inter alia, that about April 5, 1917, claimant entered into a contract of affreightment with libelant, which included a bill of lading therein specified (said contract being marked Exhibit A), whereby libelant agreed to furnish, to be transported from United States ports to French ports, a total of 100,000 tons of certain commodities, which claimant agreed to ship within a period specified on sailing vessels which flew the American flag, and claimant agreed to deliver the commodities to libelant in France. One of the provisions of the contract, Exhibit A, is as follows:

"The War Administration [libelant] agrees to assume the war risk on vessels engaged in the transportation of this merchandise by the France & Canada Steamship Corporation. The value of vessels will be calculated at the rate of £10—0–0 (sterling) per ton dead weight."

Reference is then made to seven schooners belonging to claimant, one of which was the Jane Palmer, and all of which were engaged in transporting merchandise to France under the contract. It is then alleged that libelant in connection with the prosecution of the war—

"detained and compelled said vessels to remain at said French ports for the periods hereinafter specified, waiting for libelant's war vessels to convey them out to sea and protect them from damage, destruction or capture by Germany or her allies."

The Jane Palmer was compelled by libelant to remain in the outer roads at St. Nazaire from July 6, 1917, to July 21, 1917, and the damage for this delay was $11,277.18. It will be noted that the discharge of the cargo of the Jane Palmer was completed some time on July 5th, i. e., 48 days from May 18th, while the delay in starting the voyage back to the United States did not begin until July 6, 1917. In other words, the damage for the delay complained of arose out of a voyage intended to be undertaken after the completion of the voyage on which libelant's merchandise is said to have been damaged.

Libelant then sets forth damage of the same kind for periods specified in respect of the delay of the other six schooners. The total claimed for the damage for delay in regard to the seven schooners is the sum of $133,972.93. The theory of this part of the pleading is that libelant breached that part of the contract quoted supra.

The same facts are then repeated and the same amount is claimed, upon the theory that libelant in and by its contract, Exhibit A, as an implied term thereof, gave claimant the right to send its vessels engaged in transporting the merchandise to and bring them from the French ports whenever the vessels were ready and able to sail, and that libelant, in violation of its agreement, detained and compelled the vessels in question to remain at the French ports for the periods set forth.

As a further answer, claimant refers to article XIII of the contract, Exhibit A, reading:

"All disputes relative to execution of present contract must be submitted to the arbitrage of the Chamber of Commerce of New York."

Claimant alleges that it was and is willing and has offered to submit its claim of $133,972.33 and libelant's claim for damage to the car-

go in accordance with the arbitration provision above quoted, but that libelant has refused and still refuses to submit these claims to arbitration, as provided by the contract.

The libel and answer in respect of the Singleton Palmer are the same in regard to theory and differ only in details. The damage in respect of the Singleton Palmer is put at $22,659.97. The voyage on which the cargo was damaged and the voyage which was delayed by failure to furnish convoys bear a similar relation as those in the case of the Jane Palmer.

[1] It is, of course, well settled that in admiralty a decree awarding affirmative relief in favor of a claimant or respondent, as the case may be, cannot be made in the original action. The answer can go only so far as may reduce or completely set off the award in favor of libelant. This principle is too well known to need citation. The question, then, is whether the facts alleged in the answer constitute any set-off whatever.

Libelant's position is that the actions are in rem, founded on a maritime lien on the specific vessels arising out of the ordinary relationship of ship and cargo, and libelant has not pleaded the contract between the parties. Claimant, however, has pleaded the contract and insists that all questions arising under the contract and, in any event, growing out of the voyage of the vessels employed to carry out the contract, arise out of the same transaction. It may well be that the contention of libelant is too narrow, and that by simply avoiding the setting up of the contract it could not prevent a set-off which arose out of the same transaction.

[2] The mere fact, however, that there are breaches of the same contract, occurring unrelated to the cause of action alleged, does not ipso facto characterize such breaches as arising out of the same transaction. It must be remembered that, in the admiralty, set-off is confined within a restricted scope. The more liberal expansion in respect of counterclaim and set-off in equity (equity rule 30, 201 Fed. v, 118 C. C. A. v) at common law and by statute has not developed in the admiralty, either by statute or rule, or by the decision of courts, and the law, in this regard, is where Mr. Justice Story left it in Willard v. Dorr, 3 Mason, 161, 29 Fed. Cas. 1277, No. 17,680 (1823).

There is some language in some of the cases which, if read irrespective of the context, might suggest that any claim arising out of the same contract might be pleaded by way of set-off or might be pleaded in a cross-libel. Thus, in The Highland Light (D. C.) 88 Fed. 296, the language is used:

> "Any cause of action in favor of a party called upon to defend against the original libel founded upon the same contract, or arising out of the same transaction, is a counterclaim, which may be set up by the cross-libel."

In that case, and in the long list of cases cited by both sides in the controversy at bar, analysis will show that, wherever a state of facts is considered upon the question of set-off, the facts, in order to constitute a set-off, must arise clearly out of the same transaction, and that an independent cause of action which springs into existence because of

a breach of the contract in some entirely different respect does not constitute the proper subject-matter of a set-off.

In the case at bar, the damage due to the detention of the Jane Palmer and the other vessels was in no way related to the transaction concerned in the voyage upon which it is alleged that libelant's cargo was damaged. This alleged damage was due to a state of facts entirely separate and distinct from those concerned with the damage to the cargo complained of. I have carefully examined the cases, and I am unable to find any case which, in principle, justifies the set-off here sought to be interposed, or which justifies a departure from the well-settled principles of admiralty law in this regard.

The exceptions, therefore, so far as relate to this subject-matter of the answers, are sustained.

In respect of the cross-libel a motion is made by the cross-libelant for security under admiralty rule 53 (29 Sup. Ct. xliv). Cross-respondent has excepted on various grounds, including the ground that the cross-libel fails to set forth facts constituting a cause of action. In view of the conclusion just stated in respect of the allegations of the answer, the same principle will apply to the cross-libel, and the exception in that regard is sustained. The Dove, 91 U. S. 381, at page 385, 23 L. Ed. 354; Bowker v. United States, 186 U. S. 135, at page 140, 141, 22 Sup. Ct. 802, 45 L. Ed. 1090; 1 C. J. 1322.

This determination renders academic a discussion of the question of sovereignty, as well as a discussion of the question as to whether cross-respondent has waived its special appearance and is to be regarded as having appeared generally.

[3] There remains for consideration only the matter of the arbitration clause. In regard to this clause, claimant advances an interesting contention. The law as stated in Aktieselskabet Korn-Og Foderstof Kompagniet v. Rederiaktiebolaget Atlanten, 250 Fed. 935, 163 C. C. A. 185, and The Eros, 251 Fed. 45, 163 C. C. A. 295, is not questioned, but claimant argues as follows:

> "In this case the French Republic, being a sovereign nation, was immune from suit without its own consent. The French Republic has the right to bring suit against the France & Canada Steamship Corporation in this jurisdiction to adjudicate its claims; but, as the French Republic has agreed to arbitrate any claim which the France & Canada Steamship Corporation might have against it arising out of the contract, and as the courts admittedly have no jurisdiction to adjudicate any claim of the France & Canada Steamship Corporation against the French Republic without its own consent, the courts are not ousted of jurisdiction, because they never had jurisdiction. Consequently, it is submitted that, the reason of the rule failing, the rule itself fails."

The answer to this contention is that a sovereign friendly power has no more right to oust the court of jurisdiction than has a private party. If such a sovereign power seeks our courts, it must comply with our substantive law and our procedure and it is protected only to the extent of the immunity discussed in Kingdom of Roumania v. Guaranty Trust Co., 250 Fed. 341, 162 C. C. A. 411. It must, for instance, give security for costs. Honduras v. Soto, 112 N. Y. 310, 19 N. E. 845, 2 L. R. A. 642, 8 Am. St. Rep. 744. It could not raise the point

against a set-off, otherwise appropriate, which might be pleaded against it, and therefore the arbitration clause cannot be availed of by or against it to oust our courts of jurisdiction.

This exception is therefore sustained.

Orders in conformity with this opinion may be submitted on three days' notice.

UNITED STATES v. SLOAN SHIPYARDS CORPORATION et al.

(District Court, W. D. Washington, N. D. December 7, 1920.)

No. 218–E.

1. **Receivers ⟸3—Appointed only as ancillary to other relief.**
   The federal court cannot appoint a receiver unless some final relief in equity is prayed which justifies it in proceeding, since a receivership cannot be considered final relief, but is merely an agency by which the court may administer assets with relation to the general relief.
2. **Receivers ⟸3—Not appointed at suit of contract creditor claiming no lien.**
   A receiver cannot be appointed by a federal court at the instance of a simple contract creditor to take possession of property on which the creditor claims no lien, where the defendants do not consent to, but challenge, the court's jurisdiction.
3. **Pleading ⟸72—Relief demanded determined from prayer.**
   Under Rem. Code Wash. 1915, § 258, the relief demanded is gauged by the prayer which gives the defendants information as to the judgment demanded if default is made so they may be able to decide whether or not to defend.
4. **Receivers ⟸4—Cannot assume jurisdiction over action on simple contract.**
   A complaint in an action styled a suit in equity which alleged a contract between parties and its breach by defendants, and made no claim to lien on the property of defendants, is an action at common law upon simple contract in which the court has no jurisdiction to appoint a receiver to seize the property and sell it and distribute the proceeds.

In Equity. Suit by the United States against the Sloan Shipyards Corporation and others. On motion of three of the four defendants to dismiss the complaint. Motion granted, unless plaintiff asks leave to amend the complaint.

See, also, 268 Fed. 624.

Robert C. Saunders, U. S. Atty., of Seattle, Wash.

Kerr, McCord & Ivey, of Seattle, Wash., for defendants.

NETERER, District Judge. This is an action commenced by the plaintiff against the defendants, alleging corporate relations of the three several defendants with the principal place of business respectively at Seattle and Olympia and the corporate capacity of the United States Shipping Board Emergency Fleet Corporation. It is denominated "a suit in equity." It alleges, in substance, that the defendant United States Shipping Board Emergency Fleet Corporation, the capital stock of which is owned by plaintiff, was the agent of the plain-

tiff, and on the 18th day of May, 1917, entered into a contract with the defendant Sloan Shipyards Corporation for the construction of 16 wooden ships, giving consideration and terms of payment; that certain payments were made under the said contract, and the defendant diverted $1,000,000 of said payment, and on the 1st of December, 1917, the said defendant was without funds with which to carry on the work under said contract; that on the 1st of May, 1918, a contract was entered into between the plaintiff, acting through the Shipping Board, and the defendant Sloan Shipyards Corporation, by the terms of which the price for the construction of ships was increased and entered into a new plan for payment. It alleges that the Sloan Shipyards Corporation was the owner of the Anacortes Shipbuilding Company, and also of the Capital City Iron Works, that there was advanced by the Sloan Shipyards Corporation to the Anacortes Shipbuilding Company and to the Capital City Iron Works certain sums of money, and that said companies were indebted to the Sloan Shipyards Corporation in such amounts. Various transactions alleged between the Sloan Shipyards Corporation and the Clinchfield Navigation Company, with whom the Sloan Shipyards Corporation had a contract for the construction of four motorships, which contract was canceled by mutual agreement upon payment of certain monetary considerations. It is alleged by the terms of the supplemental contract of May 1, 1918, the Sloan Shipyards Corporation assigned to the plaintiff all its rights, title, and interest in and to all money thereafter becoming due to the Sloan Shipyards Corporation on account of Clinchfield Navigation Company, ships and moneys held in escrow under such arrangement, the contract of which was held by R. M. Calkins, and that it was agreed that "until the completion, delivery, and acceptance of all the vessels being constructed under said original contract all of the money of the defendant Sloan Shipyards Corporation then on hand or thereafter received, or accruing to it under or on account of said contract of May 1, 1918, the said original contract of May 18, 1917, the said Calkins contract, or otherwise, and all moneys assigned to the plaintiff, * * * shall be placed in a special account, and shall be subject to be withdrawn as the plaintiff may provide, and that the plaintiff would from time to time advance to the credit of said special account such sums of money as might be necessary to meet the expense of constructing the Calkins ships, the ships to be constructed for the plaintiff under said original contract of May 18, 1917, and such plant improvements as might be approved by the plaintiff, and the sum of $25,000 to be used for the purchase of all of the outstanding capital stock of the Anacortes Shipbuilding Company when held by others than the defendant the Sloan Shipyards Corporation, and for the purchase of all claims against the Anacortes Shipbuilding Company owned and held by others than the said defendant, provided that the plaintiff would not be obliged to advance in excess of $200,000 more than the amount thereafter received under the Calkins contract for the construction of Calkins ships, and for all other purposes an amount not to exceed the full contract price of the ships to be built for the plaintiff, and that the

total of all unexpended balance of such special account and of all property purchased with moneys withdrawn from said special account and not covered by the mortgage provided for in said contract shall at all times be in the plaintiff until the completion, delivery, and acceptance of all the vessels under such shipbuilding contract," that by the terms of said supplemental contract the Sloan Shipyards Corporation executed and delivered to the plaintiff "its bond in the penal sum of $1,000,000, secured by mortgage and assigned to the plaintiff certain bonds of the Wisconsin Timber Company of the par value of $100,000 then and now held by the Scandanavian National Bank of Seattle, and that the said Wisconsin Timber Company bonds were held by the plaintiff, and that said bonds and mortgage be conditioned to secure the performance of said original contract of May 18, 1917, and repayments of any moneys advanced for the construction of Calkins ships in excess of the sums thereafter received as payment under said Calkins contract and to secure the repayment of any moneys advanced by the plaintiff to said defendant," and for all damages for delay, if any, and that such mortgage should constitute a first lien upon the property which is set out. It is alleged that such bond was executed by the Sloan Shipyards Corporation, the Capital City Iron Works, and Anacortes Shipbuilding Company, delivered to the plaintiff; that the plaintiff is owner and holder thereof; and that all of said defendants executed the mortgage covering specific property belonging to the several corporations, each being thereunto duly authorized. It is alleged that the defendant Anacortes Shipbuilding Company is indebted to the Sloan Shipyards Corporation in the sum of $1,148,464.11; that the Capital City Iron Works is indebted to the Sloan Shipyards Corporation in the sum of $160,546.90; that neither of said last-named corporations have other creditors; that the plaintiff paid to the defendant Sloan Shipyards Corporation, by advancing funds and furnishing materials, etc., $11,010,155.51; that the defendant is entitled to credits for completed ships, $3,300,000; for compensation for work done upon six ships under contract discontinued, $2,933,097.43; for credit on four ships under contract discontinued, $1,185,318.96; for extras, materials, overhead expenses, credit of $621,400.14—total credit $8,039,816.53, leaving a balance due of $2,970,338.98. It is further alleged that since the 8th of December, 1917, the defendants Sloan Shipyards Corporation, Anacortes Shipbuilding Company, and Capital City Iron Works have been under the same financial management and the funds "handled" through the same special account; "that none of said three defendants have now any money with which to transact business, and that the expense of protecting the property of said defendants has now and for several months past has been advanced by the plaintiff"; that all works under contract have been discontinued, and the plants have been idle for "several months"; that "said defendants have ceased to function as going concerns"; that the physical property of the Sloan Shipyards Corporation consists of Shipyard plant equipment, office furniture and equipment, machinery, and small tools of the present market value of $71,149.79, and lumber and other ma-

terial, $222,225.46; that said property is located at the city of Olympia "In a shipyard built upon piling over flooded lands"; that "the piling is deteriorating and such property will not long remain out of water," and upon property not owned by the defendant, and the lease to the same has expired; that the physical property of the Anacortes Shipbuilding Company consists of shipyards, including lands, buildings, shipyards, plant equipment, office furniture, and machinery located at Anacortes, Wash., valued at $57,528.56, and lumber and material worth $36,042.95; that the Capital City Iron Works has assets not in excess of $108,769.42; that defendants are insolvent.

It is stated "that it is necessary and desirable in the interest of all of the creditors of the corporation that a receiver shall be appointed to take charge of the property and assets of the defendants Sloan Shipyards Corporation, Anacortes Shipbuilding Company, and Capital City Iron Works, and to dispose of their assets and their property for the benefit of creditors and all persons interested therein." Prayer is made "that this court may appoint a receiver or receivers of all the property and assets of the defendants, * * * with full power and authority to collect, recover and receive and get in all the same and dispose of said assets and property and distribute the same among creditors under the direction of this honorable court."

The defendants, except the Shipping Board, jointly move to dismiss for the reason: First, that the complaint does not set forth facts sufficient to constitute a cause of action; second, that the plaintiff is not a proper party to the said action, and that there is a misjoinder of parties plaintiff; third, that the court is without power or jurisdiction to appoint a receiver in the above-entitled action; fourth, that there is a misjoinder of parties defendant.

The defendant United States Shipping Board Emergency Fleet Corporation appears "and admits each and every allegation of fact in said bill alleged."

The plaintiff relies upon subsections 5 and 6, § 741, Codes of Washington, which provides for the appointment of receivers "when a corporation * * * is in imminent danger of insolvency, * * *" and "in such other cases as * * * in the discretion of the court, it may be necessary to secure ample justice to the parties," and upon Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, in which it is contended the Supreme Court held that federal courts will enforce new equitable rights created by said statutes, provided such enforcement does not impair any right conferred or conflict with any inhibition imposed by the Constitution or laws of the United States.

[1] The defendants, except the Shipping Board, contend that the plaintiff, if it has any right, it is predicated upon a simple contract claim upon which the defendants are entitled to a jury trial under the Seventh Amendment to the Constitution, which declares that "in suits at common law where the value in controversy shall exceed $20.00, the right of trial by jury shall be preserved," and further contend that no relief is prayed other than the distribution of the property, and that the receivership can only be ancillary to the main relief sought, and, no general relief being prayed, the court is powerless to grant the relief

asked. Undoubtedly in the federal court, to justify the appointment of a receiver, some final relief in equity must be prayed which will justify the court in proceeding. A receivership cannot be considered final relief. It is merely an agency by which the court may reach out and administer assets having relation to the general relief. Zuber v. Micmac Gold M. Co. (C. C.) 180 Fed. 625.

[2] The receivership applied for in this case is the main object of the suit, and is not ancillary to relief prayed for in the complaint. A judgment for a definite sum is not demanded. No sum is ascertained. The plaintiff is a single contract creditor. The defendants do not consent, but challenge the court's jurisdiction. Under such circumstances a federal court will not appoint a receiver. Leary v. Columbia River & P. S. Nav. Co. et al. (C. C.) 82 Fed. 775. A federal court has no jurisdiction at the instance of a simple contract creditor whose claim has not been reduced to judgment to appoint a receiver for property on which he asserts no specific lien. Maxwell et al. v. McDaniels, 184 Fed. 311, 106 C. C. A. 453; Davidson-Wesson Imp. Co. v. Parlin et al., 141 Fed. 37, 72 C. C. A. 525; Peacock, Hunt & West v. Williams et al. (C. C.) 110 Fed. 917; Viquesney et al. v. Allen, 131 Fed. 21, 65 C. C. A. 259.

The Supreme Court, in Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113, held that a simple contract creditor of a corporation whose claim has not been reduced to judgment, and who has no express lien upon its property, has no standing in a federal court of equity to obtain the seizure of the debtors property through a receiver and its application to the payment of such debt. In this case, at page 379 of 150 U. S., at page 128 of 14 Sup. Ct. (37 L. Ed. 1113), the court says:

"It is the settled law of this court that such creditors cannot come into a court of equity to obtain a seizure of the property of their debtor, and its application to the satisfaction of their claims; and this notwithstanding a statute of the state may authorize such a proceeding in the courts of the state. The line of demarcation between equitable and legal remedies in the federal court cannot be obliterated by state legislation."

In Scott v. Neely, supra, cited by plaintiff, the claim was impressed as a lien upon property which was the main purpose of the suit, while in the instant case facts are stated which may give the plaintiff a lien upon certain property described in the complaint by reason of the allegations as to execution of a mortgage thereon, but the right of lien seems to be waived.

[3, 4] The relief demanded is gauged by the prayer. This gives the defendants such precise information as to the judgment demanded, if default is made, so they may be able to decide whether or not to defend. Section 258, Code Wash.; Rush v. Brown, 101 Mo. 586, 14 S. W. 735; Arrington v. Liscom, 34 Cal. 375, 94 Am. Dec. 722; Noonan v. Nunan, 76 Cal. 44 at page 49, 18 Pac. 98. There is no prayer for judgment to determine the amount and for impressing the claim upon the property as a lien and for an order of sale. The action, stripped of all of the verbiage except the essentials necessary upon the declared contract, leaves the action as one at common law

upon simple contract, and under all of the authorities this court is without jurisdiction to seize the property and sell it and distribute the proceeds through a receivership, nor can it proceed otherwise because no other relief is demanded. Notwithstanding the pleading is denominated a bill in equity, the contents determine its relation.

If the plaintiff desires to amend the complaint and seek foreclosure of its mortgage lien, permission will be granted.

THE MARY F. BARRETT.

(District Court, E. D. Pennsylvania. January 20, 1921.)

No. 33.

1. **Shipping ⇐189—"General average" does not apply where necessity for sacrifice was caused by negligence.**
   The doctrine of general average under which the loss caused by a sacrifice made for the common benefit of all should be borne ratably by all does not apply when the necessity for the sacrifice was caused by the negligence of the master or crew.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Average.]

2. **Shipping ⇐190—Stranding of vessel held caused by negligence.**
   The stranding of a vessel which necessitated the jettison of part of the cargo and of property belonging to the vessel *held* due to the negligence of the master in navigating the vessel, which was admittedly ten miles off her course in the vicinity of known reefs, either because the master gave a wrong course or because he did not make the proper allowance for the set and strength of the known currents.

3. **Shipping ⇐140—Owners cannot contract against liability for negligence.**
   Before the Harter Act shipowners could not contract to relieve themselves of liability for the negligence of the master or crew, which in law is their negligence.

4. **Shipping ⇐189—Harter Act does not entitle ship to general average for loss resulting from negligence.**
   The Harter Act (Comp. St. §§ 8029–8035), which exempted vessels from liability for losses due to errors of navigation, merely relieved them from liability, but did not entitled them to general average contribution for losses made necessary by errors of navigation.

5. **Shipping ⇐189—Ship cannot invoke general average as defense pro tanto to loss by jettison.**
   In the absence of a stipulation in the charter party entitling the ship to general average contribution for losses made necessary by errors in navigation, which stipulation is authorized under the Harter Act (Comp. St. §§ 8029–8035), the vessel cannot, on a libel for part of the cargo jettisoned because of the stranding of the vessel resulting from errors in navigation, interpose the right to general average as a defense pro tanto.

Sur Motion for Reargument.

6. **Shipping ⇐138—Cause of loss held jettison not negligent stranding.**
   The cause of the loss of part of the cargo which was thrown overboard to lighten the vessel after she had stranded because of errors in navigation was the act of jettison, not the error in navigation which occasioned

the necessity for it, so that the relief of the Harter Act (Comp. St. §§ 8029–8035) against liability for loss caused by errors in navigation does not apply.

7. Shipping ⇐189—Full loss of cargo recoverable where proximate cause was jettisoning occasioned by error in navigation.

The owner of a cargo can recover from the vessel the full value of the portion lost by jettison made necessary by errors of navigation if the charter contained no stipulation entitling the vessel to general average contribution.

In Admiralty. Libel by the American Dyewood Company against the schooner Mary F. Barrett for loss of part of a cargo of logwood. Decree for libelant.

Conlen, Brinton & Acker, of Philadelphia, Pa., for plaintiff.
Howard M. Long, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This cause was tried on the theory that there was nothing other than a question of fact involved.

The cause of action which the libel discloses is that the libelant shipped a cargo of logwood by the schooner respondent, a portion of which only was delivered. The libelant makes claim for the value of the part undelivered. The finding is made of the loss as shown by the libelant. The loss was caused by the throwing overboard of the deckload of logwood which the schooner was carrying and about ten tons taken from the hold. This was done to lighten the vessel so as to get her off the reef upon which she had been stranded. Property belonging to the vessel was also thrown overboard for the same purpose.

The defense interposed is that the case is one of general average. This seems to be conceded by the libelant, except as to the shares later mentioned.

[1] The doctrine of general average is the equitable one that the loss caused by a sacrifice made for the common benefit of all should be borne ratably by all. It has no application, however, when the necessity for the sacrifice was caused by the negligence of the master or crew.

[2] The reef on which the schooner was stranded lies north of the west end of the island of Cuba. The account we have of its location and description and whether charted or uncharted is very meager and unsatisfactory. With no thought of perpetrating a bull, if the reef is where the master located it on the chart, it is not there, or the chart is wrong, because he locates it where the chart shows a channel of ample depth. About all that we know of it is that the part on which the schooner struck is very small in area, is located about 28 miles north of San Antonio lighthouse, is so far from the coast as to be out of sight of land, and has over it a depth of water of a little less than 18 feet at low water.

The schooner left a port in Jamaica bound for Chester, Pa. This gave her navigator a choice of routes, one of which would take him to the eastward of Cuba and the other to the westward. He chose the western passage. The presence of reefs in the neighborhood of the one on which the schooner struck is shown on the chart, and are well

known to navigators, and were known to the master of the schooner. The weather conditions were not such as to give trouble. The problem was merely to lay a course around the west end of Cuba, and then far enough north of it to keep clear of the reefs, and to adhere to the course thus laid down. This is what the master attempted to do and thought he had done. To round Cape San Antonio the general course sailed was about north-northwest. The cape was passed with San Antonio lighthouse about 4 miles distant when it bore due east. The wind was free, the schooner then going almost dead before it. The wind kept hauling more and more from the eastward. After the schooner was well clear of the Cape, the course was changed until finally it was by the wind. When she brought upon the reef, she was going close hauled and was headed north-northeast, or within a point of it. As the master admits the schooner was 10 miles out of the course he meant her to have taken, an error in navigation was undoubtedly committed. The error here committed may have been any one or all of several kinds. A wrong course which would take the schooner directly upon the reef may have been given. The first course given may have been changed too soon. The helmsman may not have steered by the courses which were given, or sufficient allowance may not have been made for the set of tides or currents or for leeway made. As the wind was for a good part free and was always from the eastward, drift to leeward could not have been a contributing cause, as all such drift would have been away from danger. As the master himself tells us the courses given were adhered to, we are justified in eliminating this feature, and we are left only a mistake in giving the course or due allowance for the set of the current to explain the mishap. The master attributes the stranding to the latter cause, or to what he calls "the counter current to the Gulf Stream," but, as the current and its variations are given on the charts and were known to him, it was his plain duty to make sufficient allowance for this, and indeed, what he says the set of the current was before he struck the reef and what the chart shows it to be, the set of this current would have taken him away from the reef instead of upon it.

To whatever conclusion the mind might otherwise be led, we do not feel at liberty to make a finding of no negligence in view of the rulings by which we are controlled in Tarabochia v. American Sugar Refining Co. (D. C.) 135 Fed. 424, and Pittsburg & Erie Coal Co. v. George Urban Milling Co., 239 Fed. 271, 152 C. C. A. 259.

In the first of these cases Judge McPherson rejected the theory of the master that the vessel had been carried out of her course by a change in the current due to meteorological disturbances, and found that the error of navigation was that of the helmsmen in not steering by the courses which were given them.

In the latter case the Court of Appeals for the Second Circuit found the error to have been that of the master in not having made sufficient allowance for the strength of a current, the presence and set of which was known to all ordinarily well-informed navigators.

In both of these cases there was a finding of negligence, Judge Hazel, in the latter case, being reversed.

These rulings compel the finding in the instant case that the negligence of the master was the cause of the stranding of the schooner.

Before the passage of the Harter Act (Comp. St. §§ 8029–8035) the vessel owners would without doubt, under our law, have been answerable for the loss, and in all jurisdictions would have been so answerable in the absence of a charter party stipulation otherwise.

[3] The law has been long established in this country that shipowners cannot contract themselves out of liability for the negligence of the master or crew, which in law is their negligence. This is on grounds of public policy. In many other jurisdictions they might so contract. A disadvantage to American shipowners was thought to result. This was the occasion for the passage of the act. Instead of making a simple change of the law in this respect, however. this policy of the law was reasserted in the early sections of the act, and by the third section shipowners who were without negligence in the conditioning, equipping, and manning of their vessels (and we find the owners of the respondent schooner to have complied with this condition) were absolutely exempted from all liability for losses due. inter alia, to "perils of the sea" or "errors of navigation." There was no qualification in case the error was due to negligence. How does this act leave the shipowner with respect to the right to have the case considered one of general average?

It may be premised that the right of the cargo owner to recover for lost cargo rests upon an entirely different basis, and has a wholly different origin from that of the right to general average. The first is contractual or springs from a duty arising out of a contractual relation; the second, as already stated, rests upon purely equitable considerations, backed perhaps by a policy of the law.

[4] The view first taken of the effect of the Harter Act was to place the shipowner, in cases of stranded vessels (no matter what the cause of the stranding), in the place of an innocent victim of a catastrophe. and to give him all the rights to contribution in general average for sacrifice made. Chrystal v. Flint (D. C.) 82 Fed. 472.

In reversing this ruling, however, the Supreme Court laid down a different doctrine, holding that all the act did was to relieve the shipowner from liability under certain conditions, but not to give him anything. The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130.

This ruling was at first, in its turn, likewise misinterpreted as meaning that the Harter Act had no application if the stranding was due to the negligence of the master or crew. This was on the ground that such negligence was in law the negligence of the owners.

This misapprehension of the Irrawaddy Case was corrected by the Supreme Court in the very fully argued and well-considered case of The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969.

It was there pointed out that the Irrawaddy Case simply answered a certified question to the effect that without a charter party stipulation vessel owners could not have the sacrifice they had made enter into a general average computation, and the ruling as a precedent was limited to this proposition.

In the Jason Case there was a charter party provision that the shipowners should share with the cargo owners fully in the benefits of a general average, and the court held that the charter party was in this respect controlling. This was upon the ground that the Harter Act worked such a change that it was no longer the policy of the law to prohibit contracts giving rights to shipowners in respect to losses embraced in the third section, and that they might now stipulate in respect thereto.

The court adhered, however, to the ruling in the Irrawaddy Case that the act did not of itself give the right holding that it simply permitted the parties to so contract, or, at least, it was held that the Irrawaddy Case (in which there was no stipulation) was not in conflict with the allowance of the right to a general average in a case in which there was such a stipulation.

We do not feel at liberty to speculate whether this means a return to the doctrine not accepted by the majority opinion in the Irrawaddy Case and an approval of the doctrine advocated by a minority of the court.

In the instant case there is no charter party stipulation, and a finding of negligence and of the liability of the schooner and a denial of the right to the benefits of a general average apportionment of loss follows in accordance with these rulings.

This renders it unnecessary to go into the question of the liability in any event of that share in the vessel which belongs to the master and whether his negligence differentiates his case from that of the other owners, as was held in The Humarock (D. C.) 234 Fed. 716. The ruling in this case assumes the exemption of the shipowners other than the master who was found to have been guilty of negligence. Although decided after the above cases, the opinion does not refer to them.

The proper ruling of the questions involved in the present cause depends upon the acceptance or rejection of the following propositions:

(1) Before the Harter Act the ship was liable to the cargo owner for loss of cargo due to an error of navigation. This liability was based upon the contract of safe carriage or upon the tort which sprang from the failure of the duty which arose out of the contractual relation of owner and carrier.

(2) There was also a right to and correlative duty of contribution to repair a loss due to the voluntary sacrifice of property for the common benefit of all exposed to a common danger. Ship and cargo owner had the like right and owed the like duty, but the right did not belong to one to whose negligence the necessity for the sacrifice was due.

(3) The effect of the Harter Act was not of itself to make of shipowners innocent parties to the stranding of their ship caused by the negligence of master or crew so as to make of the sacrifice of property in order to save ship and cargo a case of general average.

(4) The effect of the act was, however, to make it permissible for the parties to contract that the doctrine of general average should apply in the event of the sacrifice of property to save ship and cargo in case of a stranding due to an error of navigation, even if the error was the result of negligence.

[5] It follows from the acceptance of these propositions that the right to invoke the law of general average is a defense pro tanto if there is a stipulation in the charter party to this effect, but in the absence of such a contract there is no such right if the loss was due to the negligence of master or crew. A further consequence is that in a libel to enforce the liability of a ship for failure to deliver a part of the cargo, although the shipowners may, of course, interpose the defense that the loss was caused by a peril of the sea or error of navigation, they cannot excuse nondelivery because the missing cargo was thrown overboard, even if it was sacrificed to save the ship and the remaining cargo from destruction, if the danger averted was in turn due to the negligence of the master.

In a very substantial, although not in the strictly literal, sense, this makes shipowners answerable for errors of navigation (if the errors are due to negligence) and permits them to agree themselves out of the consequences of such negligence, at least pro tanto, notwithstanding the fact that upon certain conditions (which in the instant case were fully met) the third section of the Harter Act exempts them from all liability for the consequences of errors without qualification, and the earlier sections forbid them to contract against liability for negligence. As already observed, the act was at first read as one absolving shipowners from liability for the consequences of such errors (although due to negligence), and placing them in the relation of innocent parties to the loss incurred, and because of this making the sacrifice of property to avert further loss a case of general average.

This is evidently the view taken by the District Court (Brown, J.) in the Irrawaddy Case, and also by the dissenting minority of the Supreme Court when the decree of the District Court was reversed.

Under the adjudged cases cited we see no escape from the conclusion that the necessity for the sacrifice of the part of this cargo which was not delivered arose out of a dangerous situation resulting from the negligence of the master, which was in law the negligence of the shipowners, and that the defense that the case is one of general average must be denied them.

Proctors for libelant do not dispute the right of the other owners to successfully set up the defense that this case is one of general average, if the share of the vessel belonging to the master is held to be answerable for the loss. This seems to be due to the opinion which, for some reason, they entertain that the libelant will be paid in full if the share of the master in the vessel is held to be answerable to them.

With findings of the amount of the loss, of negligence, and a denial of the defense of general average thus made by the court, the parties can doubtless agree upon a form of decree in accordance with this opinion. Leave is granted to submit a draft of such decree; we retaining control of the cause to make a decree in case the parties do not agree.

Sur Motion for Reargument.

All the questions involved in this cause were fully discussed on this motion. In denying it, we have been asked to develop more at length the line of thought which has led us to the conclusion reached.

A reconsideration of these conclusions is justified, not by the circumstance, neither unusual nor surprising, that the respondent thinks the decree is for too large a sum, but by the other circumstance, which is somewhat unusual, that the libelant shares in this opinion.

The proctors concerned have argued these questions with entire frankness, as well as notable ability. The frankness is induced by the fact that the general principle of maritime law involved is of more importance to the clients than the sum recovered.

We accede to the request to file a supplemental opinion, but, as the cause has so many phases and its legal merits may be viewed along so many different angles that an adequate discussion of all of them would be well-nigh interminable, we will restrict the further discussion to the questions which are controlling.

As a beginning, the discussion will be limited to the broad question of the measure of liability of shipowners for a partial loss of cargo where the cargo lost was sacrificed to save ship and remaining cargo from a stranding due to the negligence of the master. It is agreed on all hands that the cargo owners may recover a ratable contribution, but the narrower question is: May they recover their full loss or damage notwithstanding the Harter Act?

There is also agreement that the ship cannot be held responsible for errors or faults in navigation, etc., by the very terms of the act.

[6] The first subsidiary question, then, with which we are confronted, is whether a sacrifice rendered necessary by a stranding, which in turn was due to an error in navigation, is a loss resulting from such error. The stranding undoubtedly directly, and therefore proximately, resulted from the error, but did the loss of cargo so result in view of the fact that there was an independent intervening cause, to wit, the voluntary act of the ship in throwing the cargo overboard? There may, of course, be cases in which the error of navigation is the efficient proximate cause of a loss of cargo because the loss immediately and directly or otherwise consequentially follows the stranding without any other or intervening cause, but here there is an independent intervening cause in the voluntary act of the ship. To those trained to the methods of procedure, modes of thought, and forms of expression of the common-law lawyers the same question above raised may be presented more clearly in another way.

[7] A prima facie legal cause of action is established by proof of a contract of carriage, acceptance of the cargo, and nondelivery. A legal defense, under the third section of the Harter Act, is made out, if it be shown that the proximate cause of the loss was an error or fault in navigation. Here the common law and the law maritime are in accord so far as the substantive law is concerned. If, however, an independent intervening cause of loss is shown in the act of the ship in throwing the cargo overboard, and this is the proximate cause of the damage done, the damage does not, in the legal sense, result from any error of navigation, and, because it does not, the Harter Act has no application, and the legal defense fails. There is, however, a doctrine or principle of the law maritime known as the law of general average contributions. Out of it, to avoid circuity of actions, there

arises an equitable defense which in any jurisdiction in which equitable defenses are admitted is a good defense pro tanto to any action against a party who has the right to invoke it. There is, however, another doctrine or principle of the law maritime, or rather a qualification of the law of general average contributions, that it cannot be invoked by any one to whose negligence the occasion for the sacrifice was due, and for that reason cannot be invoked by shipowners in stranding cases, if the stranding was due to the negligence of the master or crew, unless there is (as is now permitted) a charter party stipulation which gives the ship the benefit of the right.

Our conclusion is that the proximate cause of the loss of cargo was not any error in navigation, but the throwing of the cargo overboard.

It follows that the only defense to the action to recover the loss is the right of the ship to a contribution from the cargo owners to help meet this loss, and, in the absence of a charter party stipulation for the allowance of this right, the defense fails, and the libelant is entitled to recover its whole loss undiminished by any general average contribution.

It only remains to inquire whether the cases in which the Harter Act has been construed give support to this line of reasoning. Of these cases, it is sufficient to cite Chrystal v. Flint (D. C.) 82 Fed. 472; Tarabochia v. American Sugar Refining Co. (D. C.) 135 Fed. 424; The Irrawaddy, 171 U. S. 187, 18 Sup. Ct. 831, 43 L. Ed. 130; The Jason, 225 U. S. 32, 32 Sup. Ct. 560, 56 L. Ed. 969.

It is true that in none of these cases was the libel based upon the contract of carriage in the sense in which a common-law action would have been brought for nondelivery of a part of the cargo. In every case the cargo owner was asserting his right or resisting the like claim of the ship to contribution under the law of general average.

We do not see, however, that this difference between those cases and the instant case affects the principle laid down or the construction there given to the Harter Act.

It is also true that in every one of the cited cases the cargo owners were claiming less than that to which they would have been entitled in accordance with the conclusions we have reached, nor is there any direct intimation that they were entitled to more. We think, however, that this moderated claim was made because of the wrong construction at first given to the Harter Act, and that there was no ruling that cargo owners were entitled to more because no question of their right to more was raised.

The construction which at first was given to the Harter Act up to and including Chrystal v. Flint was that after the act the negligence of master or crew manifested in some error or fault in navigation was no longer the negligence of the shipowners. It followed from this that the shipowners were thereafter deemed to be innocent parties to a stranding, although due to the negligence of master or crew, so that cargo and ship owners had the like reciprocal right to and duty of making contribution by way of general average.

This established the corollary that all to which the cargo owner was entitled was this right of general average.

The argument which supported this view is admitted to have been one of much strength. It is so well and fully set forth in the dissenting opinion in the Irrawaddy Case and in the opinion of Judge Brown in Chrystal v. Flint that any attempted restatement of it would weaken it.

There is small wonder that it was generally accepted by the admiralty bar, and was attacked only in respect to its allowance of the claim of the shipowner for reimbursement for his losses.

We cannot, however, now accept this view of the effect of the Harter Act, because this is the very view which the majority opinion in the Irrawaddy Case (which reversed Chrystal v. Flint) refused to accept. We are taught by the Irrawaddy Case that the Harter Act of itself conferred no rights whatever upon shipowners, except inferentially the right to contract in case of negligence (which before they could not do) for the right to a general average contribution, and that all which the act of itself did was to relieve the ship under certain circumstances of a liability which before existed.

In the absence of a contract, therefore, the doctrine of general average contributions was left as it was before, and it could not be invoked by the shipowners in case of a stranding due to the negligence of the master or crew, although this negligence was manifested in a fault in navigation. The shipowners were in consequence denied the right to put their sacrifices in hotchpotch.

The Jason Case (in which there was a contract) merely emphasizes the grounds of the ruling in the Irrawaddy Case, and makes clear the change in the policy of the law in respect to contracts for a general average.

The Irrawaddy and other cases were cases of a claim by the ship to pro tanto recoup itself for the sacrifice it had made. None of them involved the question of the obligation of the cargo owner to bear part of his own loss by way of contribution. There is here, of course, a difference, but we see in principle no distinction. The rule seems to go to the full length that a party whose negligence has caused a danger to arise, and is thus responsible for the necessity of a sacrifice to avert it, cannot claim any measure of relief by way of any contribution from an innocent party.

Some of the cases employ a verbiage which suggests the distinction, but it will be found that this verbiage was used not to note the distinction, but to fit the facts of the case ruled.

These cases and the text-books which deal with the question are cited in Chrystal v. Flint (D. C.) 82 Fed. 472. Lownes, at page 32 et seq. (5th Ed.), makes the general doctrine clear.

This opinion has already reached such length that we cannot consider the several objections urged to giving to the Harter Act the effect given to it by these cases. It is enough to know that it has been so construed.

All the objections now urged without doubt received full consideration when the rulings were made.

The argument addressed to us (for which the Strathdon Case [D. C.] 94 Fed. 206, and the Jason Case are cited) has no support in either of these cases except so far as they are based upon the doctrine in Chrystal v. Flint, which was repudiated by the Supreme Court.

The chief objection to the ruling made is that in effect it renders the Harter Act inoperative. As the argument which backs this objection is based upon the proposition that the error in navigation was the proximate cause of the loss of cargo, and the argument which supports the ruling is based upon the opposing proposition that the jettison (not the error in navigation) was such proximate cause, the acceptance of the view of the shipowners has this curious result. It is the shipowners' view which kills the Harter Act, and the ruling to which they object which keeps it alive. This is true because, if the error in navigation was the proximate cause of the loss, such loss resulted from the error, and the Harter Act applies. If it applies, it operates to relieve the shipowners of all liability for the loss, and yet, in the same view, the shipowners are liable pro tanto for this very loss; in other words, although in one breath it is said the shipowners are not liable for any part of the loss, in the next breath it is said they are liable. It is the Harter Act which says they shall not be liable. To hold them liable may well be said as a consequence to in effect repeal that act. On the other hand, under the doctrine of the Irrawaddy and Jason Cases (on which the ruling made is based), the proposition that, as the error in navigation was not the proximate cause of the cargo loss, the damage was not the "result" of any fault of navigation, and in consequence the Harter Act does not apply so as to operate to relieve the shipowners of liability for such loss cannot be said to nullify the act, but, on the contrary, leaves it free to operate (as the Jason Case holds it does operate) to change the policy of the law in respect to stipulations for the benefit of the doctrine of contributions by way of general average.

Reargument refused.

In re KALK.

(District Court, N. D. New York. January 31, 1921.)

1. **Bankruptcy ⊂=424—Judgment in replevin for property fraudulently obtained not barred; "malicious."**

Under Bankruptcy Act, § 17, subd. 2 (Comp. St. § 9601), excepting from discharge liabilities for obtaining property by false pretenses, or for willful and malicious injury to the person or property of another, a judgment in an action of replevin for the value of property obtained by the bankrupt by false representation that he was solvent and that his note for the property was good is not barred, though a judgment in replevin based on constructive fraud only would be barred, since "malicious," as used in the section, consists in the willful doing of an act with knowledge it is liable to injure another and regardless of consequences, and does not include the malignant spirit or specific intention to injure the other.

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

2. **Bankruptcy ⊂=391(3)—Suit on claim not discharged will not be stayed.**

Under Bankruptcy Act, § 11 (Comp. St. § 9595), authorizing stay of a suit founded upon a claim from which a discharge would be a release, a suit to enforce a judgment for property fraudulently obtained, which would not be barred by the discharge should not be stayed.

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3. **Bankruptcy ⊂=421(1)—Character of judgment or execution does not determine dischargeability.**
Neither the character of the judgment entered nor the kind of execution issued thereon should characterize the action in determining whether the liability is barred by discharge in bankruptcy.

4. **Replevin ⊂=106—Judgment less than $50 not erroneous, if value of chattels was more.**
A contention by the bankrupt that a judgment in replevin for less than $50 was irregular was untenable, where the verdict related to chattels of value much greater than $50.

5. **Judgment ⊂=505—Cannot be collaterally attacked, if court had jurisdiction.**
If the court had jurisdiction to render the judgment, it cannot be impeached by collateral attack, even though irregular, because of the amount for which it was rendered

In Bankruptcy. In the matter of the estate of Boniface J. Kalk, bankrupt. On application to set aside an order by the referee restraining Mary A. Hughes, a judgment creditor, from issuing execution against the wages and earnings of the bankrupt. Order set aside.

Ray W. Merrill, of Watertown, N. Y., for bankrupt.

Searle & Searle, of Rome, N. Y., for judgment creditor, Mary A. Hughes.

COOPER, District Judge. This is an application to set aside an order made by the referee in bankruptcy of Jefferson county, restraining Mary A. Hughes, a judgment creditor, from issuing execution against the wages and earnings of Boniface J. Kalk, the bankrupt.

The judgment, the collection of which has been enjoined, was obtained by Mrs. Hughes as administratrix of her husband's estate, in an action in replevin, in which she was plaintiff and the bankrupt was defendant. The bankrupt at an auction sale, had bidden in various chattels belonging to the estate of the deceased, and he offered the judgment creditor a note in payment, which she declined to accept, but upon his statements that he was solvent, had a farm, and was able to meet the obligation, it was accepted. It appeared that Kalk was at the time hopelessly insolvent, and soon thereafter filed a petition and schedules in bankruptcy. Thereupon Mrs. Hughes brought suit to replevy the goods on the theory that there had been no transfer; title never passing because of the fraud of the bankrupt, and as the complaint specifically alleged:

"That defendant claims to have purchased same, but said sale was fraudulent and possession of said property was procured by frauds, fraudulent representations and fraudulent concealment by defendant of his financial condition and insolvency. That defendant was insolvent, in debt, and had no means with which to pay for said property, and knowing his said condition, and concealing and misrepresenting same to plaintiff, and with intent not to pay for said property, induced plaintiff to deliver said property to him and to take his note therefor."

The action was tried by a jury and judgment was rendered for the plaintiff. Execution upon a money judgment was returned unsat-

isfied. Subsequently, and in November, 1920, execution was issued against the wages and earnings of the bankrupt, and for a second time Kalk filed a petition and was adjudicated a bankrupt on January 5, 1921, and the restraining order herein referred to was granted.

[1] The liberation of the bankrupt from this obligation depends upon the construction of section 17 of the Bankruptcy Law (Comp. St. § 9601), which provides that a bankrupt shall be discharged from his debts, with certain exceptions, the only subdivision of which is here applicable is No. 2, reading as follows:

"Liabilities for obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another."

There has not been a uniformity of decision under this subdivision as to the dischargeability of debts grounded in conversion or replevin. The weight of authority is that judgments grounded in conversion, which is the analogy of replevin, are dischargeable unless actual fraud was the basis of the judgment. This distinction between actual and constructive fraud was pointed out in Ulner v. Doran, 167 App. Div. 259, 261, 152 N. Y. Supp. 655, 657, in which the court said:

"Assuming that the action against defendant was for a technical conversion, it is now well settled that a judgment in such an action is provable in bankruptcy, and released by the discharge, unless there be evidence of actual fraud in incurring the liability, of which there is no evidence in this case. The merely constructive fraud and malice which is sometimes said to follow upon the fact of conversion is not sufficient to prevent the discharge of the indebtedness, whether it has been reduced to judgment or not. Maxwell v. Martin, 130 App. Div. 80; Lewis v. Shaw, 122 Id. 96; Collier, Bankruptcy (10th Ed.) 387. We think, therefore, that the judgment debt was discharged by the discharge in bankruptcy."

In Maxwell v. Martin, 130 App. Div. 80, 83, 114 N. Y. Supp. 349, 352, cited in the above case, the court, in discussing this proposition, says:

"Section 17, subd. 2, of the Bankruptcy Law (30 Stat. 550, as amended by 32 Stat. 798, § 5), provides that 'a discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are liabilities for obtaining property by false pretenses or false representations or for willful and malicious injuries to the person or property of another.' The amendment substituted the word 'liabilities' in place of 'judgments in actions for frauds,' etc., but so far as the question here involved is concerned the amendment is immaterial, and the great weight of authority, whatever may be said to the contrary, is to the effect that a claim for the conversion of personal property, possession of which was not obtained by false representation or pretenses, is provable against the bankrupt and is released by his discharge in bankruptcy. Crawford v. Burke, 195 U. S. 176; In re Wenham, 153 Fed. 910; In re Adler, 152 Fed. 422; Fechter v. Postel, 114 App. Div. 776; Lewis v. Shaw, 122 App. Div. 96.

"*On the other hand, damages for fraud and deceit and for the obtaining of property by false pretenses or false representations are not provable in bankruptcy and are not released by the bankrupt's discharge.* Bullis v. O'Beirne, 195 U. S. 606; Brown & Adams v. United Button Co., 149 Fed. 48; Mathieu v. Goldberg, 156 Fed. 541; Mackel v. Rochester, 135 Fed. 904; Shepard v. Morgan, 123 App. Div. 128."

The theory of the judgment against the bankrupt in the case at bar is that it was obtained because of moral turpitude and willful intent

to deprive the judgment creditor of her property, and because the conduct of the defendant was larcenous in its nature, no title to the property passed and the plaintiff could replevy the chattels. Of this matter Judge Hazel has spoken forcefully in Re Arnao (D. C.) 210 Fed. 395, when he refused to restrain the sheriff from issuing a body execution against the bankrupt on a judgment founded on conversion. While the facts of the case are not set out in the opinion, the court says of the law:

"My view as to the interpretation of section 17 (2) accords with the views expressed in the Kavanaugh Case, and I believe that the facts were indisputably so that the wrongful acts of the bankrupt were practically larcenous."

Bullis v. O'Beirne, 195 U. S. 606, 25 Sup. Ct. 118, 49 L. Ed. 340, was a case in which an application was made by Bullis for a discharge in bankruptcy, and the judgment creditor opposed it on the ground that judgment was procured against the bankrupt in an action for fraud, and was therefore not dischargeable. The action originally brought, charged Bullis with false and fraudulent representations in respect to certain lands and agreements concerning the same, and that certain conveyances made were false and fraudulent and the court said:

"We think a correct interpretation of the law does not require a close examination into the form of the action, to determine whether technically it is one ex delicto or otherwise; but the real question is: Was the relief granted in the judgment based upon actual, as distinguished from constructive, fraud of the bankrupt? If the judgment is thus founded, whatever the form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned."

In Kavanaugh v. McIntyre, 210 N. Y. 175, 182, 104 N. E. 135, the dischargeability of a debt in conversion was before the court. It appeared that the defendant's firm received from Kavanaugh, as security for an indebtedness, stock and scrip, which it sold shortly thereafter without the knowledge or consent of plaintiff and placed the avails to the account of the firm. Cuddeback, J., after commenting upon this, said:

"These facts show that the conversion of the stock and scrip was not merely technical nor committed in the assertion of a mistaken claim to the property. It was a wrongful act done intentionally without just cause or excuse, and constituted willful and malicious injury to the plaintiff's property as those words are used in section 17 of the Bankruptcy Law. Tinker v. Colwell, supra."

In Shepard v. Morgan, 123 App. Div. 128, 108 N. Y. Supp. 379, it was held that a claim based upon a liability for obtaining property by false pretenses and fraudulent representations is not discharged, even though the claim be not reduced to judgment.

The construction of the terms "willful and malicious" in the law have been the subject of judicial comment.

In Tinker v. Colwell, 193 U. S. 473, 24 Sup. Ct. 505, 48 L. Ed. 754, Justice Peckham, in considering the meaning of the words used in the statute, before the amendatory act of 1903, said:

In United States v. Reed, 86 Fed. 308, it was held that malice consisted in the willful doing of an act which the person doing it knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt a particular person is not an essential element. Upon that principle, we think a willful disregard of what one knows to be his duty, an act which is against good morals and wrongful in and of itself, and which necessarily causes injury and is done intentionally, may be said to be done willfully and maliciously, so as to come within the exception. It is urged that the malice referred to in the exception is malice towards the individual personally, such as is meant, for instance, in a statute for maliciously injuring or destroying property, or for malicious mischief, where mere intentional injury without special malice towards the individual has been held by some courts not to be sufficient. Commonwealth v. Williams, 110 Mass. 401. We are not inclined to place such a narrow construction upon the language of the exception. We do not think the language used was intended to limit the exception in any such way. It was an honest debtor, and not a malicious wrongdoer, that was to be discharged."

In Davis v. Standard National Bank, 50 App. Div. 210, 213, 63 N. Y. Supp. 764, 766, it is said:

"But while, to establish malice for certain purposes, such a willful intent is necessary, that intent is not involved in the legal definition of the term 'malice.' Whenever the act is done intentionally, without just cause or excuse, a legal inference of malice arises therefrom."

See, also, Kavanaugh v. McIntyre, supra; s. c., 128 App. Div. 722, 112 N. Y. Supp. 987.

The cases cited with much confidence by the bankrupt recognize the distinction between an action for conversion, without malice and fraud, and a judgment obtained because of utter disregard of the rights of the plaintiff injuring him knowingly and willfully, and where such conduct is the equivalent of larceny.

[2] Section 11 of the Bankruptcy Law (Comp. St. § 9595), under which this stay was apparently granted, provides that only a suit founded upon a claim from which a discharge would be a release may be stayed, and it has been repeatedly held that the enforcement of the debts which were not dischargeable would not be stayed. Matter of Koronsky, 170 Fed. 719, 96 C. C. A. 39; In re Hall (D. C.) 170 Fed. 721; People ex rel. Otterstedt v. Sheriff (D. C.) 206 Fed. 566; In re Cole (D. C.) 106 Fed. 837; In re Butts (D. C.) 120 Fed. 966.

[3] The judgment entered should not characterize the action nor the kind of execution which may be issued. Curtiss v. Jebb, 203 N. Y. 538, 96 N. E. 120.

[4, 5] The contention of the bankrupt that the judgment was irregular because the recovery was less than $50 was untenable, for the reason that the verdict related to chattels of value much greater than $50. Moreover, the court had jurisdiction to render the judgment, and it cannot be impeached by a collateral attack.

The order of the referee, restraining the judgment creditor and the sheriff, should be set aside.

WESTINGHOUSE ELECTRIC & MFG. CO. v. FORMICA INSULATING CO.

(District Court, S. D. Ohio, W. D. July 3, 1920.)

No. 175.

1. **Patents ⇐328—1,167,742 and 1,167,743, for noiseless gear, void for lack of invention.**
   The Conrad patents, No. 1,167,742 and No. 1,167,743, for a noiseless gear, the material of which is a composition of bakelite and fiber, known as "Bakelite Micarta," of which Conrad was not the inventor, *held* void for lack of invention.

2. **Patents ⇐61—Prior application considered on question of invention.**
   In determining whether a patent discloses invention, an application filed before that on which the patent was issued, but on which patent was not issued until later, may be considered.

3. **Patents ⇐21—Substitution of materials not necessarily invention.**
   Substitution of one material for another, which does not involve change of method nor develop novelty of use, even though it may result in a superior article, is not necessarily invention.

In Equity. Suit by the Westinghouse Electric & Manufacturing Company, against the Formica Insulating Company. Decree for defendant.

Kerr, Page, Cooper & Hayward, of New York City, and Allen & Allen, of Cincinnati, Ohio, for plaintiff.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., and Gifford & Bull, of New York City, for defendant.

PECK, District Judge. By the bill complainant seeks to enjoin defendant from the manufacture and sale of blanks to be used in the making of gear wheels, composed of a fibrous material with a phenolic condensation product for a binder, which complainant alleges to be a contributory infringement of the Conrad patent, No. 1,167,742, of January 11, 1916; also of a supplementary patent to the same patentee of the same date, No. 1,167,743. Complainant elects to stand upon claims 3, 7, 8, and 14 of the former and claim 3 of the latter.

The defense asserted is that the said patent (it is necessary only to speak of the former) is void for want of invention, or, if showing invention, then because Conrad was not in fact the first inventor, and for want of novelty.

[1] The subject-matter of the patent is the nonmetallic or "noiseless" gear. The inventor stated his object to be the production of a gear wheel which would be light, strong, durable, infusible, and impervious to moisture and to most chemicals. To obtain this result sheets of fibrous material, such as cloth or paper, are impregnated with an adhesive liquid material, preferably a phenolic condensation product, such as bakelite, dried in an oven, laid together with the treated side of one to the untreated side of the next, hydraulically pressed under heat until the material is fully impregnated and firmly cemented into a hard, compact mass, and, after cooling, subjected to a baking process.

The result claimed and actually obtained by this process is a laminated fibrous material, capable of withstanding great heat, of high tensile strength, which can be turned and bored in the same manner as wood. The finished plates are then cut into gears in the usual way.

As a modification the patentee showed and described metallic end plates or shrouds on his gears, to protect the edges of the composite structure from injury and to give added strength. The binding material, bakelite, is described as a condensation product of phenols and formaldehyde. Claim 7, which is typical of those relied on, is:

"A gear having a self-sustaining working body portion, composed of fibrous material and a phenolic condensation product."

The complainant has, by the means described, produced a gear which is not only highly useful and commercially successful, but also superior in some adaptations to all preceding types of noiseless gears. How much of this result can be attributed to the exercise of the inventive faculty by Conrad?

The new element that made this success possible was a composition of bakelite and fiber, together known as "Bakelite Micarta." It is not claimed that this material was Conrad's production. Admittedly it was that of Dr. L. H. Baekeland. It was described as a packing material in the latter's patent of November 30, 1909, No. 941,605. The same process of building up the laminated material described in Conrad's patent is fully set forth by Dr. Baekeland in his composite cardboard patent of March 5, 1912, No. 1,019,406. Upon December 16, 1910, Dr. Baekeland filed his application for a patent on a "machine element," meaning thereby gears, pulleys, and the like.

[2] This application, filed 2½ years before that of Conrad, although not allowed until after Conrad's application had been filed, may be considered in determining the question, raised by the answer, whether the patentee was the first inventor. Lemley v. Dobson-Evans Co., 243 Fed. 391, 156 C. C. A. 171. As an illustrative example of this invention, Baekeland described a gear made of a phenolic condensation product, either compounded—that is to say, mixed—with fiber, or built up with layers of wood, cardboard, paper, or similar porous material, and compressed between metal plates. This was to be done either with or without the use of interior metal strengthening plates. The gears were then to be cut from discs of the material so formed. He described such gears as capable of withstanding comparatively high temperature and of enduring conditions destructive to most plastic compositions, as being of great hardness, toughness, and wearing qualities, and, as against metal gears, silent in operation. The difference between the two patents is that in Baekeland the reinforcing plates are considered essential to the strength of the gear, while in Conrad they were considered optional with the gear maker.

Dr. Baekeland, therefore, conceived the use of the phenol condensation compound as a gear-making material, but not without reinforcement. Conrad knew the material as suitable for gears without, as well as with, reinforcement. Baekeland's material was bakelite, fiber, and metal; Conrad's, bakelite and fiber, with or without metal, as condi-

tions might warrant. Conrad's advance upon Baekeland was his recognition that under some conditions, at least, the supporting metallic plates might be omitted.

Therefore it cannot be said, broadly speaking, that Conrad was the first inventor of the use of a fibrous material, bound by a phenolic condensation product, in the art of gear making. The most that can be claimed for him is the originating of gears of the material described, without necessarily depending upon the use of shrouds or end plates or other metallic strengthening members. Assuming this contention to be true, did it involve invention in a patentable sense?

Bakelite Micarta was then in use principally as an electric insulating material. It was at the same time known to be a hard, fibrous substance, strong, insoluble, infusible, and resistant to water, oil, and most chemicals. At the same period noiseless gears of rawhide, compressed fiber, or fabroil, and vulcanized or hard fiber, were common. The rawhide and fabroil gears were held in shape by end plates, between which they were compressed. Hard fiber, on the other hand, was a self-sustaining material. It was composed of cotton rag paper treated with chloride of zinc, which rendered it gelatinous and adhesive. The layers of material, having been so treated, were pressed together and formed a laminated, fibrous, self-sustaining, hard material, useful for gear making. The resemblance of the new material, Bakelite Micarta, to the well-known hard fiber was obvious and striking. It was, in truth, also a hard fiber. Both depended upon the fiber for their strength. The difference was that the Micarta contained a new and better binding cement, and the process of its manufacture was not injurious to the fiber and left it unimpaired. But, after all, was it anything more than an improved hard fiber? And if hard fiber had for years been familiarly utilized for the manufacture of noiseless gears, was it patentable invention for Conrad to employ the greatly improved hard fiber, not itself his invention, for the same purpose? The old hard fiber gears had been used with and without end plates or shrouds. Conrad had sufficient confidence in the new material to describe a gear made of it without such supports, but not sufficient confidence in it to discard them altogether, and described them as an alternative. In his claims he is careful to limit the use of the material to the "working body portion," thus covering a gear supported by shrouds or end plates; they not being the "working body portion" thereof. Conrad's effort must be considered to have been the skillful selection of material rather than invention. Hotchkiss v. Greenwood, 11 How. 248, 13 L. Ed. 683. Mere superiority of product will not suffice. Hicks v. Kelsey, 18 Wall. 670, 21 L. Ed. 852; Burt v. Evory, 133 U. S. 349, 358, 10 Sup. Ct. 394, 33 L. Ed. 647; Capital Sheet-Metal Co. v. Kinnear & Gager Co., 87 Fed. 333, 31 C. C. A. 3.

The bakelite gear was held to be an infringement of the compressed fiber or fabroil gear in General Electric Co. v. Continental Fiber Co., 256 Fed. 660, 168 C. C. A. 54. It was there held that the Miller patent for the use of compressed textile fabrics for gear manufacturing was fundamentally new and entitled to a broad range of equivalents.

Its infringement by the bakelite gear was placed upon the ground that both depend upon the presence of a large number of fibers in a small space.

This case is to be distinguished from Westmoreland Specialty Co. v. Hogan, 167 Fed. 327, 93 C. C. A. 31, which affords example of patentable invention in the substitution of a new material, because the celluloid top of the salt dredge there patented performed an entirely new function, viz., the insulating of the salt in the dredge from the moisture in the atmosphere. Nor does this case seem to be within the principle of Smith v. Goodyear Dental Vulcanite Co., 93 U. S. 486, 23 L. Ed. 952. No new function is performed by Conrad's gear.

[3] Its superiority lies in its general excellence. Substitution of one material for another, which does not involve change of method nor develop novelty of use, even though it may result in a superior article, is not necessarily a patentable invention. Florsheim v. Schilling, 137 U. S. 64, 11 Sup. Ct. 20, 34 L. Ed. 574.

The case of General Electric Co. v. Nitro-Tungsten Lamp Co. (C. C. A.) 266 Fed. 994, very recently decided by the Court of Appeals of the Second Circuit, relied on by complainant, relates to an electric lamp bulb filled with dry nitrogen, and the inventive step seems to have been the use of a filament of tungsten of large effective diameter to secure a result not theretofore attained. Although the materials were old, their successful arrangement appears to have real creative invention. The patent was held valid; but this does not seem in conflict with the conclusion here reached.

The court, therefore, finds that neither of the Conrad patents hereinbefore referred to show patentable invention, and that, for want thereof, the same are void.

The bill, therefore, will be dismissed.

ASTORIA MARINE IRON WORKS v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, D. Oregon. February 14, 1921.)

No. 8687.

Courts ⇐426—Emergency Fleet Corporation not subject to suit in District Court on claim exceeding $10,000; "governmental agency."

The United States Shipping Board Emergency Fleet Corporation, as a governmental agency, *held* not subject to suit in a District Court, where the amount involved exceeds $10,000.

At Law. Action by the Astoria Marine Works against the United States Shipping Board Emergency Fleet Corporation. On motion to remand to state court and demurrer to complaint. Motion to remand denied, and demurrer sustained.

Cake & Cake and L. A. Liljeqvist, all of Portland, Or., for plaintiff.

Lester W. Humphreys, U. S. Atty., Hall S. Lusk, Asst. U. S. Atty., and MacCormac Snow, all of Portland, Or., for defendant.

WOLVERTON, District Judge. This is an action to recover against the United States Shipping Board Emergency Fleet Corporation for an alleged breach on the part of the Fleet Corporation of a contract theretofore entered into by and between the parties, whereby the plaintiff, in consideration of the observance of certain conditions and stipulations made and subscribed on the part of defendant, agreed to maintain a suitable site at Astoria, Or., and to construct a marine railway of a lifting capacity of 4,000 tons, and a repair plant, and to install them upon the site, with all necessary power, heat, lighting, sanitary, and other accessories and facilities, with the privilege on the part of the Fleet Corporation of taking over the title to the plant and all the materials and equipment therefor.

The cause comes here on removal from the state court, and a motion to remand is submitted on the part of plaintiff, and on the part of defendant a demurrer to the several causes of action. The motion to remand will be denied on the authority of Rosenberg Iron & Metal Co. v. U. S. Shipping Board Emergency Fleet Corporation (recently decided by this court) 271 Fed. 956.

The demurrer presents the question whether the Fleet Corporation is subject to be sued in this court; the amount in controversy being in excess of $10,000. It is insisted that the Fleet Corporation is a government utility, exercising limited powers of sovereignty, and that the cause here sought to be maintained is a claim against the government, which can be proceeded with for recovery only in the Court of Claims.

That the Shipping Board is a governmental agency, endowed with certain defined governmental powers, cannot be questioned. This board, by section 11 of the Act of September 7, 1916 (39 Stat. 728 [Comp. St. § 8146f]), is authorized, when in its judgment such action is necessary to carry out the purposes of the act, to form one or more corporations under the laws of the District of Columbia, for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States. The capital stock is limited to $50,000,000, for which the board is authorized to subscribe not less than a majority. At no time shall it be a minority stockholder. A corporation so formed is limited in the period of its existence to five years from the conclusion of the present war. Provision is made for taking over by the board all stock owned by others at the time of dissolution, to be paid for out of the funds to its credit, and for covering into the board the proceeds of the sale of bonds, charters, leases of vessels, all sales of stock made by the board, and all moneys received from any source.

In pursuance of the powers bestowed by section 11, the Shipping Board caused to be organized (April 16, 1917) the corporation known as the United States Shipping Board Emergency Fleet Corporation, with $50,000,000 capital stock, all owned by the United States. It was officered by the commissioners of the Shipping Board and their nominees, and was but an operating agency of the board. The Lake Monroe, 250 U. S. 246, 251, 252, 39 Sup. Ct. 460, 63 L. Ed. 962.

The corporation, as its name implies, was created to meet emergencies arising purely out of war conditions, and for governmental purposes, to enable the government to cope successfully with the exigencies

incident to war. Congress has continuously so treated it. By the Act of July 1, 1918 (Comp. St. Ann. Supp. 1919, § 8146fff), it authorized and directed the Secretary of the Treasury to cause an audit to be made of the financial transactions of the Fleet Corporation, under such rules and regulations as he should prescribe.

By the Act of March 1, 1918, 40 Stat. 438 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8146t), Congress authorized the corporation, within the limits of $50,000,000, to purchase, lease, requisition for temporary use, or acquire by condemnation or otherwise, land or any interest therein suitable for construction thereon of houses for the use of employees, etc., and to make just compensation therefor in such amounts as it might determine; providing that, if the amount so determined was unsatisfactory, the corporation should pay 75 per cent. thereof, and the claimant would thereupon be entitled to sue the United States to recover such further sum as would be required to equal just compensation for the property or interest therein so taken, in the manner provided by section 24, par. 20, and section 145 of the Judicial Code (Comp. St. §§ 991, 1136). This act further requires the Fleet Corporation to report to Congress each year the names of all persons and corporations with whom it has made contracts and of such subcontractors as may have been employed in furtherance of the act.

By the Act of June 15, 1917, 40 Stat. 182, the President is authorized to do many things touching the requisition of ships, plants, etc., and, among other things, it is provided that the President may exercise the power and authority thus vested in him to expend the moneys appropriated, through such exigencies as he may determine from time to time:

"Provided, that all money turned over to the United States Shipping Board Emergency Fleet Corporation may be expended as other moneys of said corporation are now expended." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d.

By this piece of legislation the President may determine the amount to be paid for the property requisitioned, which, if not satisfactory, will authorize the owner to sue the United States as provided in the last act above noticed. Such authority to sue the United States is contained in the amendatory Act of July 18, 1918, c. 157, 40 Stat. 913, 915, extending the powers of the President.

These specific authorizations to sue the United States I regard as designed by Congress as exceptions to the general rule that the United States cannot be sued except by its own consent. The Act of October 6, 1917, c. 79, 40 Stat. 383 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 251a) declares that the corporation shall be considered as a government establishment within the purview of section 5 of the act inhibiting the transfer of employees from one department to another (Comp. St. § 251).

There would seem to be a legislative purpose in requiring the Fleet Corporation to be incorporated under the laws of the District of Columbia, which municipality is a mere agency of the general government, the sovereign powers of which are lodged in the government of the United States. Metropolitan Railroad Co. v. District of Columbia, 132 U. S. 1, 10 Sup. Ct. 19, 33 L. Ed. 231. The fact that the Fleet Corporation

is accorded the power to sue and be sued to my mind does not affect the question, as it has access to the courts for the enforcement of all claims not in excess of $10,000, and to the Court of Claims involving amounts in excess of that sum.

Another incident that appeals for consideration is that, by section 9 of the original Act of September 7, 1916 (Comp. St. § 8146e), vessels while employed solely as merchant vessels are subjected to all laws, regulations, and liabilities governing merchant vessels, whether the United States be interested in them or not, and thus are subjected to the ordinary remedy of libel in rem in admiralty. This denotes an exception to the general intendment of Congress that other vessels shall not be so dealt with.

So we find that the public acts of Congress, wherever dealing with the Shipping Board and the Fleet Corporation, have seemed to recognize the condition that the Fleet Corporation is a government agency, organized for government purposes, and within its limitations to exercise the sovereign powers of the United States. The Supreme Court, in so far as it has spoken respecting the Fleet Corporation, has recognized it as "an arm of the board." Its language is as follows:

"But at the time of the emergency provision of June 15, 1917, the Shipping Board had been established as a public commission, with broad administrative powers and subject to definite restrictions, and the Fleet Corporation had been created as its agency, financed with public funds. The emergency shipping legislation evidently was enacted in the expectation that the President would employ the Shipping Board and the Fleet Corporation as its agencies to exercise the new powers, for the Fleet Corporation was mentioned in the act, and it was known to be but an arm of the board." The Lake Monroe, supra.

If an arm of the board, it is likewise an arm of the government, for doing the things in behalf of the government assigned to it. It is in no sense a private corporation, but is a purely government organization, to meet war emergencies, and while so acting, exercises the functions of the sovereign state. True, private parties may hold stock in the entity; but the control is lodged absolutely in the government, through its officers and agents. I am impelled to the conclusion that the Fleet Corporation is a governmental entity, created to exercise governmental functions within its restricted limitations, and that for its acts performed in that capacity the United States is not suable, except in the Court of Claims, involving an amount in excess of $10,000. Sloan Shipyards Corp. v. U. S. Shipping Board (D. C.) 268 Fed. 624.

Neither United States v. Strang et al., 254 U. S. ——, 41 Sup. Ct. 165, 65 L. Ed. ——; nor Salas v. United States, 234 Fed. 842, 148 C. C. A. 440, is opposed to this view. The former case must be read in view of section 41 of the Criminal Code (Comp. St. § 10205); the court holding that the defendants were not agents of the United States within the true intendment of that section. In the latter case the court exonerated the accused, because the United States was then engaging in a commercial business, and not in its sovereign capacity. I am aware that other District Courts are not in accord with this conclusion, but I am unable to agree with them.

Demurrer sustained.

UNITED STATES v. HOLT et al.

(District Court, D. North Dakota, W. D. January 8, 1921.)

No. 3676.

1. **Intoxicating liquors ⇐13—"Concurrent" power under Eighteenth Amendment of state and government permits each to prosecute same acts.**
The concurrent power given by Const. Amend. 18, § 2, to the states to enforce that amendment is similar to the power exercised by them in numerous cases, where acts already made offenses under the state law were made offenses under the United States law, with a provision that the latter law should not affect the jurisdiction of the states, and authorizes each to punish the same act as an offense against its sovereignty.

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

2. **Criminal law ⇐201—Conviction under state Prohibition Act does not prohibit federal prosecution for same acts.**
A conviction for transporting and possessing intoxicating liquor in violation of a state law enacted before the adoption of Const. Amend. 18, does not prevent a prosecution by the United States for violation of that amendment and the National Prohibition Act by the same acts on which the state prosecution was based.

3. **Criminal law ⇐201, 1211—Previous conviction in state court does not authorize refusal of leave to file information, but will be considered in assessing punishment.**
In view of the fact that the National Prohibition Act imposes more severe penalties for a second offense, the conviction and punishment of defendant in the state court for a violation of the state statute does not authorize the refusal of leave to file an information charging those acts as violations of the federal law, but the United States courts in passing sentence will take into consideration the punishment previously involved in the state courts, to the end that the citizen may not be twice subjected to the full measure of punishment for the same acts.

Martin Holt was charged by information with importing, transporting, and having intoxicating liquor in his possession. On special plea alleging a previous conviction in the state court for the same acts. Plea held invalid.

Melvin A. Hildreth, U. S. Atty., and S. L. Nuchols, Asst. U. S. Atty., both of Fargo, N. D.

Bosard & Twiford, of Minot, N. D., for defendants.

WOODROUGH, District Judge. This cause squarely raises the question whether the previous conviction of defendant in the state court for importing, transporting, and having intoxicating liquor in his possession can be availed of to prevent his prosecution in this court for violating the Volstead Act (41 Stat. 305) by importing, transporting, and having intoxicating liquor in his possession. The defendant had leave of court to plead specially, and on the trial of the special issue by the court it was proven that the acts for which he was arrested, informed against, to which he pleaded guilty, and for which he was convicted and sentenced to fine and imprisonment by the state court of general juris-

diction, are identically the same acts for which he is now informed against by Col. M. A. Hildreth, United States District Attorney for North Dakota.

The defendant claims to be within the protection of the Fifth Amendment to the Federal Constitution:

"Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

The prohibition law of North Dakota, under which defendant was convicted and sentenced, has been in force and effect for many years prior to the Eighteenth Amendment and the Volstead Act, but it is contended that by reason of the second section of the Eighteenth Amendment the state law becomes now in substance an exercise by the state of the concurrent power conferred upon the Congress and the several states to enforce prohibition by appropriate legislation.

It is said that, the power of the Congress and of the state Legislature to punish defendant's acts in question being thus made concurrent, the present offense charged is the same offense as the one for which he has been convicted within the meaning of the Fifth Amendment.

The question is important and has been given careful consideration. Repeated jeopardy for the same offense is persecution, repugnant to the Constitution, the principles of the common law, and the "genius of our free government"; and as to the enforcement of prohibition every sound reason against that kind of intolerable persecution has intensified force. The hot vindictiveness of private victims, who suffer from ordinary crimes of violence and covin, is almost entirely replaced in these cases by the cool, persistent determination of officers, who must themselves search out offenses as well as the offenders, and to the obligation of their duty as officers there is no limit, save the extent of the law.

[1] I have proceeded, therefore, to the inquiry with the actual operation of the Volstead Act, as it has been developed before the trial court, very clearly in mind. The decision of the seven liquor cases by the Supreme Court on June 7, 1920 (253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946), settled many disturbing questions concerning the Eighteenth Amendment, the Volstead Act, and related state legislation. But a decision of the particular question now before this court was not necessary to a determination of the cases, and the specific question was not answered.

No opinion was published by the majority of the court, but it was clearly established by the conclusions announced that the concurrent power which is conferred on the Congress and the several states to enforce prohibition is not concurrent in the sense elaborated and contended for by Justices McKenna and Clarke in their dissenting opinions. They insisted upon an interpretation of "concurrent power" which would have denied the supremacy of the Volstead Act over conflicting state laws, and which would have prevented the enforcement of the act by federal authority in any state whose Legislature had not approved of or adopted it. All such interpretations are incompatible with, and are clearly excluded by, the court's conclusions and disposition of the cases before it.

An interpretation according with the court's conclusions is that the word "concurrent" was used in the second section of the Eighteenth Amendment in the same or similar sense in which it has been used by the Supreme Court as illustrated in Sexton v. California, 189 U. S. 324, 23 Sup. Ct. 543, 47 L. Ed. 833. In that case there was a conviction in the state court for the crime of extorting money by threatening to falsely accuse a person of an act that was made criminal only by federal law. It was urged in the federal Supreme Court that the particular acts of the offender were denounced by a federal law against extortion and therefore cognizable only in the federal courts, to the exclusion of the state courts. Sec. 711, U. S. Rev. Stat. (Comp. St. § 1233). In the federal statute against extortion, referred to, there was a provision that nothing in the title contained shall be held to take away or impair the jurisdiction of the several states under the laws thereof. The Supreme Court denied the claim of a federal jurisdiction such as to exclude the jurisdiction of the state court over the acts in question, and expressed itself in this language:

"The jurisdiction of the state court over the crime of extortion, when perpetrated under the circumstances stated in the indictment, is at least concurrent with that of the courts of the United States."

The conviction by the state court was sustained as a proper exercise of the sovereign powers of the state; but the power of the federal government to proceed to punishment for the offence against its sovereignty was entirely unaffected. Because both courts may act against the same person for the same acts, the court used the words concurrent jurisdiction, without introducing any confusion whatever into the thought of those who are familiar with such coexisting powers of state and national governments.

Again, the same word "concurrent" is used in the same sense by Mr. Justice Johnson in Houston v. Moore, 5 Wheat. 33, 5 L. Ed. 19:

"Why may not the same offense be made punishable both under the laws of the states and of the United States? Every citizen of a state owes a double allegiance. He enjoys the protection and participates in the government of both the state and the United States. * * * The actual exercise of this *concurrent* right of punishing is familiar to every day's practice. The laws of the United States have made many offenses punishable in their courts, which were and still continue punishable under the laws of the states. Witness the case of counterfeiting the current coin of the United States, under the Act of April 21, 1806, in which the state right of punishing is expressly recognized and preserved. Witness also the crime of robbing the mail on the highway, which is unquestionably cognizable as highway robbery under the state laws, although made punishable under those of the United States."

It was not necessary for the Supreme Court in the liquor cases to exactly define the "concurrent power" of the Eighteenth Amendment. Nor is it in this case. It is sufficient and obvious, in view of the conclusions reached by the court, that any interpretation is excluded which would deny to either the nation or the state the power to punish such acts as are charged against defendant here. As applied to this case, the words in the second section of the amendment are not to be extended beyond the effect given to such provisions as the one quoted above, which are to be found in several of the acts of Congress.

"Nothing in the act contained shall be held to take away or impair the jurisdiction of the several states under the laws thereof."

[2] When the "concurrent power" is thus restricted to its real purposes and significance, it follows that the conviction of defendant in the state court cannot prevent his prosecution in this court; this upon principles long settled and established, and authoritative precedents long acquiesced in. The last expression of the Supreme Court is found in Gilbert v. Minnesota, 254 U. S. 325, 41 Sup. Ct. 125, 65 L. Ed. —, decided December 13, 1920:

" 'The same act * * * may be an offense or transgression of both' [the duty of a citizen to the state and the nation] and both may punish it without a conflict of their sovereignties."

Numerous cases are cited, beginning with Moore v. Illinois, 14 How. 13, 14 L. Ed. 306, and terminating with Halter v. Nebraska, 205 U. S. 34, 27 Sup. Ct. 419, 51 L. Ed. 696, 10 Ann. Cas. 525. A study of the cases can leave no doubt of the soundness and wisdom of the settled law that, where both sovereignties may punish, a conviction by one is not a bar to punishment by the other. Though the acts punished are identical, the offense is not the same.

[3] It is further to be considered whether the defendant ought in justice to be further prosecuted, and whether permission should have been granted by the court to file the information herein. I am impressed with the language of the Supreme Court in Fox v. Ohio, 5 How. 435, 12 L. Ed. 213:

"It is almost certain that, in the benignant spirit in which the institutions both of the state and federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected a second time to punishment by the other for acts essentially the same, unless indeed this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor."

Also the expressions of Mr. Justice McLean in Moore v. Illinois, 14 How. 21, 14 L. Ed. 306:

"It is contrary to the nature and genius of our government to punish an individual twice for the same offense. * * * It is believed that no government, regulated by laws, punishes twice criminally the same act, and I deeply regret that our government should be an exception to a great principle of action, sanctioned by humanity and justice."

The Supreme Court used the expressions above quoted in a case where the harboring of fugitive slaves in free states was under consideration, speaking upon a subject which then aroused bitter feelings and passions. The spirit reflected by the court prevailed, and has endured through the history of the nation. No matter what the difficulties, the enforcement of prohibition must be carried out in the same spirit. This is clear, but does not determine that leave to file information in this case should be denied by the court.

Incidental to the power of each sovereignty to punish for offenses against it is the power to pardon or to mitigate the punishment. In this case both fine and imprisonment were imposed, but the imprisonment permanently suspended. In other cases, especially in municipalities where the conviction is under ordinances, full pardons are frequent-

ly granted. Again, by the terms of the Volstead Act offenses subsequent to the first conviction are to be more severely dealt with. The judge, therefore, could not justify a refusal of permission to file the information upon the ground of previous proceedings had under another jurisdiction.

In the case at bar I have seen the young man charged, and have heard the circumstances of his arrest. If he shall be advised to plead guilty to the charge, the circumstance of his previous punishment will be given consideration, a record made of his first conviction, to protect the government in case of a repetition of such acts, and a nominal penalty will be imposed.

ROBERTSON v. GARVAN, Alien Property Custodian, et al.

(District Court, S. D. New York. June 29, 1920.)

1. **Contracts ⟸10(4)—For product of mine held mutual.**
   A contract whereby a mine owner agreed to sell the total production of its ore at prices varying with the market for the metal, whether construed as a contract by the seller to produce what it chooses and to refrain from selling any of its product to any one except the buyer, or as requiring the seller to continue to produce ore in good faith and sell the total output, is not void for want of mutuality.

2. **Contracts ⟸63—Exchange of $1 not sufficient consideration, unless so intended.**
   The recital in a contract of the consideration of $1.00 paid by each of the parties to the other does not establish sufficient consideration for the contract, where the real considerations intended were evidently the mutual promises of the parties, though the payment of a trifling sum, if intended as the real consideration, will support the contract.

3. **Contracts ⟸10(4)—Part performance does not supply want of consideration.**
   If a contract for the sale of ore produced from a mine was void for want of mutuality, part performance thereof by delivery and acceptance of the ore produced for a time does not bind the buyer to continue to receive the ore produced, but only requires him to pay for that received at the contract price.

4. **Estoppel ⟸93(2)—Sales ⟸19, 20—Construction of plant held not estoppel or consideration.**
   If a contract for the sale of ore produced at a mine was void for want of consideration the construction by the mine owner of a picking plant to enable it to increase its output which was not promised by the mine owner nor requested by the buyer, who had made no misrepresentation as to the facts when entering into the contract, does not estop the buyer from relying on the want of consideration, or establish consideration.

5. **Sales ⟸179(3)—Breach as to quantities delivered waived by accepting deliveries.**
   The breach of a provision in a contract for the sale of ore, which required the seller to ship the ore in as near as possible equal weekly quantities, is waived by the acceptance of ore delivered in unequal quantities, without objection on that ground.

6. **Sales ⟸176(3)—Refusal to accept for reason assigned cannot be justified for other reasons.**
   Where the buyer refused to accept further deliveries under the contract in reliance solely upon the vis major clause in the contract, he can-

not, when sued on the contract, claim a breach on other grounds as justification.

7. **Mines and minerals ⊂=106—Contract by parent company held not to affect clean hands of subsidiary.**

The fact that a company which owned all the stock of a mining corporation had previously agreed to sell the ore produced at that mine to another does not prevent the mining corporation from suing in equity to enforce a contract by it to sell its ores to defendant.

In Equity. Suit by Frederick Y. Robertson against Francis P. Garvan, as Alien Property Custodian, and others. Decree rendered for complainant.

C. W. Stockton, of New York City (Alfred Sutro, of San Francisco, Cal., of counsel), for complainant.

Francis G. Caffey, U. S. Atty., of New York City (William Travers Jerome and Harland B. Tibbetts, both of New York City, of counsel), for defendants.

AUGUSTUS N. HAND, District Judge. On September 29, 1914, the Mammoth Copper Mining Company entered into a contract with Beer, Sondheimer & Co., dated August 24, 1914, reciting a consideration of "one dollar each to the other in hand paid * * * and the mutual terms and agreements" therein contained, whereby the former agreed to sell and deliver, and the latter to purchase and receive, "the total production of zinc crude ore shipped by the seller from its properties in Shasta county, California." The buyer was not bound to accept any of the product running less than 33 per cent. metallic zinc, but if the seller should produce such zinc the buyer reserved "the option to purchase same under the terms of this contract. If the buyer should not elect to accept such product, the seller has the privilege of disposing of it elsewhere." "All of the product" (runs the contract) "shall be delivered f. o. b. cars at the buyer's smelting works at Bartlesville, * * * shipments to be made in as near as possible equal weekly quantities." The following clause of the contract regulates the payments for zinc content:

"Zinc: $19.00 per ton for product containing 40% zinc, with a St. Louis spelter price of $5.00 per cwt. For each unit of zinc in excess of 40% a credit of $1.00 will be allowed. For each unit less than 40% a debit of $1.00 will be made. For each cent raise in the price of spelter above $5.00 per cwt. a credit of 5¢ per ton will be allowed. For each cent drop in the price of spelter under $5.00 per cwt. a debit of 5¢ per ton will be made. * * *"

The contract was to run one year after the completion of the picking plant which the seller contemplated building, but in no event should "the life of the contract exceed 18 months from the date of its execution." The picking plant was completed March 5, 1915, and prior to the refusal of Beer, Sondheimer & Co. to receive further shipments 1,448.881 tons were shipped and paid for. According to the testimony of Salinger, which is uncontradicted, Eardley, who negotiated the contract for the Mining Company, mentioned 400 or 500 tons per month as the amount of zinc which the Mining Company expected to produce.

Metcalf, the manager of the Mining Company, stated at the trial that, if the price of spelter became so low that mining was unprofitable, the company would probably ship no ore. On October 22, 1914, in reply to a telegram by Salinger as to expectations of production, Metcalf answered:

"Zinc ore tonnage depends altogether on market price of spelter." (Defendants' Exhibit J.)

And on October 25th, Metcalf telegraphed:

"With spelter quotations below five shipments will be very light. If it rises above five will probably ship about 200 tons per month." (Defendants' Exhibit H.)

On November 23 Metcalf further telegraphed:

"If spelter remains above five estimate December tonnage at 200." (Defendants' Exhibit N.)

The Mammoth Company shipped to Beer, Sondheimer & Co. about 230 tons in November, 84 tons in December, 140 tons in January, 500 tons in February, and in March, up to the 17th, 800 tons appear to have been shipped. Further shipments were also made that month. At the end of February the price of spelter had reached more than $9 per cwt., whereas it was less than $5 in October, about $5 in November, about $5.50 in December, about $6 in January, and about $8 in March. Thus it appears to have greatly risen after January.

On March 17, Beer, Sondheimer & Co. telegraphed the Mammoth Company as follows:

"Are advised you shipped from March sixth to ninth fifty tons zinc ore daily whilst your average shipments since beginning contract amount to only about two hundred tons monthly. In view of abnormal conditions we will only accept tonnage reasonably equal to the average monthly amount shipped heretofore. We are unable to receive and smelt any further tonnages in accordance page five of our contract with you. We have advised all other shippers accordingly."

On March 23 the buyers again telegraphed:

"Understand so far eight hundred tons have arrived Bartlesville. Repeat we are unable to accept such tonnages and request you to act accordingly."

On March 24th the buyers telegraphed:

"Referring our yesterday's telegram received further two bill ladings. Cannot accept. What shall we do with bill ladings?"

The Mammoth Company thereafter tendered all the zinc crude ore produced of the grade of 40 per cent. metallic zinc content, or higher, which tender was refused. The clause of the contract referred to in the letter of March 17th was the vis major clause common to business contracts. It cannot, however, be successfully contended that any vis major existed which would excuse performance of a valid contract, and I do not understand that such a position is taken by any of the parties here.

The complainant, who, as assignee of the Mammoth Copper Mining Company, has succeeded to its rights against Beer, Sondheimer & Co., sues the Alien Property Custodian under section 9 of the Trading

with the Enemy Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½e). The defendants resist the suit, principally on the ground that the agreement between the original parties was void for lack of consideration.

[1] The instrument can be construed in three ways. It can be regarded as involving only an obligation to sell all the products which the Mammoth Copper Mining Company might produce and to dispose of such product to no other persons than Beer, Sondheimer & Co., during the term of the contract, leaving the seller free to produce what it chose. Such an interpretation was placed upon an agreement similar to the present one in the cases of Ramey Lumber Co. v. John Schroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241, H. M. Pfann & Co. v. J. C. Turner Cypress Lumber Co., 194 Fed. 69, 114 C. C. A. 89, and Kenan, McKay & Spier v. Yorkville Cotton Oil Co., 260 Fed. 28, 171 C. C. A. 64. Burton v. Great Northern Ry., 9 Exch. 507; Williston on Contracts, § 104.

In a second class of cases it has been held that a consideration based upon abstention from dealing is so unreal and so profitless to the buyers that it could never have been intended by the parties, especially where, as here, it was not in literal terms expressed. What the buyers particularly wanted of the seller was ore for their smelters, and not an agreement not to ship to others. Viewed in this light, an agreement which contained no words of promise by the seller to deliver either a fixed amount, or an average amount, or an amount necessary to meet the requirements of the business of the buyers, was held by the Court of Appeals of this circuit in Munson S. S. Line v. Grimwood, 249 Fed. 722, 161 C. C. A. 632, to be dependent on the mere desire of the seller for its immediate advantage. In that case the Munson Line agreed to provide transportation for "all of the coal and coke shipped by [Grimwood] from January 1, 1913, to December 31, 1915." The Circuit Court of Appeals of this circuit held that evidence of Grimwood's dealings with the Munson Line, prior to the date of the agreement, was competent to determine whether it might be supported as a requirement contract, and said in a dictum:

"We may add, however, that, had no offer to show the extent and nature of Munson's previous knowledge of Grimwood's requirements been made, and the trial court had held the contract a 'will, wish, or want' agreement, we should have agreed with such ruling. * * *"

The court goes on to say that in so far as the Ramey Case, 237 Fed. 39, 150 C. C. A. 241, "seems to assert that an agreement otherwise void, as depending for effect on the will, wish, want, or whim of one party, is validated merely by the promise of such party to abstain from dealing in respect of the subject in hand, with any person other than the second party, we are compelled to think it inadvertently used, and to disagree." I believe the court, in reaching the conclusion that the agreement in the Munson Case could not be supported, unless it could be made out to be a requirement contract, must have done so because it did not regard the implied negative covenant not to ship by other lines as the real consideration bargained for. In other words, the Munson Line wanted cargo for its ships, not abstention from shipping

by other lines. If a consideration based upon such abstention were eliminated, and a "requirement" clause could not be justily implied, the court thought that no promise remained on the part of Grimwood to support a contract.

The Grimwood contract, however, was somewhat different from the one here. Grimwood seems to have owned no coal mine. He simply bought and shipped when he found it profitable and practicable to do so. He had entirely ceased to ship coal for some time before suddenly resuming and demanding a number of ships from the Munson Line to carry a large tonnage. It was easy under such circumstances for the court to regard such a highly speculative transaction as based upon the mere whim of Grimwood. In the present case the facts more nearly resemble those related in the opinion of Judge Mayer in Select Pictures Corporation v. Australasian Films (D. C.) 260 Fed. 296, and in the case of Ramey Lumber Co. v. John Schroeder Lumber Co., supra.

The third class of cases is that in which the law implies from the business relations and conduct of the parties an implied agreement on the part of the seller to continue producing in good faith. These cases assume that there is an average or contemplated output of the mine or lumber business which is about to be produced, and that the seller will not consult his own interest in developing the material contracted for, but will, in so far as is consistent with the nature of the plant, furnish the means of carrying out the understanding of the parties. American Distributing Co. v. Hayes Wheel Co. (D. C.) 250 Fed. 109; Pittsburgh Plate Glass Co. v. H. Neuer Glass Co., 253 Fed. 161, 165 C. C. A. 61; Du Pont de Nemours v. Schlottman, 218 Fed. 353, 134 C. C. A. 161; Kenan, McKay & Spier v. Yorkville Cotton Oil Co., 260 Fed. 28, 171 C. C. A. 64; Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Wigand v. Bachmann-Bechtel Brewing Co., 222 N. Y. 273, 118 N. E. 618.

The Mammoth Copper Mining Company was about to construct a picking plant with which to separate its ore. It was plainly contemplated by the parties that, when this plant was installed, ore should be produced and shipped from it. It was completed in March, and the Mining Company began to increase its output accordingly. This fact, rather than Metcalf's theories as to his legal obligations, is important. The Mining Company attempted in good faith to carry out its part of the contract until it was stopped.

Whether the contract under consideration falls under the first class I have mentioned, as I believe it does (see Williston on Contracts, § 104), or under the third, there is ample consideration to support it. In no event can I believe that the Munson Case would go so far as to nullify a contract to sell the entire product of a mine on the ground that it lacks consideration.

Defendants' contention that the clause of the agreement, "shipped from its properties," contemplated a literal shipping, rather than a mere delivery, does not impress me. I think it in no way differs from the succeeding clause, relating to an option to purchase ore running less than 33 per cent. metallic zinc. In each case it seems reasonable

to regard the understanding of the parties to have been that the Mammoth Copper Mining Company would sell and deliver all the ore which it produced to Beer, Sondheimer & Co.

[2] The argument of complainant's counsel that the clause of the agreement, "In consideration of the sum of one dollar ($1.00), each to the other in hand paid," establishes that the contract has a sufficient consideration, is not convincing. The decisions relied upon are principally leases, where a grant might be supported even without consideration. Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856; Raydure v. Lindley, 249 Fed. 675, 161 C. C. A. 585. In the case of Lawrence v. McCalmont, 2 How. 426, 11 L. Ed. 326, there was not only an exchange of nominal consideration, but there existed the most valuable consideration of advance upon a letter of credit. That a trifling sum, if intended as the real consideration, will support a contract, is undoubtedly the case. But the real considerations intended were evidently mutual promises, and the promise of the Mining Company was no more than to ship when, and if, and to the extent, it produced ore. Mere reciprocal receipts of $1 are not ordinarily sufficient. In Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. at page 331, 114 C. C. A. at page 291, the court said:

"* * * The phrase of the contract which reads, 'and of $1.00 each to the other paid,' etc., imports no consideration. As said by the trial judge, it may well mean the exchange of the same dollar."

This view appears to be approved by Prof. Williston in his book on Contracts (section 115, at page 241), and there is no more thoughtful and eminent American authority on the subject.

[3] The claim that partial performance prevents the defendants from questioning the validity of the agreement is equally unconvincing. It could not render a contract valid which lacked mutuality. The only right a partial performance of an agreement without a consideration gives is that of recovery of the value of anything furnished. The right of action in such a case is not in assumpsit on the contract, but in indebitatus assumpsit. If the buyers here had not exchanged mutual promises, which created a valid bilateral contract, they would only be liable to pay at the agreed price for such shipments of zinc as were made before they refused to take further deliveries. This is plain from the opinion of Circuit Justice Holmes in Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co., 162 Fed. 848, 89 C. C. A. 520, and of Judge Sanborn in Cold Blast Transportation Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, as well as from general principles.

[4] As for the suggested estoppel involved in the construction of the picking plant, it nowhere exists. An estoppel technically requires a representation as to an existing fact, and there was none made by Beer, Sondheimer & Co. If the construction of the plant has any bearing on the matters in issue, it must be on the theory that it was a consideration promised, or, at the request of Beer, Sondheimer & Co., furnished in exchange for a promise on their part to take the output. There was certainly no promise by the Mammoth Copper Mining Company to construct this plant, nor any request by the buy-

ers that it be constructed. Under all these circumstances, I cannot see that the construction of the picking plant is a material factor, either as affording a basis for an estoppel, or an element of consideration.

[5, 6] The claims of the defendants that the Mammoth Company broke the contract by failing to ship ore "in as near as possible equal weekly quantities" is without merit. No objection was made to deliveries on this ground, so that the breach was waived as to all ore accepted. As for the ore tendered in March, acceptance of which was refused, the objection to taking it was based solely on the vis major clause. It is too late now to claim a breach on other grounds. More than this, there is no evidence that the Mammoth Company did not ship as nearly weekly quantities "as possible." The picking plant was only just installed, and full production was only just getting under way, when Beer, Sondheimer & Co. refused to take ore. Farrelly v. United States, 159 Fed. 671, 86 C. C. A. 539.

[7] The contention that complainant does not come into equity with clean hands is equally unsound. I do not think it true that the American Metal Company in effect had a contract for the ore in question which it could specifically enforce against the Mammoth Company. It is true it had a contract with the United States Smelting Company, which held all the stock of the Mammoth Company, and that this contract appears to have literally embraced the ore in question. But specific performance could not be enforced against the Mammoth Company, or Beer, Sondheimer & Co., by reason of a prior contract with the parent company for ore which the latter did not as a corporation own. The contract between the American Metal Company and the parent company was made in June, 1914, and only one month later that company, at the request of Metcalf, seems to have attempted to sell the Mammoth ores to the American Metal Company. This shows that the prior contract was not in mind and that the clause which strictly covered any interest the present company had in the Mammoth ore body was not thought by any of the parties to embrace these ores.

The separate corporate identity of the Mammoth Company and the United States Smelting Company was complete, and there are too many theoretical and practical objections to treating the American Metal Company's contract as enforceable against Beer, Sondheimer & Co. to make the contention as to unclean hands tenable. Moreover, there is an entire absence of mala fides. On the whole case, I find that Beer, Sondheimer & Co. broke the contract, and that the complainant must prevail.

An interlocutory decree is granted in favor of the complainant, with a reference to report as to complainant's damages.

UNITED SHOE MACHINERY CO., v. L. Q. WHITE SHOE CO.

(District Court, D. Massachusetts. November 21, 1919.)

No. 700.

1. **Patents ⇐178—Invention of doubtful utility held not pioneer, entitled to broad equivalents.**
   The invention of a machine for inserting blind eyelets in shoes, which consisted in substituting for an anvil in a machine for inserting visible eyelets a thinner piece of metal, which would go between the leather and lining without disturbing their relative position, and which was of doubtful utility and achieved no commercial success, is not a pioneer invention, entitled to a broad range of equivalents.
2. **Patents ⇐328—1,143,740, for machine for setting blind eyelets in shoes, held valid.**
   The Wales patent, No. 1,143,740, for a machine for setting blind eyelets in shoes, *held* valid, though of doubtful utility, when the general language is restricted to the means described in the patent or substantial equivalents.
3. **Patents ⇐168(2)—Fact that claim was amended after defendant began manufacturing is to be considered.**
   The fact that a claim in a pending application for a patent was amended by inserting therein language broad enough to include defendant's invention, which was not included within the original claim, after defendant began manufacturing his machine and placing it on the market, is to be considered in determining the scope to be given to the range of equivalents in plaintiff's patent.
4. **Patents ⇐328—1,143,740, for machine for setting blind eyelets in shoes, held not infringed.**
   The Wales patent, No. 1,143,740, for a machine for setting blind eyelets in shoes, *held* not infringed by defendant's machine, when its claims are restricted, as they must be sustained.
5. **Patents ⇐328—1,143,741, for process for setting blind eyelets in shoes, held invalid.**
   The Wales patent, No. 1,143,741, covering a process for setting blind eyelets in shoes, *held* invalid, as covering only the function or operation of a machine.
6. **Patents ⇐7—Process patent, covering merely function of machine, is void.**
   A process patent, which covers nothing more than the mere function or operation of a machine, is void.

In Equity. Suit for infringement of patent by the United Shoe Machinery Company against the L. Q. White Shoe Company. Bill dismissed.

Fish, Richardson, Herrick & Neave, A. D. Salinger, and Emery, Booth, Janney & Varney, all of Boston, Mass., for plaintiff.

Francis J. V. Dakin, of Boston, Mass., for defendant.

JOHNSON, Circuit Judge. This is a suit in equity, in which the plaintiff alleges infringement by the defendant of two letters patent of the United States, Nos. 1,143,740 and 1,143,741, issued June 22, 1915, to Alfred B. Wales, assignor to the plaintiff company. The first is for a machine for setting blind eyelets in shoes, and the second, entitled "Art of Shoe Making," is for a method of setting blind eyelets in shoe uppers.

The defenses to the suit for infringement of certain claims of the machine patent are invalidity, lack of invention and utility, and noninfringement; and to the method patent that the claims in issue are void, as being no more than the functions of a machine, and as being anticipated and lacking invention.

The application for the machine patent was filed May 4, 1912. At this time no machine for inserting blind eyelets in shoe uppers had been invented. Patents had been granted for several machines for setting visible eyelets in shoe uppers. Some of them were designed to set eyelets in one side of a shoe upper, in a step by step process, by punching the holes and inserting the eyelets, and others to set eyelets in both sides of a shoe upper in a continuous step by step process, first punching the holes, and then setting eyelets in the holes thus punched. In the process of setting the eyelets on both kinds of machines the eyelet was inserted from the outer or leather side of the upper and clinched upon the inside of the lining. In the machines by which eyelets were set in both sides of the upper simultaneously the parts of the two sides of the upper, which were to be eyeletted, were brought into contact with an intermediate anvil and the eyelets, when inserted from the leather side of the upper, were clenched upon the inside of the lining. Previous to the application of Wales for the machine patent in suit blind eyelets, had been set by punching the holes upon one of the machines for setting visible eyelets and then the leather part of the upper was turned back and the eyelet set by a foot-power machine; the eyelets being inserted from the inside of the lining of the upper and clinched upon the lining beneath the leather of the upper. For this operation it was first necessary to prepare the upper by cementing together the leather and the lining in the position which they would assume in the finished shoe, but leaving them unattached at their edges, so that the leather could be readily turned back after the holes had been punched through both it and the lining, and the eyelets then inserted from the inside of the lining and clinched upon the side next to the leather and beneath it. It was then necessary to stitch the leather and lining of the upper together along their edges and to undertrim the same. This had been the method practiced in shoe factories throughout the United States from about the year 1905 down to the time of Wales' application for his machine patent.

Wales, a stitching room machinist at the factory of the Regal Shoe Company at Whitman, Mass., conceived the idea that blind eyelets might be set in one operation by use of one of the machines then in use for setting visible eyelets in both sides of a shoe upper simultaneously, known as the Duplex machine. He testified that this had been suggested to him by his father. He attempted to use the Duplex machine for the setting of invisible eyelets, by placing one side of a shoe upper upon the Duplex machine, so that the lining side would be upon one side of the anvil which was used for clinching the eyelets and the leather side upon the other. He then stopped one of the raceways which fed eyelets to the leather side of the upper and allowed the eyelets to be fed from one raceway only, so that the Duplex machine, as thus modified, would punch holes in both the leather and the lining parts of an upper and an eyelet be inserted upon its lining side and clinched

against the anvil beneath the leather side of the upper. He found, upon experiment, however, that the anvil of the Duplex machine, when used for setting invisible eyelets, was so thick that he did not obtain a proper alignment between the hole punched in the leather and the eyelet which had been set in the lining, and while invisible eyelets could be set upon the Duplex machine, so much subsequent labor was necessary to procure proper alignment of the hole in the leather with the eyelet set in the lining that this method was of no commercial value. It then occurred to him that he might diminish the size of the anvil upon which the eyelet was clinched beneath the leather and upon the lining part of the upper. This was the dominant feature of his invention. He conceived the idea of inserting a thin plate of metal with an anvil upon it, between the leather and the lining, which should have a slot in it through which a punch could pass, punching the leather upon one side of it, and also punching the lining, which was arranged upon the other side. For putting this idea into successful operation it was necessary that the plate of metal, with the anvil upon its lower side, should be so thin that the relative position of the leather and the lining would not be materially changed from that which they would occupy in the finished shoe. He found that one of the machines which had been used for setting visible eyelets in one side of a shoe upper, only, was better adapted to carry out his idea than the Duplex machine, which had been used for setting eyelets in both sides of a shoe upper simultaneously. He therefore selected the Glass-Peerless machine upon which his idea could be ingrafted, and with such changes in this machine as would be readily suggested to one familiar with its operations he succeeded in setting invisible eyelets in shoe uppers. In his application for a patent he describes the attachment which he would make to the old eyeletting machines in order to set blind or invisible eyelets as:

"A plate, formed preferably from a relatively thin, flexible sheet of metal; the plate *2* comprising a body portion and a shank portion. The shank portion is mounted upon a small plate or block which serves to hold the part *2* above the table, so that the lining in which the eyelets are to be set may pass under the part *2*, while the outer part of the quarter may pass over the said part *2*, running from the front to back of the part *2*, and substantially parallel is an opening *8* through which the punch *11* may pass. The opening *8* is of a sufficient length so that it will not interfere with the feed movement of the punch, and it extends in the direction of the feed to and through the neck portion *10* of the part *2*. The part *2* is provided with a projecting portion *9*, the neck *10* of said portion *9* being downwardly bent, so that the punch *11*, when moving forward to feed the stock, will pass out of the opening *8* and over the forward projection *9*. On the under side of the projection *9* is secured an upsetting die or upper set member *12*, which co-operates with the set *13* of the machine; and when the punch has completed its forward feed movement it is directly over the upper set *12*. The forward feed movement of the punch causes the neck portion of the part *2* to disengage the under portion *6* of the upper from the point of the punch and the engagement of the punch with the superposed portion *7* of the leather carries the upper forward until the upper setting die is located in the hole just formed by the punch in the lining. When the punch is in this position the underset *13*, with the eyelet *14*, is moved upwardly and the eyelet is inserted and set in the lower portion *6*. The part *2*, together with its projecting end *9* may be made of comparatively thin sheet material, because, by the time the eyelet is set, it is backed up by the punch and is therefore held rigidly and prevented from yielding. After the eyelet is set the punch moves upwardly and toward the right and again

descends through the slot 8, cutting holes in both upper and lower pieces 7 and 6, and again feeds the stock forward, stopping directly over upsetting die 12 on the projection 9, and another eyelet is then set in the lower portion of the upper and the operation repeated."

There were only five claims in the original application, in all of which—"an intermediate plate, comprising a body portion, a projecting portion and a curved, connecting neck, said neck and body portion being slotted to permit the passage of the punch and said projecting portion being provided with a setting member to co-operate with the set of the machine," was set out as the dominating feature of his invention in combination with a punch and lower set of an eyeletting machine.

The method of operation, briefly stated, was to secure the lining and the leather of the upper in the normal position which they would assume in the finished shoe by cementing them together, but leaving the edges unstitched, so that the leather could be placed on one side of this attachment or plate and the lining upon the other side. The punch of the machine then punched a hole through the leather, passed down through the slot, and punched the lining. The upper was then moved along automatically by the machine to where the plate was bent downward, when the lining was stripped from the end of the punch by the downward bending of the plate, and the leather part remaining upon the punch was moved along until the punch, in the hole in the leather, was over the upsetting die *12*, which was on the lower side of the neck *9* of the plate. The eyelet was then inserted in the lining and by the lower set in the machine pressed up against the upsetting die *12* on the projecting neck *9*. The punch, being held in the leather above the upsetting die *12* at this time, served to back up the upsetting die when the eyelet was forced against it. In order that the hole in the leather part might be in alignment with the eyelet set in the lining, it was necessary that the intermediate plate be made very thin; and while the invention had utility, I think it can be well characterized as of a doubtful character as, because of its thinness, the plate would not stand the pressure exerted upon it when the eyelet was forced up against the upsetting die *12*, and also because the edges of the upper had to be stitched and undertrimmed after the eyelets had been set. Several pairs of shoes in which blind eyelets had been set in the uppers by the use of the intermediate plate described in Wales' invention were filed as exhibits by the plaintiff; but the testimony conclusively shows that the patent to Wales, restricted to the intermediate plate, had little commercial value, and Walter Shaw, manager of the eyelet department of the plaintiff, testified that in August, 1916, when he gave his deposition in this case, the company had but one Duplex machine with the Wales attachment in operation, and only 12 had been put out by the plaintiff. Amendments were made to the original claims by the insertion of additional ones on June 1, 1914. The principal feature of these amended claims was that the intermediate plate, described in the original claims, was broadened into "means for clinching the barrel of the eyelet upon the lining and beneath the outer portion of the upper before the tool is withdrawn from the upper"; the tool referred to being the punch of the machine.

[1] It is claimed by the plaintiff that this was a pioneer patent, and therefore entitled the patentee to a broad range of equivalents. But "the range of equivalents depends upon and varies with the degree of invention." Paper Bag Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122; Ives et al. v. Hamilton, Executor, 92 U. S. 426, 23 L. Ed. 494; Hoyt v. Horne, 145 U. S. 302, 12 Sup. Ct. 922, 36 L. Ed. 713; Deering v. Winona Harvester Works, 155 U. S. 286, 15 Sup. Ct. 118, 39 L. Ed. 153.

In view of the prior art and the use to which the Duplex machine could be put in setting invisible eyelets, I do not think that Wales can be said to be a "pioneer," in that he produced a wholly novel device which would entitle him to a broad range of equivalents. When he had before him the Duplex machine, with its thick anvil, the problem presented was how to make the anvil thinner, so that the relation of the leather of the upper to the lining might not be so disturbed that the hole in the leather would not register with the eyelet when set in the lining. While making the anvil thinner, and inserting it between the leather and the lining, more nearly accomplished the result which he desired, I do not think it can be said it was invention of a high order, which entitled him to a broad range of equivalents, to cut down the thickness of the intermediate anvil and to provide an attachment to an old machine.

The language of the court in Deering v. Winona Harvester Works, 155 U. S. 286, 295, 15 Sup. Ct. 118, 121 (39 L. Ed. 153) seems to me applicable:

"But in view, not only of the prior devices, but of the fact that his invention was of doubtful utility and never went into practical use, the construction claimed would operate rather to the discouragement than the promotion of inventive talent."

[2] While I think that the patent in suit was valid, yet I think it was of doubtful ultility, and that the broad and general language, "means for clinching the barrel of the eyelet upon the lining beneath the outer portion of the upper," should be restricted to the means described in the patent or substantial equivalents.

"A patent, covering generally any and every means or method for producing a given result, cannot be upheld." O'Reilly v. Morse, 15 How. 62, 14 L. Ed. 601; Le Roy v. Tatham, 14 How. 156, 14 L. Ed. 367; The Telephone Cases, 126 U. S. 531, 8 Sup. Ct. 778, 31 L. Ed. 863.

The defendant makes use of an old machine for setting visible eyelets, known as the Peerless-Glass machine, which is equipped with the Muther punch, for which a patent was issued October 6, 1914, on an application filed January 31, 1914. The Muther punch is an adaptation of the punch of the old Peerless-Glass machines, which was used for setting visible eyelets, to do the work of setting invisible or blind eyelets, by changing its form and making necessary mechanical changes in the old machine. The old punch was tapered at its end, a shoulder placed upon it, and above this shoulder the punch was contracted. In the operation of the machine with this punch the lining and the leather of the upper are stitched together at their edges and undertrimmed before the upper is placed upon the machine. The punch, under the

automatic operation of the machine, penetrates the leather and the lining; the upper, with the punch in both leather and lining, is moved automatically forward, and an eyelet is placed upon the tapering end of the punch, and then by the operation of the machine the eyelet is forced upward on the punch until its barrel, which had been scored, so that it may be easily split and turned, is brought in contact with the leather upon the punch, and forces it up over the shoulder, which is made sufficiently small to permit it to pass down through the hole in the leather of the upper, in which it is assisted by the contracted portion of the punch; the shoulder then interposes a barrier to the further upward movement of the eyelet on the punch, and the eyelet is turned over and clinched by the shoulder upon the lining and beneath the leather of the upper. During the whole of this process the punch remains in both the leather and the lining of the upper, and the shoulder upon the punch is placed at the right distance from the end of the punch, so that it will pass down through the hole when the leather is forced up by the eyelet.

It is claimed by the plaintiff that the defendant, in the use of the Muther punch, infringes its patents, because it places an anvil between the leather and the lining of the upper for the purpose of clinching the eyelet upon the lining and beneath the leather of the upper; that this constitutes one of the "means for clinching the barrel of the eyelet upon the lining and beneath the outer portion of the upper before the tool is withdrawn from the upper," which is covered by the claims of its machine patent; that the shoulder upon the Muther punch, though an integral part of the punch, is a substantial equivalent of the upsetting anvil *12* upon the lower part of the projecting neck *9* of the Wales invention; that in the Wales invention the punch remaining in the leather is above this upsetting anvil, and presses down upon it at the time the clinching of the eyelet takes effect; so that, while the upsetting die and the punch are separate, yet, when the process of clinching takes place, they act as a unit.

[3] In considering the scope which should be given to the range of equivalents of the Wales patent in connection with the device used by the defendant, the history of the progress of the Wales patent through the Patent Office is illuminating. This discloses that the broad claims which were included in the Wales patent by way of amendment were not added until several months after Muther filed an application for his patent.

In Railway Co. v. Sayles, 97 U. S. 554, 563 (24 L. Ed. 1053), the court said:

> "Courts should regard with jealousy and disfavor any attempts to enlarge the scope of an application once filed, or of a patent once granted, the effect of which would be to enable the patentee to appropriate other inventions made prior to such alteration, or to appropriate that which has, in the meantime, gone into public use."

The Peerless eyeletting machine, equipped with the Muther punch for setting invisible eyelets. was first used for commercial purposes in the early part of 1914, and it appears from the testimony that during the month of February of that year there were put out for this purpose 20 in March, 30 in April, 12 in May, and 8 in June. So that, before

the amendments were made to the Wales patent, the Peerless machine, equipped with the Muther punch, had come into public use, and according to the testimony, which is uncontradicted, 64 of these machines were placed with shoe factories by the Peerless Company upon a royalty basis. The plaintiff's use of the Wales patent in the form in which it was described by the patentee in his application was confined to a few machines; but three or four months after February, 1914, and after Muther had filed his application, it put out an eyeletting machine equipped with a punch substantially the same as the Muther punch.

[4] In view of these facts, I think the machine patent in suit should be limited in its range of equivalents to any anvil which may be interposed between the leather and the lining of a shoe upper when the edges are unstitched and not undertrimmed; and I do not think the Muther punch, used by the defendant, is a substantial equivalent, for in its use the edges of the upper are stitched and undertrimmed before the process of setting the eyelets is undertaken, and during the operation no part of the punch, which has penetrated both leather and lining, is withdrawn from either; but the whole upper, after the punching has taken place, is moved forward with the punch still in both leather and lining until the eyelet is presented by the lower set of the machine.

[5] I think the process patent must be limited to the machine as described, and as so limited it is void as representing only the functions of a machine. Everything about the patent is old, except the interposition of an anvil to clinch the eyelet between the leather and the lining. The clinching of an eyelet was old, and the only point in which the method disclosed by the process patent differed from the prior art was in the place where the clinching took place. The means for clinching were not operating means, but the instrument which was introduced between the lining and the leather for the purpose of effecting the clinching at that place.

[6] Wales had invented an attachment which, applied to one of the old eyeletting machines for setting visible eyelets, would effect the clinching of an eyelet upon the lining and below the leather. This method which he employed, as shown by his machine, for effecting the clinching at this point, did not entitle him to treat as infringers all who by any method whatever should effect the clinching of an eyelet upon the lining and beneath the leather of an upper; and if confined to the attachment which he described, it would be invalid as covering nothing more than the mere function or operation of a machine, which is not patentable. Corning v. Burden, 15 How. 252, 14 L. Ed. 683; Burr v. Duryee, 1 Wall. 531, 17 L. Ed. 650; Westinghouse v. Boyden Power Brake Co., 170 U. S. 537–557, 18 Sup. Ct. 707, 42 L. Ed. 1136; National Hollow B. B. Co. v. Interchangeable B. B. Co., 106 Fed. 693–708, 45 C. C. A. 544.

I therefore find that the process patent, No. 1,143,740, is invalid. I find that the machine patent, No. 1,143,741, is valid, but of doubtful utility, as it never came into general commercial use; that it is entitled to a narrow range of equivalents, and is not infringed by the defendant's machine.

The bill is dismissed, with costs to the defendant.

In re BONK.

In re SHANK.

(District Court, E. D. Michigan, S. D. December 2, 1920.)

No. 4262.

1. **Bankruptcy ⊂=348—Manager of business not entitled to priority for wages; "workman, clerks, traveling or city salesmen, or servants."**
One who had a contract with the bankrupt to manage the bankrupt's drug business for a stated weekly compensation, and who was not shown to have performed any services other than managing the business, is not entitled to priority for his claim for services under Bankruptcy Act, § 64b, subd. 4 (Comp. St. § 9648), giving priority to wages of workmen, clerks, salesmen, or servants.

2. **Chattel mortgages ⊂=5, 194—Assignment for security of interest in contract for fixtures held "chattel mortgage," required to be recorded.**
An assignment by the owner of a drug business of a contract, under which the owner had legal title to the store fixtures, subject to a mortgage held by the vendor, which assignment recited it conveyed all the right, title, and interest in the property described in the contract, and which was given to secure the claim of the assignee, was a "chattel mortgage," required by the state law to be filed to be valid against creditors, unless there was change of possession.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Chattel Mortgage.]

3. **Courts ⊂=366(18)—State decisions as to change of possession under chattel mortgage are controlling.**
The decisions of the Michigan Supreme Court, under Comp. Laws Mich. 1915, § 11988, relating to fraudulent conveyances, as to what constitutes a sufficient delivery, followed by an actual and continued change of possession, under a chattel mortgage not filed for record, are controlling in the federal courts.

4. **Chattel mortgages ⊂=191—Change of possession requires some act indicating change to third persons.**
Under Comp. Laws Mich. 1915, § 11988, as construed by the Supreme Court of that state, a delivery, followed by an actual and continued change of possession, where there is no physical delivery of the property, must involve some act by at least one of the parties to the chattel mortgage sufficient to indicate to third persons an intention that the possession of the mortgaged property has been transferred to the mortgagee.

5. **Chattel mortgages ⊂=191—Possession by manager, who was mortgagee, held not change of possession.**
Where the owner of a drug business gave his manager a chattel mortgage on the fixtures, but the business still remained the property of the owner and was conducted in his name, the possession of the fixtures by the manager was not a sufficient change of possession to dispense with the necessity of filing the chattel mortgage for record, to make it valid against creditors.

In Bankruptcy. In the matter of the estate of Julius E. Bonk, doing business as the Eagle Drug Store, bankrupt. On petition by Augustus W. Shank to review an order of the referee denying priority to petitioner's claim against the bankrupt. Order affirmed.
See, also, 268 Fed. 1012.

Millis, Griffin, Seely & Streeter and Ralph S. Moore, all of Detroit, Mich., for claimant.

Max Kahn, of Detroit, Mich., for trustee.

TUTTLE, District Judge. This is a petition to review an order of one of the referees in bankruptcy for this district, denying priority to a claim, amounting to $989.79, filed by the claimant in the bankruptcy proceedings herein. Of the amount mentioned, $300.00 was claimed as wages earned during the three months just prior to the filing of the petition in bankruptcy, alleged by the claimant to constitute a preferred claim under section 64b, subd. 4, of the Bankruptcy Act (Comp. St. § 9648), which gives priority to "wages due to workmen, clerks, traveling or city salesmen, or servants, which have been earned within three months before the date of the commencement of proceedings, not to exceed $300 to each claimant." The balance of the claim is alleged by the claimant to have been secured by the assignment to him, by the bankrupt, of the interest held by the bankrupt in a certain contract under which the latter's predecessor in title had contracted for the purchase of certain store fixtures. The referee denied priority to any part of the claim thus presented, holding that claimant was not within the class of persons entitled to priority of payment under the section of the Bankruptcy Act relied on, and that, as the assignment in question, from the bankrupt to the claimant, as security for the payment of indebtedness due from the former to the latter, was not filed for record as required by the statute applicable, such assignment was void as to the creditors of the bankrupt, represented by the trustee herein. This petition is filed by the claimant to review such order in both of the respects mentioned.

1. The contract between the claimant and the bankrupt, under which the former claims to be entitled to the payment of "wages," within section 64b, subd. 4, of the Bankruptcy Act, to the maximum amount prescribed by such section, provides as follows:

"This agreement, made and entered into this 15th day of July, A. D. 1918, between Julius E. Bonk, of the city of Detroit, Wayne county, Michigan, party of the first part, and Augustus W. Shank, of the same place, party of the second part, witnesseth:

"The said party of the first part is now the owner of a certain drug stock and fixtures, subject to certain incumbrances, and is about to enter the military service of the United States on the 19th inst., and is desirous of securing a suitable party to operate the same for him, and the said second party is familiar with the drug business and management thereof, and is desirous of taking over the management of said drug store and the affairs of the said first party.

"Whereas, it is mutually agreed by and between the parties hereto that the said first party is now operating a certain drug store located at No. 881 Forest Avenue East, Detroit, Michigan, and has agreed with the party of the second part to manage and operate the same for him under the following terms and conditions.

"The second party shall keep a true and correct account of all receipts and disbursements made by him, and he shall have the right and privilege to take any part or portion of said stock, and to operate branch stores in the said city of Detroit, and shall make a true and correct list of any and all drugs or other articles which he may take from said drug store located as

above, and he shall keep a true and correct account of all receipts and disbursements pertaining to any branch store which he may open and operate.

"It is further understood and agreed that the said party of the second part shall deposit the money received from said business in any bank that he deems advisable under the name of Julius E. Bonk, and said second party shall have the right and privilege to draw checks in the name of the said first party.

"It is further understood and agreed that the party of the second part will do all things proper and necessary for the management of said drug store and any branches which he may open and is to receive therefrom the sum of thirty-five ($35.00) dollars per week for his services until the earnings of said business shall exceed the sum of one hundred ($100) dollars per week; then he shall receive 25 per cent. in addition to the weekly salary.

"In witness whereof, said parties have hereunto set their hands and seals the day and year first above written."

[1] From the testimony on the hearing before the referee, transcript of which, returned by the referee with his opinion, has been carefully examined by this court, it appeared that the claimant, pursuant to his contract with the bankrupt just quoted, took charge of the drug store and managed it for the bankrupt, purchasing the merchandise for the store and paying the rent and the other expenses in connection with the operation of such store, including the salary of a pharmacist, who was employed there while claimant was in charge, and who, in addition to his other duties, had charge of the cash register and kept all of the records showing the receipts and expenditures of the business. It does not appear that claimant rendered services in any other capacity than as manager of the store, operating the same for the owner, but exercising his own discretion in the performance of his duties. His claim for wages is based, not on a quantum meruit for work and labor performed, but on the contract under which he had agreed "to manage and operate" the store on the terms and conditions specified in the contract. Under such circumstances, it is clear that the claimant is not included in the class of "workmen, clerks, traveling or city salesmen, or servants," within the meaning of section 64b, subd. 4, of the Bankruptcy Act; the language there used not being intended to apply to the manager of a business. In re Grubbs-Wiley Grocery Co. (D. C.) 96 Fed. 183; In re Albert O. Brown Co. (D. C.) 171 Fed. 281; In re Crown Point Brush Co. (D. C.) 200 Fed. 882; In re Greenberger (D. C.) 203 Fed. 583; In re Continental Paint Co. (D. C.) 220 Fed. 189; Blessing v. Blanchard, 223 Fed. 35, 138 C. C. A. 399, Ann. Cas. 1916B, 341; In re Eagle Ice & Coal Co. (D. C.) 241 Fed. 393. The ruling of the referee denying priority to this portion of the claim was clearly correct.

2. A review of the testimony is convincing that it abundantly supports the finding of the referee to the effect that the assignment in question was intended as security for the payment by the bankrupt of his indebtedness to the claimant. Indeed, I understand this fact to be now conceded. Section 11,988 of the Michigan Compiled Laws of 1915 provides that—

"Every mortgage or conveyance intended to operate as a mortgage of goods and chattels which shall hereafter be made which shall not be accompanied by an immediate delivery and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the

creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith, unless the mortgage or a true copy thereof shall be filed" as therein prescribed.

It is undisputed that this instrument was not filed for public record.

[2] It is urged by claimant that this was an assignment of merely the interest of the bankrupt in a chose in action, and that therefore it was not required to be filed as a mortgage of goods and chattels. This court, however, has already held, on a previous proceeding in this same case, that, under the contract thus assigned, the bankrupt owned the legal title to the fixtures in question, subject to a mortgage thereon held by the Detroit Store Fixture Company, the original vendor thereof. The assignment itself recited that the bankrupt thereby assigned to the claimant all his right, title, and interest, not only in the contract, but also in the "property therein described." It is plain that this instrument was a chattel mortgage on the physical property, and subject, as such, to the provisions of this statute.

[3, 4] It is further argued by the claimant that, as he was in charge, as manager under the bankrupt, of the store where the fixtures in question were located from the time of the making of the assignment to the time of the filing of the petition in bankruptcy, therefore he was in actual physical possession of such fixtures, and there was such a change in the situation thereof as rendered the filing of such assignment unnecessary. It will be noted that the statute requires, not only "an immediate delivery" of mortgaged goods and chattels, but also a subsequent "actual and continued change of possession of the things mortgaged"; otherwise, the mortgage must be filed for record. On the question as to what constitutes a sufficient delivery, followed by an actual and continued change of possession, the decisions of the Michigan Supreme Court are, of course, controlling. By the decisions of that court the rule has been settled to the effect that where the chattel mortgage is not filed, and there is no physical, as distinguished from symbolical, change of possession of the mortgaged property, there must be some act by at least one of the parties thereto sufficient to indicate to third persons an intention that the possession of the mortgaged property has been transferred from the mortgagor to the mortgagee. Anderson v. Brenneman, 44 Mich. 198, 6 N. W. 222; Smith v. Greenop, 60 Mich. 61, 26 N. W. 832; Buhl Iron Works v. Teuton, 67 Mich. 623, 35 N. W. 804; First National Bank v. Summers, 75 Mich. 108, 42 N. W. 536. The rule was thus stated by the court in the case first cited:

"The proper instrument not having been placed on file, an 'immediate delivery followed by an actual and continued change of possession' was absolutely essential. No such delivery and actual and continued change of possession of such bulky property could be expected or insisted upon. Yet there should be, even of bulky articles, such a clear and unequivocal designation thereof that creditors or subsequent purchasers could not be misled or be in doubt as to the nature of the transaction. * * * It must also, in this connection, be borne in mind that the creditor can protect himself by filing in the proper office his mortgage, or a copy thereof, where the articles are of that bulky nature that a symbolical delivery only can be made, and they are permitted to remain in a place where the possession may be equivocal or what could not be said to be an actual possession. Under such circumstances,

where doubts exist, they must be solved in favor of the purchaser or creditor, and against the mortgagee, because he, having power to protect himself fully and prevent others from being deceived, has not done so."

[5] In view of the facts that the bankrupt remained at all times the owner of this business and of the merchandise and fixtures thereof, that the store was conducted on behalf of the bankrupt by the claimant as manager, and that there was no designation of this property that would indicate to any one that the claimant had an interest therein, it seems clear that there was no "immediate delivery," followed by "actual and continued change of possession," within the meaning of the statute. As, therefore, the mortgage was not filed as required by such statute, it must be held void as to the creditors of the bankrupt.

The order of the referee complained of is in all respects affirmed.

KENNARD v. BEHRER et al.

(District Court, S. D. New York. October 18, 1920.)

Bankruptcy ⇐166(4)—Security given not voidable, creditor not having reasonable cause to believe that transfer would be preference.

The taking of security by a creditor, when it was known to both that the debtor was then insolvent in the sense of the Bankruptcy Act (Comp. St. §§ 9585–9656), but in the honest belief and with a reasonable prospect that some of his assets, worthless for the moment, would, if he were allowed to continue his business, realize enough to pay his debts in full, *held* not the giving or taking of a preference, voidable under Bankruptcy Act, § 60 (Comp. St. § 9644); the creditor not having reasonable cause to believe that the transfer would effect a preference.

In Equity. Suit by Johnson Hanson Kennard, trustee in bankruptcy of E. Pierrepont Rowland, against Arnold Behrer and others, doing business under the firm name of Arnold Behrer & Sons, and the Walworth Manufacturing Company. Decree for defendants.

This is a bill in equity under section 60 of the Bankruptcy Act (Comp. St. § 9644), by a trustee in bankruptcy, to set aside an assignment given to two creditors as a voidable preference. The bankrupt was an officer of a corporation known as the H. B. Stephenson Company, doing a plumbing business in the city of New York. This corporation becoming pressed for money in the winter of 1916–1917, and being unable to meet its obligations, gave a number of notes to its creditors generally, indorsed by the bankrupt, until by the spring of 1917 he had so become liable to the extent of over $18,000. Both defendant creditors were dealers in jobbers' supplies in the city of New York and sold largely to the Stephenson Company upon credit. One of them, Behrer & Sons, had had such an account with the company for some years, and in October or November, 1916, becoming somewhat concerned about its payment, a member of the firm began pressing the company. Finally, in March, after failing to get any satisfactory adjustment, he placed the case in the hands of his attorney. The other defendant creditor, the Walworth Company, had opened its account with the Stephenson Company in the year 1916, and took the first note in November of that year. It, too, became concerned over the account in January, 1917, and likewise put the matter in the hands of its attorney.

The bankrupt and other officers of the Stephenson Company met the defendants twice in the office of the attorney of Behrer & Sons on April 10 and 12, 1917, and the bankrupt executed the assignment in question, after an agree-

ment the substance of which appears in the opinion. Under the will of the bankrupt's father, he became entitled to an estate in remainder in real property situated in the city of New York, contingent upon his survivorship of his mother, the life tenant, who was then living. He conveyed this interest to the two creditors as security for the amount then due to them—$10,400 to Behrer & Sons, and about $3,000 to the Walworth Manufacturing Company. These claims were each split into 60 parts, and 60 notes given, payable at intervals of one month, and indorsed by the bankrupt and two other officers of the Stephenson Company. It was disputed on the trial whether the consideration for the transfer was any extension of the claims, and especially whether the creditors had waived their undoubted right to file mechanics' liens. The value of the remainder in fee at the death of the mother was $17,000, but upon established actuarial calculation its actual value, living the mother, was about $5,400.

Charles C. Pearce, of New York City, for trustee.
Milton M. Leichter, of New York City, for Behrer & Sons.
Bartholomew Foody, of New York City, for Walworth Co.

LEARNED HAND, District Judge (after stating the facts as above). It is quite clear that both Rowland, the bankrupt, and the Stephenson Company, were insolvent on April 12th, the day of the assignment, unless the unperformed plumbing contracts of the company be taken as having a very substantial value. On January 1, 1917, and on March 1, 1917, Greenfield's report shows that the company was insolvent in the sum of $20,000, and in July, upon their bankruptcy, their condition was worse. Stephenson's testimony, as well as Brandon's and Rowland's, touching the condition of the business after April 12th, precludes the supposition that their position had been bettered on April 12th, and it would be casuistical to indulge in any scruples as to the sufficiency of the proof.

Similarly, too, of Rowland's condition. His interest now in suit had then a present value of about $5,400, out of which he must pay some $1,000 of personal debts. The remaining $4,400 was all he had to pay the deficiency upon at least $18,000 of indorsements; his schedules, indeed, show about $25,000. Now, the debts of the Stephenson company were about $43,000, and their assets $23,000, not much over 50 per cent. of the debts. Certainly Rowland had no resources to pay any such deficiency.

The value of the uncompleted contracts is not in proof; probably "at a fair valuation," as the statute provides, they were worth nothing in exchange, and, if so, insolvency was established. As I view the case, it is, however, unnecessary to determine whether the trustee should have shown that fact, or whether I could assume so much from the mere character of the property itself. I should be much tempted to do so. The point upon which the case in my judgment turns against the trustee is that he has not shown that the defendants had reasonable cause to believe that the transfer would effect a preference, assuming that the contracts had no such value.

In discussing this point I shall assume that, even though the defendants did not know the company's financial condition, or Rowland's either, they are charged as much with knowledge as though they had. As to the company, I cannot doubt that this is true. They were certainly discussing, and I think proposing, to file mechanics' liens upon

the contracts, they had vainly been endeavoring to make some satisfactory adjustments of the notes, and they had put the accounts in the hands of their lawyers to force some payment. Weisburger had received summonses and complaints, which he must have known to be sure to result in judgments, the notes were in large part, if not altogether, overdue, and the scarcity of ready cash was well known to Clarence Behrer. Moreover, they had insisted upon some statement of the resources of the company, obviously because they feared its solvency and its possible suspension. Before taking security, in such a posture of their debtor's affairs, I think they were bound to require an actual examination of its books, which would have disclosed what we now know from the Greenfield report; that is, that upon any present liquidation the company was wholly insolvent.

Moreover, such an examination would have disclosed Rowland's indorsements, and with them his own insolvent condition. I cannot suppose that, whatever his protestations, it would have required more than a moderate insistence to compel a disclosure of his actual assets. The creditors were in a position to compel the most detailed disclosures. Yet, while all this would have shown, as I have said, a very substantial insolvency, if the contracts were disregarded, it would nevertheless leave the creditors as much in doubt as we are now as to the value of the unfinished contracts. And even assuming that these must be wholly disregarded in appraising the assets under the statute, they were a legitimate factor in the defendants' determination whether the assignment would effect a preference. That, they knew, would depend upon whether, if they were content not to press the company into immediate insolvency, it would be able eventually to emerge from its difficulties.

Now there seems to me no question that every one who attended the meetings of April 10th and 12th honestly believed that there was a good chance for this to happen. Branden specifically says that this was true, and that, had the company's credit been continued, it would have come through successfully. All the rest, except Rowland, swear that this was the expectation of the meeting, and the form of the adjustment, assuming it was made in good faith, bears out their story. The 60 notes, one month apart, could have been meant for no other purpose than to suspend any coercive action if they were regularly paid, and the defendants certainly intended to hold off their liens, even though they did not bind themselves to do so.

The question in the case may be therefore stated thus: The creditor knows the debtor to be for the moment insolvent in the sense of the statute, yet he honestly supposes that some of his assets, worthless for the moment, will, if he be allowed to continue, realize enough to pay his debts in full. May he safely take security under such circumstances? I think that he may. Of course, it is true that he is protecting himself against the possibility of the debtor's insolvency, and that he does this only in order that the transfer may in that event "effect a preference." If the statute uses "would" as an equivalent of "might," that preference, when it comes, will be voidable. If it is, a creditor can never successfully take security for an existing debt. Taking security of itself is a provision against the debtor's possible

insolvency, and an assurance that the creditor shall get more than his fellows in that event. The statute does not forbid this. Grant v. Nat. Bank, 97 U. S. 81, 24 L. Ed. 971. It recognizes that a creditor may be uncertain enough of his claim to be unwilling any longer to leave it at risk. It allows him, by taking security, to do that which, if his fears be realized, will prove to the prejudice of his fellows. It permits this because its policy is not to compel creditors to overturn all shaken debtors while they have an honest hope of regaining a firm foundation. That creditor only the statute proscribes who dips his hand in a pot which he knows will not go round. Hence it follows that, while there is an honest chance of continued life, he need not quench it at his own peril. The only test is the honesty of his purpose. Nor is it an answer here to argue with the plaintiff that the defendants' unwillingness to advance more money is a proof of bad faith. It was precisely because they were too doubtful of their debtor's position to leave their money longer unsecured that they required the security. Their fears forbade any further advances, but do not contradict the truth of their belief that the company might pull through. I think the test should be whether the chance was one whose success good judgment would forecast; it need not be a business certainty; it must not be a gambler's cast. There can be no fair doubt that such was the actual situation in the case at bar. A contractor's business is in any case one of feast or famine, in which that might be no more than an exhilarating episode which to a bank, for example, would be a despairing gasp. It is true that the situation, as Greenfield's statement showed it, looked ominous; but the concurrence of all those who knew ought to be an answer to the present suggestion that it was beyond salvation. In fact, the company had no difficulty in getting all the supplies it needed, though they were furnished on the credit of the owners. Stephenson knew that part of its affairs better than Branden, and his testimony must be preferred.

The act of March 2, 1867 (14 Stat. 534, § 35), was differently worded; it made the test reasonable cause to believe the bankrupt insolvent. The present act, up to 1910, made the test reasonable cause to believe that the bankrupt intended to effect a preference. Under this statute it was decided that the bankrupt's knowledge that he was insolvent was not equivalent to an intent to create a preference. Re First National Bank of Louisville, 155 Fed. 100, 84 C. C. A. 16 (C. C. A. 6th); Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960 (C. C. A. 5th); Kimmerle v. Farr, 189 Fed. 295, 111 C. C. A. 27 (C. C. A. 6th). It was recognized that in spite of the fact of insolvency the bankrupt might honestly suppose that he could in the end pay them all, and indeed that the creditor might share his belief. Now that the statute is changed, and intent to prefer gives place to belief that a preference will result, the rule is the same. If the bankrupt's honest judgment that he could pay in full protected the creditor then, the creditor's honest judgment to the same effect will protect him now. The change from the act of 1867 was certainly with a purpose which can be fulfilled only if the distinction which I mention is observed.

Bill dismissed, but without costs.

Ex parte FINEGAN.

(District Court, N. D. New York. February 7, 1921.)

1. **Intoxicating liquors ⇐13, 238(3)—Court cannot say 2.75 per cent. liquor is intoxicating, within Eighteenth Amendment.**
   The court cannot say as a matter of law that beverages containing not more than 2.75 per cent. alcohol by weight, or less, is intoxicating, and therefore cannot hold that the Walker Act of New York, permitting the sale of such beverages, violates the Eighteenth Amendment to the Constitution.

2. **Statutes ⇐64(9)—Prosecution under state liquor law invalid only if entirely conflicting with federal law.**
   Even though an act of Congress under the authority of the Eighteenth Amendment is paramount to state legislation, it does not invalidate a prosecution under a state act, unless the acts are so at variance therewith that nothing remains of the state act.

3. **Statutes ⇐64(9)—Provision of New York law in conflict with federal law held separable, so that prosecution under state law for sale of whisky was proper.**
   Even though the provision of the Walker Act of New York, permitting sale of beverages containing 2.75 per cent. of alcohol or less, is in conflict with the Volstead Act, the provisions of that law prohibiting the sale of liquor containing more than such percentage are separable, and sufficient to sustain a prosecution for violation thereof.

Habeas Corpus. Application by Daniel Finegan for a writ to inquire into his detention. Petition dismissed, and relator remanded to custody.

Edwin J. Mizen, of Oswego, N. Y. (Chas. N. Bulger, of Oswego, N. Y., of counsel), for petitioner.

Francis D. Culkin, Dist. Atty., of Oswego, N. Y., for State of New York.

Harry D. Sanders, of Buffalo, N. Y., for State Excise Department, amicus curiæ.

COOPER, District Judge. The petitioner has been indicted by a grand jury in the county of Oswego under two indictments—one alleging that he violated the Liquor Tax Law (Consol. Laws, c. 34) of the state of New York by the sale of liquor, wine, brandy, etc., without having obtained a license therefor; and the other charging him with having violated section 30, subdivision C, of the same state law, as added by Laws 1918, c. 229, by the sale to a soldier in uniform of liquor, wine, brandy, etc.

The decision of the case at bar involves the construction of the validity of the Liquor Tax Law of the state of New York, with its more recent amendments, known generally as the Walker Act (chapter 911, Laws 1920), and arises on the return of a writ of habeas corpus issued by this court to inquire into the detention of the relator. The relator takes the position that the state Liquor Tax Law, as amended by the so-called Walker Act, is unconstitutional, null, and void by reason of conflict with the Eighteenth Amendment to the federal Consti-

tution and with the Volstead Act (Act Oct 28, 1919), enacted by Congress for the enforcement of the Eighteenth Amendment.

[1] The state Liquor Tax Law as amended cannot be successfully attacked in this proceeding on the ground of such unconstitutionality. The Eighteenth Amendment to the federal Constitution prohibits the manufacture, sale, etc., of intoxicating liquors, but does not define intoxicating liquors. The Walker Act of New York state prohibits the sale of beverages containing more than 2.75 per cent. of alcohol by weight. The border line between intoxicating and nonintoxicating beverages being somewhat uncertain, this court cannot say as a matter of law that 2.75 per cent. of alcohol by weight makes the beverage intoxicating, and therefore cannot hold in this proceeding that the statute is unconstitutional because of conflict with the Eighteenth Amendment. There is, then, no constitutional question in the case.

The real question is: What is the force, effect, and validity of the state Liquor Tax Law, as amended by the Walker Act, in the light of the act of Congress previously passed to enforce the provisions of the Eighteenth Amendment to the federal Constitution; i. e., the Volstead Act, so called. The second section of the Eighteenth Amendment reads as follows:

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

The construction of this section has given the courts much trouble. Section 2 was under consideration by the United States Supreme Court in the case of Rhode Island v. Palmer (decided in June, 1920) 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946. The judges in that case did not agree as to the correct construction of the term "concurrent power."

A situation substantially like the case at bar was presented to the highest court in Massachusetts, when it was called upon to pass upon the validity of an indictment under the Massachusetts statute relating to the sale of intoxicating liquors passed prior to the enactment of the Eighteenth Amendment. This was the case of Comm. v. Nickerson (Mass.) 128 N. E. 273. All the judges were agreed that section 2 of the Eighteenth Amendment gave the states some real substantial power to pass legislation in aid of, and for the purpose of giving effect to, the provisions of the Eighteenth Amendment. They were apparently unwilling to say in so many words that, under section 2, federal legislation first enacted should, in case of conflict, prevail over state legislation enacted for the same purpose; but they did say:

"In our opinion the irresistible conclusion from these decisions is that state legislation, which in its practical operation is appropriate to enforce the chief aim of the Eighteenth Amendment and to make it more completely operative in all its amplitude, is not suspended, superseded, set aside, or rendered inapplicable in its denouncements by the Volstead Act in so far as not incompatible therewith or in contravention with its provisions."

It is difficult to see, however, that this means other than that the federal act is paramount. It is not necessary at this time for this court to decide whether or not the federal legislation shall prevail over that of the state in case of conflict.

[2] The most favorable view to take of the statute from the standpoint of the relator, who seeks his release on a writ of habeas corpus, is that the federal legislation is paramount, and prevails over that of the state legislation wherever there is conflict. If we assume this position, which is most favorable to the relator, he is not entitled to his discharge, unless the state statute is so completely at variance with the federal statute that nothing remains of the state statute under which the relator may be prosecuted on the indictments found against him.

[3] While it is true that the state legislation of 1920 (the Walker Act), enacted for the ostensible purpose of enforcing the provisions of the Eighteenth Amendment, follows the general form of the Liquor Tax Law of the state existing at the time of the enactment of the Eighteenth Amendment, it differs from the Volstead Act chiefly in making a more liberal definition of intoxicating liquors, and providing a license system for the sale of beverages therein defined as nonintoxicating. The Walker Act defines, as intoxicating, beverages containing more than 2.75 per cent. of alcohol by weight, and as nonintoxicating beverages with alcoholic content of one-half of 1 per cent. to 2.75 per cent. by weight, while the Volstead Act defines as intoxicating beverages containing one-half of 1 per cent. or more, by volume.

It will be seen, then, that beverages containing more than 2.75 per cent. alcohol are intoxicating under both acts. Both acts provide a penalty for the manufacture, sale, transportation, importation, and exportation of intoxicating liquors as so defined. If all the provisions of the Walker Act providing for the issue of licenses for the sale of beverages containing less than 2.75 per cent. alcohol were stricken out as invalid, because of conflict with the Volstead Act, would there not be enough left of the Walker Act to prohibit the sale of beverages containing far in excess of 2.75 per cent. alcohol—in other words, to prohibit the sale of liquors intoxicating under the definitions in both statutes? If so, the relator may be prosecuted under the indictments which charge him with the sale of whisky, wine, brandy, etc.

If the provisions providing for a license and a license fee for the sale of beverages containing alcoholic content ranging from one-half of 1 per cent. by weight to 2.75 per cent. are stricken out, and also the provisions for local option as to the sale of beverages containing not more than 2.75 per cent. by weight, we still have left a statute which prohibits the sale of beverages containing more than 2.75 per cent. alcohol by weight, by provisions which are definite, distinct, and not inextricably interwoven with the provisions thus stricken out. The statute thus abridged includes whisky and all the spirituous liquors and practically all the ordinary malt liquors as they were known prior to the adoption of the Eighteenth Amendment to the federal Constitution. The statute thus abridged provides a penalty for a violation thereof.

It seems, therefore, that there is enough of the statute remaining to prosecute the defendant under both indictments. By a divided court the same view was held concerning the Massachusetts statute, in many respects similar to the Walker Act. See Nickerson v. Comm., supra.

The views herein expressed appear to be in harmony with those expressed by Judge Tuthill in People v. Foley, 113 Misc. Rep. 244, 184 N. Y. Supp. 270, in which he quotes from what is said to be a charge of Chief Judge Gummere of the Supreme Court of New Jersey, as follows:

"With some hesitancy we have come to the conclusion that, although this statute was not passed pursuant to section 2 of the amendment, nevertheless it is effective to-day in New Jersey, and the constitutional amendment only wiped out the condition as to a license, and left the statute a bald declaration that the sale of liquor within the limits of the statute is a criminal offense."

The petition of the relator should be dismissed. The relator should be remanded to the sheriff of Oswego county.

THE HARVARD.

OCEAN ENGINE & BOILER WORKS, Inc., v. OLYMPIA SHIPPING CORPORATION et al.

(District Court, E. D. New York. December 21, 1920.)

1. **Maritime liens ⟸25—Repairs may include improvements.**
Work done on a vessel while afloat, although temporarily withdrawn from service, in making repairs and also enlarging and improving her carrying capacity, to fit her for intended future use, *held* of maritime character, and within the provision of Act June 23, 1910, c. 373 (Comp. St. §§ 7783–7787), giving a lien for repairs and necessaries.

2. **Maritime liens ⟸56—Estoppel to deny liability or amount.**
An account admitted or paid in part may be collected under an admiralty lien, even if there might be also a claim at law or in personam, on the doctrine of estoppel to deny liability or amount.

3. **Maritime liens ⟸17—Statute does not enlarge maritime law.**
Act June 23, 1910, c. 373 (Comp. St. §§ 7783–7787), does not change, by enlarging or diminishing, the classes of work for which liens are given from those recognized under the general maritime law.

In Admiralty. Suit by the Ocean Engine & Boiler Works, Incorporated, against the steamship Harvard; the Olympia Shipping Corporation, claimant, and the Equitable Trust Company of New York, intervening respondent. Decree for libelant.

Henry W. Baird, of New York City, for libelant.

Walter F. Welch, of New York City, for claimant.

Murray, Prentice & Howland, of New York City, for Equitable Trust Co. of New York.

CHATFIELD, District Judge. The Harvard was formerly a private yacht, and had been used by the government during the war. The libelant furnished work, materials, and plant in "repairing, altering, enlarging, and improving the vessel's carrying capacity," in order to fit it for the service which was desired by its new owner, the claimant

in this case. The government service necessitated repairs, in the strict sense of putting the boat in first-class order, and at the same time the superstructure and quarters were enlarged while the boat was temporarily withdrawn from service, but while afloat and in no way removed from its maritime character and surroundings.

[1] Under these circumstances there is no question that the entire matter was of a maritime nature and was not like People's Ferry Co. of Boston v. Beers, 61 U. S. 393, 15 L. Ed. 961, and The Dredge A (D. C.) 217 Fed. 617, in which construction of a boat for subsequent maritime use was held to be nonmaritime in character as a basis for jurisdiction. The cases of Smith v. Susquehanna and Smith v. Schuylkill (C. C. A.) 267 Fed. 811, point out this distinction. In those cases a boat was drawn out of the water and lengthened by having a midsection inserted. It was held that the work was maritime in character and that maritime jurisdiction attached; but this work was held to be that of construction, rather than repairs or necessaries to the vessel. The court held that the statute of June 23, 1910 (36 Stat. p. 604 [Comp. St. §§ 7783–7787]), did not enlarge the subject-matter of maritime liens, but did grant a lien where labor or materials (which previously could have been the basis of a maritime lien) were furnished to a vessel, even in a home port by the order of the master, or anywhere upon the order of the master or owner, although no proof of credit to the vessel was offered. This holding has been definitely established by the case of Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co. (Oct. 11, 1920) 254 U. S. 1, 41 Sup. Ct. 1, 65 L. Ed. ——.

In the present case it was contended by a mortgagee (whose rights are admittedly subject to maritime liens—The J. E. Rumbell, 148 U. S. 1, 13 Sup. Ct. 498, 37 L. Ed. 345), that the work done upon the Harvard was not the basis of a legal maritime lien, either under the statute or under the general admiralty law. The matter was heard by the master, who has reported in favor of the libelant, and exceptions have been presented by both the claimant and by the mortgagee. The claimant has excepted to the finding and report of the master that the amounts were correct and that certain charges for labor could include the furnishing of tools. The basis of computation was to be upon a flat percentage rate over the amount expended.

The evidence supports the master's construction of the contract, that the charge for labor properly included a charge for improved tools, where thereby the labor item was greatly diminished. The claimant contended that the contract was entered into upon the understanding that these labor-saving devices would be employed, just as a carpenter would be expected to use his own hammer and saw without extra charge therefor. But the master's finding that this case presented different conditions, and that the item of labor did include more than actual wages, would seem to be correct.

[2] The master's findings as to the other items to which the claimant has excepted are also supported by the testimony and should be sustained. An account admitted or paid in part may be collected under an admiralty lien, even if there might be also a claim at law or in personam, on the doctrine of estoppel of the right to dispute liability and

amount. The J. S. Warden (D. C.) 155 Fed. 697; The Hattie Thomas (C. C. A.) 262 Fed. 943.

[3] This leaves only the question as to the possibility of obtaining a lien for mixed alterations and repairs as to which there is room for argument. Strict construction of the statute of 1910 does not require a holding that Congress intended to diminish the instances in which previously a maritime lien could be obtained. As was said in the Case of the Piedmont, etc., Co., supra, and in The Hatteras, 255 Fed. 518, 166 C. C. A. 586, and The J. Doherty (D. C.) 207 Fed. 997, this statute was not intended to enlarge the class of services and materials for which a lien could be had; but under the general admiralty law the words "repairs" and "necessaries" were never construed so strictly as to allow a maritime lien where credit could be proven to have been given to the vessel for making good the damage which had been suffered during use, and at the same time to refuse to allow a maritime lien for additional necessary items in order to put the vessel in the condition in which it was wanted for future use.

Congress evidently, by the words "repairs, supplies and necessaries," intended to grant a lien for just such things as had previously been considered the proper subject-matter for maritime liens, where the vessel's credit was involved, and where she was not in her home port. But there is nothing to indicate that Congress, in substituting a general statute for the various state laws, limited, to "repairs" of injuries or defects only, the various items of construction, in the nature of and in connection with repairs, which previously were covered by the statutes of the different states. The J. E. Rumbell, supra; The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73.

Some of the work done on the Harvard was evidently actual repair work, in the sense of restoring her to first class condition. Considerable of the work was evidently alteration or furnishing of accommodations, in which the previous condition of the accommodations was not satisfactory, and an actual enlargement of these accommodations was desired and necessary for her intended use. Such a matter cannot be measured by the amount of money involved alone. It was not reconstruction, as in the case of The Susquehanna, supra, nor can it be said to have been entirely a repair, in the sense of replacing injured or damaged parts. It was, however, repair in the sense in which the word has always been used, both in maritime matters (The Oceana, 244 Fed. 80, 156 C. C. A. 475; The Iris, 100 Fed. 104, 40 C. C. A. 301; Hardy et al. v. The Ruggles, Fed. Cas. No. 6,062), and in work upon land.

As was said in the Piedmont Co. Case, supra, the purpose of a maritime lien is to enable a vessel to obtain necessary help, even in a port where no ordinary credit may be had, and when the money for payment is not in the captain's hands. It is not based on unjust enrichment, as in the case of a mechanic's lien, which covers repairs and also new construction. "Repairs" always include improvements as the work goes along. In order to put the Harvard in first-class condition, and particularly in first-class condition for use in the work, as was desired by her owners, it was necessary to make repairs. Her owners desired that these repairs embody certain changes or improvements, which were

extensive in character, but which were not a reconstruction of the boat, in the sense held outside of the statute by the Circuit Court of Appeals in The Susquehanna, supra.

So long, therefore, as the matter was maritime in its nature and within the former possible subject-matter of a maritime lien, it should be held that it was within the words "repairs and necessaries," in the sense in which those words were used by Congress.

The report of the master will be confirmed, and the libelant may have a decree.

JOBBINS et al. v. KENDALL MFG. CO.

(District Court, D. Rhode Island. January 29, 1921.)

No. 2973.

1. Judgment ⇐720—Findings in former suit between same parties held conclusive.

In an action by the owners of a patent to recover royalties provided in a contract, findings in previous litigation between the same parties that defendant had discontinued the use of the patented process prior to a certain date, and that the process defendant was then using was not covered by the patent, are conclusive.

2. Patents ⇐218(1)—Use of part of plant, though an infringement, held not to require payment of process royalties.

The use by defendant, who had contracted to pay plaintiffs royalties on glycerine produced by plaintiffs patented process from waste soap lyes, of part of the apparatus they obtained from plaintiffs in connection with a different process for obtaining glycerine from a different substance, does not subject defendant to liability for the royalties, even though the use of the apparatus may be an infringement of plaintiffs' apparatus patent.

At Law. Action by Frances Jobbins, as executrix, and others, against the Kendall Manufacturing Company. On final hearing. Judgment ordered for plaintiffs, for part only of the amount claimed.

Henry W. Hayes and John Henshaw, both of Providence, R. I., for plaintiffs.

Gardner, Moss & Haslam, of Providence, R. I., for defendant.

BROWN, District Judge. [1] In former litigation between these parties it was adjudicated that the defendant discontinued the use of plaintiffs' process prior to September 1, 1908. It was also adjudicated that the Twitchell process is not a process of extracting glycerine from waste soap lyes. Jobbins v. Kendall Mfg. Co. (C. C.) 184 Fed. 463, 466. The findings in that case are conclusive in this case. as stated in the rescript filed in the present case on January 29, 1915.

[2] The plaintiffs, nevertheless, contend that the defendant continued to use a part of the plant installed by the plaintiffs for refining by distillation the so-called "Twitchell liquors," and that under the con-

tract plaintiffs are entitled to royalties on all glycerine produced by distillation of Twitchell liquors.

This use of part of the plant is disputed as matter of fact. Assuming, however, that a part of plaintiffs' plant was used for one of the steps of the plaintiffs' process—i. e., distillation—upon material other than waste soap lyes, this would not be a use of plaintiffs' process. The royalty payable under the contract is for glycerine produced by the plaintiffs' process, and all payments are based upon production of glycerine by the process. See Jobbins v. Kendall Mfg. Co. (D. C.) 196 Fed. 216:

"A process is a mode of treatment of certain materials to produce a given result. It is an act or series of acts, performed upon the subject-matter, to be transformed and reduced to a different state or thing." Cochrane v. Deener, 94 U. S. 780, 24 L. Ed. 139.

The subject-matter to be treated by plaintiffs' process is defined by the contract as "waste soap lyes." The plant having been purchased by the defendant, a part of it could be used for distillation of liquors other than waste soap lyes without incurring liability under the terms of the contract for a royalty for use of the plaintiffs' process.

If it were true that the plaintiffs acquired patents for improved apparatus for better performing one step in the process, the use by defendant of that patented apparatus alone on other liquids might be an infringement of patent rights, but would not be a breach of the contract.

The plaintiffs' claim for royalties on all glycerine produced at defendant's factory must be disallowed, for the following reasons:

First. Because of the prior adjudication to which we have already referred, which establishes the fact that the defendant discontinued the use of plaintiffs' process prior to September 1, 1908, and the further fact that the Twitchell process is not a process of extracting glycerine from waste soap lyes.

Second. Because the proof is insufficient to show that the defendant, after September 1, 1908, used any portion of the so-called "Jobbins plant" to distill waste soap lyes; and

Third. Because, even if it should be held that there is sufficient proof that the defendant used a part of the Jobbins plant to distill Twitchell liquors, this is insufficient to charge the defendant with payment of royalties under the contract.

The testimony of Prof. Chandler has been read in full and given careful consideration. Due weight has been given to his opinion that the distilling feature is applicable for the refinement of Twitchell liquors, as well as of the liquors resulting from the chemical steps of the plaintiffs' process. It has also been kept in mind that the question before us is not a question of patent infringement, but a question of breach of contract, and that the use by the defendant of the substance of the plaintiff's process, though with some nonessential variations to avoid the terms of the plaintiffs' patents, might require the payment of the agreed consideration. But this is not the case shown by the testimony. The plaintiffs' chemical steps which precede the distillation of waste soap lyes are a substantial and essential part of the

mode or treatment of the special substance which was to be treated by the process. This has been wholly omitted; and upon the evidence of Prof. Chandler it is apparent that the Twitchell process is applied to a different substance, and in no sense can be regarded as an equivalent for the chemical steps of the plaintiffs' process. A finding that the mere use of the Jobbins or the Dyer distillation apparatus, if proved, requires the defendant to pay the agreed royalties, would disregard both the terms and the substance of the contract.

Upon a proper construction of the fifth paragraph of the contract, the selling price therein referred to is the "gross price obtained therefor" by the defendant, and not the average selling price in the market.

The plaintiffs are therefore entitled to judgment only for royalties upon glycerine produced by the defendant from waste soap lyes, by subjecting them, not only to distillation, but to the preliminary steps of plaintiffs' compound chemical and distilling process. The plaintiff is also entitled to interest from the respective dates when checks should have been sent, according to paragraph 5 of the contract.

Unless the parties can agree upon the computation of the amount of the judgment, the plaintiffs may file within ten days their computation of the amount due, and the defendant may file corrections thereof within five days thereafter.

Should either party desire a more specific finding of fact or law, request therefor may be filed within ten days. Otherwise, a general finding for the plaintiffs will be made, with damages in accordance with this opinion.

In re DREXEL HILL MOTOR CO.

(District Court, E. D. Pennsylvania. February 5, 1921.)

No. 6396.

1. **Bankruptcy ⇐330—Referee cannot refuse to file claim because of informality.**
   A referee has no right to refuse to file a claim presented on the ground of its informality.
2. **Bankruptcy ⇐336—Informal claim may be amended after expiration of year.**
   Where a paper presented for filing, although informal, contains the substance of a formal claim, it is sufficient as the basis of an amended claim filed after expiration of the year allowed by Bankruptcy Act, § 57n (Comp. St. § 9641).

In Bankruptcy. In the matter of the Drexel Hill Motor Company, bankrupt. On review of order of referee. Reversed.

L. L. Smith, of Philadelphia, Pa., for petitioner.
John M. Broomall, of Media, Pa., for trustee.

THOMPSON, District Judge. The Maxwell Sales Corporation, by its attorney, presented to the referee within the year after the date of

adjudication, September 27, 1918, a proof of claim under oath for $2,523.26 for automobiles shipped by the claimant. It set out the names and numbers of the cars, that the amount claimed was over and above all legal set-offs, and that no payment had been made upon the indebtedness, or no security of any kind given. According to the referee's certificate and opinion, the claim was returned to the attorney for the claimant, because it did not conform to the form of proof required by the General Orders in Bankruptcy. On May 20, 1920, the attorney for the claimant filed with the referee a proof of claim in due form for the same amount and the same indebtedness.

The claim was allowed by the referee, but, upon the petition of the trustee for reconsideration, the referee disallowed it, because the original proof of claim had not been filed within the year, and had been withdrawn by the claimant, and therefore there was nothing upon the record filed within the year upon which to base an amended claim. The referee reports that the first proof of claim presented was taken from his office at the time of its presentation, was voluntarily withdrawn for the purpose of refiling it in proper proof, shape, and form, and was never afterwards re-presented to the referee in any manner whatever. The referee also reports that the claimant did not produce or in any way exhibit the claim so presented and withdrawn within the year.

In the claimant's answer to the trustee's petition it was admitted that no proof was actually filed, but it was alleged that proof of claim in substance the same as that which was ultimately filed was actually submitted to the referee within one year of the adjudication, and was not accepted by the referee, owing to informality. But while the referee so reports, and the claimant has admitted that the claim was not filed, the record filed with the certificate for review contains the paper in controversy, and we are confronted with the original proof of claim among the papers in the case, which contains a jurat dated February 27, 1919, well within the year. Accompanying it of the same date is a power of attorney to prosecute the claim. Under these circumstances, the court must consider the record as of more cogent force and effect than the statements in the referee's report and the claimant's admission, both based upon the uncertainties of recollection of what occurred.

It is apparent, from the fact that the informal proof was presented to the referee and was filed with the record, that it has remained in the custody of the referee along with the other papers filed in the case, and was not physically withdrawn by the claimant's attorney. It is quite apparent that there was no intention on the part of the claimant to withdraw the claim, in the sense of abandoning it. In view of what is physically present upon the record, and the undisputed fact that the claim was presented within the year, it was plainly the duty of the referee to file the proof of claim, which he apparently did, by having it among the papers in the case. It was further his duty to indorse the claim in the usual manner with the date of filing. General Order No. 2. It thus constituted a part of the records of the case. Bankruptcy Act, § 42b (Comp. St. § 9626).

[1] A referee has no right to refuse to file a claim presented upon the ground of its informality. In re Haskell (D. C.) 228 Fed. 819. The

Bankruptcy Act is strict in requiring a paper constituting a part of the record to be carefully and formally kept. In re Lacey & Co., 35 Am. Bankr. R. 231.

[2] The paper presented contained the substance of the formal proof filed on May 20, 1920, and was sufficient to constitute the basis of an amended claim after the expiration of the year. Hutchinson v. Otis, 8 Am. Bankr. R. 388, 115 Fed. 937, 53 C. C. A. 419; Id., 190 U. S. 552, 23 Sup. Ct. 778, 47 L. Ed. 1179; In re Basha, 200 Fed. 951, 119 C. C. A. 335; Seligman v. Gray, 227 Fed. 417, 142 C. C. A. 111; In re Fairlamb (D. C.) 199 Fed. 278; In re Roeber, 127 Fed. 122, 62 C. C. A. 122.

It is ordered that the original proof of claim and the power of attorney be indorsed and docketed as filed nunc pro tunc as of their date, that the order of the referee disallowing the claim upon the amended proof filed be vacated, and the claim reconsidered upon the merits.

SUMNER v. PARR.

In re GEORGE A. GAY & CO.

(District Court, S. D. New York. June 20, 1919.)

1. **Bankruptcy ⇐303(3)—Creditor held not shown to have known preference would result from security.**
   In a suit by a trustee in bankruptcy against a creditor, evidence that the creditor, when he took security, knew that the debtor was embarrassed for cash to pay her debts, and knew the extent of her assets, consisting of equities in real estate, without evidence of the value of those equities, *held* insufficient to show that the creditor knew that a preference would result.
2. **Bankruptcy ⇐166(3)—Price at sale under hammer not evidence of value of real estate equities.**
   The fact that equities in real estate owned by the bankrupt produced little or nothing when sold under the hammer is not proof that they were of no value, so as to charge a creditor, who took security with knowledge of the existence of those assets, with notice a preference would thereby result.
3. **Bankruptcy ⇐166(3)—Knowledge preference might result is insufficient.**
   Under the Bankruptcy Act (Comp. St. §§ 9585–9656), requiring belief by the creditor that a preference will result to make a conveyance void as a preference, belief that a preference might result from the transfer is insufficient.

In Equity. Suit by Malcolm Sumner, as trustee in bankruptcy of George A. Gay and another, doing business as George A. Gay & Co., against Benjamin Parr. Decree for defendant.

Myle J. Holley, of New York City, for plaintiff.
I. Goetz, of New York City, for defendant.

LEARNED HAND, District Judge. [1] Although the evidence of the bankrupt's insolvency of May 29th is absent, strictly speaking, I shall disregard that feature of the case, and assume that the only

issue left open is of the defendant's knowledge that the transfer would result in giving him a preference. He knew that the bankrupt had been doing a prosperous business, and had had very substantial, if not large, interests in real property. He knew that she had been slow in her payments for some time, and that he had been obliged to take notes from her, first for $500, and finally, in the autumn of 1917, for $1,000. He necessarily knew, as he had repeatedly asked her to pay up, that she did not have enough ready money to do so. In other words, he knew that she was getting into an embarrassed financial condition. In taking the notes, he says his chief purpose was not to have so much money outstanding without interest, and this was undoubtedly so; but in taking security he was certainly actuated by suspicion of the continued sufficiency of his debtor's circumstances. He knew also that her total indebtedness amounted to some $6,000 or $7,000; in fact, it probably was $2,000 or $3,000 greater than this; but there is no evidence that he knew of any more, and, as she had told him what the facts were, I think he might reasonably have rested without further inquiry.

[2] He also knew of the extent of her assets. These assets consisted of equities in various pieces of real property; but there is throughout the case not a scintilla of evidence to show what was the real value of those equities, except the fact that when sold under the hammer they produced little or nothing. I cannot accept this proof as equivalent to a showing of what their value was. Even if it may be some evidence of value, the values of real property, as they are estimated by experts and are relied upon in general, are in no sense determined by what the property will bring at auction. Therefore, while the defendant knew the assets, there is no evidence of their value, nor can I tell what he would have found it to be if, using the information she gave him, he had made inquiry of qualified experts. The Twenty-Third street property alone had had an equity of some $33,000 over a mortgage of $17,000 seven years before. It may have dwindled to nothing, but I have no means of telling what it was, except the fact that it brought deficiency upon foreclosure. The same thing in general is true of the other pieces of property, all of which had substantial values some time before. If I am to take notice that real estate values in New York had gone off enormously, I should also observe that the shrinkage was perhaps at its lowest in the spring of 1918. The difficulty with the case in this aspect is that the plaintiff, on whom the burden rests, has not given any proof from which those values could be ascertained.

[3] Therefore the defendant's knowledge may be put in this form: There were no immediate suspicious circumstances. Nothing had just happened which should have caused him to suppose that the bankrupt was any nearer insolvency than she had been for some time past. Finding his debtor unable to make ready payments, and knowing that she had substantial property, he became suspicious, and dissatisfied with the delays, and took security. If this charges him with knowledge that the security will create a preference, then so is every creditor who takes security because he has become doubtful and sus-

picious of the eventual insolvency of his debtor. When the statute requires belief that a preference will result, it means more than this; for the taking of security only shows that the creditor has cause to believe that a preference might result. The two are very different. It may be the difference is only one of degree, but the statute establishes it none the less. In this case the proof goes no further than to show that it might.

The defendant may take a decree, but, under all the circumstances, without costs.

SUMNER v. PARR.

(Circuit Court of Appeals, Second Circuit. November 10, 1920.)

No. 7.

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

Suit by Malcolm Sumner, as trustee in bankruptcy, etc., against Benjamin Parr. Decree for defendant, and plaintiff appeals. Affirmed.

Yankauer & Davidson, of New York City (M. J. Holley, of New York City, of counsel), for appellant.

Goetz & Jacoby, of New York City (I. Goetz, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree affirmed.

CHIPMAN CHEMICAL ENGINEERING CO., Inc., v. READE MFG. CO.

(District Court, D. New Jersey. December 31, 1920.)

Patents ⊂=328—873,680, for spraying apparatus void for lack of novelty.

The Pearse patent, No. 873,680, for spraying apparatus, *held* void for lack of novelty.

In Equity. Suit by the Chipman Chemical Engineering Company, Incorporated, against the Reade Manufacturing Company. Decree for defendant.

Paul Q. Oliver, of Westfield, N. J., and Edward S. Beach, of New York City, for plaintiff.

Lewis J. Doolittle, of New York City, for defendant.

BODINE, District Judge. This suit, by stipulation, comes before the court upon final hearing upon bill, answer, and affidavits. The plaintiff claims the infringement of the fifth and eighth claims of United States patent No. 873,680, dated December 10, 1907, which read as follows:

5. "The combination with a tank, and discharge devices connected therewith, of means for establishing pressure in the tank whereby the discharge therefrom may be regulated independently of the liquid contents of the tank, substantially as set forth."

8. "In an apparatus substantially as described, the combination of a nozzle pipe, a series of nozzles connected therewith and comprising each a perforated head having a neck, a coupling receiving said neck and a pipe section intermediate said coupling and the nozzle pipe and independent valves controlling the passage of liquid from the nozzle pipe to their respective heads, substantially as set forth."

The pressure device applied to the tank is by means of a pump, which from the drawings attached is indicated to be by operation independent of the operation of the car. There is nothing, however, in the claim which suggests this idea, except by reference.

The plaintiffs' business is the spraying of railway tracks with a liquid weed killer by means of the device made under this patent, and during the year 1918 it seems to have used 281,320 gallons of liquid on such railways as the Chicago & Northwestern, Lehigh Valey, Baltimore & Ohio, Illinois Central, Southern Pacific, Pennsylvania Railroad, and other road and trolley lines. The defendant for many years prior to the commencement of business by the plaintiff has been engaged in the railroad weed-killing enterprise.

The plaintiffs' fifth claim by analysis consists of three parts—the tank, a discharge device, and a means for using pressure. Its eighth claim, in addition to the discharge device, consists of a nozzle pipe with a series of nozzles connected therewith, each containing an independent valve controlling the passage of liquid therefrom. The defendant asserts that there is no novelty in either of these claims. With respect to claim 5 he cites the Haughey patent, No. 397,287. This patent discloses in a street-sprinkling device a tank mounted on a carriage with an air pump, not independently operated, but operated from the driving gear of the carriage, for the purpose of establishing pressure, and a discharge device.

In 1891 a patent was issued to Tyrrel, No. 444,786, embodying a somewhat similar device for the purpose of destroying insects. In this device we have three elements—the tank, a discharge pipe, and air pump. In 1904 a further patent was issued to one Smith, No. 765,518, for a street cleaner. The street cleaner added to the three elements above recited a control by the driver of each of the spraying devices. It is obvious from the analysis of these patents that for years prior to the patent in suit the combination of the three elements existed and was well known; the only suggested change being the independent action of the pumping device, if it is included within the specification of claim, and which was no doubt used for convenience only, and is certainly analogous to a pump driven from the running gear of the carriage.

Defendant further claims that claim 8 of the patent in suit is completely anticipated by the Farrand patent, No. 390,657—1888, for a potato sprinkler, where substantially a similar sprinkling device and combination were used, consisting of a series of nozzles designed for sprinkling the ground, each nozzle controlled by means of a lever and valves.

Numerous other patents are cited: Murphy, No. 736,135, for a street washer; Ward, No. 805,689, for a poison distributor for plants;

Eccles, No. 436,406, for a water sprinkler for farming purposes. In addition to these patents, the Bradford patent, No. 803,090, for a hand car device for destroying weeds along the railroad, seems a complete anticipation of the patent in suit. This patent calls for the elements in the fifth claim of the patent in suit, and also for the distributing nozzles transverse across the end of the car and each nozzle independently controlled.

The application for the injunction will be denied, for the reason that there exists no novelty in the plaintiffs' claim.

DELAWARE, L. & W. RY. CO. v. JOHNSON-BROWN CO.

(District Court, S. D. Georgia, Albany Division. February 10, 1921.)

No. 47.

Carriers ⇐193—Connecting carrier cannot recover freight from shipper on shipment missent by initial carrier.

A connecting railroad cannot recover its freight charges on a carload of merchandise from the shipper, where the car was billed over its line by the initial carrier in violation of its contract with the shipper, as changed before the shipment was forwarded, which required consignment of the car to a different destination, and as a result of the mistake the carload, which was perishable, was lost to the shipper.

At Law. Action by the Delaware, Lackawanna & Western Railway Company against the Johnson-Brown Company. Judgment for defendant.

See, also, 239 Fed. 590.

James Tift Mann, of Albany, for plaintiff.

R. H. Ferrell, of Albany, Ga., for defendant.

BEVERLY D. EVANS, District Judge. This is a suit by the terminal carrier against the shipper to recover freight charges, under the following stipulation of facts:

"On July 17, 1912, the defendants delivered to the Gulf Line Railway Company, at Sylvester, one carload of watermelons, loaded in Atlantic Coast Line Railway car No. 17313 for shipment from said Sylvester to Syracuse, N. Y., and then and there consigned said car to one T. H. Whitcomb, in said Syracuse, all as per the bill of lading hereto attached, as Exhibit A. The melons were shipped under said bill of lading and carried over the lines of the said Gulf Line Railway, as the initial carrier, from said Sylvester, Ga., and over the railways of several intermediate carriers, and over the lines of the plaintiff as last connecting carrier to their point of destination named in said attached bill of lading, which bill of lading was duly received and acted upon by plaintiff as the last connecting carrier handling said shipment, and plaintiff had, as a matter of fact, no knowledge of any new contract of shipment. If the defendants are liable at all, it is for the amounts as set out in plaintiff's petition.

"That the next day after the issuance and receipt of aforesaid bill of lading, and before the car of melons had left Sylvester or the point of origin of shipment, defendants notified in person the aforesaid agent for said Gulf Line Railway Company, who issued the aforesaid bill of lading, that they wished to cancel the former shipping of said car of melons to Syracuse, N. Y., and take new bill of lading for shipment of the said car to J. B. Hayes Company, at

Nashville, Tenn., and in pursuance of said new shipping instructions the defendants' copy of the aforesaid bill of lading, reading Syracuse, N. Y., as destination, was surrendered to said agent, and a new bill of lading was issued to defendants by said agent of said Gulf Line Railway Company, the original of which is hereto attached, as Exhibit B; but, contrary to said new shipping instructions, and the said new bill of lading, and said new contract of shipment, said car was transported to Syracuse, N. Y., as per the first bill of lading attached as Exhibit A aforesaid. It is further agreed as a fact that said car of melons was a total loss to defendants in that they never received any proceeds from said car."

I construe the stipulation of the parties to mean that the consignor and receiving carrier entered into a contract to carry the car of melons to Syracuse, N. Y., but before the actual shipment was made the original contract of shipment was rescinded, and a new contract was substituted therefor, whereby the receiving carrier undertook to carry the melons to Nashville, Tenn., and a new bill of lading was issued for the carriage of the melons to Nashville. Notwithstanding the abrogation of the first contract, and the entering into a new contract for the carriage of the melons to a different point, the receiving carrier acted on the abrogated contract, and caused the melons to be transported to the destination given in such abrogated contract. Under these facts I do not think that the connecting carrier, carrying the goods to the point of destination in the rescinded contract, is entitled to recover of the shipper freight for that service.

The receiving carrier was not the agent of the shipper for a transportation of the goods to Syracuse, N. Y., because that contract had been mutually terminated by it and the shipper before the goods started. By the execution of the new contract as a substitute for the first, the receiving carrier became the agent of the shipper only with respect to the carriage of the goods to Nashville, Tenn. It was not the fault of the shipper that the receiving carrier negligently acted on the rescinded contract.

This is not a case of a secret contract between the receiving carrier and the shipper with respect to amount of freight charges or as to routing, as were the cases relied on by the attorney for the connecting railroad company. It is a case of a shipment by a receiving carrier to a destination different from that of the contract. The initial carrier stood in relation to the shipper just as if only one contract of carriage was made and the destination of the goods was Nashville, Tenn. If it wrongly routed the goods to a different destination, it was without authority from the shipper to contract with a connecting carrier in aid of a wrongful diversion, and neither it nor its connecting carrier can lawfully charge freight to the shipper for such wrongful diversion. The connecting carrier's remedy for its freight charges is against the initial carrier, and not against the shipper, with whom it had no privity of contract.

UNITED STATES v. BURNS.

(District Court, S. D. Ohio, W. D. January 24, 1921.)

No. 1869.

Intoxicating liquors ⇐255—Vehicle knowingly used in illegal transportation by owner forfeited.

Under National Prohibition Act, tit. 2, § 26, the court is without authority to return to the owner a vehicle used in the illegal transportation of liquors, unless the owner shows absence of guilty knowledge.

Prosecution by the United States against John Burns. On petition of defendant for return of an automobile. Petition denied.

Allen C. Roudebush, Asst. U. S. Atty., of Cincinnati, Ohio.
John J. Molloy, of Cincinnati, Ohio, for defendant.

PECK, District Judge. On petition for return of an automobile.

Defendant was convicted and fined for transporting liquor contrary to the terms of the Volstead Law (41 Stat. 305). At the time of his arrest his motor truck was seized by the prohibition officers. The petition for its return is based upon allegations that he is married, with a dependent family, which he supports by means of this truck, and that he has no other vehicle, and that the vehicle was never used to transport liquor at any other time, and, upon the argument, that by the fine heretofore imposed he has been sufficiently punished for his offense, all of which are found to be true.

It is urged that it is within the discretion of the court, under these circumstances, to order the vehicle restored to him, and, if it were so, such order would be made. The Volstead Law provides that upon conviction, and unless good cause to the contrary be shown by the owner, the court shall order a sale of the vehicle, and out of the proceeds shall pay all liens thereon, according to their priorities, which are established as being bona fide and as having been created without the lienor having any notice that the carrying vehicle was being used, or was to be used, for illegal transportation of liquor.

In construing this section it would violate common sense to put the rights of the owner, who, having possession and control, is primarily responsible for the use of a vehicle, above the rights of the lienor. The latter, to protect his lien, has the burden of establishing its creation without notice to him of unlawful use of the vehicle. Guilty knowledge by the lienor at the date of the creation of his lien is sufficient to defeat it. The act recognizes that, as mere lienor, he would have no power of direction over the vehicle after the creation of his lien.

If guilty knowledge forfeits the interest of the lienor, it would seem that an interpretation which deals equally with the rights of the owner is the natural one. Accordingly, it is held that in order to show good cause against the sale of a vehicle seized under the Volstead law, and shown to be an instrument of illegal transportation of liquor, the owner must show the absence of guilty knowledge.

Therefore an order of sale will issue and the lienors, if any, may be served with process.

LAWRENCE v. WARDELL, Collector of Internal Revenue.

(District Court, N. D. California, Second Division. November 16, 1920.)

Internal revenue ⊂=7—United States citizen residing in Philippines is subject to income tax.

Under Revenue Act 1916, § 1 (Comp. St. § 6336a), imposing a tax on the net income received by a citizen or resident of the United States and by nonresident aliens from sources within the United States, a citizen of the United States, who resided in the Philippine Islands during the whole of 1918 is liable to the income tax imposed by Revenue Act 1918, § 210 (Comp. St. Ann. Supp. 1919, § 6336⅛e), in lieu of taxes imposed by the acts of 1916 and 1917.

At Law. Action by W. H. Lawrence against Justus S. Wardell, Collector of Internal Revenue for the First District of California. Demurrer to the complaint sustained.

W. H. Lawrence and Burt F. Lum, both of San Francisco, Cal., for plaintiff.

F. M. Silva, U. S. Atty., of San Francisco, Cal., for defendant.

RUDKIN, District Judge. The sole question presented by the demurrer in this case is this: Is a citizen of the United States who resided in the Philippine Islands during the entire year 1918 subject to the tax imposed by the revenue act of that year?

Section 1 of the act of 1916 (Comp. St. § 6336a) imposed a tax upon the entire net income received by every individual "a citizen or resident of the United States" and upon the entire net income received by every individual "a nonresident alien" from all sources within the United States. This act was amended in 1917 (40 Stat. 300), but the amendment is not deemed material to our present inquiry. Section 210 of the act of 1918 (Comp. St. Ann. Supp. 1919, § 6336⅛e) imposed upon the net income of every individual a normal tax in lieu of the taxes imposed by the acts of 1916 and 1917.

From those provisions it will be seen that the tax is imposed on citizens of the United States regardless of their place of residence, or residents of the United States regardless of their citizenship, and upon the income of nonresident aliens from sources within the United States. Nothing is found in any other provision of the act in conflict with this view. Thus section 260 of the act of 1918 refers to individuals who are citizens of any possession of the United States, but not otherwise citizens of the United States and the following section provides that returns shall be made by individuals who are citizens or residents of Porto Rico and the Philippine Islands or derive income from sources therein, but makes no reference to citizens of the United States residing in the Islands.

For these reasons I am of the opinion that the tax was properly imposed, and the demurrer is therefore sustained.

HALBLEIB et al. v. BENDIX et al.

(Court of Appeals of District of Columbia. Submitted January 11, 1921. Decided February 7, 1921.)

Nos. 1367–1374.

1. **Patents ⇐82—Party to interference proceeding held to have abandoned experiment.**
   Where an applicant for a patent on an engine starter constructed a starter in 1912, which worked successfully, but the company whose business he was attempting to secure adopted a different kind of starter, and his own company never put his device on the market, but prepared to supply a different starter, and, though he filed numerous applications, some of which related to starters, he made no attempt to resurrect or commercialize the device until another party's device was exhibited and described in a periodical, the conclusion that his experiment was abandoned was warranted.
2. **Patents ⇐90(2)—Later applicant must show diligence just before earlier applicants came into field.**
   One whose application for a patent was filed later than those of others, but who proves earlier conception and disclosure, in order to prevail in an interference proceeding, must show that he was exercising diligence just before such other applicants came into the field.
3. **Patents ⇐91(3)—Evidence held to show diligence by junior party to interference.**
   Evidence in an interference proceeding *held* to show that the junior party, who proved conception and disclosure prior to those of the other parties, was at no time lacking in diligence from a time prior to the time the other parties came into the field until the date he filed his application.

Appeal from a Decision of the Commissioner of Patents.

Interference proceedings in the Patent Office between Edward A. Halbleib and Vincent Bendix and another, between Edward A. Halbleib and Vincent Bendix and others, between Frank Conrad and Vincent Bendix and another, between Frank Conrad and Vincent Bendix and others, and between Joseph Bijur and Vincent Bendix and others, with three proceedings between Joseph Bijur and Vincent Bendix. From a decision awarding priority of invention to Bendix, the other parties appeal. Affirmed.

Melville Church, of Washington, D. C., for appellants.

Wesley G. Carr and Otto S. Schairer, both of Pittsburgh, Pa., Samuel E. Hibben, of Chicago, Ill., and S. T. Cameron, W. B. Herkam, and C. L. Sturtevant, all of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. These appeals grow out of a four-party interference, in which priority of intervention was awarded generally to the party Bendix by each of the three tribunals of the Patent Office.

The application of Bijur was filed November 5, 1914; of Conrad, December 26, 1913; of Halbleib, May 28, 1913; and of Bendix, November 24, 1913. A patent was granted to Bendix January 12, 1915.

The issue is set forth in two counts, as follows:

"1. An engine starter comprising, in combination with a member operatively connected with the engine, a motor, a driving member operated thereby and adapted to co-operate with and drive the other member but normally out of engagement therewith, means whereby relative movement between the motor and the driving member automatically moves the latter into driving engagement with the other member, and a yielding driving connection interposed between the motor and the driving member.

"2. An engine starter comprising, in combination with a member operatively connected with the engine, a motor, a driving member operated thereby and adapted to co-operate with and drive the other member but normally out of engagement therewith, means whereby relative movement between the motor and the driving member automatically moves the latter into driving engagement with the other member, and a yielding clutch interposed between the motor and said driving member."

The invention relates to a transmission for an electric starting motor for cranking an internal combustion engine. Each of the interfering applications discloses a starter in which an electric motor rotates a screw shaft on which a nut is mounted. The nut is so adjusted, either by a weight or spring, that it will not rotate until it advances along the shaft to the proper point where teeth on the nut engage teeth upon the flywheel of the gas engine. When this occurs the nut is forced to rotate with the shaft and thus start the engine. The engine gear wheel will then reversely rotate the pinion nut on the screw-threaded shaft, until it moves out of gear with the engine wheel, thus leaving the engine in operation.

The first five cases may be treated in a single group, and turn solely upon issues of fact. The tribunals below being in accord upon the facts, manifest error must appear to justify a reversal. We will consider the parties in order.

[1] Bijur relies wholly upon reduction to practice early in 1912. If this point is established, he must prevail. If not, he fails. He produced in court a starter (Exhibit No. 2) which meets the issues of this interference. He has unquestionably proven that this device was constructed and tested in the early part of 1912 on a Packard car, which had been furnished by the Packard Company for that purpose. The witnesses testified that it worked successfully. While it appears that it broke frequently during the test, it is explained that this was caused by purposely subjecting it to destructive tests. If Bijur's succeeding conduct was such as to corroborate his proof of a successful test, reduction to practice could readily be inferred; but it was not.

Exhibit 2 was designed with a view of securing the business of the Packard Company. But immediately following the test of 1912 that company adopted a different kind of a starter. Though the Bijur Company was engaged in the business, they never put a device like Exhibit 2 on the market. In 1913 they prepared to supply the Vaughn Company with a starter which was different from the one in question. During this period of delay, Bijur, who was a prolific inventor, filed 17 applications in the Patent Office, 10 of which relate to starters, and all seem to have some relation to the art. Nowhere is it established that Bijur made any attempt to resurrect or commercialize his device, as shown by Exhibit 2, until Bendix's device was exhibited at an automobile show in January and February, 1914, where it is claimed

Bijur saw it. A full description of the Bendix device was also published in the Motor Age at the same time.

From the foregoing facts, but one conclusion can be drawn—that Bijur himself did not regard the 1912 test a success. In the light of his conduct, the court cannot be called upon at this late date to give it a status which the inventor did not attribute to it at the time. The conclusion reached by the tribunals below, that what Bijur did in 1912 resulted only in an abandoned experiment, must, in view of his subsequent conduct, be accepted as correct.

[2] With Bijur eliminated from the controversy, we will now consider the cases of the remaining interferents. The party Halbleib took no testimony, but stands upon his filing date, May 28, 1913. Conrad is accorded a date of conception and reduction to practice in May, 1913. Bendix has clearly proven conception and disclosure as early as 1910. To entitle him to prevail, it must appear that he was exercising diligence just before Conrad and Halbleib came into the field in May, 1913.

[3] While Bendix claims that he reduced his invention to practice in the fall of 1912, in what is known as his Nashville machine, it is unnecessary to consider this test in detail, since, we think, from that date until he filed one year later, he was at no time lacking in diligence. In 1912 he became associated with parties who financed his operations until the end, in 1913. It appears that these parties objected to the use of the spring, which interfered to some extent with the speedy development of the invention. He states that, out of consideration for the views of his associates, he was delayed to some extent in developing the spring feature of the invention. But the record is replete with evidence of his activities in experimenting with springs from March to November, 1913. It may be suggested that the discouragement Bendix encountered from his financial backers emanated from a view commonly held at that time by mechanicians in respect of the use of the spring in connection with the screw shaft to establish a "yielding driving connection" or a "yielding clutch."

Coming to the remaining three cases, which involve features of the general invention in issue, the contest is limited to the parties Bijur and Bendix. The issues in these cases relate to details which exclude the devices of Conrad and Halbleib. But they are clearly as readable on the Bendix invention as on the Bijur 1912 device, and since Bijur has failed to establish his right to priority over Bendix, by reason of his failure to reduce to practice in 1912, he cannot prevail in the present cases.

The decision of the Commissioner of Patents, awarding priority of invention to the party Bendix in all of the cases, is therefore affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

IMPERIAL COTTO SALES CO. v. N. K. FAIRBANKS CO.

(Court of Appeals of District of Columbia. Submitted January 18, 1921. Decided February 7, 1921.)

No. 1328.

1. **Trade-marks and trade-names ⇐21—Damage presumed from use of mark having definite meaning; "Cottolene."**
   Where the registered trade-mark "Cottolene" had been used so long and so extensively as a trade-mark for cooking fat that it was defined in modern editions of the dictionaries as such, the right to oppose registration of the word by another does not turn merely on the question whether goods of the opposing parties are of the same descriptive properties or the use of the mark would be likely to lead to confusion, but the courts will presume damage therefrom.
2. **Trade-marks and trade-names ⇐44—Remedy of opponent of registration based on right to protection of good will and reputation.**
   The relief given by Trade-Mark Act, §§ 6, 13 (Comp. St. §§ 9491, 9498), by opposition or cancellation proceedings, rests fundamentally on the right of a person to be protected in the reputation and good will of his business.
3. **Trade-marks and trade-names ⇐1—Function is to identify origin and ownership of goods.**
   The function of the trade-mark is to identify the origin and ownership of the goods to which it is attached.
4. **Trade-marks and trade-names ⇐32—Property right ceases with discontinuance of use.**
   While there is a property right in a trade-mark, the right is grounded not in the mark itself, but in the right to be protected in the reputation and good will of the business designated thereby, and such right ceases with the discontinuance of the use of the trade-mark.
5. **Trade-marks and trade-names ⇐43—Use of mark for stock food can be opposed by owner of mark for cooking fat.**
   The owner of the trade-mark "Cottolene," which had been used long and extensively to designate the owner's product of a cooking fat derived from cotton seed oil, can oppose registration of the same word as a trade-mark for a stock food prepared from cotton seed, since, even if there would be no confusion of the goods of the respective parties, the application of that word to a product made from inferior cotton seed would damage the reputation of the original user.

Appeal from the Commissioner of Patents.

Application by the Imperial Cotto Sales Company for registration of a trade-mark, opposed by the N. K. Fairbanks Company. From a decision of the Commissioner of Patents, sustaining the opposition and refusing registration, the applicant appeals. Affirmed.

E. T. Fenwick and Charles R. Allen, both of Washington, D. C., for appellant.

Archibald Cox, of New York City, and William G. Henderson, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This is a trade-mark opposition proceeding. The appeal is from the decision of the Commissioner of Patents sustaining a notice of opposition to the registration by appellant, Imperial Cotto Sales Company, of the word "Cottolene" as a

trade-mark for an animal feed meal composed principally of cotton seed.

[1] It appears that the predecessor in business of the opposer, the N. K. Fairbanks Company, coined the word "Cottolene" in 1887 as a trade-mark to designate a cooking fat made from cotton seed oil and oleostearine. The mark has been registered in most of the countries of the civilized world, and the goods of the opposer company bearing the mark have a wide international reputation. The word "Cottolene," coined and used exclusively by the opposer and its predecessor in business for over 30 years, has come to have a fixed meaning in the language. It appears in the modern editions of the dictionaries. In the latest edition of the Standard Dictionary, it is defined as "a derivative of cotton seed used as a substitute for lard." It will therefore be observed that the word has come into the language solely by reason of its application by opposer to a certain class of goods, and the character of the goods defines its meaning.

This is not, therefore, the ordinary case which may be turned merely upon the question whether the goods of the opposing parties are of the same descriptive properties and the use of the mark would be likely to lead to confusion in trade. Where this element is clearly present, the courts will usually go no further, but presume damage therefrom. The protection extended by the court in such a case is both to the public and to the owner of the mark whose rights are being invaded.

"The deceit of the public, and the consequent injury to it, are as much to be regarded by a court of equity as an injury to a plaintiff's business." Celluloid Mfg. Co. v. Read (C. C.) 47 Fed. 712, 715.

[2] In the present case, however, the issue of damage to the opposer is twofold—damage from confusion of goods and more particularly damage from confusion of reputations. The Trade-Mark Act broadly gives relief by opposition or cancellation proceedings to any one believing himself to be damaged by the registration of a mark. 33 Stat. 724, §§ 6 and 13 (Comp. St. §§ 9491, 9498).

The redress thus accorded rests fundamentally upon the right of a person to be protected in the reputation and good will of his business.

"It seems to be the law that, when manufacturers have educated the public to ask for a certain article by its trade-mark name, they have acquired the right to insist that products manufactured by others shall not be given to the public under that name. It is just that it should be so, for the benefit derived from such name can only be obtained by faithful service in furnishing articles of recognized value. Moreover, if the trade-mark name might be adopted by others, inferior articles might then be produced and sold under it; and thereby the value to manufacturers of the reputation of the name used by them as a trade-mark would be destroyed." N. K. Fairbanks Co. v. Central Lard Co. (C. C.) 64 Fed. 133, 136.

[3, 4] The function of the trade-mark is to identify the origin and ownership of the goods to which it is attached. While there is a property right in a trade-mark (Trade-Mark Cases, 100 U. S. 82, 92, 93, 25 L. Ed. 550), the right is grounded not in the mark itself, but in the right to be protected in the reputation and good will of the business designated and known by the use of the trade-mark. This property right in the trade-mark ceases with the discontinuance of its use.

The courts, therefore, afford protection in trade-marks only in so far as they maintain and extend the reputation and good will of the owner in the business for which they are adopted and used. Hanover Milling Co. v. Metcalf, 240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713.

[5] It may well be that no purchaser would mistake a stock food for a lard substitute, merely because they bear the same trade-mark. But this is not the exclusive test. While the likelihood of confusion in trade arising from the use of the same or similar marks is sufficient to establish damage, it is not the only ground upon which injury may be predicated. Manifestly it would be too narrow a ground upon which to rest the present case. The goods are derived from the same product. The stock food is produced by the extraction of the oil from the cotton seed. A poor or adulterated grade of cotton seed meal, bearing the mark "Cottolene," would, we think, reflect upon the reputation of opposer's product, which is known the world over by that name. It is clear that, if these goods, derived from the same product, bear the same name, the public would be justified in concluding that they originated from the same trader. In other words, "Cottolene," having been coined and used for more than a generation exclusively as the name of a cotton seed product, when adopted as the name of an inferior cotton seed product, would lead to a comparison damaging to the reputation derived from its original use.

"The essence of the law of trade-marks is that one man has no right to palm off, as the goods or manufacture of another, those that are not his. This is done by using that other's trade-mark, or adopting any other means or device to create the impression that goods exhibited for sale are the product of that other person's manufacture when they are not so." Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94.

For the foregoing reasons, we think the opposition should be sustained and registration refused. The decision of the Commissioner of Patents is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

PRALL et al. v. IMLAY et al.

(Court of Appeals of District of Columbia. Submitted January 5, 1921. Decided February 7, 1921.)

No. 3420.

1. Infants ⇐88—Cannot, after majority, complain that amended bill, under which no action was taken, was not served.

One who had during minority been made a party to partition proceedings by service of the original bill on herself and her guardian ad litem cannot, after her majority, complain that the amended bill was not served on her, where no relief had been granted under it.

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

2. Infants ⇐88—After day in court, since majority, cannot complain of order entered during minority.

In partition proceedings, where one who had been made a party defendant during her minority was given her day in court after her majority on petition to vacate previous proceedings, she cannot complain of an order directing the sale of the property for partition and confirming the previous determination of the interests of the parties, on the ground that she was not heard before the previous determination.

Appeal from the Supreme Court of the District of Columbia.

Suit for partition by Elizabeth C. Prall against Jennie M. Prall and others, in which Charles V. Imlay, as committee of Elizabeth C. Prall, and Robert H. McNeill and others, as substituted trustees, were substituted as complainants. From a decree dismissing the petition of Gladys E. Lavagnino to establish an interest and to vacate prior proceedings, and directing a sale of the property for partition, the petitioner and defendants appeal. Affirmed.

Henry E. Davis and Alvin L. Newmeyer, both of Washington, D. C., for appellants.

Charles V. Imlay, George W. Offutt, Jr., and J. W. McNeill, all of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. A bill in equity was filed March 31, 1904, in the Supreme Court of the District of Columbia by Elizabeth C. Prall, as complainant, against Jennie M. Prall, Annie M. Prall, Emma C. Knorr, Augustus Ernest Knorr, Gladys Ernestine Knorr, William E. Prall, Sr., Julia L. Prall, and Adolph A. Hoehling, Jr., to procure partition by sale of certain real estate described therein. It is averred in the bill, among other things, that William E. Prall, Sr.. on May 17, 1872, conveyed the premises in question to his children, Jennie M., Annie M., Emma C., and William E. Prall, Jr., "for and during their natural life as tenants in common, with remainders to the children of said parties of the second part, their heirs and assigns as tenants in common in fee simple."

It appears that service of process was had upon the infant defendant. Gladys E. Knorr, and another defendant, Annie M. Prall, was appointed her guardian ad litem, and, as such, formally answered the bill. Certain orders were made, which need not be considered, since no sale was made. On June 13, 1911, complainant filed an amended bill setting up additional rights claimed to have accrued to her by reason of the death of her husband, William E. Prall, Jr. She prayed that a decree entered under the original bill on January 9, 1906, "be set aside and a new substitute and proper judicial partition decree by sale be passed declaring and fixing the rights, titles and interests, present and future, of your petitioner and the defendants herein according to the provisions by the fixed terms of the aforesaid deed herein" ; that new trustees be appointed, the property sold, and the proceeds divided, and that a rule issue upon the several defendants and the then existing trustees to show cause why the prayers of the petition should not be granted.

On November 13, 1911, a decree was entered setting aside the decree of January 9, 1906, determining the interests of the respective parties in the property, ordering a sale thereof and appointing the National Savings & Trust Company trustee. From this decree an appeal was taken to this court (Prall v. Prall, 39 App. D. C. 100), wherein the decree of the court below, in respect of fixing the interests of the claimants under the deed, was modified and affirmed. Thereafter, on May 22, 1914, a decree was entered in the court below in conformity with the mandate of this court directing a sale of the property.

No sale was made, and, on November 25, 1919, Gladys E. Lavagnino, the former infant Gladys E. Knorr, filed a petition "to establish interest and vacate order of sale," in which she reviewed the proceedings had since the filing of the original bill in 1904. She avers that neither she nor her guardian ad litem were served with process or notice under the amended bill of 1911, or with notice of the various proceedings thereunder; that she became of age January 15, 1916; that Elizabeth C. Prall, the original complainant, has been adjudged insane, and appellee Imlay appointed a committee of her estate, and that no sale of the property can be made at this time for its fair and reasonable value. She prays, in effect, that all proceedings heretofore had be vacated and for nothing held, and for general relief.

The defendants Jennie M. Prall, Annie M. Fahnestock, and Emma Prall Knorr answered, admitting the allegations of the petition and joining in the request to have the former proceedings set aside and held for naught. The court entered a decree ordering that the decrees of January 9, 1906, Novmber 13, 1911, and May 22, 1914, and every order or proceeding depending thereon, be vacated in so far only as they decree the sale of the property, but that in all other respects they be affirmed, that the cause be referred to an examiner to take testimony upon the advisability of making sale of the property, and that the cause be retained for further action.

On April 12, 1920, the court entered a decree again affirming the earlier decrees and orders depending thereon, except as to the sale of the property, dismissing the petition of Gladys E. Lavagnino and directing the trustees to sell the property in compliance with the decree of May 22, 1914.

The defendants Jennie M. Prall, Annie Prall Fahnestock, Emma Prall Knorr, and the petitioner, Gladys E. Lavagnino, appealed from this decree.

[1] The case can be disposed of in much less space than it has taken to state the facts. Appellant Lavagnino was properly brought into court by the appointment of a guardian ad litem and service of process upon both the infant and the guardian. Section 102, D. C. Code. It is unnecessary to consider the effect of the filing of the amended bill, since no sale or disposition of the property was made under it during the minority of the appellant Lavagnino. All that occurred affecting her rights was the final determination by this court of the rights of the respective claimants in the property under the deed of William E. Prall, Sr. Of this we do not understand that she complains. If so, however, she is now properly before us, and we will reaffirm our former judgment.

[2] The case was instituted by a proper party under the provisions of section 100 of the District Code, proof has been adduced as to the advisability of a sale of the property, the court has found that it is to the interests of the respective parties that it be sold, and no error in respect of these proceedings has been assigned. As to the propriety of a sale and partition of the property, appellant Lavagnino has had her day in court in the present action. The orders made and proceedings had during her minority resulted in nothing, and therefore cannot prejudice her rights, since she has been accorded a full hearing in the proceedings culminating in the order under which the court now proposes to sell and partition the property.

As to the other appellants. defendants below, they were parties to the proceedings under the original bill, participated in the proceedings under the amended bill of 1911, and they here rest their appeal upon the assignments of error of appellant Gladys E. Lavagnino. The determination of the appeal as to her disposes of the case as to all.

The decree is affirmed, with costs.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

ALLEN v. HILL.

(Court of Appeals of District of Columbia. Submitted January 10, 1921. Decided February 7, 1921.)

No. 1326.

1. **Patents ⇐113(7)—Concurrent action of patent officials not disturbed.**
   In so far as the Examiner of Interferences, the Examiners in Chief and the Commissioner of Patents were in accord in an interference proceeding, their judgment, when apparently sound, will not be disturbed.
2. **Patents ⇐90(6)—Application held not reduction of invention subsequently claimed to practice.**
   Where an earlier application by a party to an interference proceeding did not constitute a constructive reduction to practice, if it disclosed that a certain lever was fulcrumed on another lever, and it was so specified in the claims and specifications, the claim of priority denied, though it was contended that the drawings showed that the claims and specifications were incorrect.
3. **Patents ⇐90(6)—Drawing must be certain and conclusive to constitute reduction to practice, when contrary to specification.**
   To base a holding of a constructive reduction to practice on a drawing in an earlier application, in the face of a positive contrary statement in the specification, the drawing should be certain and conclusive.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding in the Patent Office between Edward B. Allen and George S. Hill. From a decision awarding priority to Hill, Allen appeals. Affirmed.

James A. Watson, of Washington, D. C., and J. Edgar Bull, of New York City, for appellant.

Alfred H. Hildreth, of Boston, Mass., for appellee.

SMYTH, Chief Justice. The invention involved in this interference relates to buttonhole cutting and stitching machines. There are nine counts, of which 2 and 7 are typical.

2. In a buttonhole sewing machine, the combination with stitch-forming mechanism, of a work clamp, a buttonhole cutting device, a cutter shaft with controlling means for causing it to perform a single rotation only preparatory to a buttonhole stitching operation, means carried by the cutter shaft for actuating the cutting device, and means also carried by the cutter shaft and acting independently of said actuating means for effecting the closing of the work clamp.

7. A buttonhole sewing machine having, in combination, a stitch-forming mechanism, a work clamp, a cutter, a cam shaft, a cam on the shaft and connections for closing the clamp, a second cam on the shaft and connections for relatively moving the clamp and cutter into and out of cutting relation, a third cam on the shaft and connections for operating the cutter, mechanism thrown into operation by the operator for driving the cam shaft, devices for stopping the cam shaft, mechanism for actuating the stitch-forming mechanism and work clamp to sew about a buttonhole, and means for stopping said mechanism after a buttonhole is completed.

[1] Counts 1, 2, 4 and 5 were awarded by the Examiner of Interferences to Allen, and the remaining counts to Hill. Allen admits that he cannot make count 3. The Examiners in Chief gave all the counts to Hill, and they were affirmed by the Commissioner. The three tribunals, therefore, are in accord as to all the counts but 1, 2, 4 and 5. In so far as they are in accord their judgment seems sound, and on the authority of Lautenschlager v. Glass, 47 App. D. C. 443, Rees v. White, 48 App. D. C. 149, and Greenawalt v. Dwight, 258 Fed. 982, 49 App. D. C. 82, we will not disturb it. This leaves counts 1, 2, 4 and 5 to be considered.

[2] The Examiner of Interferences in awarding these counts to Allen proceeded upon the hypothesis that an earlier application of his filed September 6, 1912, and upon which a patent issued in 1916, effected a constructive reduction to practice. If it disclosed that a certain clamp lever *223* was fulcrumed on the upper cutter lever *108*, it did not do so, and the debate centers about that point. It specified that the clamp-closing lever *223* "fulcrumed intermediate its ends at *224* upon the upper cutter-carrying lever." Not only that, but his claims 40 and 41 of the same application included as an element "a clamp-closing rock lever fulcrumed upon said cutter lever and adapted," etc. Those claims were allowed to Allen in that application; but after this interference had been declared, and after he had access to Hill's papers, and had discovered the necessity of establishing an earlier date for himself than he then had, Allen canceled the claims. He now argues that the claims and specification were erroneous. If so, it is remarkable how this error persisted, for he carried it into his British patent, where he describes "the rock lever *223* fulcrumed intermediate its ends at *224* upon the upper cutter-carrying lever." Allen is a man highly skilled in the art. He tells us that he gives little attention to the specification of his application, but that it is otherwise with his claims. "The claims," he testified, "I invariably read very carefully several times." In view of this is it not rather surprising that he overlooked the error, if there was one, which lay in the claims of the American and British applications?

But Allen says that the drawings of his earlier application disclose that the claims and specifications are incorrect. We are by no means persuaded that they do. The First Assistant Commissioner, dealing with this question, said:

"Where there is a specific statement in the specification of an application as to the manner in which the parts are mounted and operated, it would require a very clear showing in the drawing to permit a change of this statement."

And he reached the conclusion that, if any change was to be made in the matter we are considering, it should be in the drawings so as to make them conform to the specification; in other words, that a definite statement in the specification is more reliable than a drawing, especially where the latter, as here, is not clear.

[3] We think the Examiners in Chief summed the matter up correctly when they said, in effect, that to base a holding of a constructive reduction to practice of an invention upon a drawing in the face of a positive statement in the specification contrary to what was contended for, the drawing should be certain and conclusive, which is not so in the present case. Accordingly they held that the Examiner of Interferences was in error in finding that Allen's earlier application was a constructive reduction to practice of the invention of the counts 1, 2, 4 and 5, and in this connection, as we have said, the Commissioner concurred.

Allen contended at the bar that, if he could use the testimony of Hill's witnesses in a former interference referred to by him, he would be able to demonstrate the correctness of his theory. But it is stipulated in the record that he might do so. Why, then, complain? We do not think, however, that the testimony would have helped him any.

We believe the Patent Office is right, and therefore the decision of the Commissioner is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

BALL v. BARNHURST et al.

(Court of Appeals of District of Columbia. Submitted January 17, 1921. Decided February 7, 1921.)

No. 1398.

1. Evidence ⊂=265(7)—Admission by former attorney persuasive against client.

An admission in an interference proceeding that the adversary's exhibit illustrated the subject-matter of the issue, made by a former attorney, if not conclusively binding upon the client, is very persuasive in determining whether the Commissioner's decision that the adversary had disclosed the invention in issue should be affirmed.

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2. **Patents ⊂=113(7)—Concurrent finding of Office tribunals not reversed, unless manifestly wrong.**
Where the three tribunals of the Patent Office are in accord upon a question of fact, the Commissioner's decision will not be disturbed on appeal, unless it is clearly wrong.

3. **Patents ⊂=113(1)—Right of interferor to make claims cannot be questioned, without motion to dissolve or excuse for failure.**
Where a party to interference proceedings did not file a motion to dissolve in accordance with rule 122, he is not entitled, under rule 130, to contend that his adversary cannot make the claims, unless he shows good reasons why he failed to file a motion.

4. **Patents ⊂=113(1)—Reliance on other ground held not excuse for failure to move to dissolve.**
Reliance by a party in interference proceedings on estoppel of his adversary, under a prior decision of the appellate court, which was subsequently reversed by the Supreme Court, does not excuse failure to move to dissolve the interference proceedings, because the adversary is not entitled to make the claims.

Appeal from the Commissioner of Patents.

Interference proceeding between Herman F. Ball and Henry G. Barnhurst, administrator of the estate of Henry R. Barnhurst, deceased, and others. From a decision of the Commissioner of Patents, awarding priority to Barnhurst and others, Ball appeals. Affirmed.

Paul Synnestvedt, of Philadelphia, Pa., for appellant.

Dean S. Edmonds, of New York City, for appellees.

SMYTH, Chief Justice. This interference relates to an apparatus for burning pulverized fuel in boiler furnaces. Ball is the senior party, having filed in August, 1913, while the appellees, whom we shall refer to herein as Barnhurst, did not file until March, 1914. A patent issued to Ball while the applications were copending. Ball took no testimony, and is therefore restricted to his filing date. The three tribunals of the Patent Office concurred in holding that Barnhurst conceived the invention as early as July, 1913. It was stipulated by the parties that there was no lack of diligence on his part between that date and the date on which he filed his application. Consequently he was awarded priority.

Ball planted his case before the Examiner of Interferences and the Examiners in Chief on the assumption that Barnhurst, not having made his claims in time, was estopped under the ruling in Wintroath v. Chapman, 47 App. D. C. 428; Id., 252 U. S. 126, 40 Sup. Ct. 234, 64 L. Ed. 491. The first tribunal held against him, but was reversed by the second one. When the matter came before the Commissioner on appeal, he withheld action until the Supreme Court of the United States disposed of the Wintroath Case. That case was reversed, and thereby the basis for Ball's argument that Barnhurst was estopped was removed.

[1] Ball then took the position that Barnhurst had not disclosed the invention in issue. The Commissioner pointed out that Ball, in his brief before the Examiner of Interferences, admitted that Barnhurst's Exhibit 4, which was made prior to Ball's filing date, illustrated "the

subject-matter of the issue." Ball does not deny the admission, but says it was made by a former attorney, and that he should not be bound by it. Even if we should hold that it was not conclusively binding upon him, we think it must be treated as very persuasive in determining whether or not we should reverse the Office. It indicates at least that one of Barnhurst's attorneys is in harmony with the decision of the three tribunals of the Patent Office. The Commissioner held that Barnhurst's Exhibit 4 did disclose the invention, and, Ball's other contentions being out of the way, awarded Barnhurst priority.

[2] We have repeatedly ruled that where, as here, the three tribunals of the Patent Office are in accord upon a question of fact, we will not disturb the Commissioner's decision, unless it is clearly wrong (Hopkins v. Riegger, 49 App. D. C. 188, 262 Fed. 642; Greenawalt v. Dwight, 49 App. D. C. 82, 258 Fed. 982), which it is not in this case.

[3, 4] Furthermore, the argument now made on behalf of Ball is to the effect that Barnhurst cannot make the claims. Ball did not file a motion to dissolve in accordance with rule 122, and where this is not done, rule 130 says that a party shall not be entitled to raise the question, unless he shows good reasons why he failed to file a motion. He says he relied on the ruling in Wintroath v. Chapman to defeat his opponent; but the fact that he might have great confidence in the strength of one point is no excuse for failing to raise all points available to him. This is the only excuse he offers for his default, but it is not sufficient. His contention could have been rejected on that ground, but the Commissioner did not see fit to do so, but disposed of it on the merits, and we are satisfied with his decision.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

In re COFFIELD.

(Court of Appeals of the District of Columbia. Submitted January 17, 1921. Decided February 7, 1921.)

No. 1392.

1. **Patents ⟸26(2)—Claims for rigid drain board and clothes guide on wringer held to disclose invention.**
   Claims in an application for a patent on improvement in clothes wringers, the only novel element of which was a rigidly attached drain board and clothes guide, *held* to disclose invention by producing a new and useful result.

2. **Patents ⟸32—Doubts as to invention will be resolved in favor of inventor.**
   A doubt as to whether the improvement is invention or mere mechanical improvement will, as a general rule, be resolved in favor of the inventor.

3. **Patents ⟸18—Production of new and useful result is invention, though apparently simple.**
   An improvement which produces a new and useful result, and efficiency where before there had been inefficiency, is the result of invention, though after it was made it would appear that any one could have made it.

Appeal from the Commissioner of Patents.

Application by James L. Coffield for a patent for improvement on clothes wringers. From a decision of the Commissioner of Patents, rejecting two claims, the applicant appeals. Reversed.

R. J. McCarty and Edward L. Reed, both of Dayton, Ohio, for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

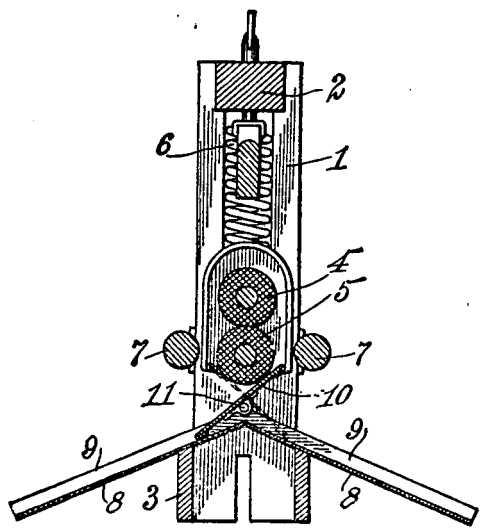
VAN ORSDEL, Associate Justice. [1] Applicant, Coffield, appeals from the decision of the Commissioner of Patents, rejecting the following claims for improvements in clothes wringers:

"1. In the clothes wringer, the combination with the wringer rolls, of a drain board and clothes guide rigidly mounted in the wringer frame below said rolls and extended a substantial distance on each side of the wringer frame to form a clothes guide, and a reversible water shutter pivotally mounted between said drainboard and clothes guide and said rolls to direct the water to one side of the said drain board and clothes guide while the clothes are guided from the wringer on the other side to a receiving receptacle.

"2. In a clothes wringer, the combination with the wringer rolls, of a double inclined shed rigidly mounted in the wringer frame and extended a substantial distance on each side thereof to form a combined drain board and clothes guide upon one part of which the clothes passing through the wringer rolls are delivered to a receptacle and upon the other part of which the water wrung from the clothes is directed elsewhere."

The device is described by the Commissioner as follows:

"The device shown is a clothes wringer having a combined drain board and clothes guide rigidly connected to the frame of the wringer and extending therefrom at a considerable distance on each side, and a pivoted water shutter; the latter being so arranged with reference to the drain board and the wringer rolls that the water wrung from the clothes by the latter can be drained in either direction."



The rigidly mounted drain board and clothes guide *9* is the only improvement over the prior art. The reversible water shutter *11*, mentioned in the claims, is old. A number of references to patents are cited by the Patent Office, but all relate to means for draining the water from the rolls into the receptacle from which the clothes are being placed in the wringer. These are so arranged that they may be adjusted to either side of the wringer as desired. But in none of them is the idea of a rigidly mounted drainboard and clothes guide disclosed. The function of the clothes guide to direct the clothes without manual assistance into the receiving receptacle is as important as the draining feature.

[2] While the idea here developed is in the twilight zone between invention and mere mechanical improvement, we will apply the rule of the courts generally and resolve the doubt in favor of the inventor. We are dealing with an old and well-developed art, and it is significant that no one has before conceived the means for automatically delivering the wrung clothes into the receiving receptacle.

"Now that it has succeeded, it may seem very plain to any one that he could have done it as well. This is often the case with inventions of the greatest merit." Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177.

[3] The improvement here produces a new and useful result, and efficiency where before there had been inefficiency. Where this is accomplished there is invention. As was said in Re Harbeck, 39 App. D. C. 555, 563:

"While the use of new materials to produce a known result, or of known materials to produce a new, but obvious, result, may not always constitute invention, if the new idea, when applied, brings success out of failure, produces a new and useful result and saving in operation or production, or efficiency instead of inefficiency, gives to the device new functions and useful properties, it is invention, and may be patented."

The decision of the Commissioner of Patents is reversed.
Reversed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat with the court in the hearing and determination of this appeal, in the place of Mr. Justice ROBB.

BISSELL v. PHELPS.

(Court of Appeals of District of Columbia. Submitted January 13, 1921. Decided February 7, 1921.)

No. 1380.

1. Patents ⟸90(5)—Last applicant must show prior reduction to practice or diligence from time prior to adverse party's proceedings.

An applicant for a patent, who was first to conceive the invention, but the last to file, to establish priority, must prove an actual reduction to practice prior to that of the other party, or show diligence on his part from the time just prior to that when the other party entered the field down to his own date of filing.

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2. Patents ⊜90(6)—Invention not reduced to practice by making model out of clay.

An invention relating to caps for the outside end of conduits through which electric wires are led into buildings was not reduced to practice by making a model out of ordinary molding clay, which would have broken or disintegrated if any attempt had been made to use it.

3. Patents ⊜90(4)—Applicant held not to have used diligence, so as to give priority over one filing earlier.

An applicant for a patent, who was first to conceive, and who gave directions for the preparation of an application in July, 1915, executed it June 5, 1916, and filed it August 29, 1916, did not use diligence, entitling him to priority over one filing earlier, where his excuse for the delay in executing the application was futile, and there was no attempt to explain the subsequent delay in filing the application.

Appeal from Decision of Commissioner of Patents.

Interference proceeding in the Patent Office between Carl H. Bissell, junior party, and James C. Phelps, senior party. From a decision awarding priority to the senior party, the junior party appeals. Affirmed.

Arthur E. Parsons, of Syracuse, N. Y., for appellant.

Harry W. Bowen, of Springfield, Mass., and William L. Edmonston, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellant, Bissell, lost before the three tribunals on the question of reduction to practice. The invention relates to caps which are designed to cover the outside ends of conduits through which electric wires are led into buildings. Bissell, who is the junior party, made a drawing of the invention in February, 1915, and a clay model on March 25 of the same year, and, about July, 1915, gave directions to have an application for patent prepared. He did not file until August 29, 1916. Phelps, the senior party, made a sketch about March 31, 1915, and constructed a wooden model about June 30, 1915. From that time until he filed on August 19, same year, he was diligent. He was given as his date of conception as early as June, 1915.

[1, 2] Bissell, on the other hand, is entitled to conception as of March 25, 1915, thus placing him ahead of Phelps' earliest date. Being the first to conceive and the last to file, if he succeeds he must do so by proving an actual reduction to practice prior to any date accorded to Phelps for reduction to practice, or by showing diligence on his part running from a time just prior to that when Phelps entered the field down to his own date of filing. Was Bissell's clay model a reduction to practice within the meaning of the law? Speaking of it, the Examiner of Interferences said:

"No attempt was ever made to subject that model to any tests corresponding to the conditions surrounding such caps in actual use. And an examination of the model forces the conclusion that, if subjected to such tests, its parts could not be secured together; it would break down on pulling the wires threaded through it; and it would disintegrate under the action of rain."

In reference to the same point the Assistant Commissioner observed:

"This model was obviously not capable of use for the purpose for which it

was intended, since it was made of ordinary molding clay. At the best it merely illustrated the manner in which a device embodying the invention should be built, and disclosed substantially nothing that would not have been disclosed in an accurate drawing."

He, of course, united with the other tribunals in the conclusion that the model did not amount to an actual reduction to practice, and he was right. It is a rule of decision, long established, that the mere making of a model is not a reduction to practice unless capable of use. Lindemeyr v. Hoffman, 18 App. D. C. 1; Hammond v. Basch, 24 App. D. C. 469. The evidence shows that this model was not capable of use.

[3] With respect to the question of diligence, Bissell, as we have said, gave directions to prepare an application for patent some time in July, 1915. It was not executed by him until June 5, 1916, and was not filed before August 29, same year. While an attempt was made to excuse the long delay between the date on which Bissell gave directions to have an application prepared and the date on which he signed it, it was utterly futile. But not even an attempt was made to account for the delay of nearly three months between the date on which he signed the application and the date on which it was filed by him in the Patent Office. Hence the conclusion was inevitable that Bissell was lacking in diligence in reducing his invention to practice, actual or constructive.

The decision of the Commissioner of Patents is affirmed

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

SPEED v. KIRBY.

KIRBY v. SPEED.

(Court of Appeals of District of Columbia. Submitted January 18, 1921. Decided February 7, 1921.)

Nos. 1376, 1378.

1. **Patents ⇐106(2)—Senior application held to disclose air valve required by one count.**
   In interference proceeding, relating to carbureters for internal combustion engines, the senior application *held* to disclose a valve answering to the call of a count for an air valve controlling the admission of air to the mixing chamber.
2. **Patents ⇐106(2)—Senior party entitled to broad construction of claim in issue.**
   The senior applicant is entitled under the law to a construction of the claim in issue in interference proceedings as broad as the language will permit.
3. **Patents ⇐106(2)—Senior application held not to disclose "nozzle" called for by two counts.**
   Ports disclosed by the senior application, through which the fluid fuel ran by gravity into the mixing chamber of a carbureter, *held* not to disclose a nozzle for discharging fuel into the chamber called for by the

counts, since a nozzle is defined as a short tube, usually tapering, forming the vent of a hose or a pipe, and it is straining the language too much to apply the term to a hole through which the fluid flows by gravity from a chamber.

Appeal from the Commissioner of Patents.

Interference proceeding between James A. Speed and Charles H. Kirby. From a decision of the Commissioner of Patents, awarding one of the three counts in issue to Speed and the other two counts to Kirby, both parties appeal. Affirmed.

J. F. Robb, H. C. Robb, and H. S. Hill, all of Washington, D. C., for appellant.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., and Frank Parker Davis, of Chicago, Ill., for appellee.

SMYTH, Chief Justice. This interference relates to carbureters for internal combustion engines. There are three counts, as follows:

1. In a carbureter, the combination, with the casing containing the mixing chamber, of an automatic air valve controlling the admission of air to said mixing chamber, co-operating means variably restricting the flow of the liquid fuel, and a dashpot for retarding the opening movement of said valve, permitting the unresisted closing thereof.

2. In a carbureter, the combination, with a casing containing the mixing chamber, of an automatic valve controlling the admission of air to said chamber, a nozzle for discharging liquid fuel into said chamber, a metering pin co-operating with said automatic valve for variably restricting the flow of liquid to increase the same upon the opening of said valve, a dashpot for resisting the sudden opening of said valve, and a valve-controlled by-pass for said dashpot permitting the unresisted closing of said valve.

3. In a carbureter, the combination, with a casing containing the mixing chamber, of an automatic valve controlling the admission of air to said chamber, a nozzle for discharging liquid fuel into said chamber, a piston connected with said valve, a cylinder co-operating with said piston to form a dashpot for resisting the sudden opening of said valve, and a valve-controlled by-pass for said dashpot permitting the unresisted closing of said valve.

Speed was allowed by the Commissioner count 1, and Kirby counts 2 and 3. Both parties appeal.

[1, 2] The Examiner of Interferences gave the three counts to Speed; so did the Examiners in Chief; but, as just stated, the Commissioner modified their findings. With respect to count 1, if Speed has an "air value controlling the admission of air to" the "mixing chamber," then the patent granted to him on an application filed in December, 1911, reads on it, and, as that date is prior to any date established by Kirby, Speed must prevail. It seems to us beyond a doubt that the valve *24* answers to the call of the patent. It controls the admission of the air to the mixing chamber. Speed is entitled under the law to a construction of the claim in issue as broad as the language will permit. Kirby v. Clements, 44 App. D. C. 12; Miel v. Young, 29 App. D. C. 481. Giving him this, we think it must be said that the Patent Office was right in awarding him count 1.

[3] Concerning counts 2 and 3, the solution of the question presented turns on whether or not Speed in his patent disclosed a "nozzle for discharging liquid fuel into" the mixing "chamber." The Ex-

aminer of Interferences and the Board of Examiners held that he had, but the Commissioner refused to approve this finding. A nozzle is defined by Webster's International Dictionary as "a short tube, usually tapering, forming the vent of a hose or a pipe." Speed has two ports, which he says are nozzles. Through them the fluid runs by gravity. "To call a hole through which the gas flows by gravity from a chamber a 'nozzle' is straining language too much," says the Commissioner, and we agree with him. Kirby's pipe *F*, on the other hand, is described by him as a nozzle, and meets the definition from Webster's Dictionary just quoted.

Believing that the Commissioner is right, his decision is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

SKENE v. MARINELLO CO.

(Court of Appeals of District of Columbia. Submitted January 10, 1921. Decided February 7, 1921.)

No. 1339.

1. **Evidence ⊜265(8)—Admission in petition held insufficient to show use of trade-name.**

   In a proceeding commenced in July, 1918, to cancel the registration of a trade-mark, a bill filed by the registrant in the early part of 1917, amounting to an admission that the petitioner was then using the registered name was not sufficient proof that she was using it when the petition for cancellation was filed, so as to have any interest in the cancellation, notwithstanding the presumption that a fact shown to exist will usually be regarded as continuing, in the absence of any proof to the contrary.

2. **Trade-marks and trade-names ⊜45½, New, vol. 7A Key-No. Series—Person abandoning use cannot ask cancellation of registration by another.**

   One who has abandoned her use of a name registered by another as a trade-mark, and is not using it at the time she applies for cancellation of the registration, is in no position to urge that she is damaged by the registrant's use of such name.

Appeal from Decision of Commissioner of Patents.

Proceeding in the Patent Office by Anna M. Skene for cancellation of the registration of a trade-mark by the Marinello Company. From a decision denying the petition, the petitioner appeals. Affirmed.

F. M. Phelps, of Washington, D. C., and Edward H. Stearns, of Chicago, Ill., for appellant.

A. A. Smith and Max W. Zabel, both of Chicago, Ill., and Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The Marinello Company has registered in the Patent Office as a trade-mark on certain toilet preparations the word

"Marinello." The appellant, called herein the petitioner, seeks to have it canceled on the ground that she deems herself damaged thereby. The Patent Office denied her prayer.

Petitioner has filed an elaborate brief, in which many points are raised and argued. We think, however, that the proceeding turns on the answer to a simple question: Has petitioner shown any such interest in the word as would entitle her to attack the registration? The statute provides that, whenever any person shall deem himself injured by the registration of a trade-mark, he may apply to the Commissioner of Patents to cancel the registration. Section 13, 33 Stat. 728 (Comp. St. § 9498). We have construed this to mean that he who seeks cancellation must state facts from which, if true, the court may reasonably infer that he might be damaged unless the mark is canceled. McIlhenny's Son v. New Iberia, etc., Pepper Co., 30 App. D. C. 337, 339; Underwood Typewriter Co. v. A. B. Dick Co., 36 App. D. C. 175, 176; Standard Brewery Co. v. Interboro Brewing Co., 44 App. D. C. 193.

[1] The only allegation with respect to damages made by petitioner is to the effect that she used the word in connection with her business for many years, and deems herself injured by the registration. How she used it, whether as a trade-mark or as a trade-name, upon goods of the same descriptive properties, or as the name of a system, or otherwise, she does not say. Her only proof of use is found in a copy of a bill of complaint filed against her by the registrant in an Illinois court, and introduced by her in this proceeding, wherein it is alleged that she uses the word "Marinello" as a trade-name for her shop. This, she argues, is an admission of use by her. That may be conceded, but to what time does the admission relate? Clearly to the time when the bill was filed, and that was in the early part of 1917, while her petition for cancellation was not lodged in the Patent Office until July, 1918, about a year and a half thereafter.

[2] Proof that she was using the name in 1917 is not satisfactory proof that she was doing so a year and a half later. We are aware of the presumption that, where a fact is shown to exist, it usually will be regarded as continuing, in the absence of any proof to the contrary; but that is too flimsy a thing upon which to rest an application for cancellation. If petitioner was using the mark in connection with her business, it was very easy for her to have offered convincing proof of it. If she was not using it at the time she filed her application for cancellation, but had abandoned its use, she would not be in a position to urge that she was being damaged by the registrant's use of it.

We think petitioner has utterly failed in her proof of use, and therefore the decision of the Commissioner of Patents is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

JAY v. COULOMBE.

(Court of Appeals of District of Columbia. Submitted January 13, 1921. Decided February 7, 1921.)

No. 1379.

Patents ⇐82—Party not continuing experiments until he saw adversary's device held properly denied priority for abandonment.

A party to an interference proceeding, who, after making experiments not amounting to a reduction to practice, did nothing more for 3½ years, until he was spurred into activity by seeing the other party's device, though during such time he was actively engaged in prosecuting applications for patents on similar devices, was properly denied priority, on the ground that his experiment was abandoned, though he had been inadvertently granted a patent while the other party's application was pending.

Appeal from Decision of Commissioner of Patents.

Interference proceeding in the Patent Office between Webb Jay and Joseph C. Coulombe. From a decision in favor of Coulombe, Jay appeals. Affirmed.

Joseph R. Edson, of Washington, D. C., and Charles S. Burton, of Chicago, Ill., for appellant.

Robert Cushman, of Boston, Mass., and Arlon V. Cushman, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This interference relates to an invention consisting of a two-chambered gasoline tank for internal combustion engines, in which the gasoline is drawn by suction from the source of supply into a receptacle located above, from which it is discharged by gravity to supply the engine carbureter as required.

It is unnecessary to set out the counts of the issue, since the case turns solely upon a question of fact in which we agree with the conclusions reached in the concurring decisions of the three tribunals below.

Jay was inadvertently granted a patent while the Coulombe application was pending. Jay made some experiments in 1913, which did not amount to a reduction to practice. He did nothing more for 3½ years, when he was spurred into activity by seeing his adversary's device. It appears that, during this period, he was actively engaged in prosecuting applications for various other gasoline feeding devices. It also appears that in 1914 he assigned to the Stewart-Warner Company, of Chicago, all his inventions on fuel-feeding devices for internal combustion engines, but did not include the invention of the present issue. These actions, together with the long period of inactivity, indicate conclusively that he regarded the present invention as worthless. The finding of the Commissioner that what Jay did in 1913 resulted in an abandoned experiment was right.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

In re HOILAND.

(Court of Appeals of District of Columbia. Submitted January 17, 1921. Decided February 7, 1921.)

No. 1395.

Patents ⇐138(1), 144—Determination whether delay in seeking reissue was excusable is within Commissioner's discretion.

A determination whether the delay of more than three years after the issuance of the patent in seeking a reissue with broader claims was excusable is one largely within the discretion of the Commissioner, and will not be disturbed on appeal, unless manifest error has been committed.

Appeal from the Commissioner of Patents.

Application by Albert Hoiland for reissue of a patent. From a decision of the Commissioner of Patents, refusing to grant the reissue, applicant appeals. Affirmed.

James A. Watson, of Washington, D. C., for appellant.

T. A. Hostetler, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the refusal of the Commissioner of Patents to grant a reissue application filed more than three years after the issuance of the patent. The invention, as described by the Commissioner, relates to—

"An internal combustion engine radiator shutter and means for opening and closing the shutter operated by the temperature of the water in the radiator, so as to regulate the amount of air passing through the radiator coils."

The claims were denied upon the settled rule that reissue claims, which seek to broaden the claims of the original patent, will not be allowed, except for unusual circumstances, which excuse delay. In re Starkey, 21 App. D. C. 519. The determination of this question is one largely within the discretion of the Commissioner, and will not be disturbed unless manifest error has been committed.

A careful examination of the record fails to disclose any extenuating circumstances which would justify a departure from the rule.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the place of Mr. Justice ROBB in the hearing and determination of this appeal.

KEYSTONE STRUCTURAL CO. v. LINK-BELT CO.

(Circuit Court of Appeals, Third Circuit. February 9, 1921. Petition for Rehearing Dismissed March 9, 1921.)

No. 2592.

Contracts ⇐22(1)—Contract for building bridge held binding after performance.

As a preliminary to bidding on construction work for a railroad company, which included a steel bridge to be 193 feet or 243 feet long, as the railroad company might determine, defendant asked plaintiff for an estimate on the bridge, to include both material and work, submitting a drawing for a bridge 193 feet long, but without specification of material, and plaintiff submitted an offer at a named price for 100 pounds of steel used. Later defendant furnished plaintiff with detail sheets, specifying the material, without a drawing, but which disclosed a bridge of 243 feet span, and a corresponding quantity of steel. Afterward the contract was closed on the basis of the offer. Plaintiff built the bridge and received payment at the contract price per unit of steel. *Held*, that it could not thereafter claim that there was no contract for the bridge, which it in fact built, and recover therefor on a quantum meruit.

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

Action at law by the Keystone Structural Company against the Link-Belt Company. Judgment for defendant, and plaintiff brings error. Affirmed, and petition for rehearing dismissed.

For opinion below, see 265 Fed. 320.

M. Hampton Todd, of Philadelphia, Pa., for plaintiff in error.

Joseph Carson, John Kent Kane, and Hampton L. Carson, all of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. All agree that the parties thought they had entered into an express contract for the erection of a bridge. The plaintiff undertook to supply the material and do the work of construction and the defendant to pay for the same at a named price per 100 pounds of steel used. The plaintiff built a bridge and the defendant paid for a bridge. Later, the plaintiff found, as it claims, that the bridge it built was not the bridge it had contracted to build. On the assumption that the bridge it built was not covered by the contract, the plaintiff brought this action of indebitatus assumpsit to recover for the bridge at a price per unit substantially higher than that named in the contract. The trial court directed a verdict for the defendant and the plaintiff sued out this writ of error.

As the main facts of this novel controversy are not in dispute, we find it necessary to state them with particularity and at some length in order correctly to draw from them the inferences on which the decision rests.

The case made by the plaintiff was as follows:

The defendant was in negotiation with the Lake Champlain & Moriah Railway Company for the erection, at Port Henry, New York, of an

ore-handling bridge tramway of 193 feet span containing about 190 tons of structural steel or of 243 feet span containing about 290 tons, as the railway company should later determine. In order to fix the amount of the bid it proposed to make for a bridge of either size, a representative of the defendant in a personal interview with a representative of the plaintiff asked the latter concern for quotations per pound or per unit of 100 pounds of structural steel (covering both labor and material) on a plan which it submitted, showing a bridge of 193 feet span but without specifications or details. By its letters of December 28 and 31, 1915, the plaintiff, referring by identification number to the plans submitted, quoted a price of 4.95 cents per pound. Thereupon the defendant made its bid to the railway company and on January 19, 1916, it was awarded a contract for the bridge, the dimension, whether the short or long span, remaining open for determination by the railway company. Pending the railway company's decision on this point, the defendant closed the contract with the plaintiff by letter of its agent, dated February 8, 1916, informally written at its Philadelphia office, and by letter of March 7, 1916, written at its home office in Chicago, formally accepting the quoted price. In the letter of the latter date the defendant directed the plaintiff "to furnish all necessary labor, tools, for the delivery and erection at Port Henry, New York, the structural steel necessary for one ore-tramway as per detail drawings and bills of material which we will furnish." Later, the defendant sent the detail drawings and bills of material to the plaintiff's plant. These did not show a bridge of 193 feet span according to the plan previously submitted but called for a bridge of 243 feet span. Pursuant therewith, the plaintiff corporation—its office force being ignorant of this disclosure—fabricated the steel, shipped it to Port Henry and erected the bridge. Not until it had finished the bridge, made delivery and received final payment did the plaintiff find that the bridge it had built was different from and larger than the bridge covered by the contract into which it regarded itself as having entered.

On these facts, when read in colorless outline, there would seem to be substance in the plaintiff's contention that the minds of the parties had never met, or that the bridge contracted for was not built, that the bridge built was not contracted for, and that, accordingly, recovery therefor might validly be had on an implied contract in an amount to be found on the quantum meruit. Tucker v. Preston, 60 Vt. 473, 11 Atl. 726.

When the defendant came to its defense it did not dispute these facts, but supplemented them with other facts, which, taken together, constituted the case as made by the defendant. It was as follows:

In closing the contract by accepting the plaintiff's offer to build a bridge at the price quoted, the defendant by its letter of March 7, 1916, concluded:

"All as per your quotations of 12—28—15 and 12—31—15 and letter from our Philadelphia Plant dated 2—8—16"

—restating the quoted price as $4.95 per 100 pounds, delivered and erected, and giving for the first time terms of payment as:

"50% cash when all material is delivered, 25% cash when erection is complete, and balance (25%) upon acceptance."

The importance of the cited letters to the present discussion is that in the plaintiff's letter of December 28, which contains the first quotation of price, reference was made by plan number to the defendant's drawing of a bridge of 193 feet span. At that time, it may be, the plaintiff's price was made with reference to a bridge of that dimension. In the letter of February 8, 1916, last referred to, the defendant, pursuant to a previous conversation, enclosed eighteen listed sheets showing the structural steel work for the proposed bridge and instructed the plaintiff "to take these sheets as (its) authority for proceeding with the work," evidently chancing the decision of the railway company on the size of the bridge it had yet to make. In this letter the defendant further stated that "the list covers from 85 to 95% of the structural steel required for the order, which, together with about 10,000 pounds of plates * * * all constitute the greater part of the steel to be used in connection with this order," concluding that, "as soon as we have the accurate drawings and regular bills of material from Chicago, we will be glad to forward these to you for your attention."

It is in testimony that these listed sheets comprised the "Specification for Estimate" on the bridge with reference to which the parties were negotiating, and that the beams, rails and shapes there specified, considered with reference to their number and dimensions, disclosed to anyone familiar with such matters that the bridge for which the estimate had been asked was of 243 feet span and corresponding weight. It therefore appears that before the defendant's letter of March 7, 1916, finally accepting the plaintiff's price and formally closing the contract, there were in the hands of the plaintiff, first, a drawing without detail specifications showing a bridge of 193 feet span and a weight of about 190 tons and, second, listed sheets without a drawing, which, read in connection with the letter of February 8, showed specifications for a bridge of 243 feet span calling for more than 250 tons of steel.

Thus upon the closing of the contract there might have arisen a question whether the minds of the parties had met on the construction of a bridge of the dimension shown by the drawing or a bridge of the dimension shown by the listed sheets. If matters had stopped here and this question had arisen in litigation, concededly it would have been one for a jury. But the transaction went on.

Without further correspondence concerning the terms of the contract, the plaintiff, evidently regarding the contract as closed by the defendant's letter of March 7, set about its performance. It requested the defendant to send the detail drawings and bills of material, promised in that letter, direct to its fabricating plant at Royersford. These the defendant forwarded as requested. For this reason they failed to pass through the plaintiff's Philadelphia office. The detail drawings showed, as we have already said, a bridge of 243 feet span and the bills of material called for a corresponding tonnage of steel.

In sending plans and bills of material for the larger bridge instead of for the smaller one, the defendant is not charged with fraud. Yet there is the fact. With full knowledge of this fact,—not at its office in Phil-

adelphia, it is claimed, but at its works in Royersford,—the plaintiff corporation proceeded to manufacture steel in the shapes and in the quantity required for the larger bridge. After it had delivered all material upon the premises at Port Henry as called for by the contract, amounting to 583,174 pounds or 291 tons, the plaintiff presented to the defendant a bill, expressly referring to the contract by its identifying number and calling for payment at the contract price of $4.95 per 100 pounds for one-half the price of the full tonnage, as provided by the contract terms of payment. The defendant paid the bill. The plaintiff then set about the erection of the bridge. On its completion it sent the defendant a bill for the balance of the contract price. This also the defendant paid; the plaintiff, on accepting the money, raising no question as to the identity of the bridge with that of the contract. After the bridge had been built and paid for, the plaintiff discovered, it maintains, that the bridge it built was not the bridge it had contracted to build, and that, having built and delivered a bridge not under the express contract, it brought this action on an implied contract, demanding of the defendant payment for the bridge at a market rate of $9.00 per 100 pounds of steel.

At the trial the learned judge found a contract between the parties and construed it as contemplating a bridge of the smaller span and smaller tonnage, but held that the price, being based on units of material estimated, extended to and embraced all units of material afterwards added. Under this construction the defendant had paid the contract price in full, therefore the learned trial judge directed a verdict in its favor. As this interpretation involves a construction of a business practice in the bridge building industry of quoting prices on an unit basis in a case in which we regard that practice to have been discussed in the evidence with doubtful sufficiency, we prefer to sustain his decision on another ground fully warranted, we think, by evidence relating to this particular transaction.

As we have said before, there might at one time have arisen a question whether the minds of the parties had met as to the size of the bridge to be built under the contract, whether a bridge of the smaller dimension as shown by the plan of a bridge without specifications as to material, or a bridge of larger dimension as shown by the listed sheets specifying materials without a plan, both being in the plaintiff's possession before the contract was closed. If the case had at that time come to trial, we say again, this question would have been for the jury to determine; but since that time, we think, the plaintiff has itself determined the question.

To review, at the risk of repetition, the plaintiff's part in these transactions, we assume that at first the parties contemplated a bridge of the smaller dimension. Yet later there were before the plaintiff data of bridges of both dimensions. With such data in its hands the plaintiff closed the contract and began work. Admittedly both parties had dealings with reference to a bridge of a span of 243 feet. Both parties knew or were charged with knowledge of the amount of material it would take to build a bridge of such dimension. The plaintiff fabricated and delivered upon the premises all material for a bridge of that

size, rendered a bill for one-half of its price as the contract provided, and received payment at the contract rate. It then erected the bridge of the larger size and on its completion rendered a bill for the balance due at the contract price. On payment of the latter bill the plaintiff delivered the bridge of larger size and the defendant accepted it, no one intimating that the bridge so built, paid for, delivered, and accepted was not the one covered by the contract. Such being the plaintiff's conduct, we regard it as interpretative of its understanding of the contract. As its understanding corresponds with the understanding of the defendant, we do not think that the plaintiff can now be heard to say, or that a jury can now be allowed to decide, that the bridge it built was erected under no contract at all, and that, in consequence, it has a right to recover payment at a price found on the quantum meruit.

The judgment below is affirmed.

On Petition for Rehearing.

PER CURIAM. The writer of this opinion confesses error in the statement that upon the completion of the bridge of larger size the plaintiff "rendered a bill for the balance due at the contract price." It is literally true, so far as the testimony shows and as the plaintiff says in its petition for rehearing, that "no such bill was rendered." What the plaintiff did, however, was in effect the same as rendering a bill. With a regard to a more precise statement of the evidence, we give the facts:

By letter of October 16, 1917, the plaintiff informed the defendant that the bridge would be completed a week hence and asked it to "note that *further* payments will then be due *on our contract with you for this work.*" A difference having arisen as to minor matters, among which was the percentage of the balance then payable, the plaintiff, by letter of November 7, 1917, asked the defendant also to "note that *the terms of the contract* made the erection and acceptance contemporaneous events and since we hold certificate of acceptance then the full 50% of claim *presented* is now due"; threatening that, "unless we have check for *this amount,* less such just claims that you have against us, in our hands by the morning of the 12th inst., then we will instruct our attorney to proceed at once in a proper legal way to make this collection." By letter of November 21, 1917, the defendant remitted in full what it considered to be the balance due at the contract price and by receipt of November 28, 1917, the plaintiff acknowledged payment; each reserving the right to make claims against the other respecting matters which did not, so far as the evidence shows, relate to the difference in the size of the bridge here in controversy.

Although there is testimony that it was in October, 1917, that certain officers of the plaintiff company first discovered the size of the bridge constructed, and that in the same month they consulted counsel about it, there is no evidence that the plaintiff disclosed its discovery to the defendant or made any claim based on it until after payment had been demanded and made at the contract rate in the month of November.

The petition for rehearing is dismissed.

YARYAN ROSIN & TURPENTINE CO. v. ISAAC.

(Circuit Court of Appeals, Fifth Circuit. February 22, 1921.)

Nos. 3641 and 3646.

1. **Bankruptcy ⊜439—Rehearing suspends time for taking proceedings for review.**
   A decree or order does not take effect, for purposes of an appeal or petition to revise, while a motion for rehearing is pending.
2. **Bankruptcy ⊜440—Order allowing fees to counsel for trustee reviewable on petition to revise.**
   An order allowing fees to counsel for a trustee is reviewable by petition to revise, and not by appeal.
3. **Bankruptcy ⊜482(1)—Contract with attorney by receivers does not bind trustee.**
   A contract with respect to fees made by receivers for a bankrupt with their counsel *held* not to apply to services rendered by such counsel to the trustee after the receivers were discharged.
4. **Bankruptcy ⊜446—Questions of fact not reviewable on petition to revise.**
   A petition to revise opens only questions of law, and the appellate court cannot review the decision of the District Court on a question of fact.

Petition to Superintend and Revise and Appeal from the District Court of the United States for the Eastern Division of the Southern District of Georgia; Beverly D. Evans, Judge.

In the matter of the Yaryan Rosin & Turpentine Company, bankrupt. On appeal from and petition to revise an order allowing counsel fees to Max Isaac. Appeal dismissed, and affirmed on petition to revise.

Frederick T. Saussy, of Savannah, Ga., for petitioner and appellant.

John D. Little, Arthur G. Powell, Marion Smith, and Max F. Goldstein, all of Atlanta, Ga., for respondent and appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This case comes before this court on a petition to revise in matters of law (No. 3641), and also on appeal (No. 3646) from, a decree in bankruptcy awarding fees to the counsel for the trustee in bankruptcy.

The bankruptcy proceeding was a voluntary one filed by the Yaryan Rosin & Turpentine Company in the United States District Court for the Southern District of Georgia, Eastern Division. In this proceeding three persons were at first appointed receivers, and, under a contract made with the bankrupt, Max Isaac was appointed their counsel, to render all services (with certain exceptions not material) for the sum of $500 per month. After these receivers had acted for slightly over a year, the court, because of want of harmony between them, determined that the bankruptcy should proceed, and a trustee in bankruptcy was appointed. The trustee was authorized by the court to employ counsel and to agree to pay him for ordinary and usual serv-

ices compensation not to exceed $500 per month. He employed Isaac as his counsel under this authority at a fee of $250 per month, covering only regular services to the trustee, and further services to be paid for by fees subject to approval by the court. This agreement was made with said counsel solely by the trustee as an officer of the court.

The petition of Isaac for compensation set up his entire service to the receivers and also the trustee, and alleged certain services as not covered by the monthly payments stipulated. The judge referred the petition to the standing master for a report. The master held that only one item of service rendered during the receivership was not covered by the contract for monthly compensation made with the receivers. He found a number of items of service rendered to the estate after the appointment of the trustee, which were not covered by the monthly payments contracted to be paid by the trustee, and recommended that the counsel be paid the sum of $25,000. Evidence was taken as to the value of such services, which placed them at a sum exceeding the amount recommended.

The District Judge, as stated in the brief for both parties in this case, declined to allow any extra compensation for services rendered during the receivership and reduced the finding of the master $1,000. He awarded $24,000 as an additional fee to said Isaac for his services as counsel to the trustee. In his opinion overruling a petition for rehearing and confirming said decree the court said:

"I reach this conclusion, both from the record before the master, and from my personal knowledge of the services rendered by applicant. The Yaryan Rosin & Turpentine Company, on its own application, was adjudicated a bankrupt, and receivers were appointed to manage its affairs. During the receivership the business was conducted at a loss. Upon a hearing it was determined to end the receivership proceedings, and to let the case take the usual course in bankruptcy. All parties earnestly pressed upon the court not to refer the case to a referee, but as the creditors had omitted to elect a trustee, for the court to nominate one and manage the business. Acting on this request the court appointed George C. Smith as trustee, and because of the unsatisfactory administration in receivership the trustee was requested to retain his counsel at as small charge as possible, with the understanding that for unusual services the attorney would be given additional compensation by the court. At the time the trustee assumed control of the Yaryan affairs, in addition to the very large indebtedness to creditors, there was also an indebtedness of approximately $200,000, which had been incurred by the receivers. The management by the trustee resulted in most phenomenal success. In addition to liquidating the obligations of the receivers, the trustee paid interest on secured notes amounting to approximately $90,000, secured debts of approximately $127,000, unsecured debts of approximately $115,000, and delivered to the Yaryan Company cash and manufactured products of approximately $80,000. When the trustee delivered the assets of the corporation to the Yaryan Company, from the reports of Haskins & Sells, accountants, it will be seen that its financial condition was that of a solvent, going concern. This unusual result was brought about by the superb management and administration of the trustee, in which he had the constant attention and advice of the attorney. The administration of the Yaryan Company occupied a great deal of the time of the court, and the trustee and his attorney were in almost weekly consultation with the court as to matters which arose in the administration."

The assignments of error present two questions:

(1) That the petitioner, Isaac, is estopped by reason of his contract with the receivers from claiming a greater compensation than $500 per month for all services rendered to the trustee.

(2) That under the competent evidence in said case the award of $24,000 for unusual services rendered the trustee is excessive.

[1] The case is brought to this court on petition to revise in matter of law and by appeal, and motions are made to dismiss the petition as not in time and the appeal as not the proper method to review this judgment.

Within 10 days after the rendition of the decree first awarding this compensation a motion for a rehearing was filed, and by order of court continued for hearing until December 1, 1920, when it was heard and overruled, and said decree confirmed. On December 13, 1920, the petition to revise was filed in this court. The presentation to this court of the petition to revise while the District Judge had the matter still before him on a petition for rehearing would have been premature. As the pendency of a motion for a rehearing would suspend the running of the time for taking an appeal, so would the pendency of a motion for rehearing operate to suspend the time for filing of a petition to revise.

"Until then the judgment or decree does not take final effect for the purposes of the writ of error or appeal." Kingman v. Western Mfg. Co., 170 U. S. 675, 678, 18 Sup. Ct. 786, 787 (42 L. Ed. 1192).

[2] That the petition to revise is the proper method to review the action of the court in matters of this sort is, we think, settled by the decision of the United States Supreme Court in Re Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. This exact question was decided in Davidson v. Friedman, 140 Fed. 853, 72 C. C. A. 553. An appeal from an order, allowing the counsel of the trustee in bankruptcy fees, was dismissed on the ground that the matter was one reviewable only by a petition to revise in matter of law. The court, in refusing to reinstate the appeal, held:

"The matter involved in the present appeal is an expense incurred by the trustee in the course of his administration. It was not a debt against the bankrupt, and had no existence before adjudication. It was therefore one of the class of matters over which this court is given supervisory jurisdiction to 'review in matters of law the proceedings of the several inferior courts of bankruptcy,' within this circuit."

The Supreme Court of the United States has approved the rule laid down above in the decision in Re Loving:

"In our judgment the rule was well stated in In re Mueller, 135 Fed. 711, by Mr. Justice Lurton, then Circuit Judge (page 715): 'The "proceedings" reviewable (under section 24b) are those administrative orders and decrees in the ordinary course of a bankruptcy between the filing of the petition and the final settlement of the estate, which are not made specially appealable under section 25a. This would include questions between the bankrupt and his creditors of an administrative character, and exclude such matters as are appealable under section 24a.' We answer the question certified in the negative." In re Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725.

The propriety of the petition to revise as the procedure to review the fixing of fees in bankruptcy proceedings has been approved by this court. The appeal (No. 3646) is therefore dismissed. Lazarus et al. v. Harding et al., 223 Fed. 50, 138 C. C. A. 414.

[3] The petitioner in this case was not bound by his agreement as to professional services to be rendered to the receivers, after they were discharged and the trustee appointed. The trustee was under no obligation to employ him, and could have employed other counsel. Isaac could have declined to go on as counsel for the trustee under the same arrangement which he had made with the receivers. We therefore think that the agreement between the trustee and Isaac stood on an entirely different basis from the former arrangement with the receivers. It was subject at all times to revision by the court.

[4] As to the point that the allowance made by the court in this case is too large, that raises a question of fact which is peculiarly within the discretion of the court below. If the case were here on appeal, the matter would still be one peculiarly for decision by the judge before whom the proceedings were pending, and who states in his opinion that he was personally cognizant of the services rendered, as well as informed by the testimony taken before the master, and it could not be said that the decree was erroneous.

"But a petition for revision" in matter of law "opens only questions of law, and when the foundation of its jurisdiction is thus narrowed, the action of the court cannot enlarge it so as to deal with the facts." Duryea Power Co. v. Sternbergh, 218 U. S. 299, 302, 31 Sup. Ct. 25, 26 (54 L. Ed. 1047).

The petition to revise is denied.

GRATZ v. McKEE et al. *

(Circuit Court of Appeals, Eighth Circuit. November 13, 1920. Petitions for Rehearing Denied February 10, 1921.)

No. 5285.

1. Navigable waters ⇐1(1)—Stream must be capable of practical general use.

A small stream, running through a swampy country, used only in times of high water to a small extent for floating of logs and for skiffs and dugouts by people living near, because of the bad condition of the roads, *held* not navigable in any sense that would constitute it a part of the public waters of the state.

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

2. Fish ⇐5(1)—Owner of stream has property in fish.

The owner of land has a special property interest in the fish in a stream on his land; but until he reduces them to possession, by taking them in a lawful way, such interest is subject to regulations by the state for their protection in the interest of the public generally.

3. Fish ⇐7(3)—Taken by trespasser becomes property of owner of land.

While there is no unqualified ownership of fish until they have been caught and reduced to possession, they must be lawfully taken to vest

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

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 535, 65 L. Ed. —.

title in the taker; and where mussels were taken for the shell by a trespasser from a nonnavigable stream on the land of another, the shell *held* to have become the property of the owner of the land, and not of the trespasser.

4. **Fish ⊂=5(1)—Property in fish not impaired by statutory regulations.**
Rev. St. Mo. 1909, § 6508, providing that "the ownership of and title to all birds, fish and game * * * not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed, * * * or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri for the purpose of regulating and controlling the use and disposition of the same after such catching," etc., is a statute of regulation only, and leaves private ownership unimpaired, except as to the right of the state to prescribe the seasons and conditions under which fish and wild game may be taken, used, and disposed of.

5. **Appeal and error ⊂=882(17)—Counsel estopped to object to finding expressly requested by them.**
Where counsel for plaintiff in error in an action of trespass expressly requested the appellate court, in case of reversal, to determine the measure of damages applicable, in view of a new trial, which question was dependent on whether the trespass, as shown by the evidence, was willful, such counsel cannot afterward object because the court did so, on the ground that it invaded the province of the jury.

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

Action at law by Benjamin Gratz against James S. McKee and others. Judgment for defendants, and plaintiff brings error. Reversed.

For former opinion, see 258 Fed. 335, 169 C. C. A. 351.

S. Mayner Wallace, of St. Louis, Mo. (Shepard Barclay, of St. Louis, Mo., on the brief), for plaintiff in error.

Lon O. Hocker, of St. Louis, Mo., and William Hoffman, of Muscatine, Iowa (Hoffman & Hoffman, of Muscatine, Iowa, and Jones, Hocker, Sullivan & Angert, of St. Louis, Mo., on the brief), for defendants in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

VAN VALKENBURGH, District Judge. Plaintiff in error, plaintiff below, sued the defendants in error, defendants below, to recover the value of 307½ tons of mussel shells alleged to have been taken from the lands of plaintiff's assignors and converted to defendants' use. The trial court directed a verdict for the defendants, which judgment was affirmed by this court. 258 Fed. 335, 169 C. C. A. 351.

The plaintiff invoked the rule of the common law, that where title to animals feræ naturæ is obtained by taking possession thereof, the taking must not be wrongful, and if the taking is effected by one who is at the moment a trespasser, no title to the property is created in him, but it vests in the owner of the soil. This court was of opinion, however, that whatever might be the effect of this rule in general, the legislation of Missouri (R. S. Mo. §§ 6508, 6551) vested the title

of the killed mussels in the state, and not in the plaintiff, and for this reason the rule stated could not aid the plaintiff. 258 Fed. 339, 169 C. C. A. 351.

Upon petition for rehearing, the court being of opinion that the ruling upon this point involved doubt sufficient to warrant reargument and resubmission, the petition for rehearing was granted. The main facts are so substantially stated in the former opinion that extended repetition is unnecessary. Such additional references to the record as may be essential to clearer understanding of the points ruled will be made in the course of the opinion.

We adhere to the conclusion originally reached that the fresh-water mussel is a shellfish capable of locomotion, in a most limited degree to be sure, but sufficient to bring it within the category of migratory fish; that as such it cannot be deemed part of the realty, within R. S. Mo. 1909, § 5448, allowing treble damages in certain cases for digging up and carrying away any substance or material, being a part of the realty. The rules laid down in certain cases respecting oysters, also shellfish, are not applicable here, because these mussels were neither planted nor confined in any manner prescribed to create a special private ownership in them as such. Furthermore, the fact that they were taken, not for food, but for the commercial value of their shells, cannot avail the plaintiff. The shells do not differ in principle from the pelts of fur-bearing animals, which are hunted and caught for these alone, and not for any other useful purpose. While in all the particulars named the subject-matter of this controversy lies extremely close to the border which separates diverging lines of judicial decision, nevertheless the law must be applied with strict reference to the actual legal status involved.

It is conceded that plaintiff's assignors own the land through which Little river flows, and from which these mussels were taken. Therefore it had title, not only to both banks, in so far as any banks are defined, but likewise to the soil underlying the bed of the stream. These lands were selected and conveyed as swamp or overflowed lands. It appears from the record that they consist of a swampy tract, through which, during most of the year, there is little or no well-defined stream or current; the so-called river resolving itself rather into pools along its course. During periods of high water the semblance of a river is more apparent. It is at those times, and perhaps at all times in some places, susceptible of being used in a very limited way for floatage, or by small rowboats or dugouts for the convenience of those living in the vicinity. As stated by the record:

"At times people rafted and floated logs for sawmills on Little river. It was only at different times they did that; when there was a sawmll on the bank of the river there, and when the stage of the water was high enough, they floated logs for the mill by way of the river. * * * The stream was used for small craft, small boats and dugouts, to carry provisions and things of that kind. The roads were not particularly good in that country at different seasons of the year. When the river was high, the roads would be pretty bad from the water. The principal transportation there would not be by the river, for people going back and forth; but the individuals used it, whenever they saw fit, to carry things. If they wanted to go up or down the river and carry a little amount, probably they would go in boats. If they lived on the

river, they would carry anything to their homes, back and forth, that way. * * * It was just a low swamp, first on the one side and then on the other, with a little meandering channel, small meandering channel, probably 50 or 100 feet. It meandered diagonally from the northeast to the southwest across this territory by maybe two townships. Quite a good many logs were floated down it. At Wardell there was a sawmill; two that I know of. The river was the only way of travel for a good part of the time, in boats. The roads in that country were so poor that you couldn't go with wagons. During wet weather the condition of the roads was bad; muddy. People would go from place to place in little dugouts. A 'dugout' is a log split in two and carved out like a half watermelon. Things were carried in the dugouts, groceries and supplies of all kinds; and occasionally make a trip across the swamp over to the mills; take milk or corn in the dugout, and go across to a place where they got a farmer to haul their stuff to Kennett."

[1] In its former opinion the court found the stream to be "nonnavigable, except in a very restricted sense." Counsel for defendants in their brief admit that the river is not navigable in the full sense of that term, but assert that it is capable of a public use for rafting, floating logs, and for navigation in small boats. Upon a full consideration of the record, we are of opinion that the river is nonnavigable in any sense that would constitute it a part of the public waters of the state. Harrison v. Fite, 148 Fed. 781, 78 C. C. A. 447.

"A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for rowboats or small launches, answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable." Schulte v. Warren, 218 Ill. loc. cit. 119, 75 N. E. 785, 13 L. R. A. (N. S.) 745.

It is held that navigable waters must be capable of practical general uses. Hubbard v. Bell, 54 Ill. 110, 5 Am. Rep. 98.

"If its location is such, and its length and capacity so limited, that it will only accommodate a few persons, it cannot be considered a navigable stream for any purpose. It must be so situated, and have such length and capacity, as will enable it to accommodate the public generally as a means of transportation." Griffith v. Holman, 23 Wash. 347, 63 Pac. 239, 54 L. R. A. 178, 83 Am. St. Rep. 821.

To the same effect is the great weight of authority. Rowe v. Granite Bridge Corporation, 21 Pick. (Mass.) 344; Nutter v. Gallagher, 19 Or. 375, 24 Pac. 250; Haines v. Hall, 17 Or. 165, 20 Pac. 831, 3 L. R. A. 609; Burroughs v. Whitwam, 59 Mich. 279, 26 N. W. 491; Wethersfield v. Humphrey, 20 Conn. 218; Ricks Water Co. v. Lumber Co., 107 Cal. 221, 40 Pac. 531, 48 Am. St. Rep. 125; Olive v. State, 86 Ala. 88, 5 South. 653, 4 L. R. A. 33; Morrison Bros. v. Coleman, 87 Ala. 655, 6 South. 374, 5 L. R. A. 384.

The decision must rest upon the special facts in each case, and in this state is said generally to be one for the jury. Weller v. Missouri Lumber & Mining Co., 176 Mo. App. 243, 161 S. W. 853.

But, even though this co-called river be regarded as navigable, in this very restricted sense, for small uses in the floatage of logs and for skiffs and dugouts during high water, when the roads are bad, as is usual in most swamp and overflowed districts, nevertheless such local, limited, and intermittent forms of use cannot transform waters

otherwise nonnavigable into navigable streams nor catalogue them among the public waters of the state; and the use which any person may lawfully make of such waters is limited to such incidental right of floatage or qualified navigation.

"There is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless." City of Grand Rapids v. Powers, 89 Mich. 94, 50 N. W. 661, 14 L. R. A. 498, 28 Am. St. Rep. 276; Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405; Hall v. Alford, 114 Mich. 165, 72 N. W. 137, 38 L. R. A. 205.

In the case at bar the mussels were taken from the stream in the following manner:

"At Wardell they were taken principally with tongs, a kind of what they call an oyster fork. It has a handle, and they go together like that (illustrating), and they raise them up. The water there was most favorable for using tongs. During the real low stages they waded and got them out. I would say that the principal part of them were taken with tongs. The shells can be taken with tongs very nicely in anything up to about 12 feet of water. In 1913 and 1914 Little river was very crooked; a very crooked stream; lots of deep short bends in it; and there was quite a variation in the depth. Some places were considerably deeper than others, and they would be right close together, too. It seemed to run off in holes. It was a very swampy stream; that is, it ran out flat, and there was growth in the stream, trees. In certain places this swampy condition existed on either side of the channel. * * * After the mussels were dug, they were boiled out by the diggers, on the banks of the river, generally, where they are taken, or very close. The meat was taken out of the shells, and they were prepared for market. * * * Under ordinary conditions, during the summer and working season, I don't think the shells would be on the bank over two or three weeks." (Testimony of Witness McClung.)

"The way that I dug shells was to go out in the water and pick them up by hand, with my fingers. I could not see them; I had to feel for them; the water was muddy. A part of them would be almost buried in the mud. I have been acquainted with the mussel down there all my life. In digging shells down there other people used forks, something like a potato fork, that had eight or nine prongs to it. They would fork them that way. And the other way they had tongs, something like those tongs used in digging up snails. They would fork them in deep water, where they couldn't reach them any other way. * * * The length of time a pile remained on the bank before being hauled would depend on getting cars; sometimes from ten days to a month. (Testimony of Witness Hickerson.)

In the brief of defendants' counsel it is said:

"The method is either to wade in the stream at low tide, or go in boats in high water, and by means of hooks or other devices take the mussels from the bed of the stream."

It is apparent that the mussels were taken by those who went upon the land of plaintiff's assignors expressly for that purpose; that they were taken indiscriminately either by waders, who picked them out, or dug them out with forks, or from boats in places where the water happened to be too deep for wading. The shells were then piled upon

the banks or higher ground, also belonging to plaintiff's assignors, where they remained for periods ranging from ten days to a month, and were thence hauled to the railroad for shipment. All these unlicensed acts were trespasses.

[2] The decision of this case, it would appear, must rest upon the determination of title and ownership, if any, to which the plaintiff in this case has succeeded. Under the common law as it has existed, and still exists, in England, and generally as transmitted to the states of the Union, modified by statutory enactment and supplemented by usage, the owner of the soil would have a qualified, but substantial, property interest in the fish upon his own land, with the exclusive right to reduce it to possession superior to that of others, and subject only to regulation by the state as a sovereign and under its police powers. State v. Mallory, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852; Hall v. Alford, 114 Mich. 165, 72 N. W. 137, 38 L. R. A. 205; Payne v. Sheets, 75 Vt. 335, 55 Atl. 656; Peters v. State, 96 Tenn. 682, 36 S. W. 399, 33 L. R. A. 114; Lincoln v. Davis, 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116; Sterling v. Jackson, 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405; Schulte v. Warren, 218 Ill. 108, 75 N. E. 783, 13 L. R. A. (N. S.) 745; Realty Co. v. Johnson, 92 Minn. 363, 100 N. W. 94, 66 L. R. A. 439, 104 Am. St. Rep. 677; Cobb v. Davenport, 33 N. J. Law, 223, 97 Am. Dec. 718; Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74.

The rule is well and comprehensively stated by the Supreme Court of Arkansas in State v. Mallory, supra:

"It is insisted that these questions generally rise in suits between individuals, involving only individual rights, and that the recognized right to take game on one's own land and to prevent others from so doing is merely a right to prevent a trespass on the land, and not a right of property growing out of the soil. But this is not a correct estimate of the force of these authorities, for the cases all hold that it is a right inhering in the soil, and not a mere right to prevent an invasion of the possession of the owner. * * * We therefore conceive it to be settled by authority and by long recognition in the law that the owner of land has a right to take fish and wild game upon his own land, which inheres in him by reason of his ownership of the soil. It is a property right, as much as any other distinct right incident to his ownership of the soil. It is not, however, an unqualified and absolute right, but is bounded by this limitation: That it must always yield to the state's ownership and title, held for the purposes of regulation and preservation for the public use. These two ownerships or rights—that is to say, the general ownership of the state for one purpose, and the qualified or limited ownership of the individual, growing out of his ownership of the soil—are entirely consistent with each other, and in no wise conflict. The transitory nature of the property renders the benefits so diffusive that all may join in the enjoyment thereof, and for that reason the sovereign holds as the representative of the public, so as to regulate and protect the common use. Still the right of the landowner to hunt and fish on his own lands is to that extent a special property right, though subordinate to the other."

[3] It is true that unqualified ownership becomes complete only when the fish or animal is reduced to possession by capture in conformity with state regulation. These mussels have been so reduced to possession, and the question presented is: To whom does the title inure? To the trespasser who took them, or to the owner of the soil whose

rights have been invaded? If our conception of the relationship of the parties and of the rights of the owner of the land is correct, then the rule of law widely prevailing in this country is not different from that obtaining in England, and that is that:

"Title to property created merely by the act of reducing a thing into possession necessarily implies a reduction into possession effected by an act which is not in any way of a wrongful nature. Such an act, therefore, effected by one who is at the moment a trespasser, cannot create a title to property."

In such case the title inures at once to the owner of the land. Blades v. Higgs, 11 H. L. C. 621; State v. Repp. 104 Iowa, 305, 73 N. W. 829, 40 L. R. A. 687, 65 Am. St. Rep. 463; Brown v. Eckes (City Ct.) 160 N. Y. Supp. 489, Ann. Cas. 1917B, 981; Harper v. Galloway, 58 Fla. 255, 51 South. 226, 26 L. R. A. (N. S.) 794, 19 Ann. Cas. 235; Commonwealth v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348; Lonsdale v. Rigg, 11 Exch. 654; Rexroth v. Coon, 15 R. I. 35, 23 Atl. 37, 2 Am. St. Rep. 863; State v. Mallory, 73 Ark. 236, 83 S. W. 955, 67 L. R. A. 773, 3 Ann. Cas. 852; Schulte v. Warren, 218 Ill. 108, 122, 75 N. E. 783, 13 L. R. A. (N. S.) 745.

[4] It would seem, therefore, that the plaintiff should prevail in this action, unless the statutes of Missouri, relating to fish and game, have diverted the current of the law from its accustomed channel and extinguished the rights which otherwise would be his. This court, in its original opinion, adopted this view, but misgivings upon this vital point caused this rehearing to be granted.

It is necessary to consider only section 6508, which reads as follows:

"The ownership of and title to all birds, fish and game, whether resident, migratory or imported, in the state of Missouri, not now held by private ownership, legally acquired, is hereby declared to be in the state, and no fish, birds or game shall be caught, taken or killed in any manner or at any time, or had in possession, except the person so catching, taking, killing or having in possession shall consent that the title of said birds, fish and game shall be and remain in the state of Missouri, for the purpose of regulating and controlling the use and disposition of the same after such catching, taking or killing. The catching, taking, killing or having in possession of birds, fish or game at any time, or in any manner, by any person, shall be deemed a consent of said person that the title of the state shall be and remain in the state, for the purpose of regulating the use and disposition of the same, and said possession shall be consent to such title in the state."

This section in its present form first appears in the Session Acts of Missouri for 1905, at page 159, and was approved March 10th of that year. As interpretive of its meaning but four Missouri cases are cited by counsel: State v. Blount, 85 Mo. 543; Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; State v. Heger, 194 Mo. 707, 93 S. W. 252; State v. Weber, 205 Mo. 36, 102 S. W. 955, 10 L. R. A. (N. S.) 1155, 120 Am. St. Rep. 715, 12 Ann. Cas. 382. And no others bearing with appreciable directness upon the point in question have been brought to the attention of the court. State v. Blount was decided in 1885, and had under consideration section 1625, R. S. 1879, prohibiting seining and netting of fish in any of the waters of the state under certain conditions and subject to certain exceptions. The case arose prior to the en-

actment of section 6508, supra; but the court had under consideration the extent of the sovereign power of the state over fish, and announced the right of the individual landowner under the legal exercise of that sovereign power as it was then deemed to exist. The court said:

"The property which a man hath in animals, feræ naturæ, is a qualified property; that is, he may have the privilege of hunting, taking and killing them on his own premises, to the exclusion of others. He has but a transient property in these animals, usually called game, so long as they continue within his premises. 2 Black, Com. 394. This qualified, transient property, is not taken away by the statute. One who may have the right to take fish from such waters as are specified in the statute, is not denied the right to do so; but, in order to the preservation of fish and prevent their destruction, the state, in the exercise of its police power, simply forbids them from being taken by the use of certain prohibited methods. He can exercise such right in any other method than those which the statute prohibits."

This accords with the great weight of authority in other jurisdictions to which reference has been made. The opinion in State v. Heger, supra, 194 Mo. at page 711, 93 S. W. 253, contains the following statement which is supposed to uphold the contention of the defendants herein:

"The authorities are uniform in holding that the absolute ownership of wild game is vested in the people of the state, and that such is not the subject of private ownership. As no person has in such game any property rights to be affected, it follows that the Legislature, as the representative of the people of the state, and clothed by them with authority to make laws, may grant to individuals the right to hunt and kill game at such times, and upon such terms, and under such restrictions as it may see proper, or prohibit it altogether, as the Legislature may deem best."

This declaration is expressly based upon the following decisions: Haggerty v. Ice Mfg. & Storage Co., 143 Mo. 238, 44 S. W. 1114, 40 L. R. A. 151, 65 Am. St. Rep. 647; Geer v. State of Connecticut, 161 U. S. 519, 16 Sup. Ct. 600, 40 L. Ed. 793; American Express Co. v. People, 133 Ill. 649, 24 N. E. 758, 9 L. R. A. 138, 23 Am. St. Rep. 641; Ex parte Maier, 103 Cal. 476, 37 Pac. 402, 42 Am. St. Rep. 129; State v. Rodman, 58 Minn. 393, 59 N. W. 1098; Magner v. People, 97 Ill. 320; Phelps v. Racey, 60 N. Y. 10, 19 Am. Rep. 140. All of these cases, including those first above cited, were dealing either directly or indirectly with the effect and enforcement of statutes of regulation as between the state and the individual, and had not under consideration comparative rights of property between individuals, subject, of course, to such right of regulation. And as was well said in State v. Mallory, supra, the language of the courts in those cases must be limited to the question under consideration, as must always be done when testing the soundness of a declared doctrine. Furthermore, the Supreme Court of Illinois, in Schulte v. Warren, 218 Ill. 122, 75 N. E. 783, 13 L. R. A. (N. S.) 745, expressly recognizes a qualified right of property in wild animals and birds as between the owner of the land on which they are found and a trespasser thereon, as also does the Supreme Court of Minnesota in Realty Co. v. Johnson, 92 Minn. 363, 100 N. W. 94, 66 L. R. A. 439, 104 Am. St. Rep. 677, and the Supreme Court of California in Kellogg v. King, 114 Cal. 378, 46 Pac. 166, 55 Am. St. Rep. 74. And nothing in Geer v. Connecticut is

inconsistent with this doctrine. In Haggerty v. Ice Mfg. & Storage Co., State v. Heger, and State v. Weber, supra, no purpose is disclosed of overruling the doctrine announced in State v. Blount. It must be assumed, therefore, that the absolute ownership declared in State v. Heger, supra, is identical with that declared from earliest times to inhere in sovereignty for the common benefit, which has never been supposed to be inconsistent with a qualified special property right of the landowner as against trespassers.

It is our duty to interpret statutes in accordance with their true spirit and purpose, so far as may be consistent with the language employed. Section 6508 contains striking internal evidences that the title declared was assumed for the sole purpose of regulation and control for preservation, propagation and protection, and not otherwise to determine the beneficial use and ownership. It says so substantially, not once, but twice, in this same section of 13 lines. Our view is that this enactment is a statute of regulation pure and simple, and leaves private ownership unimpaired, except as to the right of the state to prescribe the seasons and conditions under which fish and wild game can be taken, used, and disposed of. It is but declaratory of the title of the state and the law applicable thereto as it already existed. There is nothing in the decided cases that combats this view, but much that supports it.

It follows, from what has been said, that the judgment below should be reversed, and the case remanded for a trial anew in accordance with the principles announced in this opinion. Those from whom the defendants procured these mussels went wrongfully upon the premises of plaintiff's assignors, and by wading, or from boats produced for no other purpose, dug from the soil beneath these waters, upon private lands, over 300 tons of mussel shells, to which they had no title, and to which plaintiff's assignors had title, subject only to the right of regulation of the state. While it is desirable to preserve to the people at large all the rights of hunting and fishing to which they are legally entitled, it is equally necessary that such privileges should not be so extended as to destroy the still more sacred rights of private property to which our form of government is unalterably dedicated.

Inasmuch, however, as it appears that the trespass was not willful in a legal sense, but in a belief of right under a mistaken interpretation of the game laws of the state, and inasmuch, further, as the property taken cannot be deemed part of the realty within the meaning of the laws in such cases made and provided, the recovery should be limited to the actual value at the time of the conversion, as disclosed by the evidence, instead of that of the manufactured product, and treble damages cannot be sustained under section 5448, R. S. Mo. 1909.

On Petitions for Rehearing.

PER CURIAM. Both plaintiff in error and defendants in error have filed petitions for rehearing, the plaintiff in error, as an alternative, requesting a modification of the opinion. With respect to that of defendants in error we are of opinion that it presents nothing that was not duly argued and considered at the hearing and in no respect

answers the conclusion reached. We are satisfied with that conclusion, and the petition is accordingly denied.

[5] Plaintiff in error urges a modification of the last paragraph of the opinion filed, or a rehearing on the question of the measure of damages referred to therein. It is suggested that the opinion invades the province of the jury, and that the decision is contrary to that of the Supreme Court in Union Naval Stores Co. v. United States, 240 U. S. 284, 36 Sup. Ct. 308, 60 L. Ed. 644. That case was before the court and duly considered. The law involved and the situations presented in the two cases are essentially different. Our conclusion upon the facts recognized the rule announced in the case cited, but the evidence showed to our satisfaction that there was no willful trespass in the case at bar.

In their original brief filed in this case, under the heading "What is the Proper Measure of Damages," counsel for plaintiff in error said:

"The plaintiff's contention is not only that defendants were willful and intentional trespassers, but that they have concealed or destroyed evidence tending to the proof thereof. The facts referred to are hardly disputed now, and, as there was a demurrer to the evidence, their effect may be fully assumed."

In their reply brief they again urged this issue upon the court in the following language:

"More important on this phase of review is the issue as to the *measure of damages*, which we believe should be solved by allowing the highest value the property acquired while in defendants' possession, since it is manifest from the testimony that defendants had no vestige of claim of right and no semblance of consent to excuse the trespass. * * *

"As this issue is so vitally material to the final result, we hope it will be disposed of on this review, should a new trial be awarded."

Obviously counsel were not seeking a ruling by this court upon the abstract proposition that where the trespass is willful the owner is entitled to the product manufactured by a third person, who knowingly purchased the same from the trespasser, a doctrine already most conclusively established by the Supreme Court in Union Naval Stores Co. v. United States, supra. What counsel evidently desired, and certainly invited, was a ruling upon this concrete case presented. We complied with this request. It is hardly consistent now to say that we had no power to do so.

The rehearing and modification prayed by plaintiff in error must accordingly be denied.

NATIONAL CIRCLE, DAUGHTERS OF ISABELLA, v. NATIONAL ORDER OF DAUGHTERS OF ISABELLA.

(Circuit Court of Appeals, Second Circuit. December 15, 1920.)

No. 56.

1. **Judgment ⊂=665—Conclusiveness of findings not affected because there were other parties in earlier suit.**
In a suit between fraternal beneficiary corporations, the conclusiveness of findings made in an earlier suit to which plaintiff and defendant were parties was not affected because subordinate branches or lodges were joined as plaintiff and defendants in the earlier suit.

2. **Judgment ⊂=714(2)—Findings held conclusive in similar suit, though cause of action was different.**
The findings in a suit by a fraternal beneficiary corporation to enjoin the use of a similar name by another in the state of Connecticut, as to priority in the use of such name, and complainant's succession to the rights of a voluntary association first using it, were conclusive in a subsequent suit to restrain defendant from using such name anywhere in the United States.

3. **Corporations ⊂=49(2)—Evidence held to warrant finding of plaintiff's prior use of corporate name.**
In a suit by one fraternal beneficiary corporation to enjoin another from using the same name, evidence *held* to warrant a finding that the name was first used by a voluntary association to whose rights complainant had succeeded.

4. **Corporations ⊂=49(2)—Fraternal corporations entitled to sue to enjoin use of name by others; "charitable corporation"; "eleemosynary corporation."**
Fraternal beneficiary corporations organized and carried on for the mutual benefit of their members, and not for profit, and having no capital stock, but collecting assessments out of which payments are made upon the death or disability of members to designated beneficiaries, are not charitable or eleemosynary corporations and are entitled to have the use of the same or a similar name by another enjoined whether or not the law of unfair competition applies to charitable or eleemosynary corporations.
[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Charitable Corporation; First and Second Series, Eleemosynary.]

5. **Corporations ⊂=49(2)—Right to enjoin use of name by another may be asserted in any state where corporation does business.**
That an incorporated fraternal order was organized and incorporated in Connecticut does not restrain its right to protection against the use of its name by another order to such state and its right to protection may be asserted under proper conditions in any state in which it is permitted to conduct its business.

6. **Corporations ⊂=49(2)—Fraternal society adopting another's name not entitled to use it because first incorporated.**
A fraternal order adopting the same name used by a voluntary association acquired no additional right to the use of the name because it was incorporated before the incorporation of such association.

7. **Trade-marks and trade-names ⊂=21—Right ordinarily depends on priority of appropriation.**
In the absence of exceptional circumstances, the exclusive right to a trade-name or trade-mark is founded upon priority of appropriation.

8. **Equity ⊂=67—Rights may be lost by laches.**
A right may be waived or lost by failure to assert it at a proper time.

9. Equity ⟸71(1)—Laches not measured by days or months.
The doctrine of estoppel by laches is not one which can be measured in days and months as though it were a statute of limitations.

10. Equity ⟸80—Laches not defense in case of fraud.
In cases of fraud the defense of laches does not appeal to the conscience of the chancellor.

11. Corporations ⟸49(2)—Fraternal corporation held not to have lost rights to protection of name by laches.
An incorporated fraternal order *held* not to have lost its right to protection against the use of its name by another similar order by delay in asking relief.

12. Corporations ⟸49(2)—Right of fraternal corporation to enjoin use of name not affected by large number of branches organized by defendant.
Where defendant, a fraternal order, adopted the same name as a voluntary association to whose rights complainant had succeeded, the large number of branches organized by defendant or the fact that it had more branches than complainant did not defeat complainant's right to an injunction against the use of the name, as the branches had no rights or equities superior to those of the organization of which they were a part.

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

Suit by the National Circle, Daughters of Isabella, against the National Order of the Daughters of Isabella. From a decree for defendant (252 Fed. 815), complainant appeals. Reversed, with directions.

Certiorari denied 254 U. S. ——, 41 Sup. Ct. 376, 65 L. Ed. ——.

Mills & Mills, of Albany, N. Y. (Charles F. Roberts, of New Haven, Conn., and Howard F. Landon, of Salisbury, Conn., of counsel), for complainant.

P. H. Fitzgerald, of Utica, N. Y., for defendant.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This case presents the question whether the complainant is entitled to enjoin the defendant and all its subordinate branches and lodges from using the name "Daughters of Isabella."

The complainant and the defendant are composed of women of the Catholic faith, and they are organized for religious and fraternal purposes. The complainant's charter states that:

"The objects and purposes of said corporation shall be to render pecuniary aid and assistance to sick and distressed members and to the beneficiaries of members whether such sickness be temporary or incurable, and to render pecuniary aid toward defraying the funeral expenses of members, and to promote social and intellectual intercourse among its members."

The particular objects for which the defendant was incorporated as stated in its certificate for incorporation are:

"A. For the purpose of promoting the social and intellectual standing of its members.

"B. For literary purposes.

"C. For the purpose of rendering such aid and assistance among its members as shall be desirable and proper, and by such lawful means as to them shall seem best."

The defendant was incorporated on June 24, 1903, under the name "Daughters of Isabella," and in June 1905 it petitioned the Supreme Court of the state of New York to change its name to "The National Order of the Daughters of Isabella." Its petition was granted on August 7, 1905.

The defendant's articles of incorporation contain no express provision for the establishment of branches.

The incorporation of the Connecticut association on March 7, 1904, contained no provision for the establishment of branches. But its articles of incorporation were amended on November 5, 1904, and as amended the power was obtained to establish branches in Connecticut and elsewhere.

The complainant's charter, granted on July 25, 1907, reads as follows:

"Said corporation shall have power to locate and establish state and district circles, local or subordinate circles, or other branches or divisions thereof under the name of Daughters of Isabella, composed of members of the order in any town or city in this state or in any other state of the United States, or in any other country, and said state, district, or local circles, or other branches or divisions, when so established, shall be governed and managed by such laws, by-laws, rules, and regulations against any such state, district, or local circle or circles, or other branches or divisions in any court of this state or of any other state in the United States, and said corporation may grant charters to such state, district, or local circles, or other branches or divisions, and may authorize such state, district, or local circles to make subject to the approval of the national or some authorized officer thereof, such local by-laws as the needs of any state, district, or local or subordinate circle, or other branch or division may seem to require."

The defendant soon after its incorporation began to organize subordinate lodges or branches in different states. It had at the time this case was considered below some 300 branches or courts with a membership of some 25,000.

The complainant in this case alleges in substance that the defendant upon its incorporation in the state of New York appropriated a name similar to that of a then existing voluntary association in the state of Connecticut, which was the predecessor in title and interest of the complainant, and adopted a ritual, odes, and ceremonies substantially similar to those in use by such voluntary organization and which were later adopted and used by the complainant. It is also alleged that defendant has established and is creating local branches or lodges using the words "The Daughters of Isabella," which are the words used by the complainant in designating its branches or councils, and that this has caused great confusion and uncertainty in the minds of many persons and has deceived many inducing them to join with the latter's branches under the belief that they are the branches of the complainant. The complaint asks an injunction restraining the defendant from establishing any further branches in any part of the United States under the name "Daughters of Isabella," and of any name so similar thereto as to be likely to deceive or induce persons to join or treat with it as the complainant, and it also seeks to restrain and enjoin the defendant and all its subordinate branches and lodges from using or continuing to use such name or any name so similar thereto as to be likely to

create confusion, or to deceive the public or to induce persons to join or treat with the same as the complainant. And an accounting of damages and loss of income and profits is asked.

It appears that in May, 1897, at New Haven, Conn., there was organized a voluntary secret fraternal benefit association by women of the Catholic faith under the name of "The Ladies' Auxiliary of Russell Council, No. 65, Knights of Columbus." That from the time of its formation the members called each other "Daughters of Isabella." The organization adopted a constitution and a ritual. In 1898 the association appointed a committee to consider the matter of incorporating under the name "Daughters of Isabella," but took no further action at that time. In 1901 the association adopted, and its members began to wear, a society pin on which appeared letters and symbols indicating "Daughters of Isabella" and by that name the members were commonly known among themselves and to the public. This association was incorporated on March 7, 1904, under the laws of the state of Connecticut, and under the name "Daughters of Isabella, No. 1, Auxiliary to Russell Council, No. 65, Knights of Columbus." The aforesaid corporation was organized by the members of the original voluntary association, and it adopted the same constitution, used the same ceremonies, ritual, songs, society pin, and insignia, and continued to carry out the plans and purposes of the original voluntary association, and to use and be known by the name of "Daughters of Isabella." It was the successor in title and in all other respects to the rights of the original voluntary association, including the right to use the name "Daughters of Isabella." In November, 1904, its articles of incorporation were amended and it was empowered to establish branches under the name of "Daughters of Isabella." By a special act of the General Assembly of the state of Connecticut, approved on July 25, 1907, all of the incorporators named in the articles of incorporation of March 7, 1904, were on their application and the application of the subordinate branches granted a charter incorporating them under the name of "The National Circle, Daughters of Isabella," with power to establish branches within the state and elsewhere. And this second corporation used substantially the same ceremonies, ritual, songs, society pin, and insignia, and continued to carry out the purposes of the first corporation. The National Circle, Daughters of Isabella, has continued ever since to be the successor to all the rights and privileges of the original voluntary association including the right to the use of the name "Daughters of Isabella."

It also appears that as early as the year 1899 the National Secretary of the Knights of Columbus was receiving from time to time inquiries from various sections of the country regarding the "Daughters of Isabella," and that such inquiries were referred by him to the officers of the voluntary association at New Haven already referred to. Prior to the organization of the defendant one Michael F. Kelly of Utica, N. Y., was at New Haven, and there discussed with the National Secretary of the Knights of Columbus the voluntary association of the Catholic women that there existed, and obtained from him the name of its presiding officer, and from her he obtained copies of the ritual and in-

stallation exercises then being used by such voluntary association. Later Kelly was instrumental in organizing the Catholic women of Utica into the defendant organization under the name "The Daughters of Isabella" which was incorporated on June 24, 1903, under the laws of the state of New York. He furnished to the New York corporation the basic idea of that organization, which, on its petition to the Supreme Court of the state of New York, had its name changed on and after September 15, 1905, so that it should be thereafter known as "The National Order of the Daughters of Isabella." This corporation is not under its articles of incorporation, expressly empowered to organize or institute subordinate lodges or courts or branches, but it has nevertheless done so in various states.

It appears that the New York organization prior to April 4, 1904, had no branch or court in the state of Connecticut, but on that date it established a branch at Naugatuck in that state. Some time in April or May of that year the New York corporation, defendant herein, applied to the Secretary of State in Connecticut for leave to file a copy of its articles of association preliminary to its beginning business in that state and was refused because of the practical identity of its name with that of the Connecticut corporation. In January, 1905, it applied to the General Assembly of Connecticut to incorporate it in that state under the name "National Order, Daughters of Isabella," and the application was refused. Then in September, 1905, the Supreme Court of New York having in June of the same year granted it permission to change its name to National Order of the Daughters of Isabella, it filed a certificate of its articles of incorporation with the Secretary of State in Connecticut. Then it established a number of courts in that state, including a "state court." Thereupon, and on October 21, 1907, a complaint was filed in the superior court at New Haven, Conn., and an injunction was asked restraining the defendant from establishing any further branches in that state under the name and title of "Daughters of Isabella," and it was also asked that defendant's existing subordinate branches within the state be restrained from using that name or title. That court awarded the injunction, and on appeal to the Supreme Court of Errors the order was affirmed. The Supreme Court in speaking of the complaint said:

"But the complaint does not ask that the New York corporation be enjoined from using its corporate name. It asks that it be restrained from establishing any further branches in this state under the name and title of 'Daughters of Isabella,' and that its existing subordinate branches within the state be restrained from using that name or title. The injunction was asked and granted upon the ground that this distinctive portion of the plaintiffs' name was being used by the defendants to the plaintiff's injury, to the confusion of their business, and so as to deceive the public, and not upon the ground that the two names were identical. The words 'Daughters of Isabella' are the distinctive words in the name of each of the corporations. They are common to all of them, and are the ones by which the public designates the members of the different corporations. Whether such members belong to the National Circle * * * or subordinate circles, is a matter which concerns the members only. To the public they are all Daughters of Isabella. The finding makes it clear that the plaintiffs first adopted these words as distinctive of their association and activities, and that they and the voluntary

association out of which they grew were using them several years before the defendant was organized. The New York corporation found the plaintiffs here using the name in pursuing their objects and purposes when it first came to this state and sought permission to do business here under the same name. After its change of name the court finds that, with full knowledge of the plaintiffs' rights and of the injury and loss that must result to them from the establishment here by the defendant of subordinate branches, it proceeded to establish such branches, and is threatening to establish others under the name 'Daughters of Isabella.' To thus appropriate and use the distinctive portion of the plaintiffs' name was in effect to appropriate their name. * * * The court finds that the effect of this use of the name by the defendants has been, as alleged in the complaint, to cause confusion and uncertainty in the plaintiffs' business, to injure them pecuniarily and otherwise, and to deceive and mislead the public. In such a case an injunction lies in favor of the corporation first using the name to restrain another corporation thus attempting to appropriate and use it." Daughters of Isabella No. 1 v. National Order, Daughters of Isabella, 83 Conn. 679, 78 Atl. 333, Ann. Cas. 1912A, 822.

[1] In that action the present complainant, the National Circle, Daughters of Isabella, was one of the plaintiffs and the present defendant, the National Order, Daughters of Isabella, was one of the defendants. The fact that there was associated with the present plaintiff a branch known as "Daughters of Isabella No. 1" and with the defendant certain branches established by it within the state of Connecticut is immaterial so far as any question now before us is concerned.

[2] The District Judge in the present suit in making his findings was in error when he declined to find as follows:

"The issue of fact as to the priority of the use of the name and title 'Daughters of Isabella' by the predecessor in interest of the complainant here, raised in the said action in said superior court, and the issue of fact as to the succession of interest and title by the complainant here, from the original user of the said name and title, raised in the said action in said superior court, were the identical issues of fact as to such priority of use and as to such succession raised by the pleadings in the above-entitled action."

The learned District Judge, in referring to the Connecticut judgment, stated that—

"It settled and settles forever the rights of the parties in that state and no other."

We admit that the cause of action in that case is not identical with the one alleged in the instant case. We admit that the judgment in that case only enjoined the defendants from using the name "Daughters of Isabella" within the state of Connecticut. But we do not agree that the Connecticut action settled nothing which can in any way affect the rights of the parties in the present suit.

The findings of the Connecticut court are conclusive upon the parties to that litigation, and they are as conclusive outside of Connecticut as they are inside of the state. And one of the issues of fact which it conclusively determined was that the Connecticut organization used the words "Daughters of Isabella" for several years before the defendant was organized. And another issue of fact which it in substance determined was that the present plaintiff is the successor of the voluntary association which in 1901 appropriated the name "Daughters of Isabella."

The Connecticut court was not asked to restrain the defendant from the use of its name outside of that state or from establishing branches outside of the state of Connecticut, so that the decision then rendered was not intended to restrain and did not restrain the defendant from doing the things complained of in the present suit. The present action seeks to restrain the defendant from doing anywhere in the United States what the Connecticut court restrained it from doing in that state. But the findings of fact in the Connecticut action, in which the present plaintiff and the present defendant were parties plaintiff and parties defendant, must be regarded as res adjudicata between them. The findings of the court as to the essential facts are conclusive between the parties in all subsequent judicial proceedings so long as the judgment remains unmodified. They are not only final in the state where the judgment was rendered, but they are final in every other state.

As expressed by Lord Hardwicke in Gregory v. Molesworth, 3 Atkyns, 626, in 1747, when a question is necessarily decided in effect, though not in express terms, between parties to the suit, they cannot raise the same question as between themselves in any other suit in any other form. And in Southern Pacific Railroad Co. v. United States, 168 U. S. 48, 49, 18 Sup. Ct. 18, 27 (42 L. Ed. 355), it was said:

"Even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified."

See too, Forsyth v. Hammond, 166 U. S. 518, 17 Sup. Ct. 665, 41 L. Ed. 1095; Hartford Life Ins. Co. v. Ibs, 237 U. S. 673, 35 Sup. Ct. 692, 59 L. Ed. 1165, L. R. A. 1916A, 765; Bates v. Bodie, 245 U. S. 520, 526, 38 Sup. Ct. 182, 62 L. Ed. 444, L. R. A. 1918C, 355.

[3] We may say that, if the question of priority of use were still an open one, we should have no difficulty upon the present record in reaching the conclusion that the name "Daughters of Isabella" was first used by the Connecticut voluntary association.

There is considerable testimony in the record to show that in February, 1898, the voluntary association of the Daughters of Isabella had a social meeting in New Haven which was attended by a Mr. Kelly, who later organized the defendant corporation under the laws of New York. The testimony is that Kelly spoke at this meeting and asked the aid of the members present in establishing the Daughters of Isabella at Utica. Four of the women present on that occasion testified quite positively to his presence and three of them as to what he said. It does not seem to us probable either that they are mistaken or that they testified falsely. The Supreme Secretary of the Knights of Columbus[1] for 25 years, Daniel Colwell, testified as follows:

"I recall Mr. Kelly paying a visit here to New Haven some years ago in connection with the Daughters of Isabella; it was a visit of inquiry. I had received as secretary of my own society innumerable letters inquiring about the Daughters of Isabella and how they could be reached; it was my custom

[1] The Knights of Columbus was organized in 1885. Its membership is drawn from men of the Catholic faith. It is an organization for social, educational, and other purposes.

to refer them to the officers of the society, and particularly to Miss Kennedy, the head of the order, and I frequently turned the whole correspondence over to her, and at other times I answered the letters and referred the original writer to Miss Kennedy. I think very likely I referred Mr. Kelly to Miss Kennedy for information about the order. I don't recall but one conversation with Mr. Kelly about the order. That was at my office in Chapel street, when I was secretary of the Knights of Columbus. At this particular time he came to learn the method of establishing a council of the Daughters of Isabella in Utica. I could not fix the year. This conversation between Mr. Kelly and I took place long before the establishment of the Daughters of Isabella in Utica. I referred Mr. Kelly to Miss Kennedy. I gave him a copy of the ritual which I had prepared for the Daughters of Isabella in New Haven. I know Mr. Kelly was intent upon the establishment of the Daughters of Isabella in Utica, and I assumed and supposed that it was part of the organization here. If I supposed it was intended for a separate organization he could not have got the ritual from me for $10,000. Mr. Kelly suggested to me that I would furnish him with the ritual. I did so, including the songs and odes, and Mr. Kelly told me he would pay me for it, and Mr. Kelly kept his word and paid me for it. The society we were talking about was called the Daughters of Isabella and passed between us as common as 'How do you do' to-day, or 'Good-by' to-morrow. I do not recall any occasion on which I was present at a meeting of the organization in the Wood's building at which Mr. Kelly was present."

The last reference is to the social meeting already referred to which it is said that Mr. Kelly attended. The latter denies that he was present at the meeting, or that he ever addressed any such meeting and expressed a wish to have the members go to Utica and establish the Daughters of Isabella. His testimony is:

"I never said, I hoped to have the ladies go to Utica, and establish Daughters of Isabella there. In 1897 or 1898 I did not or had not from any source heard the words 'Daughters of Isabella' as applied to any organization. I first heard the words 'Daughters of Isabella' as applied to an organization when I used it myself late in 1901 or early in 1902."

It is impossible to reconcile his testimony with that of the other testimony in the record. Some one is mistaken, and, while we do not believe that Mr. Kelly intentionally misstated the facts, we think that he is mistaken in his recollections. He was instrumental in organizing the association at Utica in 1903, and in having it incorporated under a name containing the words "Daughters of Isabella." While it is claimed that the persons who formed that corporation were not aware at the time of the existence of another organization under the name "Daughters of Isabella," we think it improbable that such was the fact.

[4] In Creswill v. Knights of Pythias, 225 U. S. 246, 260, 32 Sup. Ct. 822, 56 L. Ed. 1074, the court stated that a conflict in the decisions existed as to whether in controversies over the right to use the name as between such organizations as the Knights of Pythias, for example, the court below was right in applying the rules applicable to trade-marks and trade-names and unfair competition in trade. The court in that case refrained from any discussion of the question. It is true that some difference of opinion exists as to whether eleemosynary or charitable corporations having nothing to sell and which do not make money are beyond the protection of the law of unfair competition. The question whether distinct identity may often be as important to such corporations and whether their interest in their names may be as definite and specific

as though they were engaged in commercial undertakings is not before us in the instant case, and we make no intimations concerning it. The parties to the present suit are not eleemosynary or charitable corporations. The complainant and the defendant are fraternal beneficiary corporations without capital stock. They are organized and carried on for the mutual benefit of their members, and not for profit. They are nevertheless business corporations, collecting from their members certain assessments out of which payments are made upon the death or disability of members to the designated beneficiaries. In this respect they resemble life insurance companies. The law of unfair competition applies to them. Such corporations have a right in their name, and equity in proper cases will enjoin another from the use of the same name or one so similar to it as to mislead the public. Wherever the name is calculated to deceive or tends to confusion the use may be enjoined. Von Thodorovich v. Franz-Josef Benevolent Association (C. C.) 154 Fed. 911. The right to injunctive relief against the improper use of a corporate name is, by many of the courts, not limited to corporations engaged in business and trade, but it extends to charitable, religious, benevolent, and patriotic societies. Society of 1812 v. Society of 1812, 46 App. Div. 568, 62 N. Y. Supp. 355; Salvation Army in the United States v. American Salvation Army, 135 App. Div. 268, 120 N. Y. Supp. 471; Benevolent and Protective Order of Elks v. Improved and Benevolent Order of Elks of the World, 205 N. Y. 459, 98 N. E. 756; International Committee, Y. W. C. A., v. Young Women's Christian Association, 194 Ill. 194, 62 N. E. 551, 56 L. R. A. 888.

[5] It must be conceded that the name of any organization, whether a voluntary association or of a corporation, if engaged in business, is, like that of a trade-mark, not necessarily limited in its enjoyment by territorial bounds. The fact that the plaintiff herein is a Connecticut organization does not in itself restrict its right to the protection of its name to the confines of that state. But its right to protection may be asserted under justifying conditions in every state in which it is permitted to conduct its business.

[6] Importance cannot be attached to the fact that the defendant was incorporated first. The mere incorporation of an organization under a particular name does not add anything to its right to use the name as against another organization unincorporated and already using the same or a similar name. Salvation Army in the United States v. American Salvation Army, supra; Grand Lodge of the Ancient Order of United Workmen of Iowa v. Graham, 96 Iowa, 592, 65 N. W. 837, 31 L. R. A. 133.

In Nims on Unfair Competition (2d Ed.) p. 163, it is well said that the fact that the defendant corporation, in a suit for unfair competition involving its name, has been chartered by some state government, does not afford it a defense or immunity from action against it in a federal court or state court by a corporation of another state, where the name adopted is used to compete unfairly with the complainant company. And see Peck Bros. & Co. v. Peck Bros. Co., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81; Ft. Pitt Building & Loan Association, etc., v. Model Plan Building & Loan Association, 159 Pa. 308, 28 Atl. 215. The writer

already quoted, Nims on Unfair Competition, p. 62, also says that a corporate name is chosen by the incorporators themselves, and that, that being the case, their responsibility for its use is greater than in the case of their own personal names.

"Incorporators of a company," he says, "choose a name at their peril. They will be presumed to know the names under which the probable existing competitors of the new company are doing business. The choice of a name colorably similar to that used by a competitor is evidence of fraud, especially if it is likely that the new corporation will profit by the confusion that will result from the similarity between its names and that of a competitor."

[7] In many cases the exclusive right to a trade-name or to a trademark is founded upon priority of appropriation. In the ordinary case of parties competing under the same name or mark in the same market prior appropriation settles the question of the right. There are exceptional circumstances when the question of prior appropriation appears legally unimportant. Hanover Milling Co. v. Metcalf, 240 U. S. 403, 415, 36 Sup. Ct. 357, 60 L. Ed. 713. But in the present suit the exceptional circumstances referred to in the Hanover Milling Case are not disclosed.

[8, 9] A right may be waived or lost by failure to assert it at a proper time. Atlantic Coast Line Railroad v. Burnette, 239 U. S. 199, 36 Sup. Ct. 75, 60 L. Ed. 226; Burnet v. Desmornes, 226 U. S. 145, 33 Sup. Ct. 63, 57 L. Ed. 159. But, as was said in Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 509, 33 Sup. Ct. 554, 562 (57 L. Ed. 931), the doctrine of estoppel by laches is not one which can be measured out in days and months, as though it were a statute of limitations. "For what might be inexcusable delay in one case would not be inconsistent with diligence in another, and, unless the nonaction of the complainant operated to damage the defendant or to induce it to change its position, there is no necessary estoppel arising from the mere lapse of time. Townsend v. Vanderworker, 160 U. S. 171, 186."

[10] In cases of fraud the defense of laches does not appeal to the conscience of a chancellor. In Bowen v. Evans, 2 H. L. 257, a bill was filed to set aside, on the ground of fraud, a sale of lands under a decree nearly 50 years before. Lord Chancellor Cottenham observed:

"So, when much time has elapsed since the transaction complained of, there having been parties who were competent to have complained, the court will not, upon doubtful or ambiguous evidence, assume a case of fraud, although upon fraud clearly established no lapse of time will protect the parties to it, or those who claim through them, against the jurisdiction of equity depriving them of the fruits of their plunder."

In McIntire v. Pryor, 173 U. S. 38, 59, 19 Sup. Ct. 352, 43 L. Ed. 606, the Supreme Court did not wish it to be understood as holding that even in the case of actual fraud there could be indefinite delay in instituting proceedings. The intimation was that laches depends upon whether under all the circumstances of a particular case the plaintiff is chargeable with a want of due diligence.

In Saxlehner v. Eisner, 179 U. S. 19, 39, 21 Sup. Ct. 7, 14 (45 L. Ed. 60) the court said:

"But in cases of actual fraud, as we have repeatedly held, notably in the recent case of McIntire v. Pryor, 173 U. S., 38, the principle of laches has but

an imperfect application, and delay even greater than that permitted by the statute of limitations is not fatal to plaintiff's claim."

In McLean v. Fleming, 96 U. S. 245, 24 L. Ed. 828, which was a suit for the infringement of a trade-mark, the right to an injunction was upheld, although there had been a delay of about 20 years in instituting proceedings. On account of the unreasonable delay in bringing the suit the complainant was denied the right to an account for profits.

In Menendez v. Holt, 128 U. S. 514, 523, 9 Sup. Ct. 143, 145 (32 L. Ed. 526), an attempt was unsuccessfully made to have the doctrine of McLean v. Fleming reconsidered. In declining to modify it the court, speaking through Chief Justice Fuller, said:

"The intentional use of another's trade-mark is a fraud; and, when the excuse is that the owner permitted such use, that excuse is disposed of by affirmative action to put a stop to it. Persistence then in the use is not innocent; and the wrong is a continuing one, demanding restraint by judicial interposition when properly invoked. Mere delay or acquiescence cannot defeat the remedy by injunction in support of the legal right, unless it has been continued so long and under such circumstances as to defeat the right itself. Hence, upon an application to stay waste, relief will not be refused on the ground that, as the defendant had been allowed to cut down half of the trees upon the complainant's land, he had acquired, by that negligence, the right to cut down the remainder (Attorney General v. Eastlake, 11 Hare, 205); nor will the issue of an injunction against the infringement of a trade-mark be denied on the ground that mere procrastination in seeking redress for depredations had deprived the true proprietor of his legal right (Fullwood v. Fullwood, 9 Ch. D. 176). Acquiescence to avail must be such as to create a new right in the defendant. Rodgers v. Nowill, 3 De G., M. & G. 614. Where consent by the owner to the use of his trade-mark by another is to be inferred from his knowledge and silence merely, 'it lasts no longer than the silence from which it springs; it is, in reality, no more than a revocable license.' Duer, J., Amoskeag Mfg. Co. v. Spear, 2 Sandford (N. Y.) 599; Julian v. Hoosier Drill Co., 78 Indiana, 408; Taylor v. Carpenter, 3 Story, 458; s. c., 2 Woodb. & Min. 1."

In O'Brien v. Wheelock, 184 U. S. 450, 493, 22 Sup. Ct. 354, 370 (46 L. Ed. 636), the court said:

"The doctrine of courts * * * to withhold relief from those who have delayed the assertion of their claims for an unreasonable length of time is thoroughly settled. Its application depends on the circumstances of the particular case. It is not a mere matter of lapse of time, but of change of situation during neglectful repose, rendering it inequitable to afford relief."

In Creswill v. Knights of Pythias, supra, it was held that the doctrine of laches applies to the use of a name of a fraternal corporation, and that equity will not grant relief against the use of the name by parties who had been using it for many years without objection, at the instance of the older organization; there not appearing to be any fraud or intent to deceive the public. In that case a voluntary association known as the Knights of Pythias composed of white members only was organized in the District of Columbia as early as 1864. A few years later it became incorporated under a general incorporation act of the District, adopting the name Supreme Lodge, Knights of Pythias, and in 1894 it received a special charter from Congress. In 1880 an order of the Knights of Pythias to which black members only were eligible was formed in Mississippi. It became a corporation in the District of Co-

lumbia in 1889, by virtue of a general incorporation act, under the name of the "Supreme Lodge, Knights of Pythias, North and South America, Europe, Asia and Africa." About 1908 an application for an injunction to prevent the use of the name by the defendant was asked. The right to the injunction was sustained in the Supreme Court of Georgia, which was reversed by the Supreme Court of the United States on the ground of laches; it being stated to the court by counsel for the defense that the complainant had uttered no word of complaint for over a quarter of a century. And in that case, as already stated, there was no fraud. The facts in that case are therefore readily distinguishable from the facts in this.

And in Nims on Unfair Competition (2d Ed.) § 411, that writer says:

"The doctrine of laches as to stale claims in matters of trust does not apply in full force to unfair competition cases, where acquiescence will not usually be inferred, and, even if at one time the facts would justify a presumption of such acquiescence, there still exists in the first user a right of revocation of such acquiescence."

[11] In our opinion the complainant has not lost its right to the protection of its name by its delay in asking the relief it now seeks. Its right rests on the principle stated by Chief Justice Fuller above quoted that, where consent to the use of a name is to be inferred from knowledge and silence, such consent lasts no longer than the silence from which it springs. Moreover, in cases of fraud the question of laches does not strongly appeal to the conscience of a chancellor.

[12] We do not attach controlling importance to the fact that the defendant has organized a large number of branches under the name "Daughters of Isabella," or that it has a larger number of branches than the complainant. The branches are parts of the parent organization and can have no rights or equities in the name which are superior to the rights and equities of the organization of which they are a part.

Those branches which are in Connecticut are already known as "The Daughters of Castile," and if it becomes necessary for the remaining branches to adopt the same name or some name dissimilar to that of complainant, the fault is that of the defendant, whose improper conduct has occasioned it. If damage is suffered by the defendant corporation by being compelled now to change its name and cease its infringement on the plaintiff's name, the loss arises out of the defendant's own folly in deliberately incorporating under a name already in use.

Under all the circumstances and the delay which has occurred there is no right to an accounting.

The decree is reversed, and the District Court is directed to issue an injunction as prayed.

ABBATE v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1921.)

No. 3535.

1. **Intoxicating liquors ⇐132—Alaska statute not repealed by National Prohibition Act.**
   Act Feb. 14, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3643b–3643r), known as the "Alaska Bone Dry Law," *held* not repealed by National Prohibition Act Oct. 28, 1919, and the penalties for its violation prescribed in the local act, although heavier than those imposed for the same offense by the national law, *held* valid and enforceable.
2. **Statutes ⇐162—Special act not repealed by general act.**
   Where there are two legislative acts, one a special or local act and the other a general act, which standing alone would include the same matter as the local act, so that the provisions of the two acts conflict, the local act must be given the effect of establishing an exception to the general act.

Ross, Circuit Judge, dissenting.

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 Arthur Abbate. Judgment of conviction, and defendant brings error. Affirmed.

John R. Winn and John H. Cobb, both of Juneau, Alaska, for plaintiff in error.

James A. Smiser, U. S. Atty., of Juneau, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error was convicted of violation of the Bone Dry Law of Alaska (39 Stat. 903, c. 53 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3643b–3643r]), in that he willfully and unlawfully had in his possession for sale intoxicating liquor, and he was sentenced to pay a fine of $800 and to be imprisoned three months in jail.

[1] It is contended that the Bone Dry Law of Alaska has been repealed by the National Prohibition Act, the penalty for violation of which for a first offense, as here, is a fine of $500 without imprisonment. 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 an addition to existing laws." 41 Stat. 317.

There can be no question that the act takes the place of prior general statutes of the United States so far as they are inconsistent therewith. United States v. Sohm (D. C.) 265 Fed. 910. But it does not follow that it repeals the express provisions of a local statute adopted expressly for Alaska. In legislating for a territory Congress exercises the combined powers of a national and a state government. The Bone Dry

Law of Alaska stands upon the same footing it would have had it been enacted by a territorial Legislature created by Congress. In re Murphy, 5 Wyo. 309, 40 Pac. 398. And it is well settled that a law of a territory will subsist and be enforced concurrently with a general law of Congress applicable throughout the United States on the same subject-matter. Territory v. Guyott, 9 Mont. 46, 22 Pac. 134; State v. Norman, 16 Utah, 463, 52 Pac. 986; Moore v. People, 14 How. 13, 14 L. Ed. 306.

Congress enacted the Bone Dry Law for Alaska, and 20 months later it enacted the National Prohibition Act. In enacting the latter Congress was adopting legislation for the whole United States to carry out the provisions of the Eighteenth Amendment. In enacting the Bone Dry Law, on the other hand, Congress was pursuing its policy of prohibition in Indian country. That policy as to Alaska was first manifested by legislation enacted on July 27, 1868, for the prevention of the importation and sale of intoxicating liquors in Alaska, the population of which was largely composed of Indians, and it was continued without interruption until the enactment of the Bone Dry Law of February 14, 1917. That act contains provisions peculiarly applicable to Alaska, and which are more drastic and far-reaching, and involve severer penalties for the same offense, than do the provisions of the National Prohibition Act.

What is there to show that the National Prohibition Act was intended to replace the Bone Dry Law of the territory of Alaska? It is not to be found in the statute, which provides that the Constitution of the United States and all the laws thereof "which are not locally inapplicable" shall have the same force and effect within the said territory as elsewhere in the United States. That is a general provision which is found in the organic act of all the territories. It is simply an extension of the laws of the United States to the territory. It does not stand in the way of or affect the construction of special congressional legislation solely for the territory.

[2] The provision of the National Prohibition Act for the punishment of selling liquor in Alaska is "locally inapplicable" in Alaska, for the reason that Congress has provided for a severer penalty for the act when committed there.

"A general act repealing all acts that are inconsistent with its provisions will usually be construed to refer to general statutes alone and not to include special or local laws." 25 R. C. L. 913.

"The presumption against implied repeals has peculiar and special force when the conflicting provisions which are thought to work a repeal are contained in a local or special act and a later general act. The presumption is that the special is intended to remain in force as an exception to the general act, especially where both laws were enacted at the same time or are substantially contemporaneous. And there is a tendency to hold that where there are two acts, one a special or local act, which certainly includes the matter in question, and the other a general act, which, standing alone, would include the same matter, so that the provisions of the two acts conflict, the special or local act must be given the effect of establishing an exception to the general act. Hence it is a canon of statutory construction that a later statute, general in its terms and not expressly repealing a prior special statute, will ordinarily not affect the special provisions of the earlier statute." 25 R. C. L. 927.

In Washington v. Miller, 235 U. S. 422, 428, 35 Sup. Ct. 119, 122 (59 L. Ed. 295), it is said:

"Where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general."

See, also, Ex parte United States, 226 U. S. 420, 424, 33 Sup. Ct. 170, 57 L. Ed. 281, and Petri v. Creelman Lumber Co., 199 U. S. 487, 26 Sup. Ct. 133, 50 L. Ed. 281.

The decision in Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268, involves considerations which have no application to the present case. What was there decided is concisely stated in McAllister v. United States, 141 U. S. 174, 184, 11 Sup. Ct. 949, 953 (35 L. Ed. 693), by Mr. Justice Harlan, who wrote the opinion in both cases, and who said that the conclusion in Page v. Burnstine was reached—

"not because the courts of the District of Columbia were adjudged to be of the class in which the judicial power of the United States was vested by the Constitution, but because all the acts relating to the competency of witnesses when construed together, indicated that that section of the Revised Statutes applied to the courts of the District of Columbia."

In the nature of things there could be no reason, and no reason is suggested, why Congress should intend to establish a rule of evidence in the District of Columbia different from that which obtained elsewhere in the federal courts of the United States. But there was reason for such discrimination as to the liquor laws of the District of Alaska.

The right to manufacture liquor for any purpose in Alaska has never been granted by any act of Congress, yet, if the contention of the plaintiff in error is correct, Congress has now granted that right in declaring, in the national act, "liquor for non-beverage purposes and wine for sacramental purposes" may be manufactured. It follows, also, if the contention is correct, that Congress has by the national act repealed that portion of section 2139 of the Revised Statutes (Comp. St. § 4136a) which provides, "No ardent spirits * * * shall be introduced, under any pretense, into the Indian country," and has greatly modified the penalty for introducing liquors into an Indian reservation, for an Indian reservation is affected by the national act in no lesser degree than is the territory of Alaska.

In brief, we think that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the states, and the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaskan act than it does the state acts.

The judgment is affirmed.

ROSS, Circuit Judge (dissenting). February 14, 1917, Congress passed an act, called in the record the Bone Dry Law (39 Stat. 903, c. 53), entitled "An act to prohibit the manufacture or sale of alcoholic liquors in the territory of Alaska, and for other purposes," the first section of which declared, among other things, that on and after the 1st day of January, 1918, it should be "unlawful for any person, house, association, firm, company, club, or corporation, his, its, or their agents,

officers, clerks, or servants, to manufacture, sell, give, or otherwise dispose of any intoxicating liquor or alcohol of any kind in the territory of Alaska, or to have in his or its possession or to transport any intoxicating liquor or alcohol in the territory of Alaska unless the same was procured and is * * * possessed and transported" as therein specifically provided, which specific provisions are inapplicable to the present case.

Subsequently there was enacted by Congress, pursuant to the Eighteenth Amendment to the Constitution, what is commonly known as the Volstead Act (41 Stat. 305), the title of which is as follows:

"An act to prohibit intoxicating beverages, and to regulate the manufacture, production, use, and sale of high-proof spirits for other than beverage purposes, and to insure an ample supply of alcohol and promote its use in scientific research and in the development of fuel, dye, and other lawful industries"

—designed to give effect to the prohibition provision of the Eighteenth Amendment, and which also made unlawful the act charged against the plaintiff in error.

The plaintiff in error was prosecuted for, and in the court below convicted of, the violation of the Bone Dry Law in that on the 4th day of February, 1920, at Juneau, Alaska, he willfully and unlawfully had in his possession for sale intoxicating liquor, and was sentenced to pay a fine of $800 and serve three months in jail, which punishment was authorized by the Bone Dry statute. Under the Volstead Act the maximum penalty for such offense (where, as in the present instance, it was the first offense) was a fine of $500 without any imprisonment.

The territory ceded to the United States by Russia by the Treaty of March 30, 1867, 15 Stat. 539, remained until 1884 unorganized, subject to provisions of Act July 27, 1868, c. 273, 15 Stat. 240, and subsequent acts, most of which were incorporated into R. S. §§ 1954–1976. It was constituted a civil and judicial district, and a civil government therefor was established, by Act May 17, 1884, c. 53, 23 Stat. 24, which provided for a Governor and other officers and for a District Court for said district. A Criminal Code and Code of Criminal Procedure for the district were enacted by Act March 3, 1899, c. 429, 30 Stat. 1253. Further provisions for a civil government, including a Code of Civil Procedure and a Civil Code, were made by the Carter Act of June 6, 1900, c. 786, 31 Stat. 321. And it was constituted the territory of Alaska, and further provisions for its government, including the creation of a legislative assembly, were made by Act Aug. 24, 1912, c. 387, 37 Stat. 512 (U. S. Comp. Stats. § 3528 et seq.). Section 3530 of those Statutes, relating to the territory of Alaska, is as follows:

"The Constitution of the United States, and all the laws thereof which are not locally inapplicable, shall have the same force and effect within the said territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska shall continue in full force and effect until amended or repealed by act of Congress; that except as herein provided all laws now in force in Alaska shall continue in full force and effect until altered, amended, or repealed by Congress or by the Legislature," with certain exceptions and provisions not applicable to the present case.

A similar statute, enacted by Congress February 21, 1871, respecting the District of Columbia, provided as follows:

"The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere in the United States." 16 Stat. 426.

In the statute first above quoted Congress was legislating for the territory of Alaska, and in the second for the District of Columbia—the one as much within the exclusive power and jurisdiction of Congress as the other—and for that reason the two provisions of the statutes quoted may be properly said to be substantially identical. One of the questions involved in the case of Page v. Burnstine, 102 U. S. 664, 26 L. Ed. 268, was whether a certain rule of evidence declared by section 858 of the Revised Statutes applied to the courts of the District of Columbia as fully as to the Circuit and District Courts of the United States. One of the grounds given by the Supreme Court for holding the affirmative of the proposition was that that portion of section 34 of Act Feb. 21, 1871, creating a government for the District of Columbia, declared that "the Constitution, and all the laws of the United States which are not locally inapplicable, shall have the same force and effect within the said District of Columbia as elsewhere within the United States"; the court saying in effect (102 U. S. 667, 26 L. Ed. 268) that, if other points made in the case were not well founded—

"It is, nevertheless, quite clear that, from and after the passage of the Act of February 21, 1871, if not before, the Act of March 3, 1865, became a part of the law of evidence in this District. The legal effect of the declaration that all the laws of the United States, not locally inapplicable, should have the same force and effect within this District as elsewhere within the United States, was to import into, or add to, the special Act of July 2, 1864, relating to the law of evidence in the District, the exception, created by the Act of March 3, 1865, to the general statutory rule, excluding parties as witnesses."

To the extent of all conflicts between the two acts of Congress here in question, namely, the Bone Dry Law and the Volstead Act, I not only think it plain on principle that the provisions of the latter are controlling, but it is in the Volstead Act expressly so declared in two places, to wit, in section 19 of title 3 and section 35 of title 2, in the first of which it is declared that "all prior statutes relating to alcohol as defined in this title are hereby repealed in so far as they are inconsistent with the provisions of this title," and in the second that "all provisions of law that are inconsistent with" it "are repealed only to the extent of such inconsistencies." To the inquiry, "What is there to show that the National Prohibition Act was intended to replace the Bone Dry Law of the territory of Alaska?" the answer is that the Volstead Act in its nineteenth section expressly declares that "all prior statutes relating to alcohol as defined in this title" (which manifestly includes Alaska's Bone Dry Law) "are hereby repealed in so far as they are inconsistent with the provisions of this title," and in its thirty-fifth section expressly declares that such repeals go "only to the extent of such inconsistencies."

The repeals relied on by the plaintiff in error being express repeals, questions relating to implied ones become irrelevant. I am unable to see any force in the suggestion that the provision of the National Pro-

hibition Act for the punishment of selling liquor in Alaska is "locally inapplicable" in Alaska for the reason that Congress had previously provided for a severer penalty of the act when committed there. See, also, United States v. Tynen, 11 Wall. 88, 92, 20 L. Ed. 153; Houston v. Moore, 5 Wheat. 20, 5 L. Ed. 19; United States v. 356 Caddies of Tobacco, 11 Wall. (78 U. S.) 652, 659, 20 L. Ed. 235; United States v. Windham (D. C.) 264 Fed. 376; United States v. Sohm, et al. (D. C.) 265 Fed. 910.

In the present case the plaintiff in error was convicted of the alleged offense of having in his possession on the 4th day of February, 1920, at Juneau, Alaska, for the purpose of sale, alcohol and intoxicating liquor, and the evidence showing that the place where it was found was the place of business of the plaintiff in error, I think it manifest that no ground is afforded for any discussion of the point suggested about the need of a search warrant. That the law is that where there are two statutes imposing a penalty for the same offense, and the penalty imposed by the one is not the same as that imposed by the other, the later statute repeals the earlier, see Black on Interpretation of Laws (2d Ed.) 354, and cases there cited. And that the correct judgment may yet be entered by the court below on the verdict rendered, see United States v. Pridgeon, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631; In re Bonner, 151 U. S. 242, 14 Sup. Ct. 323, 38 L. Ed. 149; Harlan v. McGourin, 218 U. S. 442, 31 Sup. Ct. 44, 54 L. Ed. 1101, 21 Ann. Cas. 849.

In my opinion the judgment should be reversed, and the case remanded to the court below, with directions to enter judgment upon the verdict in accordance with the provisions of the Volstead Act.

MURRAY v. SHIPMAN KOAL CO.

(Circuit Court of Appeals, Third Circuit. February 14, 1921.)

No. 2565.

1. **Corporations ⇐426(10)—Liable on unauthorized notes of which it received the proceeds.**
   A corporation cannot receive and retain the benefit of the proceeds of notes executed in its name, and repudiate the notes, even though they were executed without authority.

2. **Corporations ⇐414(5)—Notes executed by treasurer without authority not valid obligations of corporation.**
   Where the treasurer of a coal company contracted for the purchase of all of its stock, and pursuant to the contract took over the management of its business on behalf of himself and his associates in the purchase, but owing to default in payment the contract was not carried out, notes given by him in the name of the company, without authority of the directions for money advanced by one of his associates, which was not used in the business of the company, but was paid for stock under the contract, *held* not to be valid obligations of the corporation.

In Error to the District Court of the United States for the Middle District of Pennsylvania; Charles B. Witmer, Judge.

Action at law by Edward F. Murray against the Shipman Koal Company. Judgment for defendant, and plaintiff brings error. Affirmed.

James Farrell, of Troy, N. Y., for plaintiff in error.

Layton M. Schoch, of Philadelphia, Pa., and Henry W. Chamberlin, of Milton, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This is a suit instituted by the plaintiff in error to recover from defendant $14,250 and interest alleged to be due on two promissory notes made by him to the order of defendant and delivered to Abel I. Culver. On May 9, 1914, John B. Corliss, who owned or controlled all of the capital stock of the defendant company, and Abel I. Culver, treasurer of the company, entered into a contract whereby Corliss agreed to sell to Culver the entire capital stock of the defendant company, consisting of $300,000 common stock, all issued and outstanding, and $300,000 preferred stock, of which $132,000 was issued and outstanding, for $350,000. Corliss was on that day to deposit with the Columbia Knickerbocker Trust Company of New York City certificates representing all the shares of the common stock, and on or before May 29, 1914, certificates representing all the outstanding preferred stock, provided Culver paid, in cash, $20,000 on the date of agreement, $30,000 on or before May 22, 1914, and $25,000 on or before May 29, 1914. Corliss was to bring about the election of Culver and two others to be nominated by him as directors of the defendant company, and to file in escrow with the said Trust Company the resignations of the other two directors and all of the officers of the defendant company. Resignations of Culver and his nominees, elected to the board of directors, were to be similarly filed. Culver was further to pay $150,000 on or before January 1, 1915, and $125,000 on or before May 1, 1915, aggregating the full purchase price, with interest thereon, at 6 per cent. per annum, payable semiannually. All these payments, except the first, were to be deposited in the said Trust Company, and paid out on checks signed by Corliss and countersigned by Culver as treasurer.

This was a special escrow deposit in the name of the company, and was to be used in part for acquisition of preferred stock in pursuance of the agreement. When the final payment was thus made, the Trust Company was to deliver to Culver all the certificates of stock, resignations, and other papers held in escrow. The books of the company were to be closed on May 15, 1914, and Corliss was to assume and pay all the liabilities of the company on the date the books were closed; and during the existence of the contract, until the final payments were made, Culver agreed not to allow any mortgage or lien to be placed upon the property, or any other obligation to be created against it, except in the usual course of operation. Corliss and Culver further agreed that they would co-operate in causing, and use their best efforts to apply, the amounts of the payments to be made by Culver, as heretofore set forth:

"(1) To the prompt payment and discharge of all the liabilities of said Company accrued and unpaid on the date of closing the books as aforesaid.

"(2) To the purchase of the thirteen hundred and twenty-nine (1,329) shares of outstanding preferred capital stock of the company at par and accrued dividends to the date of payment.

"(3) The balance, if any, of said payments to be paid to said Corliss or order on May 1, 1915, provided said Corliss shall have produced valid vouchers showing the payment of all the liabilities of the company which he agreed to pay hereunder."

The contract contained the further provision that Culver—

"will subscribe, or cause to be subscribed and paid for, or cause to be paid for, in cash such an amount of preferred stock as is necessary to provide working capital for said company, not in excess of two hundred and fifty (250) shares of the preferred capital stock of said company, said cash to be paid into the treasury of the company and to be expended in the discretion of said Culver for the purchase of new equipment or otherwise."

Under the contract, and during its existence, until the terms thereof were complied with, Corliss was to retain the office of president and director of the company, and Culver was to be treasurer and general manager, and was "to have the active management of the business affairs and current operations of the company." Culver became the treasurer and general manager of the company, and operated the mines, but was unable to make the payments in accordance with the contract, and so on January 19, 1916, finally defaulted, and surrendered the management and property of the corporation to Corliss.

On January 4, 1915, the plaintiff made his check, payable to the order of the defendant company, and delivered the same to Culver, who made, in the name of the defendant and delivered to plaintiff, a note for $5,000. This note was subsequently renewed, and reduced to $4,250. On June 12, 1915, Culver, in the name of defendant, made and delivered to plaintiff a note for $10,000 as security for two checks for $5,000 each, payable to order of defendant, one of which was made on June 11, 1915, and the other on June 14, 1915, by plaintiff, and delivered by him to Culver. It is for the amount of these three notes and interest that suit is brought.

Defendant filed an affidavit of defense, alleging that the notes were given without proper authority; that Culver had no authority to execute notes in the name of the company for personal loans to himself; that the money was not used for corporate purposes, and that Murray was interested with Culver as partner or copurchaser of the stock of said company, in pursuance of which the money was loaned or advanced to Culver by him.

Upon the pleadings and proofs, the learned trial judge, sitting by agreement of the parties without a jury, found that the proceeds of the checks for which the notes were given "were used by Culver in an attempt of putting over the deal, and without any benefit derived by the defendant company," and that Culver was the agent of and represented Murray in the transaction. Consequently the company was not liable, and judgment was entered for defendant.

[1] The evidence does not disclose any action by the directors authorizing Culver to execute the notes in question. Regardless of this, however, if the defendant company received the plaintiff's money, and it was used for corporate purposes, as plaintiff contends, as a general proposition of law, defendant cannot avoid payment. The company may not retain the benefit of the transaction and repudiate the burden

thereof, even though the notes were executed without authority. Presbyterian Board v. Gilbee, 212 Pa. 310, 61 Atl. 925; First National Bank of Bangor v. Am. Bangor Slate Co., 229 Pa. 27, 77 Atl. 1100; Hartzell v. Abbvale Mining Co., 239 Pa. 602, 86 Atl. 641.

[2] The law is clear, but the case turns at this point upon a question of fact. Did the defendant company, as constituted before or after the Culver management, receive the benefit of the proceeds of these checks? The check for $5,000, of January 4, 1915, was deposited in the so-called "escrow" account in the Knickerbocker Trust Company. The other two checks, for $5,000 each, on June 11, 1915, and June 14, 1915, were deposited in the Dime Trust & Safe Deposit Company at Shamokin, Pa. This account was subject to the check of Culver alone. The $10,000 deposited in this account was immediately transferred to the "escrow" account in the Knickerbocker Trust Company, and the entire $15,000, so deposited, was paid out in acquiring preferred capital stock in pursuance of the agreement between Corliss and Culver. It was thus merely "washed through" the company's account in the Dime Trust & Safe Deposit Company without benefit to the defendant company.

On the contrary, Corliss testified that the obligations of the company aggregated about $70,000 when the books were closed on May 15, 1914, which amount under the terms of the contract he assumed and paid, but that, when Culver surrendered the mines and management of the company, its obligations had increased to $125,000, a loss of about $55,000 in operating the mines, besides the loss of $150,000 on 300,000 tons of coal, worth 50 cents a ton, which had been removed from the mines during the Culver operation.

Did Culver, as agent or otherwise, represent Murray in negotiating the contract with Corliss, and in the operation of the mines and management of the defendant company generally? The testimony shows that Murray embarked on this enterprise with Culver. It is clear that, in negotiating the contract, Culver did not himself expect to finance the proposition, either in paying for the stock or operating the mines. There were undisclosed persons whom he represented. One of these was Murray. This is admitted both by Culver and Murray. Manifestly, Culver was not operating the mines for the interest of the old stockholders and officers of the company, who were in office at the time the contract was executed, and whose resignations were filed in escrow with the Knickerbocker Trust Company. He was operating this company for those whom he represented in purchasing it. Murray testified that Culver made the terms and conditions of the contract, and he was willing to go in on it with him, and back him to the extent of one-eighth.

In depositing the check of January 4, 1915, for $5,000, from Murray, in the Knickerbocker Trust Company, and in transferring to that company the $10,000 represented by the other two checks from the Dime Trust & Safe Deposit Company, immediately after it was deposited, with which preferred stock was subsequently purch .sed, Culver was carrying out the terms of the contract for himself and associates, including Murray. While, as a fact, the company existed as a

legal entity, yet it had turned its property over to a proposed new company; that is, a new set of men, who had the management of the property, and who were to become the owners of it and operate it under the old name. It was not the old men back of the company who received and used the money in question, but the set represented by Culver. Since he failed to carry out the terms of the contract, and surrendered the property, decreased by about $205,000, it would be both illegal and inequitable to hold the company liable for Murray's money spent by Culver in carrying out the failing enterprise on which Murray had embarked.

The contract executed between Corliss and Culver was properly admitted by the learned trial judge, and the judgment will be affirmed.

TOWNES v. TOWNES.

(Circuit Court of Appeals, Fifth Circuit. February 11, 1921.)

No. 3587.

1. **Vendor and purchaser ⇐44—Evidence held to show fiduciary relation between brothers, parties to contract.**
   In a suit to set aside a contract for the sale of land by complainant to his brother, evidence that the brother had always managed the land for complainant, and that by the contract for sale they entered a partnership for the operation of the land until the sale, *held* to show a fiduciary relationship between the parties.
2. **Vendor and purchaser ⇐44—Burden is on fiduciary, purchasing for inadequate consideration, to show fairness of transaction.**
   In a suit to cancel a contract for the sale of land, where the evidence showed the purchaser stood in a fiduciary relation to the vendor and that the contract price was inadequate, the burden is on the defendants affirmatively to prove the fairness of the transaction, and to show a full disclosure by the purchaser and absence of undue influence, and the fact that such evidence cannot be produced because of the purchaser's death does not make the finding for complainant without support in the evidence.
3. **Vendor and purchaser ⇐58—Contract for partnership and sale of land held interdependent.**
   Where an owner of land, which had been managed for him by his brother, entered into a contract, before leaving for overseas military service, whereby a partnership for the operation of the land was formed between the two brothers, and the owner agreed to sell the land to the other brother at a stated price five years after the date of the contract, the provision for partnership and sale of the land were dependent on each other, so that the failure to perform the partnership agreement, resulting from the death of the other brother, released the owner from his contract to sell.
4. **Contracts ⇐173—Dependency of covenants determined by intention of parties.**
   Whether or not the different provisions of a contract are dependent on each other is to be determined by ascertaining the intention of the parties, and not by the application of technical rules of law.

Appeal from the District Court of the United States for the Northern District of Mississippi; Edwin R. Holmes, Judge.

Suit by Robert E. Townes against Evelyn Pope Townes, as guardian of Charlie Townes, a minor, and individually, to set aside a contract for the sale of land. Decree for complainant, and defendant guardian appeals. Affirmed.

A. F. Gardner, of Greenwood, Miss., E. M. Yerger, of Clarksdale, Miss., and G. T. Fitzhugh, of Memphis, Tenn., for appellant.

William H. Fitzhugh, of Memphis, Tenn., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The complainant, Robert E. Townes, a citizen of Tennessee, filed a bill in equity in the United States District Court for the Northern District of Mississippi against Evelyn Pope Townes, the widow of Charles L. Townes, Jr., deceased, and their minor child, Charlie Townes, born January 25, 1919, both alleged to be citizens of Mississippi, praying to have set aside, as a cloud upon the title thereto, a contract entered into on July 12, 1917, between himself and his brother, Charles L. Townes, which provided, among other things, for a future sale to be made by said Robert E. Townes to said Charles L. Townes of certain property acquired by the said Robert as a devisee under the will of his father, C. L. Townes, Sr.

The record showed that Charles L. Townes, Sr., died testate in 1910 and by his will divided his real estate consisting of cotton plantations among his widow and their three children, to wit, Robert E. Townes, Charles L. Townes, and another child, Mary Harper Townes, now Mrs. N. Hill Martin. At the death of the father the son Charles was 21 years of age and his brother Robert 7 years younger. Charles was very mature for his years; Robert an impulsive boy. Charles took charge of and managed, exclusively, the entire property. From the time the plaintiff was 8 years old he had resided at Memphis, Tenn. The planting operations of Charles were successful, and resulted in a considerable income for the complainant. Complainant went to Cornell University, and after graduation went into business as a clerk in Memphis, Tenn. He was disposed to be extravagant, and to spend much more money than his brother Charles thought proper, and Charles frequently remonstrated with him on this subject. It appears, however, that he did not exceed the sum derived from his income from his lands, and that a substantial sum to his credit was at all times in the hands of Charles. While Robert's mother was his guardian, under the will of his father, she has been an invalid for several years, and his affairs were managed by his brother Charles.

In the spring of 1917, complainant, being 21 years of age, volunteered for service in the war against Germany, joining the Aviation Corps of the United States Army, and was ordered to Rantoul, Ill., for training. It appears that in June, 1917, Charles went to Illinois, to Rantoul, and presented to his brother a contract creating a partnership for the planting of said land, together with the adjoining lands of Charles, which was identical in every respect to the contract in this case, except that it recited that in consideration of the advantages and benefit to accrue to him from the partnership agreement the said Robert gave

to said Charles an option to purchase said lands at any time after June 25, 1920, and prior to June 25, 1922, at the sum of $125,000, payable in the same manner as was provided in said contract of July 12, 1917. Robert did not then sign it, saying he wished to consider it. He afterwards brought it back with him to Mississippi signed, but did not deliver it to his brother, nor does it appear in the evidence that the brother was informed that it had been signed.

About the 12th of July, Robert returned to Memphis and made a trip to Mississippi to visit his brother. While there he executed, on July 12, 1917, a contract creating a partnership between himself and Charles from January 1, 1917, for the term of five years, for the operation of complainant's lands, together with certain other adjoining lands of said brother—the entire management and all powers of the partnership being vested in his said brother; said contract further reciting that for a valuable consideration, then receipted for, he agreed to sell and to execute and deliver and to give a good and lawful warranty deed on June 15, 1922, to said land and to all the personal property of all sorts situated thereon or owned in the partnership agreement for the consideration of $125,000, $25,000 to be paid on said 15th of June, 1922, and the balance of said consideration of $100,000 in 10 annual equal installments from January 1, 1924, to January 1. 1933, inclusive, with interest from June 15, 1922, at 6 per cent. per annum, payable annually, the plaintiff to retain the usual vendor's lien upon the property conveyed, and providing for the right of said C. L. Townes, to pay off any or all of said notes at any time.

The plaintiff averred that the property described was worth at the time $275,000; that no explanation was made to him of the value of the property; that plaintiff signed the contract without knowledge of the value of the personal property, and with only a vague idea of the value of the land, because his brother not only requested his signature, but accompanied his demand with a threat that he would cease operating complainant's property unless this agreement was made. The plaintiff shortly thereafter was sent for overseas service to France, and was serving there when his brother Charles died on October 15, 1918.

It appeared that subsequent to the death of said Charles L. Townes the widow, Mrs. Evelyn Pope Townes, executed to complainant an instrument by which she granted, bargained, sold, released, quit-claimed, and conveyed to the said Robert Townes all of her rights to purchase said property under said contract of July 12, 1917. It was admitted on the trial that the release was executed, and that the averment of her answer denying its execution was inadvertently inserted.

The evidence in the case showed that the deceased, C. L. Townes, was very mature for his years, of a dominant disposition, and an excellent business man; that he was buying up lands in the vicinity; that in June, 1913, he had purchased the lands derived by his sister under her father's will, with all personal property thereon, for $95,000; that on January 1, 1917, he had purchased 826.56 acres from Mrs. Avery for the sum of $82,125. There was evidence that this land was inferior to the Robert Townes land. Evidence was introduced to

the effect that the land was worth from $150 to $200 per acre. No particular intimacy between the two brothers was shown. It was shown that Robert was a free spender, and was constantly after his brother for money, the proceeds of his rents of the property, and that the brother Charles was constantly remonstrating with him that he was spending his money foolishly.

The District Court, before whom the case was tried, rendered a decree declaring said contract null and void for the reasons set out in the bill, in so far as it undertakes to obligate the complainant to sell the lands and personal property described in said contract, and revoking said contract as a cloud upon complainant's title to said property. The appellant insists that the decree is without support in the evidence; that no confidential relation between the parties is shown, and no such inadequacy of price as to raise a presumption of fraud. The appellee insists that the decree is correct; that the evidence was sufficient to show a confidential relationship between the parties; that the agreement to sell was for an inadequate price; that this made a prima facie case entitling the complainant to a cancellation of the agreement, and put the burden on the defendant to show the entire circumstances of the sale, and to affirmatively establish that Charles had fully disclosed all facts in his knowledge respecting the property and its value, and had not exercised any undue influence to induce the making of the contract, and that the absence of any proof as to what transpired between the parties rendered the contract liable to be disavowed and set aside by complainant.

There is no suggestion in the record that there was any desire on the part of Robert to sell. It indicated that the agreement for the sale was due to the insistence of Charles, and that, whether the execution of the agreement to sell was made a condition to the agreement on the part of Charles to run the place under the partnership agreement for five years, such agreement was the inducement to the entering into the agreement to sell the place at the expiration of said partnership term. Charles died, as stated, on October, 15, 1918, a little over a year after the execution of said agreement. The partnership agreement, of course, came to an end by the death of such partner and the performance of the same, to wit, the management of said place during said period by the personal efforts and skill of said Charles L. Townes, became impossible.

[1] While the facts in the case are meager as to what transpired between the brothers, one being dead and the other being rendered incompetent as a witness, there is enough to sustain the finding of the lower court as to the existence of a fiduciary relationship between the parties. They were not only brothers, but partners in respect to the farming operations conducted on these lands, and in this partnership Charles had exclusive control; the younger brother being absent and exercising no share in the management of the partnership affairs. There was evidence tending to show that Charles had become, as to this property and its management at least, the head of the family; also that he was desirous of becoming the exclusive owner of the lands. The proof is also sufficient to sustain the finding that the price named in the agreement was much less than the then market value of the property.

[2] The finding of the District Court as to the confidential relations of the parties and as to the inadequacy of price, being warranted by the evidence, makes a prima facie case of invalidity of the transaction, even had this agreement to make a sale been consummated by the execution of a deed, and puts the burden of proving its fairness, and of affirmatively showing a full disclosure of all facts known to him, on the vendee, and an absence of any undue influence to induce the agreement to sell. The absence of this proof in this case, though not possible because of the death of Charles, leaves the case where the lower court cannot be said to have found for the complainant without evidence to support the decree. Pomeroy, Eq. Jur. (4th Ed.) §§ 955, 956; Brooks v. Martin, 2 Wall. 70, 17 L. Ed. 732.

[3] There is also another reason why we do not think the decree in this case contains reversible error. The contract is not an executed one, by which a sale of this property has been accomplished, but an executory contract, providing for the management for a term of years, during which no title, legal or equitable, was vested by Robert in Charles, with an agreement that at the expiration of the term one partner will sell to the other on terms involving the future conveyance of the land on a long credit for the greater part of the purchase price. The proposed agreement for the partnership with an option to buy recited that, in consideration of the "advantages and benefits" secured by Robert by the partnership agreement, the option to purchase was given. The agreement entered into, after providing for the same partnership, recited that "for a good lawful and valuable consideration unto the said Robert Edward Townes, the receipt of which is hereby acknowledged," the agreement to sell on June 15, 1922, was made. The only consideration then received for the making of this agreement to thereafter sell appears to have been the "advantages and benefits" derived from securing the partnership agreement providing for the management of this plantation for a term of years by the peculiar skill of Charles.

"Primarily the question whether a contract is entire or severable is one of intention, which intention is to be determined from the language which the parties have used and the subject-matter of the agreement. A contract may both in its nature and terms be severable and yet rendered entire by the intention of the parties." 13 Corp. Jur. p. 562.

[4] As the Supreme Court of Ohio has said, quoting from the opinion of Parker, J., in Johnson v. Reed, 9 Mass. 83, 6 Am. Dec. 36:

" 'They [the modern English and leading American decisions] show a disposition on the part of the Judges to break through the bonds which some of the old cases had imposed upon them and to adopt what Lord Kenyon, in one of the cases, calls the common sense doctrine—that the true intention of the parties, as apparent in the instrument, should determine whether covenants are independent or conditional instead of any technical rules of which the parties were totally ignorant, and the application of which would in most cases utterly defeat their intention.' This is, in our judgment, the proper rule of construction." The Wellsville v. Geisse, 3 Ohio St. 333, 337. See also Lowber v. Bangs, 2 Wall, 728, 736, 17 L. Ed. 768; Gray v. Hinton (C. C.) 7 Fed. 81, Coos Bay Wagon Co. v. Crocker (C. C.) 4 Fed. 577; Sixta v. Ontonagon Valley Land Co., 157 Wis. 293, 147 N. W. 1042, 1045.

The party thereto who was to contribute his personal skill and peculiar knowledge of the property to its management, and to whom this credit was to be extended, died intestate. We cannot but think that the contract for the management of the place until June 15, 1922, and to then execute a deed, is an entire one, and that the death of Charles rendered impossible the carrying out of an essential part of the contract by which this agreement to sell in the future was made, and releases Robert from the obligation to sell. Homan v. Redick, 97 Neb. 299, 149 N. W. 782, L. R. A. 1915C, 601.

We conclude that, in view of all the facts of the case, the decree of the court declaring the contract to be now null and void contains no reversible error, and the decree is therefore affirmed.

HAWAIIAN PINEAPPLE CO., Limited, v. SAITO et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3374.

1. **Appeal and error ⇐84(4)—Decree of reversal by Supreme Court of Hawaii held appealable.**
   A decree of the Supreme Court of Hawaii, reversing a decree of the circuit court and remanding the cause, with directions to dismiss the bill, *held* appealable to the Circuit Court of Appeals.
2. **Injunction ⇐59(1)—Violation of contract for personalty may be enjoined, if legal remedy is not adequate.**
   Equity has jurisdiction to enjoin violation of a contract relating to personalty, where special circumstances are alleged showing that the remedy at law is not adequate.
3. **Sales ⇐68—Contract for sale of pineapples to be grown construed; "present holdings."**
   A contract for the purchase by complainant of all the merchantable pineapples that might be grown by defendant during the next four years "on his present holdings at Leilahua or elsewhere on the island of Oahu or that he may own or control on the island of Oahu," made on a printed blank prepared by complainant, leaving only the word "Leilahua" to be inserted, *held* to obligate defendant to sell only such pineapples as might be grown by him on his "present holdings," whether at Leilahua or elsewhere on the island, and such as he might then own or control on the island, and not to cover pineapples grown by him on other holdings subsequently acquired.

Appeal from the Supreme Court of the Territory of Hawaii.

Suit in equity by the Hawaiian Pineapple Company, Limited, against Masamari Saito and Libby, McNeill & Libby, of Honolulu, Limited. From a decree of the Supreme Court of Hawaii, reversing a decree of the circuit court in its favor, complainant appeals. Affirmed.

Peters & Smith and Frear, Prosser, Anderson & Marx, all of Honolulu, T. H., and Edward Hohfeld, of San Francisco, Cal., for appellant.

Thompson, Cathcart & Lewis and Barry S. Ulrich, all of Honolulu, T. H., and Pillsbury, Madison & Sutro and L. G. McArthur, all of San Francisco, Cal., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. On May 18, 1916, the appellant was engaged in the business of canning pineapples in the Hawaiian Islands. On that date a contract was entered into between the appellant and the appellee Saito for the sale of pineapples by Saito to the appellant for a period of four years therefrom. At that time Saito was raising pineapples upon 150 acres of land on the island of Oahu, which he held under leases. Later in the same year on July 1 and August 1, Saito acquired two other leasehold interests, upon which he grew and produced pineapples. All the pineapples which he produced, both upon his prior and subsequently acquired holdings, were sold and delivered to the appellant until about the end of January, 1918, when he ceased to deliver to the appellant the pineapples grown upon the subsequently acquired leaseholds, and soon thereafter he entered into a contract by which he agreed to sell and deliver those pineapples to the appellee Libby, McNeill & Libby. It was to enjoin such sale and delivery to Libby, McNeill & Libby that the present suit was brought by the appellant in the circuit court of Hawaii. That court sustained the appellant's contention and enjoined the further sale of such pineapples to Libby, McNeill & Libby. On appeal to the Supreme Court the decree of the circuit court was reversed, and the cause was remanded with instructions to dismiss the bill. From the decree of the Supreme Court the present appeal is taken.

[1] The appellee raises the question of the jurisdiction of this court to entertain the appeal, and cites Rumsey v. New York Life Ins. Co. (C. C. A.) 267 Fed. 554, in which we held that a decree of the Supreme Court of Hawaii, remanding a case for such further action compatible with the decision as might be necessary, was not a final decree, and was not appealable. In the present case the Supreme Court ordered that the decree appealed from be vacated and set aside, and that the permanent injunction be dissolved, and that the lower court be instructed to dismiss the complainant's bill of complaint filed therein, "and to take such further and other proceeding prior or subsequent to the dismissal of the bill as may be consistent with the opinion of this court in said cause." We think the decree was final and appealable. There was no proceeding which the circuit court could take prior to the dismissal of the bill, and after the dismissal of the bill it is equally plain that no proceeding could be had pertaining to the merits of the controversy.

[2] The appellee brings in question also, the jurisdiction of equity to entertain the cause of suit, contending that there was a complete and adequate remedy at law. It is true that equity will not decree the specific performance of a contract which relates to personalty in a case where compensation in damages furnishes a complete and satisfactory remedy. But the bill sets forth special circumstances, the allegations of which it is unnecessary here to repeat, which show that there was no adequate remedy at law, and we think the case comes clearly within the principles announced in Curtice Bros. Co. v. Catts, 72 N. J. Eq. 831, 66 Atl. 935, Gloucester, etc., Co. v. Russia Cement Co., 154 Mass. 92, 27 N. E. 1005, 12 L. R. A. 563, 26 Am. St. Rep. 214, Vail v. Osburn, 174 Pa. 580, 34 Atl. 315, White Marble Lime Co. v.

Consolidated Lumber Co., 205 Mich. 634, 172 N. W. 603, and Mutual Oil Co. v. Hills, 248 Fed. 257, 160 C. C. A. 335.

[3] The provisions of the contract which are pertinent to the controversy are the following:

"The Pineapple Company agrees that during the term of four years beginning May 1, 1916, and ending April 30, 1920, it will handle and buy under the conditions as hereinafter detailed, and with such exceptions as are hereinafter stated, all the merchantable smooth cayenne pineapples that may be grown by the planter on his present holdings at Leilahua or elsewhere on the island of Oahu, or that he may own or control on the island of Oahu.

"The planter agrees that he will deliver to the Pineapple Company, under the terms and conditions and with the exceptions hereinafter contained, all the merchantable smooth cayenne pineapples that he may grow at Leilahua or elsewhere on the island of Oahu, or that he may own or control on the island of Oahu, during the term stated."

"It is mutually agreed that the Pineapple Company will furnish f. o. b. railroad cars at Leilahua, Oahu, lug boxes for the delivery of the fruit, and that the planter will deliver said fruit f. o. b. railroad cars at Leilahua, Oahu, in said lug boxes, and that said merchantable pineapples will be delivered in such condition of ripeness as may from time to time be required or designated by the said Pineapple Company."

It is the contention of the appellant that Saito was obligated to sell, not only the pineapples which he grew on the land which he had at the time when the contract was made, but also all that he might grow upon any subsequently acquired lands during the term of the contract. The appellees, on the other hand, contend that the contract required Saito to sell and deliver only the pineapples which he might grow during the period of the contract on the lands which he had at the date of the contract. The appellant draws particular attention to the words "elsewhere on the island of Oahu," as indicating that the contract was to cover pineapples grown on lands other than Saito's "present holdings at Leilahua," and contends that the words "that he may own or control on the island of Oahu" import futurity into the obligations, and indicate that the contract referred to not only the then holdings of Saito, but to holdings which he might afterwards acquire, and it is argued that the words "present holdings" may be added to the word "Leilahua" without changing the meaning or scope of Saito's obligations, and that the sentence should read:

"Pineapples he may grow at Leilahua on his present holdings or [which he may grow] elsewhere on the island of Oahu, or pineapples that he may own or control on the island of Oahu during the term stated."

At the time when the contract was made the appellant was engaged in raising pineapples upon about 6,000 acres of its own land, and it agreed, under contracts made in the early months of that year, to purchase from various independent growers the product of about 1,000 acres in addition to its own. The contracts with the independent growers were made on printed forms prepared by the appellant, and the only blanks left to be filled in the paragraphs of the contract which have been quoted above were blanks for the names of the places where the holdings were situated, so that in Saito's contract the only blanks were the blanks where the word "Leilahua" was subsequently

inserted. The words "or elsewhere on the island of Oahu, or that he may own or control on the island of Oahu," were in the printed form of all such contracts, and they evidently were not employed with any special view to the situation of Saito as a pineapple grower. The contract, it may be conceded, is not free from ambiguity. But the ambiguity is of the appellant's own creation. The appellant prepared the printed forms of the contract, with blanks thereafter to be filled in, and took them to Saito to obtain his signature thereto. Upon well-settled principles, the language of the contract is to be construed most strongly against the appellant.

The first paragraph above quoted expressed the appellant's undertaking. Its most reasonable construction is that it limited the obligation of the appellant to buy only the pineapples to be produced by Saito on the holdings which he then had at Leilahua or elsewhere on the island of Oahu, or pineapples that he then owned or controlled, and that nothing but Saito's "present holdings" were contemplated. The purpose of the words "or that he may own or control on the island of Oahu" seems to have been to forestall the contingency that Saito might not himself grow pineapples on his "present holdings," but might let to others the right to raise them on shares. It is to be observed that nowhere in the contract did Saito obligate himself to grow any pineapples on his holdings or elsewhere. The contract left him free to transfer his holdings or to sublet the same. It is to be observed, also, that at the time when the contract was made, Saito had been for several years a pineapple planter, and there is nothing in the record to show that then, or at any time before or after that date, he was a pineapple broker, or engaged in the business of buying and selling pineapples; and the reasonable construction of Saito's undertaking, in view of the circumstances and the terms of the contract, is, we think, that Saito agreed to sell and deliver pineapples that might be grown by him on his "present holdings" at Leilahua or on his present holdings elsewhere on the island of Oahu, and pineapples that he then might own or control on his present holdings at Leilahua or on his present holdings elsewhere on the island of Oahu.

The appellant contends that a contemporaneous and mutual construction of the contract is found in the fact that Saito up to the end of January sold and delivered to the appellant, not only the pineapples which he produced on his holdings which he had at the time of making the contract, but the pineapples produced on one of the holdings which he thereafter acquired. But to this it is to be said, first, that the pineapples so produced on said subsequently acquired holding were delivered with the others, so far as the evidence shows, without any express understanding between the parties, or discussion as to the rights of the parties; and, second, that Saito had on August 10, 1916, borrowed from the appellant $6,000, and to secure the same executed a mortgage on all of his holdings, including those which he acquired after the date of the contract, and the money which became payable to him for pineapples produced on all of his holdings was applied to the satisfaction of the note and mortgage, which was finally paid on September 10, 1917, and that after that date the pineapples produced on his

after-acquired holdings, which Saito sold and delivered to the appellant, were only the remnant of the 1917 crop on a 20-acre tract.

Of greater value, as showing contemporaneous construction, is the fact that after Saito's signature to the contract had been obtained, and before it was signed by the appellant, there was written thereon by one of the representatives of the appellant, below the place for the signatures:

"Approximately 150 acres. Approximately 1,500 tons (class B 200 tons)."

Thereby the appellant placed a construction upon its agreement, and indicated what the contract entitled it to receive from Saito. The words were written, not only on the copy which the appellant retained, but also upon that which it gave to Saito.

A provision of the contract which throws light on its meaning is that which requires Saito to deliver "said fruit f. o. b. railroad cars at Leilahua, Oahu." It shows that in the contemplation of the parties all pineapples produced by Saito were to be shipped at Leilahua, an obligation that might become wholly incapable of performance as to pineapples raised elsewhere on the island of Oahu.

Another fact to be noted is that, so far as the evidence goes, neither of the parties to the contract at the time when it was entered into contemplated that Saito would increase his holdings of land, or produce pineapples in any greater quantity than those which he was then producing. It would be unreasonable to suppose that the appellant intended to bind itself to take at a specified price all pineapples which Saito might within the coming four years produce or control on the island of Oahu. If such had been its intention, it is reasonable to assume that the appellant would have expressed the same without ambiguity in the contract.

The decree is affirmed.

ALASKA TREADWELL GOLD MINING CO. v. MUGFORD.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3492.

1. **Mines and minerals ⇐118—Mining company held liable for injuries from defect in club house approach on government land.**
   A mining company, which built a club house with a platform on piles in front of it, which was used as a public passageway, and assumed and exercised authority and control over it and its repair, although the title to the ground and the street was in the United States, *held* liable for an injury to a person who fell through a hole in the platform, due to a rotten and defective plank, while passing over it in the dark during an entertainment in the club house.

2. **Negligence ⇐136(27)—Contributory negligence, in failing to avoid known danger in walk, held for jury.**
   Where plaintiff was injured by falling through a hole, caused by a broken plank, in a platform built and maintained by defendant and used as a public way, the fact that she knew generally that the platform was

not in good condition, though she did not know of the hole, *held* not to charge her with contributory negligence as matter of law, but that the question was for the jury.

3. **Negligence ⊜62(3)—Concurring act of another does not relieve from liability.**

Where plaintiff was injured by falling through a platform maintained by defendant for use by the public, where a rotten and defective plank had been broken, leaving a hole, defendant *held* not relieved from liability by the fact that the plank was broken without its knowledge by a third person, who jumped on it; defendant's negligence in leaving the unsafe plank in the platform being the proximate cause of the injury.

4. **Appeal and error ⊜231(9)—General objections to instructions on damages insufficient.**

A general objection to a charge on the measure of damages *held* insufficient to authorize review, where counsel refused to state any specific ground.

In Error to the District Court of the United States for Division No. 1 of the District of Alaska; Robert W. Jennings, Judge.

Action at law by May Mugford against the Alaska Treadwell Gold Mining Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Action in damages for personal injuries sustained by plaintiff in falling through a hole in a plank platform, which rested on piling, in front of a club house controlled and operated by the Alaska Treadwell Gold Mining Company, for the benefit of the employés of that company and those of two other mining companies whose properties adjoined the Treadwell property. Verdict for plaintiff. Defendant brought writ of error. There was evidence to show these facts:

The Treadwell Company at its expense built a club house, and a voluntary association of its employés, known as the Treadwell Club, was organized for general recreation purposes. The company collected a fixed sum from each member of the association, with the intention of reimbursing itself for the moneys advanced. Officers of the association were chosen from among the members, but the company acted as banker for the club, and employed and paid a surface inspector, whose duty it was to inspect platforms and sidewalks. In front of the building, approximately 50 feet away, there was a railroad track, and running along the track, and parallel with it, was a board platform set on piles. This was used as a thoroughfare, and for ingress and egress to and from the club house. The building was built on the tide flat, below the line of ordinary high tide, a short distance back from the walk, and practically parallel with it. One end of the building was approximately 20 feet from the walk; the other end somewhat farther. Between the walk and the building there was a plank platform built on piling.

On the night of the accident the Treadwell Fire Department, a voluntary organization, was giving a dance at the club house, at which plaintiff and her brother were guests. About midnight, while she and her brother were going from the building, plaintiff, not knowing of any hole in the boards, followed others directly ahead of her, and in stepping down from the doorstep to the platform fell into a hole to the beach, 10 or 12 feet below, and was injured. There was evidence that the hole was made during the same evening by one of the men guests, who, when leaving the club house, made a running jump, and came down on the board, and cracked it. Immediately afterwards other guests in leaving stepped on the cracked board, and it broke, leaving the hole through which plaintiff afterwards fell. There was no light at the door through which plaintiff and her brother went out. Plaintiff testified that she was more or less familiar with the walk, and had frequently been to the club house; that prior to her injury she had observed the "rotten condition" of the whole platform; that there were little patches on the boards that were

rotted, and depressions in boards that looked as if they were ready to break; that she had not seen any repairs made during three years before the accident. The plank upon which plaintiff stepped was broken and unsound, and "the break appeared crumbling and rotten." Some patches had been put upon the platform since it had been built, 10 or 12 years before, and the evidence tended to show that because of the rotten condition of the plank it broke when some one jumped upon it before plaintiff left the ball room. The plank was 3 inches thick and from 5 to 6 feet long, was old, and, while there had been patches or repairs made in various places of the platform, the broken plank had not been replaced since the platform was constructed.

Hellenthal & Hellenthal, of Juneau, Alaska, and Curtis H. Lindley, of San Francisco, Cal., for plaintiff in error.

Roden & Dawes, of Juneau, Alaska, and A. H. Ziegler, of Ketchikan, Alaska, for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] It is argued that the court should have directed a verdict for the defendant. One ground urged is that, the dance having been given by the fire department and Miss Mugford having been a guest of the fire department, she was a licensee as to the Treadwell Club and the Treadwell Mining Company. It is also said that the evidence did not show that the walk proper was a public highway, or that the platform which connected the walk with the club house was a public highway. Neither ground is well taken, for the testimony was that the general superintendent of the Mining Company employed the manager of the club building, that the walk upon which people went in going into and coming out of the club house was used as a thoroughfare, that the defendant company made repairs on the thoroughfare, that at different times its employés repaired the walk in front of the club, and that the assistant superintendent of the Mining Company gave instructions to the manager of the club. The evidence justified the conclusion that it was a part of the duty of the superintendent to supervise generally the surface work, and that with the head carpenter he inspected the platform and directed a number of repairs to be made. There was also the evidence of the injured woman that, soon after the accident, she talked with the assistant superintendent of the defendant company, and that, after explaining to him how it happened, he replied that he had ordered the place fixed and thought it was. The court was right in adopting the theory that, if it were satisfactorily established that the platform was used as a public passageway and that the Mining Company had assumed and exercised authority and control over it and the repair of it, there arose a duty on the part of the company to the public and such duty became coextensive with the inducement or implied invitation. Shearman & Redfield on Negligence, § 706; Rachmel v. Clark, 205 Pa. 314, 54 Atl. 1027, 62 L. R. A. 959; Plummer v. Dill, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.

With respect to responsibility for the control and supervision over the platform and street, there was evidence that, although the fee-simple title to the surface of the street was in the United States government, the Mining Company had possession of the surface, had

erected its buildings thereon, and connected them with the town of Douglas by means of streets, one of which passed in front of the club house and was used by the public. The agents of the Mining Company exercised supervision and care over the portion of the street in front of and about the club house, and when a board looked as if it were decayed the agents of the company would test it, and repair it, if necessary. It also appeared that it was the duty of an employé of the defendant to inspect the platform, walks, and all surface work, and that he performed such duties from time to time. There was evidence which tended strongly to show that defendant did not fulfill its obligation by keeping the premises in reasonably safe repair. Witnesses said that the plank which broke was rotten, and that since the platform had been built, some 10 or 12 years before the accident, it had been repaired and patched in places, but this particular plank had not been replaced. Whether the plank would have broken, had it not been in the rotten condition in which witnesses testified it was, became a question for the jury.

[2] It is said that even though the platform was owned and maintained by the Mining Company and used as a thoroughfare, and that even if plaintiff below was rightfully there, she was guilty of contributory negligence. Miss Mugford testified that she knew generally that the platform was in poor and dilapidated condition, but that she knew nothing of the hole, and was not looking for one at the point where she stepped off the platform. It cannot be said that she was obliged to abandon the use of the walk merely because she knew in a general way that the street was generally in bad condition. Of course, she was obliged to use a care related to the dangers known to her, or of which she ought reasonably to have known; but she did not know of the hole at the point, and it could not be said she ought to have known of it. The court properly declined to say as a matter of law that she was culpable, and submitted the question to the jury. Bassett v. Fish, 75 N. Y. 303.

[3] It is next urged that, even if the defendant company were negligent with respect to the repairs of the platform, something unusual happened in the nature of an independent cause, without which the accident would not have happened, and that the proximate cause was the fact that two men had jumped upon the plank, and had broken it, and that the Mining Company, not being to blame, cannot be held responsible. But the rule is well settled that, where an injury has resulted because of the concurrence of several acts or conditions, one of which is the wrongful act or omission of a defendant, and thus the injury results, but would not have been produced but for such wrongful act or omission, then such act or omission is the proximate cause of the injury, provided the injury be one which might reasonably have been anticipated as a natural consequence of the act or omission. Shearman & Redfield on Negligence, § 346; Ring v. Cohoes, 77 N. Y. 83, 33 Am. Rep. 574; Campbell v. Stillwater, 32 Minn. 308, 20 N. W. 321, 50 Am. Rep. 567.

Among certain instructions complained of was one upon the liability of an owner of a highway. The court in part said that in this

case, if the way became public by consent or invitation generally held out by the Mining Company, then the duty of the Treadwell Company was to use ordinary care to see that the highway was reasonably safe for the purposes of a highway. Inasmuch as the evidence tended to show that the space or place about which the accident occurred was used as a highway, we fail to find error in the instruction as given.

The court also charged that the defendant would not be held "to warrant the plank to be strong enough to bear loads of greater weight than it was reasonably to be anticipated would or might be put upon it in connection with or incidental to its use." In criticism the plaintiff in error argues that the court erred in implying that the defendant was called upon to "warrant" the platform. But, as the court throughout its instructions carefully charged that the law imposed no greater obligation upon the defendant than to use ordinary care in keeping its walks in reasonably safe condition, surely the use of the word "warrant" could not have been misunderstood by the jury.

The court instructed that if the jury found from the evidence that the defective condition of the platform, if found to be defective, had existed for such length of time that the agents or officers of the company, using reasonable care and diligence, would have known about it, then "that is the same as if they did actually know about it." It is said that the court should have defined the circumstances under which there could be such a thing as constructive knowledge, if such knowledge could exist at all. The principle, however, is a familiar one that actual notice of the defective and dangerous condition of a street upon the part of a city is not necessary to be shown in order to hold it liable, for if the agents of the city who are charged with the supervision and control of the streets could, by exercise of reasonable care and diligence, have known of the defective condition, liability may follow. Dallas v. Moore, 32 Tex. Civ. App. 230, 74 S. W. 95. But as the record is made up the plaintiff in error cannot complain, for there was no request for a further instruction upon the point now made.

[4] Upon the measure of damages the court instructed that if, from the evidence, defendant was found guilty of negligence, and that plaintiff was not guilty of contributory negligence, then she was entitled to recover such damages "as would fairly and reasonably compensate her for the injury which she has suffered, if any," and the court enumerated, as elements of damages, pain and suffering, if any, injury to health, to nervous system, and to general condition, as may have been shown from the evidence, but said there could be no damages by way of punishment or smart money. After the reading of the charge, plaintiff in error "objected" to that portion which related to "the measure of damages as not stating the law upon the subject." The court asked counsel for the defendant "in what respect" he maintained that the instruction on the measure of damages was incorrect, to which counsel replied, "That is just a general exception to that." The court then said, "You won't point out anything," to which counsel replied, "No, I think not." Counsel, having declined to state any specific ob-

jection to the statement of the law as made by the trial judge, is not in a position to contend that there was error in the law as laid down.

It is argued that, in the light of the evidence, the verdict must have been arrived at as a result of passion and prejudice. But, if the evidence of plaintiff below was credible, she was seriously hurt. The accident occurred more than three years before the trial, and there was testimony that, although she had worked and supported herself before the injury, she had not been able to earn any money afterwards, that her nervous system had been badly shattered, that four of her ribs had been disconnected from the vertebræ as a result of the injury, that she had lost in weight, and that because of the dislocated ribs she suffered much pain, through irritation of the nerves in the region of the ribs.

We find no error, and affirm the judgment.

Affirmed.

KRYSIAK v. PENNSYLVANIA R. CO. et al.

(Circuit Court of Appeals, Third Circuit. February 7, 1921.)

No. 2574.

1. Commerce ⊜27(5)—Servant on leaving work, held not employed in "interstate commerce."

An employé working in an ash pit in railroad yards, cleaning engines used in both interstate and intrastate business, who on leaving his work, instead of taking a stairway to the street provided by the railroad company, for his own convenience walked across the yard and tracks, as other employés did, but following no defined way, and was struck and killed by a train on a main track, *held* to have ceased his employment in "interstate commerce," within the meaning of Employers' Liability Act, § 1 (Comp. St. § 8657), when he left his work and deviated from the way provided for his departure.

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

2. Master and servant ⊜137(4)—Railroad not under duty to give warning to volunteer in yards.

A railroad company *held* to owe no duty of warning to an employé voluntarily crossing a main track through its yards, not in the course of his employment and at a place where there was no recognized crossing, and not chargeable with negligence for failure to give such warning, which rendered it liable for injury to such employé, where he was not seen by those operating the train which struck him.

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

Action at law by Wladyslawa Krysiak, administratrix of the Estate of Adam Krysiak, against the Pennsylvania Railroad Company and Walker D. Hines, Director General of Railroads. Judgment for defendants, and plaintiff brings error. Affirmed.

Hershenstein & Finnerty, of Jersey City, N. J. (Leonard F. Fish, of New York City, of counsel), for plaintiff in error.

Albert C. Wall and John A. Hartpence, both of Jersey City, N. J., for defendants in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Krysiak, an employé of the Pennsylvania Railroad Company, was run down and killed by a train on its main line of tracks in Jersey City, within yard limits. In this action, brought under the Federal Employers' Liability Act (Comp. St. §§ 8657–8665) his administratrix charged the defendant with negligence in failing to provide its servant with a reasonably safe place in which to work and in operating its train at great speed without warning him of its approach. The defendant had judgment on a directed verdict. By this writ the plaintiff brings the judgment here for review on the two grounds upon which the verdict was directed: First, that the decedent was not employed in interstate commerce at the time of his injury; and, second, that the plaintiff failed to prove negligence on the part of the defendant.

[1] The facts out of which these questions arose were briefly these: Krysiak was at work during the night as an engine fire-cleaner in an ash-pit. His employment, being upon engines used in both interstate and intrastate commerce, was concededly interstate in character. Instead of ascending a near-by stairway leading to a street which the defendant had provided for the safety of its employés on leaving their work, Krysiak, on leaving his night's work, pursued a course, for his personal convenience, across the yard tracks and main tracks of the Railroad Company. The earth thereabout was packed down by the feet of many employés, who were in the habit of leaving the yard in any direction they chose, but it was not shown that there was a beaten pathway across the tracks suggestive of invitation or permissive way.

It was early in the morning; the day was dark and foggy. Krysiak stepped between the rails of one of the main tracks and was struck by a train coming from behind an obstruction at a rapid though not unusual rate of speed without giving warning.

At the trial, no issue was joined on the plaintiff's allegation of negligence (within its ordinary meaning) that the defendant failed "to provide a reasonably safe place for the plaintiff's intestate to carry out his employment," for it was not disputed that the defendant had not only provided him with a safe ash-pit in which to work, but had also provided him with a safe exit from his place of work. The plaintiff, however, relied upon the averment as tendering an issue of negligence, not within its literal meaning, but within her contention that in leaving the defendant's yard at the close of his night's work Krysiak was still engaged in his employment in the sense that he was but discharging a duty of his employment and was but pursuing a necessary incident to his work which partook of its interstate character, and that his injury, while so employed, brought him within the Act under the rule laid down in N. C. R. Co. v. Zachary, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159, and Erie

R. Co. v. Winfield, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662.

In asking the trial court—and later this court—to apply the law of these cases to the case at bar, the plaintiff seeks to extend the law one step farther than the rule has gone. In the Zachary and Winfield Cases the injured employés were still about their employer's business when leaving their work and their departure was necessarily incident to their work and necessarily partook of its character. But here, the employé declined to take the safe way provided for him on leaving his work—that is, he declined to take his departure and thereby complete his employment in the way provided—but departed by another way more convenient to him in following his own affairs.

We are particular to note just here that we are not passing on a case where an employé, leaving employment in interstate commerce, selects one of several more or less dangerous means of exit from his place of employment because his employer had provided him no safe means; but we are passing on a case where the employer had provided a safe way out and the employé, ignoring it, selected a dangerous way. At that moment, we think, Krysiak ended his employment and lost the status of an employé in interstate commerce. Later, when he was killed, he was not engaged in his employer's work, or in an incident to it, but was engaged in his own private concerns.

We are therefore of opinion that the learned trial judge committed no error in holding that the decedent when killed was a mere volunteer on the defendant's tracks.

[2] This finding materially alters the remaining question of negligence and reforms it into an inquiry as to what duty the defendant owed one in the relation of volunteer, as distinguished from that of employé under the facts of the case, and in what respect did the defendant violate such duty. The negligence charged against the defendant was that it operated a train on its main line of tracks through its yard without giving warning of its approach and without providing for regular warning by rule. There was nothing shown in the place of the accident in the way of street crossing or other thing which imposed upon the defendant railroad company a duty to provide for regular warnings, except, as the plaintiff contends, that many yard employés were in the habit of crossing the tracks, here and elsewhere, and the fact that the defendant knew it. So also there was nothing in the situation, in the absence of evidence that the engineer saw or should have seen Krysiak, which imposed upon it the duty of sounding an emergency warning. We are at a loss to find any duty of warning, which, under the circumstances of train movements through its railroad yard, the defendant owed Krysiak. The place was one with dangers on every hand. To afford protection against such dangers in such places by warnings, other than those which arise from emergency, has, from the very nature of the place and work, been found impracticable in most instances. In default of some practical way of protecting yard employés from the great dangers normally incident to train movements, courts have been constrained to hold that yard employés assume the risk of these manifold dangers, unless arising from

negligence. Certain it is that in a particular case a railroad company cannot be held liable for its failure to do something which the plaintiff has not shown it could and should have done. Aerkfetz v. Humphreys, 145 U. S. 418, 12 Sup. Ct. 835, 36 L. Ed. 758; Connelley v. Pennsylvania Railroad Co., 228 Fed. 322, 142 C. C. A. 614; Hines, Director General, v. Jasko (C. C. A.) 266 Fed. 336; Erie R. Co. v. Healy (C. C. A.) 266 Fed. 342; Director General v. Templin (C. C. A.) 268 Fed. 483; Smith, Adm'r, v. Director General (C. C. A.) 269 Fed. 1.

Such being the employer's duty to an employé, what was its duty to a trespasser or volunteer such as Krysiak was?

As applied by the learned trial judge, and as stated by the United States Circuit Court of Appeals for the Second Circuit in Hoyer v. Central Railroad Co. of New Jersey, 255 Fed. 493, 496, 166 C. C. A. 569, the general rule is that a railroad company is under no duty to exercise active vigilance to provide against injury to a trespasser on its tracks until his presence is known. Sheehan v. St. Paul, etc., R. Co., 76 Fed. 201, 22 C. C. A. 121; Cleveland, etc., R. Co., v. Tartt, 99 Fed. 369, 39 C. C. A. 568, 49 L. R. A. 98; McCreary v. Boston, etc., R. Co., 156 Mass. 316, 31 N. E. 126; Nolan v. New York, etc., R. Co., 53 Conn. 461, 4 Atl. 106; James v. Illinois Central R. Co., 195 Ill. 327, 63 N. E. 153. It is bound only to abstain from wanton, reckless, or willful injury. Grand Trunk R. Co. v. Flagg, 156 Fed. 359, 84 C. C. A. 263. Its duty is to exercise reasonable care to avoid injuring him after discovering his peril. Texas, etc., R. Co. v. Modawell, 151 Fed. 421, 80 C. C. A. 651, 9 L. R. A. (N. S.) 646; Tutt v. Illinois Central R. Co., 104 Fed. 741, 44 C. C. A. 321.

Applying this law to the facts of the case we fail to find error and therefore direct that the judgment below be affirmed.

UNITED STATES v. McGRANE.

(Circuit Court of Appeals, Third Circuit. February 8, 1921.)

No. 2622.

1. **Courts ⇐426—Jurisdiction of suits to recover additional compensation for property requisitioned for war purposes not repealed.**
   The provision of Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), conferring on the District Courts jurisdiction of suits by owners of property requisitioned thereunder to recover additional compensation, was not repealed by Act March 2, 1919, c. 94 (Comp. St. Ann. Supp. 1919, §§ $3115^{14}/_{15}$a–$3115^{14}/_{15}$e).

2. **Courts ⇐426—Jury ⇐18—District Court has jurisdiction of claim for additional compensation for property requisitioned, regardless of amount in controversy, and plaintiff has right to jury trial.**
   In a suit in a District Court under Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii), to recover additional compensation for property requisitioned for war purposes, the court has jurisdiction, regardless of the amount involved, and the plaintiff in such suit is entitled to trial by jury as in ordinary actions at law.

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

Action at law by James B. McGrane against the United States. Judgment for plaintiff, and the United States brings error. Affirmed.

Isaiah Matlack, of Trenton, N. J., for the United States.

James B. McGrane, of Philadelphia, Pa., and James Mercer Davis and John A. Riggins, both of Camden, N. J., for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and LYNCH, District Judge.

BUFFINGTON, Circuit Judge. In this case, James B. McGrane, a citizen of Pennsylvania, brought suit in the United States District Court for the District of New Jersey, against the United States. McGrane, as appears from the record, owned land in New Jersey. The government, under power which both government and McGrane conceded was vested in it by section 10 of the Act of Congress of August 10, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii) seized and took title to said land for storage purposes. The compensation fixed by the President, under the terms of the act, not being satisfactory to McGrane, he brought this suit in the District Court, where the cause was tried by jury, verdict rendered, and judgment entered thereon in his favor. Thereupon the government sued out a writ of error to this court.

We state the question involved in the case, by using the language of the counsel of the United States, as found in their brief, viz.:

"The question presented is whether the United States District Court for the District of New Jersey, in a suit for the recovery of just compensation for land requisitioned under section 10 of the Act of August 10, 1917, (40 Stat. § 10, c. 53, p. 279), has jurisdiction to hear and determine the cause, and whether the defendant in error was entitled to trial by jury, either by virtue of the Seventh Amendment to the Constitution or by reason of the provisions of the act. The District Court held in the affirmative on each issue. This, the defendant submits, was error.

"I. Section 10 of the Act of August 10, 1917 (40 Stat. p. 279), giving jurisdiction to the United States District Court was superseded by the Act of March 2, 1919 (40 Stat. p. 1272 [Comp. St. Ann. Supp. 1919, §§ $3115^{14}/_{15}$a–$3115^{14}/_{15}$e]), and the United States District Courts have no jurisdiction to hear suits under section 10 of the Act of August 10, 1917.

"II. The amount sued for is in excess of $10,000 and therefore without the jurisdiction of the United States District Court."

[1] Turning to the first question, we inquire whether section 10 of the Act of August 10, 1917, was repealed by the Act of March 2, 1919, 40 Stat. p. 1272. After due consideration, we are of opinion it was not, and our reasons for so holding we now state:

In the first place, the act of 1919 nowhere states or evidences a purpose to repeal the act of 1917. The statute of 1917 was one of war necessity, and, under its provisions, acts of inclusive scope had been done, and property of large value had been taken by the government, and unadjusted liabilities of great amounts were in process of adjustment when the act of 1919 was passed. By the act of 1917, jurisdiction had been "conferred on the United States District Courts to hear

and determine all such controversies," namely, those arising under the act. No suggestion is now made, and in the absence thereof we are justified in concluding that none were or could have been made to Congress, that the jurisdiction thus conferred by Congress on the District Courts was unsuitable in process or had proved unsatisfactory in performance. In the absence, therefore, of any call for changing that jurisdiction, and in the absence of any expression or implication in the statute to repeal, supersede, or affect the act of 1917, and in view of the fact that such widespread change in the statute of the then accrued war claims under it would naturally and reasonably have been evidenced in express enactments, and not be left to implication, we cannot attribute to Congress, and to the act of 1919, an intent to repeal the statute of 1917. This conclusion is supported by the further consideration that the particular department of the government to which was intrusted the enforcement of the act of 1917, continued after the act of 1919 was passed on March 2, 1919, to act under the law of 1917, for on May 31, 1919, the award was made to McGrane, an award authorized by the act of 1917, and one that had no basis of support save section 10 thereof, and a practice by a department is, where long enough continued, an interpretation of a law. United States Fidelity Co. v. Commonwealth, 186 Fed. 290, 108 C. C. A. 331, citing Stuart v. Laird, 1 Cranch, 308, 2 L. Ed. 115.

Moreover, it is clear to us, both from its own terms and from our taking judicial note of the situation at the close of the war, that the act of 1919 was passed to meet conditions wholly different from those that had arisen under the act of 1917. By the act of 1917 authority had been given to government officials to do certain things, to make awards, and to pay for what the government got. But the purpose of the act of 1919 was to enable the government, acting by the Secretary of War, to make settlements in cases where matters had been undertaken in good faith, though possibly without express or sufficient authority. The act of 1919 was in the nature of a validating one, and its purpose was to enable settlements to be made where no existing provision for settlement already existed. To turn such a validating, enabling, and enlarging statute into a repealing statute would be to run counter to the spirit and purpose which led to its passage. For this additional reason we are clear section 10 of the act of 1917 was not repealed by the act of 1919.

[2] Such being the case did the District Court err in allowing the case to be tried by jury? As we have seen, Congress in said section allowed the United States to be sued, by these words:

"The person entitled to the amount * * * shall be entitled to sue the United States to recover such further sum," etc.

And, having thus provided for a suit against the United States, Congress conferred jurisdiction of such suit upon the District Courts in these words:

"Jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies."

Now, it will be noted that the act of Congress nowhere provided for any particular form of trial, or indicated in any way a purpose to deprive the person whose property was taken of that most prized of rights, trial by jury. In the absence of expressed purpose to so deprive, can we impute to Congress a purpose either to shear the claimant of that right or to curtail the power of the District Courts to proceed by jury trial to hear and determine the controversy? If, as here contended, the government is to forbid the citizen a jury trial, the burden is upon it to show constitutional warrant and express legislative enactment to warrant such deprivation. Indeed, to our mind the purpose, and the sole purpose, of Congress in this section, simply was to grant the claimant the right to sue the United States, and to then vest jurisdiction in the District Court to hear and determine the allowed suit. Such being the case, Congress having permitted the United States to be sued, and McGrane having brought his suit, that suit stood as any other case between suitors, namely, one to determine and recover from a defendant the value of property for which unascertained value the defendant was confessedly liable.

In such a suit, how was the court to hear and determine the controversy? Issues in the District Court are determined in certain causes, equity, admiralty, and bankruptcy, by a judge, and in others by the combined work of judge and jury. Which method did Congress have in view when it enacted "jurisdiction is hereby conferred on the United States District Courts to hear and determine all such controversies"? Certain it is the jurisdiction was not committed to a judge, or to the court sitting as a judge. It was committed to the District Courts without limitation, and common practice and common sense alike suggest that Congress had nothing else in view than a jury trial.

Finding, as we do, that by the above section Congress, in the instances cited, of which the present plaintiff's was concededly one, conferred jurisdiction upon the District Courts without respect to the amount involved, we are clear that such conferred jurisdiction was in no way affected or restricted by the $10,000 limitation contained in section 24, paragraph 20, of the Judicial Code (Comp. St. § 991 [20]).

The judgment below is affirmed.

WHITE, Commissioner of Immigration, v. CHAN WY SHEUNG.*

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3516.

1. **Aliens ⟸32(5)—Burden of proof rests on Chinese applicant for admission to prove citizenship.**

The burden of proof rests on a person of the Chinese race, seeking admission to the United States on the ground that he is a son of an American-born citizen.

2. **Aliens ⟸32(9)—Informality of hearing by immigration officials does not establish unfairness.**

A denial of a fair hearing to a Chinese applicant for admission is not established by showing that the decision of the immigration officials was

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

*Rehearing denied May 17, 1921.

against the weight of the testimony, nor that evidence was considered which, under the rules of evidence as applied in courts of law, was inadmissible.

3. Aliens ⇐32(13)—Prior decisions of immigration department not an estoppel.

The prior admission by the immigration officials of the father and two brothers of a Chinese applicant on the ground of citizenship *held* not an adjudication which precluded a reconsideration of the question of the father's citizenship on his application.

Appeal from the District Court of the United States for the First Division of the Northern District of California; Frank H. Rudkin, Judge.

Habeas corpus by Chan Wy Sheung against Edward White, Commissioner of Immigration, Port of San Francisco. From a judgment awarding the writ, defendant appeals. Reversed and remanded with instructions.

For opinion below, see 262 Fed. 221.

Frank M. Silva, U. S. Atty., and Ben F. Geis, Asst. U. S. Atty., both of San Francisco Cal., for appellant.

Joseph P. Fallon, of San Francisco, Cal., for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The appellee was born in Ding Boy village, China, and lived there until he left China to come to San Francisco, where he arrived July 23, 1918. He clamed admission on the ground that he was the foreign-born son of Chan Young, who was alleged to have been born in the United States. He was denied admission after a hearing before a board of special inquiry, a decision which, on appeal to the Secretary of Labor, was affirmed. In the petition for habeas corpus, it was alleged that the decision of the immigration officials, in view of the conclusive character of the evidence, amounted to abuse of discretion. Upon the hearing in the court below on the return to the writ the appellee was ordered discharged from custody. From that order this appeal is taken.

The ground on which the appellee was denied admission by the immigration officials was that the American citizenship of his alleged father, Chan Young, was not satisfactorily established. It appeared on the hearing that Chan Young was admitted to the United States in December, 1899, as a native-born citizen, on the evidence of his father, Chan Wong, and another Chinese witness, that he was born in San Francisco on a specified date in the year 1875. It was also shown that in the year 1909 or 1910 Chan Way Bon, a son of Chan Young, was admitted as a son of a native-born citizen, and that in 1917 Chan Way Ging, another son of Chan Young, was likewise admitted as the son of a native-born citizen. The evidence on which the appellee was excluded, notwithstanding the admission of Chan Young and two of his sons, was that, on the hearing of the appellee's application, evidence came to light which discredited the testimony that Chan Young was born in the United States. One item of that evidence

was that on June 2, 1899, Chan Young, having just arrived from China, filed at Victoria, B. C., a statement and declaration for registration as a laborer, in which he stated that he was born at Ding Boy, Sun Woy district, China, and that his age was 25 years. Another item was a certified copy of the application for a certificate of residence made at San Francisco by Chin Wong, grandfather of the appellee, on April 10, 1894. Chin Wong therein deposed that he arrived in the United States at the port of San Francisco in May, 1876, and his application was accompanied by the affidavit of Chin Jow, who also said that Chin Wong arrived in the United States in May, 1876. Upon this evidence the board of special inquiry found that Chan Young could not have been born here in 1875, and that in fact he was born in China and obtained admission to the United States by fraud.

The court below expressed doubt whether the declaration made at Victoria was made by the father of the appellee or by some other, and was in doubt whether either of the items of evidence was competent or admissible against the appellee, but reached the conclusion that in any event the department should be bound by its own prior adjudications, made at a time when the witnesses who had knowledge of the facts were living and able and competent to testify, and that it would be gross injustice to exclude the appellee after the death of his father and grandfather had rendered it impossible to explain or contradict the statements so received in evidence against him.

[1, 2] The ground on which the appellee claimed his right to discharge, as alleged in the petition for the writ, was abuse of discretion by the immigration officials, in that they disregarded conclusive evidence that the appellee was entitled to admission as the son of a native-born citizen of the United States. The burden of proof was upon the appellee to show that his father was born in the United States, Lee Yuen Sue v. United States, 146 Fed. 670, 77 C. C. A. 96, and a denial of a fair hearing cannot be established by showing that the decision of the immigration officials was against the weight of the testimony. Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369. It is not open to the courts to consider either the admissibility or the weight of proof according to the ordinary rules of evidence, and the fact that the rules of evidence as applied in courts of law are violated does not show that the hearing was unfair. Healey v. Backus, 221 Fed. 358, 137 C. C. A. 166; Ex parte Watchorn (C. C.) 160 Fed. 1014; In re Jem Yuen (D. C.) 188 Fed. 350; Frick v. Lewis, 195 Fed. 693, 115 C. C. A. 493; Lee Lung v. Patterson, 186 U. S. 168, 176, 22 Sup. Ct. 795, 46 L. Ed. 1108. In a case where, as here, there is evidence to sustain it, the decision must be accepted. United States v. Uhl (D. C.) 211 Fed. 628; Ong Chew Lung v. Burnett, 232 Fed. 853, 147 C. C. A. 47; McDonald v. Sin Tack Sam, 225 Fed. 710, 140 C. C. A. 584.

There is substantial evidence of the identity of Chan Young with the Chinese person who appeared upon the Canadian records as arriving at Victoria June 2, 1899, and as sailing therefrom on the steamship Umatilla for San Francisco on December 20, 1899, and who arrived at San Francisco December 23, 1899, and was admitted December

26, 1899. The testimony of the two Chinese witnesses that Chan Young was born in San Francisco in 1875 is no stronger or more entitled to credence than the testimony of the two Chinese witnesses who testified that Chan Young's father first came to the United States in 1876, and there is in addition the evidence of Chan Young himself who stated when he arrived in Victoria in 1899, that he was 25 years of age at that time, and that he was born in China. We are not warranted in holding that the proof of Chan Young's American citizenship is conclusive, or that there was no substantial evidence to sustain a finding to the contrary.

[3] It remains to be considered whether the judgment of the court below is sustainable on the ground on which it was based, that the department should have been bound by its own prior adjudications in admitting the appellee's father and his two brothers as citizens of the United States. The board of immigration is not a court. It is an instrument of the executive power, and its decisions do not in a technical sense constitute res adjudicata (Pearson v. Williams, 202 U. S. 281, 285, 26 Sup. Ct. 608, 50 L. Ed. 1029), and the department is not bound by its prior decisions in admitting aliens to the United States (Haw Moy v. North, 183 Fed. 89, 105 C. C. A. 381; Lew Quen Wo v. United States, 184 Fed. 685, 106 C. C. A. 639; Li Sing v. United States, 180 U. S 486, 21 Sup. Ct. 449, 45 L. Ed. 634). We are unable to see how any principle of estoppel can apply in favor of the appellee from the fact that his father and his two brothers were admitted to the United States as citizens thereof. The appellee was in no sense a party to the proceedings in which those decisions were made, and he was not represented therein. His right to enter the United States depends solely upon the question whether his father was born in the United States. On his application for admission that question was determined adversely to him.

The judgment of the court below is reversed, and the cause is remanded, with instructions to dismiss the writ and remand the appellee to custody.

DAVIS v. ANDERSON, Warden.

(Circuit Court of Appeals, Eighth Circuit. January 11, 1921.)

No. 5512.

1. **Criminal law ⟸1216(2)—Sentence held to permit imprisonment for but one year.**
   Under a sentence "that defendant be imprisoned * * * for five years, said indictment containing five counts and sentenced to one year on each count, sentence to run concurrent on all counts," defendant *held* entitled to discharge after serving one year, although the warrant of commitment was for five years and described the sentences as running successively.

2. **Habeas corpus ⟸109—Prisoner may be returned for correction of sentence.**
   It is only when a sentence is wholly without authority of law, when there was a valid conviction, that a court may in a proceeding of habeas corpus refuse to discharge a prisoner and return him to the court in which he was convicted for resentence in conformity with law.

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

Habeas corpus by Joseph Davis against August V. Anderson, Warden. From a judgment refusing the writ petitioner appeals. Reversed.

Lee Bond, of Leavenworth, Kan., for appellant.

L. S. Harvey, Asst. U. S. Atty., of Kansas City, Kan. (Fred Robertson, U. S. Atty., of Kansas City, Kan., on the brief), for appellee.

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

TRIEBER, District Judge. The appellee was indicted in the District Court of the United States for the Western District of Wisconsin for violations of sections 189, 190 and 194 of the Penal Code (Comp. St. §§ 10359, 10360, 10364). There were five counts in the indictment, all arising out of the same act.

In the first count it is charged that the appellant feloniously did tear, cut and injure a certain mail bag designed for the use of conveying letters, with intention to feloniously remove and steal.

In the second count appellant is charged with feloniously stealing and purloining the bag.

In the third count it is charged that the appellant did convey away, to the hindrance and detriment of the public service, the mail pouch or bag.

In the fourth count it is charged that appellant did take, steal and abstract a letter from the mail, describing the letter, and that he did then and there unlawfully and feloniously secrete and embezzle the letter, which letter contained $600.

In the fifth count appellant is charged with unlawfully stealing the letter from the mail bag, describing the same letter, as described in count 4.

All of these acts are charged to have been done at the same time and place.

[1] Upon a plea of guilty the following judgment was entered:

"This day came the defendant before the court and came the United States attorney, and said defendant did give the court to understand and be informed that he desired to withdraw his plea of not guilty, and to enter a plea of guilty. Leave therefor being granted, said defendant withdrew his plea of not guilty and did enter a plea of guilty in manner and form as charged in said indictment. On like motion it is ordered by the court that defendant be imprisoned in the United States penitentiary at Leavenworth, Kansas, for five years. Said indictment containing five counts and sentenced to one year on each count, sentence to run concurrent on all counts. Commitment issued and delivered to marshal."

The commitment under which the petitioner was held was as follows:

"United States of America, Western District of Wisconsin—ss.:
"The President of the United States of America, to the Marshal of the Western District of Wisconsin and to the Warden of the United States Penitentiary, Leavenworth, Kansas:

"Whereas, Joe Davis, alias Joe Feeney, has been, by the District Court of the United States for the Western District of Wisconsin, convicted of the offense of stealing mail pouch and taking letter therefrom, in violation of sections 189 and 190, Penal Code, and has been sentenced by said court to imprisonment for five years in the United States penitentiary at Leavenworth, Kansas. Indictment containing five counts, and sentenced to one year on each count. Sentence to run successively for the period of five years in all. Sentence to commence at 12 o'clock noon to-day.

"You, the said marshal, are hereby commanded forthwith to deliver into the custody of the said United States penitentiary, Leavenworth, Kan., the body of Joe Davis, alias Joe Feeney, and you, the said warden of the United States penitentiary, Leavenworth, Kansas, are hereby required to receive the said Joe Davis, alias Joe Feeney, into your custody, in the said United States penitentiary, Leavenworth, Kansas, and him there safely keep, until the expiration of said term of imprisonment, or until he shall be otherwise discharged according to law.

"Witness the Honorable Arthur L. Sanborn, Judge of the District Court of the United States for the Western District of Wisconsin, at the city of Madison, in said district, this 28th day of December in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second."

The petitioner, after having served a year in prison, applied for a writ of habeas corpus. The court entered a judgment that the petitioner be discharged on April 6, 1919, unless prior thereto he be removed to the Western district of Wisconsin there to be resentenced.

On behalf of appellant it is claimed that the offense of stealing a mail pouch as denounced by section 194 of the Penal Code could not be divided into five separate offenses, as was done in this cause, and therefore he should have been released unconditionally. In view of the conclusions reached by us, we do not deem it necessary to pass on that question. But see Morgan v. Devine, 237 U. S. 632, 35 Sup. Ct. 712, 59 L. Ed. 1153; and Braden v. United States, 270 Fed. 441, decided by this court, December 14, 1920.

The court, so far as appears from the judgment, although sentencing him to five years' imprisonment, amplified the sentence by adding:

"Said indictment containing five counts, and sentenced to one year on each count, sentence to run *concurrent* on all counts."

But the clerk, in preparing the commitment, erroneously made it read:

"Indictment containing five counts, and sentenced to one year on each count. Sentence to run *successively* for the period of five years in all.".

As the authority for the imprisonment of one charged with the commission of a crime is the judgment of the court, and not the commitment, which is only the evidence of the judgment, the judgment record controls. While the judgment is for imprisonment for five years, it states in specific terms that it is "for one year on each count to *run concurrent on all counts.*"

In none of the sections charged in the indictment is there a minimum punishment; the court therefore had the power to impose a sentence of one year on each of the counts, and make them run concurrently. Omitting that part of the judgment ordering appellant's imprisonment for five years, the sentence imposed could not exceed

one year. In a cause involving a man's liberty, all presumptions are in his favor.

[2] If the judgment was erroneously entered by the clerk, it could have been corrected by a nunc pro tunc order, after the expiration of the term, and even without notice. In re Wight, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865. It is only when the sentence is wholly without authority of law, when there was a valid conviction, a court may, in a proceeding of habeas corpus, refuse to discharge him, and return him to the court in which he was convicted for resentence in conformity with law.

In the instant case there was a valid judgment of imprisonment for one year, which has never been corrected by a proceeding authorized by law, and, having served one year, he was entitled to his discharge.

For the error in refusing to discharge him, the judgment is reversed.

SOUTHERN PAC. CO. v. MARTINEZ.*

(Circuit Court of Appeals, Ninth Circuit. February 14, 1921.)

No. 3497.

Railroads ⟸350(3, 15)—Negligence in maintaining crossing and in operating automobile, stalling on track, held questions for jury.

An action against a railroad company for death of a person killed while crossing the track in an automobile *held* properly submitted to the jury, where there was evidence of defendant's negligence in failing to maintain the crossing in reasonably safe condition, by reason of which the engine was killed while on the track, and under the provision of the Constitution of Arizona requiring the defenses of contributory negligence and assumption of risk in all cases to be submitted to the jury.

In Error to the District Court of the United States for the District of Arizona; Edward S. Farrington, Judge.

Action at law by Sophia Martinez, administratrix of the Estate of Carlos L. Martinez, deceased, against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Francis M. Hartman, of Tucson, Ariz., and Wm. F. Herrin and Henley C. Booth, both of San Francisco, Cal., for plaintiff in error.

Jesse C. Wanslee, Thomas W. Nealon, and F. C. Struckmeyer, all of Phœnix, Ariz., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. Error is assigned to the denial of the defendant's motion for an instructed verdict in its favor. The plaintiff's intestate, Carlos Martinez, was killed while crossing the railroad track of the defendant. He was riding in a Ford automobile, sitting on the back seat with his niece, 14 years of age. His daughter Mariana, 18 years of age, was sitting on the front seat with the driver, Manuel Sanchez. They were on their way to Cochise station on a road which

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*Rehearing denied May 16, 1921.

ran parallel with the railroad track and about 100 feet distant therefrom. The road turned at right angles to cross the track at a point about half a mile from Cochise. The automobile with its occupants was seen by the fireman on the defendant's train, and was seen to turn to cross the track directly ahead of the train. The hind wheels of the automobile were upon the track at the time of the collision. The negligence alleged in the complaint is that the defendant saw the plaintiff's intestate approaching the track without giving any warning of the approach of the train; that the defendant had not constructed or maintained a good and sufficient crossing across the public highway, and was negligent in leaving the rails of the crossing projecting above the grade surface on either side of the track, whereby the engine of the automobile was killed, and the automobile was delayed upon the track; that the defendant did not exercise vigilance and care to observe and discover the presence of the plaintiff's intestate upon the track.

According to the evidence there was no obstruction by which a traveler on the highway could be prevented from seeing a train on the track for a distance of 4 or 5 miles west of Cochise, and there can be no doubt that some, if not all, the occupants of the automobile saw the train as it approached. Mariana Martinez testified that after the automobile had made the turn, and was about to cross the track, she looked in the direction of the train, but did not see it. The fireman on the train saw the automobile traveling in the direction in which the train was going; but he had the right to assume, as he did, that the automobile would stop, instead of crossing the track ahead of the train. The train, just prior to approaching the crossing, had been going at 50 miles an hour, a permissible rate of speed. It had slowed down to a speed of between 35 and 40 miles. The evidence is ample and undisputed that on approaching the crossing the whistle had been blown and the bell was ringing.

Upon the testimony no negligence is imputable to any employé upon the train. Neither does the evidence leave room for the application of the last clear chance doctrine. After discovering that the automobile was in the danger zone and was still proceeding, there was no time for the engineer to avoid the collision. If the automobile was delayed but five or six seconds, which is the utmost time that any witness said it was delayed on the track, it was a time insufficient to permit avoidance of collision. The train was stopped as soon as it was known that the automobile was proceeding to cross the track. The driver of the automobile was shown to have been inexperienced. He doubtless thought he had time to get across the track ahead of the train, and he took the chance. If the testimony of Mariana Martinez, the only survivor of the party, is to be taken as true, the automobile would have crossed in safety, but for the engine dying while the hind wheels of the machine were still upon the track. The negligence of the driver and of the plaintiff's intestate in so attempting to cross the track might have been sufficient to justify the court below in directing a verdict for the defendant, but for the fact that the Constitution of Arizona provides:

"The defense of contributory negligence or assumption of risk shall in all cases whatsoever be a question of fact and shall at all times be left to the jury."

A similar provision in the Constitution of Oklahoma was under consideration in Chicago, R. I. & Pac. Ry. Co. v. Cole, 251 U. S. 54, 40 Sup. Ct. 68, 64 L. Ed. 133, in which the constitutional provision was held to require the submission of the defense of contributory negligence to the jury in a case where the plaintiff's intestate stepped upon the railroad track when a train was approaching in full view and was killed.

The only question remaining is whether there was evidence to go to the jury on the question of the defendant's negligence in constructing and maintaining the crossing. A statute of Arizona, which requires that railroad companies shall plank crossings in a certain prescribed manner, was held inapplicable to the case, for the reason that the statute related only to highways which had been officially declared to be open as such, and there was no proof that the road in question had been so declared to be open. To that ruling no exception was taken. In the absence of a statute the general rule is thus expressed:

"It is the duty of a railroad so to construct and maintain its crossings that they may be safely used by persons traveling the highway, and for the negligent breach of this duty it must answer in damages to one injured thereby while exercising ordinary care, provided such breach was the proximate cause of the injury." 22 R. C. L. 991.

As to the condition of the crossing the testimony was conflicting. There was evidence that the rails projected above the roadbed to a height of 3 or 4 inches, that the space between the rails was very rough, and that heavy ore wagons had cut ruts in the crossing. There was evidence that such a crossing would be likely to kill the engine of an automobile, and there was testimony that in fact the engine of the automobile in question was killed while on the track, and that otherwise it would have passed in safety ahead of the train. We cannot say that this testimony was insufficient to make a case to go to the jury on the question of the defendant's negligence.

The judgment is affirmed.

DEMONSTRATION PLANTATION CO. v. KEARNEY.

(Circuit Court of Appeals, Third Circuit. February 14, 1921.)

No. 2616.

Master and servant ⇐68—Double employment, with consent of both employers, compensable.

A plaintiff *held* entitled to recover compensation from a corporation for keeping its books, although he was at the same time employed as bookkeeper for another corporation, on a finding by the jury, supported by the evidence, that the double employment was with the knowledge and consent of both corporations.

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action at law by Joseph B. Kearney against the Demonstration Plantation Company. Judgment for plaintiff, and defendant brings error. Affirmed.

W. W. Stoner and Maurice Chaitkin, both of Pittsburgh, Pa., for plaintiff in error.

L. P. Monahan, of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

DAVIS, Circuit Judge. This is a suit brought by the plaintiff below against the defendant, the Demonstration Plantation Company, to recover on a quantum meruit for services alleged to have been performed by him for said company at the instance and request of W. A. Roberts, its secretary, treasurer, and general manager. The defendant is an Alabama corporation engaged in selling, in that state, farms planted, or set out, in orange, pecan, and fig trees. The plaintiff was employed by the Alvarado Construction Company, a New Jersey corporation, engaged in the sale of banana producing farms owned by that company in Mexico. The Alvarado Company was organized, owned, and controlled by J. M. Bain and W. A. Roberts, and the defendant company was organized, owned, and controlled by these two gentlemen and John H. Henderson. The plaintiff had been working for the Alvarado Company, at first, as assistant bookkeeper, and later as bookkeeper, since 1909. The defendant company, from the time of its organization, in 1915, had its office at 339 Fifth avenue, Pittsburgh, and the Alvarado Company had its office on Fourth avenue, in said city.

The suit is based on an oral agreement between the plaintiff and W. A. Roberts, representing the defendant. The plaintiff testified that in April or May, 1916, Mr. Roberts called him over from the office of the Alvarado Company to that of the defendant company and said to him:

"Our books are in bad shape. I wish you would take hold of these books, put them in a system for me, and keep them. Understand, we are just organizing, and our bank account is low. I will take care of that later on."

He further testified that at his request Mr. Roberts then and there called Mr. Bain, his partner, over the telephone, at the office of the Alvarado Company, and told him of the above conversation; whereupon Kearney took the books of the defendant company, with the accounts, from the office of the defendant company over to the office of the Alvarado Company on Fourth avenue, re-ruled a new set of books for the defendant, and rewrote them from the inception of the company, and kept them until about May 1, 1918. This conversation constitutes the alleged agreement. Defendant admitted that plaintiff kept the books of the defendant company from about May 1, 1916, to May 1, 1918, but denied that any agreement or contract was made between it, or any one representing it, and the plaintiff, and alleged that plaintiff kept the books because directed to do so by the officers of the Alvarado Company, in whose employ he was; that the defend-

ant company paid the Alvarado Company for the work of keeping said books by plaintiff; and that the regular salary which the Alvarado Company paid plaintiff included the work done by him on the books of the defendant company.

Upon the pleadings and proofs the jury returned a verdict for the plaintiff in the amount of $1,818.66. The verdict of the jury has established the disputed facts in the case, and the verdict must stand, if the testimony is sufficient to sustain it, unless the court committed reversible error in the admission or rejection of evidence, or in the submission of the case to the jury.

If the facts of the contract, as stated by plaintiff, be admitted, defendant contends that they are too indefinite as to parties, subject-matter, and compensation to constitute a valid contract. We are not able to agree with this contention. The identity of the parties and subject-matter is entirely clear. The plaintiff sued for $75 per week, or the aggregate amount of $7,800. Whether or not the plaintiff was entitled to anything under the evidence was a question for the jury. It found that the plaintiff was entitled to a verdict, but that the amount sued for was too much, and reduced it to $1,818.66. We cannot say that this is excessive or unreasonable.

The defendant further contends that the verdict should not stand, because the plaintiff was acting in a dual capacity, as a servant of two separate employers. A servant may not recover double compensation, from two employers, except upon clear proof of the consent of both employers to double service and double compensation. Pennsylvania Railroad Co. v. Flanigan, 112 Pa. 558, 4 Atl. 364. According to plaintiff's testimony, the dominant officers of both corporations knew of his services, to be rendered to the defendant, and consented to the terms thereof; that for two years, while it was being performed, no objection was raised. The court submitted this question under proper instructions to the jury, which found for the plaintiff, and his testimony, which must have been believed by the jury, was sufficient, if believed, to establish consent. The plaintiff also testified that it was the understanding and agreement between him and the Alvarado Company that he was not to devote his entire time to its work, but that he was to keep the books of that company only; that he kept the books, as above stated, and that with the knowledge of, and without objection by, the Alvarado Company, he carried on several lines of business outside of his employment with that company are admitted in the testimony of said officers of both companies.

The verdict of the jury settled the fact that W. A. Roberts employed the plaintiff to keep the books, not for himself and on his own account, as defendant contended, but for the defendant company. The fact of the employment, however, is raised here, and not the authority of Mr. Roberts. The verdict of the jury has settled the fact, and the defendant corporation, having had the benefit, may not now repudiate the burden, of plaintiff's services. Presbyterian Board v. Gilbee, 212 Pa. 310, 61 Atl. 925; First National Bank v. Am. Bangor State Co., 229 Pa. 27, 77 Atl. 1100; Hartzell v. Ebbvale Mining Co., 239 Pa. 602, 86 Atl. 1093.

The learned trial judge properly submitted the case to the jury, and we do not find any error in his rulings upon the evidence, or his refusal to charge, which justifies reversal. The judgment will therefore be affirmed.

GEORGE W. TRAVERS CO. v. A. MECKY CO.

(Circuit Court of Appeals, Third Circuit. January 5, 1921. Rehearing Denied March 2, 1921.)

No. 2575.

Patents ⇐328—1,021,476, for wheel hub, valid and infringed.

The Pursglove patent, No. 1,021,476, for a wheel hub, for the front wheel of a child's velocipede, *held* not anticipated, valid, and infringed.

Appeal from the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

Suit in equity by the A. Mecky Company against the George W. Travers Company. Decree for complainant, and defendant appeals. Affirmed.

Kenyon & Kenyon, of New York City (Alan D. Kenyon, of New York City, of counsel), for appellant.

J. Bonsall Taylor and E. Hayward Fairbanks, both of Philadelphia, Pa., for appellee.

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

WOOLLEY, Circuit Judge. This is an appeal from an interlocutory decree holding valid and infringed claim 3 of Letters Patent No. 1,021,476, issued to the plaintiff-appellee as assignee of William T. Pursglove, for a wheel hub. The claim of the patent here in suit has been held valid, and infringed by the same device, in a suit by the same plaintiff against Garton Toy Company in the District Court of the United States for the Eastern District of Wisconsin, affirmed by the United States Circuit Court of Appeals for the Seventh Circuit. 251 Fed. 629, 163 C. C. A. 623. As the invention has been described and discussed in the opinions of three courts, we shall give only in outline such of its elements as will bring to view the reasons for our judgment.

The patent relates to a front-wheel hub for a child's velocipede whose wheels are made of wire, whose price is small, and whose problem concerns a construction which admits of ease in knocking down its several parts for boxing in small compass for shipment and ease in reassembling and putting together the parts by persons unskilled in mechanics.

The claim of the patent in suit is for a simple device containing in combination four elements which, using the language of the patent, are described as follows:

"In a hub,

"(a) A tubular hub member proper, the same having on an end thereof a shoulder whose exterior is angular and whose interior comprises an angular socket (this is new);

"(b) A crank having on its horizontal limb a nose whose exterior is angular and is adapted to enter and interlock with said socket (this is old);
"(c) A tightening bolt adapted to pass through said crank, the nose thereof, and said hub member proper (this also is old); and
"(d) A spoke-carrying sleeve which is interlockingly fitted on the exterior of said shoulder" (this is new).

Limited to the structure disclosed, this little device, we think, contains invention, and the patent granted for it is valid, if not anticipated by the prior art.

The prior art on which the defendant mainly relies as anticipating the invention is found in Letters Patent No. 219,551 granted August 29, 1878, to Will & Uebele and in Letters Patent No. 301,247 granted July 1, 1884, to Latta. The first is for the hub member of a velocipede; the second for the hub member of a bicycle. Although it seems that neither reached the practical art, both are, nevertheless, in the art of the invention of the patent in suit.

The Will & Uebele invention discloses a wooden wheel with an ordinary wooden hub whose axial opening contains what is urged to be—and may be accepted as being—a rectangular tube into which the rectangular ends of cranks are seated, through all of which a tightening bolt is passed and held. We do not think the square or nearly square tube driven into the hub is the "tubular hub member proper" of the patent in suit. The hub member proper of Will & Uebele is the wooden hub and the interior tubing is nothing more than its bushing. If the wooden hub were removed from its bushing and the bushing left to form the hub member of the patent in suit, it would not function as such without reconstruction, and if reconstructed, it would not anticipate. The Will & Uebele wooden hub lacks the shoulder of the invention in suit and lacks also a spoke-carrying sleeve interlockingly fitted on such shoulder, for the reason, obviously, that in Will & Uebele, the hub, being a member of an unitary wooden wheel, there is no function for a shoulder, and, accordingly, no provision for a spoke-carrying sleeve. Clearly none is needed. Moreover, as pointed out by the Circuit Court of Appeals for the Seventh Circuit, in the Will & Uebele velocipede the cranks are not removable from the wheel until the wheel has been removed from the fork, a characteristic of the invention of Will & Uebele which is advantageously absent from the invention of the patent in suit.

In the invention of the Latta patent, the hub proper, the horizontal limbs of the cranks, and the spoke-carrying sleeve of the wheel are all tubular, and in this sense broadly cover like elements of the invention in suit; but the hub member of Latta is cylindric from end to end instead of being quadrangular on its interior as in Pursglove. Likewise Latta's cranks are cylindric instead of being quadrangular; and his spoke-carrying sleeve is internally tubular instead of being internally quadrangular. In Latta all these parts would in operation turn around and around upon each other but for a pair of keys or cotter pins which make a connection between the hub, cranks, and spoke-carrying sleeve and hold them together. These key or cotter pin connections, crossing the several members at an angle in the keyways, the defendant maintains, are equivalents of the external angular shoulder and internal angular sock-

et of the hub member, of the external angular nose of the crank, and of the spoke-carrying sleeve squared to conform to and interlock with the angular exterior of the shoulder of the hub in the invention in suit. The structure of the Latta device with its key or cotter pin connections, operating in a different way on members differently shaped,—though by producing an angle they prevent them from revolving one around the other and cause them to act together,—we do not regard as the equivalent of the parts of the device of the invention, which by their own angular shapes and without the aid of keys or pins prevent rotation and produce coaction.

Infringement is admitted if the patent is valid.

Being of opinion that the claim of the patent in suit is valid and infringed, we direct that the decree below be affirmed with costs.

DUTHERAGE & HALL et al. v. JOHNSON.

(Circuit Court of Appeals, Fifth Circuit. February 3, 1921.)

No. 3565.

Partnership ⊂=197—Action may be maintained by person doing business under another name.

Rev. St. La. § 2668, providing that "no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and company,' or '& Co.,' is used, it shall represent an actual partner or partners," *held* not to preclude a person doing business under the name of a "company" from maintaining an action, where it is found as a fact that credit was not given him in the belief that he had a partner, to prevent which is the purpose of the statute as construed by the Supreme Court of the state.

In Error to the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Action at law by T. E. Johnson against Dutherage & Hall and others. Judgment for plaintiff, and defendants bring error. Reversed.

J. D. Wilkinson, of Shreveport, La. (Wilkinson, Lewis & Wilkinson, of Shreveport, La., on the brief), for plaintiffs in error.

Sidney M. Cook, of Shreveport, La. (Cook & Cook, of Shreveport, La., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is an action to recover damages for the loss of profits arising out of the failure on the part of plaintiff in error, defendant below, to deliver certain lumber upon orders accepted by it from defendant in error. A jury was waived, and the District Judge, after hearing the evidence, entered a judgment in the sum of $5,112.40 in favor of defendant in error.

It is urged that defendant in error was precluded from recovery by reason of the fact that he was doing business as the T. E. Johnson Lumber Company, in violation, it is said, of section 2668, Revised Statutes of Louisiana which is as follows:

"Hereafter no person shall transact business in the name of a partner not interested in his firm, and when the designation 'and Company' or '& Co.,' is used, it shall represent an actual partner or partners."

In Wolfe v. Joubert, 45 La. Ann. 1100, 13 South. 806, 21 L. R. A. 772, it was said that the intent of the statute—

"was to prevent the use of the name of a person not interested in a firm, and thus inducing a false credit to which it was not entitled. * * * Beyond this the statute cannot be extended by implication, or even by a liberal construction."

The District Court found as a fact that credit was not advanced upon the belief that defendant in error had a partner. In addition, it will be observed that the name under which defendant conducted his business does not fall within the literal terms of the statute.

Error is also assigned upon the refusal of the court to hold that plaintiff in error was justified in refusing to deliver the lumber, upon the ground that defendant in error was in arrears in making payments. The court found as a matter of fact that such was not the reason which actuated plaintiffs in error, but that the advance in price of lumber was the real reason. Plaintiffs in error are bound by this finding of fact upon the evidence, which was conflicting.

Finally, it is contended that the judgment was excessive. This assignment is well taken. There were three orders given and accepted, numbered 61, 62, and 76. It is admitted that defendant in error lost profits amounting to $396.40 on orders numbered 61 and 62. The trial court held that plaintiffs in error had 262,000 feet of lumber which it should have delivered under order No. 76. The loss of profits on the several grades of lumber included in this order varied considerably. There was a loss of $18 per thousand on only 25,000 feet of lumber. Defendant in error did not himself claim a loss so great as that on any other grades. The trial court fixed the loss at $18 per 1,000 feet on all of the lumber which it found plaintiffs in error were bound to deliver, and based this ruling upon the fact that the quantity of the different grades on hand was peculiarly within the knowledge of plaintiffs in error, and that, upon their failure to produce evidence of the various grades on hand, judgment should be awarded upon the highest grade, and the one upon which the greatest loss was incurred. Even if the evidence and the conduct of plaintiffs in error at the trial justified that assumption, yet the judgment is for an amount greater than the loss defendant in error sustained or claimed on the lumber which he was entitled to receive. Therefore the judgment is excessive, and for that reason it must be reversed.

In re STANDARD AERO CORPORATION OF NEW YORK.

STANDARD AERO CORPORATION OF NEW YORK v. LEONARD.

(Circuit Court of Appeals, Third Circuit. February 4, 1921.)

No. 2620.

1. **Bankruptcy ⇐81(4)—Allegation of act of bankruptcy sufficient.**
An allegation of an act of bankruptcy by a corporation, by making a preferential payment to a creditor while insolvent, *held* sufficient, although it did not state the name of the creditor nor the nature of his claim, where the books of the corporation had disappeared and its president, who drew the check with which the payment was made, was himself unable to remember such facts.

2. **Bankruptcy ⇐76(1), 320—Judgment for waste founded on contract provable debt on which creditor may petition for involuntary bankruptcy.**
The New Jersey statute of waste, as construed by the courts of the state, while giving a remedy by an action on the case in the nature of waste founded on tort against certain classes of tenants, does not destroy the remedy by an action for waste founded on a covenant contained in the lease, and the judgment in such an action, although the claim was unliquidated at the time of the commission of an act of bankruptcy by the defendant, is provable under Bankruptcy Act, § 63a (Comp. St. § 9647[a]), and may be made the basis of a petition in bankruptcy.

Appeal from and Petition for Revision of Proceedings in the District Court of the United States for the District of New Jersey; Joseph L. Bodine, Judge.

In the matter of the Standard Aero Corporation of New York, alleged bankrupt. Charles H. Leonard, petitioner. Bankrupt appeals from and petitions for revision of an order of adjudication. Affirmed.

See, also, 270 Fed. 783.

M. Casewell Heine, of Newark, N. J., for appellant.

Frank P. McDermott, of Jersey City, N. J., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. By this order the District Court adjudged Standard Aero Corporation of New York a bankrupt. That corporation now attacks the validity of the order on many grounds, only two of which call for discussion.

During the war the corporation was engaged in building aeroplanes for the United States, receiving either by advances or payments, approximately $5,000,000. Its business ended with the armistice and its relations with the Government were concluded by a further payment of about $1,000,000. The corporation disbursed all the moneys so received; but in just what manner it disposed of the latter sum does not appear beyond the fact that it paid in full all its debts except three or four, which, but for one presently to be mentioned, were for amounts that were not considerable. It also disposed of all its personal assets except a bank balance of less than $400. Further, it proceeded to tear down buildings and remove machinery from its

plant. These last acts brought to light the following facts and brought about the following events:

The corporation had conducted its business upon premises and in a plant which it acquired from the owner, Charles H. Leonard, under two leases, the relevant one, bearing date in October, 1917, being for the term of one year and four months from the first day of January then next ensuing. In this lease the corporation, as lessee, covenanted that at the expiration of the term it would surrender the premises with the appurtenances to the lessor in the same good order and condition in which they were when it received them. It remained in possession of the premises until the end of the term, when it breached its covenant by committing waste. Thereupon, Leonard, the lessor, brought suit against the corporation in the Supreme Court of the State of New Jersey, and on February 13, 1920, obtained judgment for $9,000, afterwards affirmed by the Court of Errors and Appeals of that state. 112 Atl. 252.

Having obtained judgment in the trial court, Leonard, on March 22, 1920, filed an involuntary petition in bankruptcy against the corporation in the District Court of the United States for the District of New Jersey, wherein he declared on the judgment as a provable claim and averred as an act of bankruptcy payment by the corporation, while insolvent and within four months prior to filing the petition, of the sum of $1,000 to one of its creditors, name unknown, with intent to prefer such creditor above its other creditors.

On reference, a special master found the corporation insolvent and to have committed the act of bankruptcy alleged, and on the corporation's exceptions, the District Court entered the order of adjudication here appealed from.

The main questions under review are, whether the evidence shows that the corporation committed an act of bankruptcy by making a preferential transfer of property under Section 3a, subd. 2 of the Bankruptcy Act (Comp. St. § 9587) as charged by the petition and whether the obligation due by the corporation to Leonard was, and even after reduction to judgment could ever become, a provable debt in bankruptcy.

[1] Upon the question of preferred payment the facts are meager, but they are sufficient, we think, to sustain the court's finding. After the corporation's assets had been almost wholly distributed, and after Leonard had brought suit on his claim, and just before he had recovered judgment thereon, the President of the corporation (who held nearly all its stock) drew several checks, including one for $1,000 to the order of a creditor whose name he had forgotten, and whether "for merchandise or service or notes" he could not remember. Being unfamiliar with the corporation's accounts and knowing no one who knew them any better, and as the books had disappeared,—he was not able to throw any light upon the transaction.

We are not unmindful of the rule that to be valid the allegation of the commission of an act of bankruptcy should state the specific facts relied on, with time, place and circumstances, so that the alleged bankrupt may be apprised of what he is required to answer, Clark v.

Henne & Meyer, 127 Fed. 288, 62 C. C. A. 172; and that, when the act was an alleged preferential payment, the allegation must show that thereby one creditor was enabled "to obtain a greater percentage of his debt than any other of such creditors of the same class," Mills v. J. H. Fisher & Co. 159 Fed. 897, 900, 87 C. C. A. 77, 80 (16 L. R. A. [N. S.] 656). Yet we are of opinion that the petitioner's allegation of the act of bankruptcy stated the circumstances with sufficient particularity to apprise the corporation of what it was called upon to meet, as later proved by the event, and showed that, because of the preference, the petitioner will suffer in the payment of his claim—if his claim is provable in bankruptcy. This is the central matter in controversy.

[2] Conceding that at the time of the alleged preferential payment Leonard's claim for waste to the demised premises had been presented to the corporation and payment refused, that suit therefor had been begun, but that judgment had not been rendered, the corporation maintains that the lessor was not in position to complain of the $1,000 payment, though preferential, because his claim then or thereafter was not provable in bankruptcy under section 17a of the Bankruptcy Act (Comp. St. § 9601). This section, under the title of "Debts not Affected by a Discharge," provides that:

"A discharge in bankruptcy shall release a bankrupt from all his provable debts, except such as * * *

"(2) Are liabilities * * * for wilful and malicious injuries to the person or property of another. * * *"

In other words, the corporation maintains that its obligation to Leonard at the time of the preferential payment was solely in tort, that the judgment afterward recovered was likewise in tort, and that a claim for unliquidated damages founded upon tort, or a judgment sounding in tort, is not provable in bankruptcy.

To maintain this position the corporation cites the statute of waste of the State of New Jersey (4 Comp. St. 1910, pp. 5789–5791), which like most state statutes of waste, was founded on the statutes of Marlbridge and Gloucester (52 Hen. III, c. 23; 6 Edw. I, c. 5). This statute, like its English models, did not create new kinds of waste but simply extended the remedies afforded by the common law for waste against tenants in dower and curtesy—whose estates were created by law—to tenants for life and for years, whose estates were created by contract, where, until the statute, no remedy for waste was available. By its construction of this statute the corporation maintains that actions for waste in the State of New Jersey are in form actions on the case in the nature of waste grounded on the statute, Townshend v. Moore, 33 N. J. Law, 284, and that, in consequence, Leonard's action for waste in the state court was not on the covenant of the lessee but on the liability created by the statute. By endeavoring thus to show that the gravamen of the action for waste in the New Jersey court was a breach of a statutory duty the corporation seeks to withdraw from the action as brought all characteristics of a breach of contract. We do not regard this position as sound because the very authority on which the corporation relies recognized that the New

Jersey statute, like the English statutes, while affording a remedy by an action on the case in the nature of waste founded on tort against a tenant for life or years, did not destroy the remedy of an action of waste founded on contract, and admitted that, notwithstanding, the New Jersey statute, the action of waste on liability created by covenant was preserved. Townshend v. Moore, supra; 2 Wait's Actions and Defenses, 362; 6 Wait's Actions and Defenses, 253.

Applying this construction of the New Jersey law as made by the New Jersey courts to his complaint filed in the suit in the state court, printed in the record, it is clear that Leonard, the lessor, brought an action of waste on the lease, pleaded the covenant, and sought to recover, and did recover, non-punitive damages for its breach, and that, therefore, the action arose not on the liability created by the statute but on the corporation's liability created by the lease. In a word, the action arose in contract. How does the Bankruptcy Act regard such liability?

While we find from section 17a of the Bankruptcy Act that certain debts are not provable in bankruptcy, it is from section 63 (Comp. St. § 9647) that we learn what debts are provable. Among these are debts arising upon contract, express or implied. Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147. That a claim for waste to demised premises arises from contract is true from its very nature. Waste is defined by Pollock as:

"Any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance." Poll. Torts, 327.

It is defined by the Massachusetts courts as:

"Any unreasonable or improper use, abuse, mismanagement or omission of duty touching real estate by one rightfully in possession which results in its substantial injury." Delano v. Smith, 206 Mass. 365, 92 N. E. 500, 30 L. R. A. (N. S.) 474.

By Archibald, it is said that:

"Waste is a spoil or destruction in lands, houses, trees, or other corporeal hereditaments committed or permitted by a tenant under certain tenures, to the disherison of him who has the remainder or reversion. * * *" Archibald's Pl. 11 and 12; 2 Sellon, 335.

Always there is the relation of reversioner and tenant in possession in a claim for waste; and where, as here, that relation is technically one of lessor and lessee it arises from a contract of demise. The character of the claim then is contractual, and being so, the Bankruptcy Act takes cognizance of it.

But assuming that a claim for waste arising from contract is provable in bankruptcy when liquidated, the corporation further contends that because the lessor's claim for waste in this case was unliquidated at the time of the corporation's act of bankruptcy in making a preferential payment, it is not provable, relying upon rulings of the courts, frequently made, that:

"A claim for unliquidated damages founded upon tort is not provable in bankruptcy."

But some courts in so construing the Act have been cautious to make the distinction, on which we think this case turns, by the qualification that:

"A claim for unliquidated damages resulting from injury to the property of another, *not connected with or growing out of any contractual relation* (or, as one court put it—*unaccompanied* with contractual liabilities) is not provable in bankruptcy, under the existing law." In re New York Tunnel Co., 159 Fed. 688, 86 C. C. A. 556 (C. C. A. 2d), following Brown & Adams v. United Button Co., 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445 (C. C. A. 3d).

The injury to property for which the claim for damages at one time unliquidated was made was incontestably connected with and grew out of the contractual relation of lessor and lessee existing between Leonard and the bankrupt. This distinction validly brings the claim of the petitioning creditor within the purview of the Bankruptcy Act, and having later been liquidated by reduction to judgment, he was entitled to use it as the basis of his petition in bankruptcy.

The order below is affirmed.

In re STANDARD AERO CORPORATION OF NEW YORK.

STANDARD AERO CORPORATION OF NEW YORK v. LEONARD.

(Circuit Court of Appeals, Third Circuit. February 10, 1921.)

No. 2582.

Bankruptcy ⟸242(1)—Scope of examination of officer of bankrupt corporation stated.

Where the person examined under Bankruptcy Act, § 21a (Comp. St. § 9605[a]), was the president, principal stockholder, and manager of an alleged bankrupt corporation, it is imperative that much latitude be permitted in the examination, even though some personal affairs of the witness may be revealed, keeping in mind as the test of its scope that the inquiry concerns, primarily and objectively, the "acts, conduct or property of the bankrupt."

Petition for Revision of Proceedings of the District Court of the United States for the District of New Jersey, in Bankruptcy; Charles F. Lynch, Judge.

In the matter of the Standard Aero Corporation of New York, alleged bankrupt. On petition by bankrupt to revise orders of the District Court. Affirmed.

See, also, 270 Fed. 779.

M. Casewell Heine, of Newark, N. J., for appellant.

Frank P. McDermott, of Jersey City, N. J., for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and RELLSTAB, District Judge.

WOOLLEY, Circuit Judge. We are asked to revise, and annul, an order of the District Judge directing examination under section 21a of

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

the Bankruptcy Act (Comp. St. § 9605[a]). The pertinent part of this familiar section is the following:

"A court of bankruptcy may, upon application of any * * * creditor, by order require any designated person, * * * to appear * * * before a referee * * * to be examined concerning the acts, conduct, or property of a bankrupt whose estate is in process of administration under this act."

As the main facts are stated in our opinion on another phase of these proceedings, reported at 270 Fed. 779, only a few additional facts are necessary to an understanding of the matter now before us.

Proceedings in bankruptcy against the appellant corporation had begun but had not advanced to adjudication, when, on petition of a creditor, the District Judge made an order of examination. On hearing before a referee, sitting as special master, answers to questions were refused, and on denial of a motion to vacate the order and dismiss the petition for lack of necessary or legal reason for the examination prior to adjudication, the Judge entered an order to proceed therewith. This order, coupled with the first, is the one before us for revision.

The alleged bankrupt is a corporation whose affairs were open to inquiry under section 21a before adjudication, Cameron v. United States, 231 U. S. 710, 34 Sup. Ct. 244, 58 L. Ed. 448; and the person designated for examination was Harry Bowers Mingle, its president.

Besides being president of the corporation Mingle was its principal stockholder and had been its active manager in its very substantial business of manufacturing aeroplanes. He had loaned the company much money which the company had repaid from the large sums it had received from the United States Government. Mingle apparently had close business relations with Mitsui & Company, an importing house of New York, three of whose partners or employés constituted a majority of the corporation's board of directors. The inquiry before the special master was directed to the relations of these several parties and to their money transactions, with the object of ascertaining whether the large volume of funds which flowed to and from the corporation by various channels had reached their proper destinations. Obviously, the point of the inquiry was whether the moneys of the corporation admittedly paid to Mingle were really due him, and whether the moneys paid to Mitsui & Company, if any, were really due them. To this end Mingle was asked questions touching his financial dealings with the latter concern. He complained of impropriety in these questions and declined to answer them on the ground that the business was his own and not that of the bankrupt. This may be so. But if it is not so—and this is just the point of the inquiry—then the petitioning creditor had a right to know the sources of the corporation's funds in order adequately to follow their subsequent repayment and in order to be fully apprised of the validity of the same. This was but an orderly way of developing the whereabouts of the assets of the estate.

Where acts inquired of, seemingly personal to a witness, arose out of his close official relations with the bankrupt and out of business dealings between the two which were so closely interwoven that conduct of the bankrupt cannot be fully made known without revealing some personal

conduct of the witness, it is imperative to a proper administration of section 21a that much latitude be permitted in the examination, keeping in mind as the test of its scope that the inquiry concerns, primarily and objectively, "the acts, conduct, or property of [the] bankrupt." In re Foerst (D. C.) 93 Fed. 190; In re Horgan & Slattery, 98 Fed. 414, 39 C. C. A. 118; In re Lathrop, Haskins & Co. (D. C.) 184 Fed. 534; In re Carley (D. C.) 106 Fed. 862; In re Williams (D. C.) 123 Fed. 321; In re Seligman (D. C.) 192 Fed. 750; Rawlins v. Hall-Epps Clothing Co., 217 Fed. 884, 133 C. C. A. 594; Abbott v. Wauchula M. & T. Co., 229 Fed. 677, 144 C. C. A. 87.

We are of opinion that the latitude of the examination conducted under the order in question was not, in the light of the interwoven relations of all parties affected, greater than the facts justified or the statute contemplated.

The several orders and acts of the court brought up on this petition are affirmed.

THE SENATOR PENROSE. THE READING. THE PEERLESS.

(District Court, E. D. Pennsylvania. January 19, 1921.)

No. 65.

Collision ⟸95(4)—Ferryboat held at fault for collision with tow showing proper lights.

On libel and cross-libel for damages resulting from a collision between a ferryboat and a barge in tow of a tug which were on substantially meeting courses, the tow *held* to have displayed the proper lights, and the ferry to have been solely at fault for assuming the course of the tow to be different from what it actually was, and therefore not paying attention to the lights, which would have shown the falsity of the assumption.

In Admiralty. Cross-libels by the Gloucester Ferry Company, owner of the steam ferryboat Peerless, against the steam tug Senator Penrose and the lighter Reading, and by the Baltimore & Philadelphia Steamboat Company, owner of the steam tug Senator Penrose and of the lighter Reading, against the steam ferryboat Peerless. On trial hearing on libel, cross-libel, and proofs. Libel on behalf of the ferryboat dismissed, and cross-libel sustained.

Lewis, Adler & Laws, of Philadelphia, Pa., for plaintiff.
Howard H. Yocum, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This cause is one in which each of the parties is asserting a cause of action against the other arising out of a collision. The only facts of which any one can be sure is that there was a collision, and that each puts the blame upon the other. Even every minor evidentiary fact is in dispute, except a very few, and these afford us little, if any, real help in reaching a conclusion. One of these minor facts with respect to which we are able to make a finding is that the tug Senator Penrose, with the barge Reading in tow, was proceeding down the Delaware river on an ebb tide not long

after slack high water, something after 6 o'clock on the morning of October 9, 1918. The tug and barge were made fast alongside of each other by bow and stern lines and by a spring line. The tug was on the starboard side. The ferryboat Peerless was on one of its regular trips from Gloucester to the South Street slip on the Philadelphia side of the river. The ferryboat had crossed the river to the Pennsylvania side, and under the weight of the evidence had straightened its course following its purpose to proceed up the river on the western side of the channel. The tug, with its tow, was about in mid-channel, or a little to the eastward of mid-channel.

The evidence would seem to warrant the negative finding that it could not be found that either was not displaying the regulation lights. The testimony on behalf of the ferryboats is that, when the vessels had approached to within signaling distance of each other (assuming that they were proceeding on parallel courses in reverse), the lines of these courses were about 175 feet apart, with the ferryboat to the westward. The testimony of those aboard the tug and barge would indicate that these lines of approach were nearer dead on, but the finding is justified that the ferryboat was, if anything, somewhat to the westward.

Another minor fact upon which the parties are in agreement is that the tug first gave a passing signal of one whistle indicating that the boats should pass port to port, and that this signal was promptly answered by a like whistle from the ferryboat, indicating that the tug's signal was understood and would be observed.

The conclusion, which is also undisputed, follows that the helm of each should have been ported, changing the course of the tow to the westward and the ferryboat to the eastward. Each avers and vigorously insists that it complied with the requirement to port helms.

The testimony on behalf of the ferryboat is that the course of the latter was shifted five points to the eastward. This was almost a right angle turn.

The testimony on behalf of the tow is that its course was changed to the westward one-half point.

There is no agreement upon another fact except the fact of collision; the fact that the port side of the ferryboat collided with the port forward corner of the barge; that the barge as a result of the collision dumped its cargo load; and that the load thus dumped was afterwards located by a survey. There is no agreement, but, on the contrary, a dispute over the further fact of whether the dump locates the place of the collision. The ferryboat insists that it does, and the tow insists that it does not, because of the fact that the barge was cast or broken loose from the tug and swung completely around and far to the westward before the dump went overboard.

There is one fact which, if it appeared with any degree of certainty, would supply the key to unlock the truth of this case and furnish a solution of what otherwise is almost a riddle. That fact is the distance up and down the river which separated the two vessels at the time the signal was given. Each of the parties has a theory of how the collision came to result. Each theory fits the facts which each

side presents, but each theory is wholly demolished by the fact situation presented by the opposing side. We are in consequence confronted with the dilemma in which we are thus placed. The dilemma is the difficulty of deciding whether the theory was made to fit the facts or the facts have been made to fit the theory. The theory of the ferryboat is that at once upon the exchange of signals the course of the ferryboat was swung five points to the eastward. The rate of speed (over the bottom) of the boats was about the same. Neither boat changed its speed. The collision occurred. It follows that what we will call the lateral distance between the vessels must have been one-half the longitudinal distance. The former distance (by the ferry boat estimate) was 660 feet, and the latter 1,320 feet. The barge estimate of the latter distance, however, is 2,640 feet, and, if this is correct, the ferryboat would have cleared the barge by a wide margin of clearance. The theory of the tow is, of course, open to the same query whether the figures of real distances fit the theories or have been made to fit.

In consequence, the theories of the parties afford us little aid, and we must look elsewhere for light. From the viewpoint of the ferryboat the vessels should have passed starboard to starboard. The signal from the tow called for a port to port passing. The ferryboat was within its rights in exercising its privilege to accept this signal, or, if the maneuver was not a safe one, to cross signals. It accepted the signal, and is not open to criticism for so doing, but the acceptance carries the finding that there was room and time to get to eastward of the tow. Its theory is that it turned abruptly to starboard, but that the tow kept its course straight down the river. If the facts support the theory, the collision was in part, if not wholly, the fault of the tow. If the facts were as stated, however, the tow would have showed its green light. This plainly spelled a danger of which the ferryboat was wholly unaware. Why was the danger not apparent? The necessity to explain this was appreciated and accepted. The explanation given is that not only was the tow not showing the regulation sailing lights, but was showing deceptive and misleading lights in that it displayed no green light at all and displayed a red light which showed and was visible all around the horizon.

We have already made the finding in a negative form, which we now make affirmatively, that the tow was displaying the regulation sailing lights. We further find there was no bastard red light displayed on the barge. We come back then to the question why did the ferryboat not see the green light?

The confession follows that it was due wholly to inattention. Why did they not see the green light, and why do they testify that they saw a red light? The answer, we think, is easily reached. We are far from entertaining the thought of any willful misstatement of facts. The ferryboat helmsmen thought the tow was going in to one of the wharves. If she was thus headed, she would show a red light. Hence she must have showed it, and those aboard the ferryboat must have seen it. It became afterwards clear that the tow was not bound for the wharves, but was continuing down the river. The position

of the vessels was such that at the time of the exchange of signals the red light (if of the regulation kind) could not have been seen. Hence it could not have been of the regulation kind and must have been a lantern lashed to a stay or suspended by a halyard so as to show red in all directions. As such must have been the case, of course, such was the fact. With the finding of the fact to be otherwise the whole theory falls.

The opposing theory is that the ferryboat assumed the tow was going into the wharves. The tow was a half mile or more ahead. It had less than 150 feet to go to get across the course of the ferryboat. The latter would, in consequence, pass astern of the tow without more being done, and there was no need for the ferryboat to change its course at once, and probably would not need to change at any time. The ferryboat accordingly held its course for some time until the vessels had approached within a longitudinal distance of about 300 feet of each other, when suddenly the helmsman of the ferryboat discovered his error, and at once pushed his helm to port in the hope he could get across the bow of the tow in time to avoid a collision. The fact that the helm was put hard aport (which we learn from the testimony on behalf of the ferryboat) bears out this theory of the collision. If, as the ferryboat had supposed, the tow had turned sharply to the westward, as the lateral distance was not more than 175 feet (and according to the witnesses for the tow much less than this distance), what occasion was there for the ferryboat to turn as sharply as five points to the eastward, when the longitudinal distance between the boats was from a quarter to half a mile? If, on the other hand, the shift of helm was not made until the boats were within 300 feet of each, there was every reason to push the helm hard over at once.

The very capable and experienced proctor for the ferryboat frankly admits that the weight of the evidence on the subject of the red light is against his clients. This convicts them of depending and acting, not upon what the sailing lights disclosed to them was the course of the tow, but upon their assumption of what the course was, and the collision was brought about by their assumption turning out to be wrong. They failed to observe the sailing lights of the tow. If this was due to the fact that the lights did not show when the signals were exchanged, the distance between the vessels was under the conditions of that night over one-half mile. In that case their theory entirely falls.

There is a further obstacle to an acceptance of the theory on behalf of the ferryboat. Not only does the red lantern fact feature of the case fail them, but they are convicted of neglect to observe and be guided by the lights displayed by the tow. Just how far a green light could be seen under the conditions of that night cannot be found, but there is a concurrence of testimony that if it could not be seen the vessel displaying it was more than a half mile distant, and there is a further concurrence of testimony that it could be seen to the distance of a half mile. According to the helmsman of the ferryboat, they did not see the green light when the vessels were within one-quarter of a mile of each other, and according to the testimony of those

aboard the tow the inference would be justified that the sailing lights of the tow were not observed by those aboard the ferryboat until the vessels were within about 300 feet of each other.

The only explanation the navigators of the ferryboat give of their failure to see these lights was that they did not look for them nor pay any attention to them. This convicts them of negligence at the outstart. It also makes it clear that they maneuvered their vessel on what they assumed to be the situation ahead of them, and were so sure that this assumption was right that they did not take the trouble to confirm it, although confirmation was in easy reach.

The conclusion reached is that the libel on behalf of the ferryboat should be dismissed, and the cross-libel sustained.

To give definiteness of date for any appellate use which may be made of it to the decree entered, no decree is now made, but the proctors in the cause have leave to submit a decree in accordance therewith.

OERTEL CO. v. GREGORY, DIST. ATTY., et al.

(District Court, W. D. Kentucky. February 10, 1921.)

No. 89.

1. **Constitutional law ⟸77—Intoxicating liquors ⟸134—National Prohibition Act cannot be extended by regulations.**
   National Prohibition Act, tit. 2, § 1, which defines "liquor" and "intoxicating liquor," "provided that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced if it contains less than one-half of 1 per centum of alcohol by volume and is made as prescribed in section 37 of this title and is otherwise denominated than as beer, ale or porter," determines the scope of the act, and a beverage within the proviso is not within the purview of the act and cannot be brought within it by any "regulation" of the Commissioner of Internal Revenue therein authorized.

2. **Constitutional law ⟸77—Regulations under National Prohibition Act invalid as beyond authority of executive department.**
   A decision or regulation of the Commissioner of Internal Revenue, approved by the Secretary of the Treasury, purporting to be made under authority of the National Prohibition Act, prohibiting the use of the words "Lager Bock or Stout" on labels for cereal beverages otherwise not within the act, *held* unauthorized and not enforceable as an attempt to amend and enlarge the act not within the power of an executive department.

In Equity. Suit by the Oertel Company against W. V. Gregory, District Attorney, and Paul M. Williams, Prohibition Agent. Our motion for injunction and motion to dismiss bill. Injunction granted, and motion to dismiss denied.

J. Verser Conner and T. Scott Mayes, both of Louisville, Ky., for plaintiff.

W. V. Gregory, U. S. Dist. Atty., of Louisville, Ky., for defendants.

WALTER EVANS, District Judge. [1, 2] The Eighteenth Amendment to the Constitution of the United States is as follows:

"Section 1. After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.

"Sec. 2. The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation."

It was ratified by the requisite number of states in January, 1919, and by its terms became effective one year thereafter.

Titles 2 and 3 of the act passed by both Houses of Congress over the President's objections thereto on October 28, 1919 (41 Stats. 307–322), and which is commonly known as the Volstead Act, had received an elaborate consideration by each House of Congress, inasmuch as it was, largely by anticipation, designed to provide adequate means for the enforcement of that amendment to the Constitution. It is not necessary in the case now before us to go elaborately into the provisions of those titles, and we shall limit ourselves to those of them which bring up the questions involved in this case.

Section 1 of title 2 of the act in its first clause provides:

"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: Provided, that the foregoing definition shall not extend to dealcoholized wine nor to any beverage or liquid produced by the process by which beer, ale, porter or wine is produced, if it contains less than one-half of 1 per centum of alcohol by volume, and is made as prescribed in section 37 of this title, and is otherwise denominated than as beer, ale, or porter, and is contained and sold in, or from, such sealed and labeled bottles, casks, or containers as the commissioner may by regulation prescribe."

Section 7 of the title reads thus:

"The term 'regulation' shall mean any regulation prescribed by the commissioner with the approval of the Secretary of the Treasury for carrying out the provisions of this Act, and the commissioner is authorized to make such regulations."

Pursuant to the power thus conferred the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, on January 16, 1920, made regulations of the most elaborate character, and which, with the forms prescribed therein, cover 110 closely printed pages.

The bill alleges that the plaintiff is a body corporate engaged in the business or profession of cereal beverage manufacturing and the operation of a dealcoholizing plant for the manufacturing of cereal beverages containing less than one-half of 1 per centum of alcohol in volume, and which said business is and has been operated and conducted under a permit issued by the Commissioner of Internal Revenue under section 37, title 2, of the Act approved October 28, 1919.

In order to clearly understand the exact contention of the plaintiff it may be well to insert at this point certain of the important allegations of the bill as follows:

"Plaintiff states that in pursuance to the permit issued by the Commissioner of Internal Revenue to the Oertel Company as aforesaid, and in pursuance to the provisions of the 'National Prohibition Act,' this plaintiff has been manufacturing in accordance with section 37, title 2 of said act, certain cereal beverages, and is now engaged in the manufacture of said beverages in accordance with said act, and that it now has on hand many thousand gallons of said cereal beverages containing less than one-half of one per cent. of alcohol by volume, and that this plaintiff is now and has at all times herein mentioned, been engaged in the business of selling said cereal beverages to dealers in Louisville, Ky., the vicinity thereof, and other parts of the United States.

"Plaintiff states that on the 16th day of January, 1920, the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, caused to be issued certain regulations relative to the manufacture and sale of said cereal beverages. Subsection C of section 49 of article 6 of Regulations 60, so issued by said Commissioner, reads as follows, to wit:

"'(c) The containers of beverages produced at dealcoholizing plants, distilleries, or industrial alcohol plants, must, before or at the time of removal from the premises where produced, bear a statement either on the commercial label or separate label that the beverage contains less than one-half of 1 per cent. of alcohol by volume. This statement must appear on every bottle or other container of such beverages and where such beverages are transferred to new containers a similar statement must appear on the new containers. Such beverages may not be denominated as beer, ale, or porter.'

"Plaintiff states that in pursuance to said regulations, plaintiff caused a large number of labels to be printed, which said labels described the cereal beverage manufactured and sold by this plaintiff as 'Oertel's Lager Style and Oertel's Double Lager.' A copy of each of said labels is attached hereto as a part hereof, marked 'Exhibits 1 and 2.'

"Said labels in all respects comply with the provisions of said National Prohibition Act, and particularly point out that said beverage contains less than one-half of one per cent. of alcohol by volume.

"Plaintiff states that it has sold many thousand bottles of said beverages, and on each of said bottles one of said labels has appeared; that it has conducted an expensive advertising campaign, advertising said beverage as 'Lager Style' and 'Double Lager,' and that said names 'Lager Style' and 'Double Lager' have become well known to the purchasers of such cereal beverages, by reason of said advertisements, and that said brands constitute a valuable asset of this plaintiff, and have been established by plaintiff at great cost and expense as aforesaid.

"Plaintiff states that on the 26th day of October, 1920, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued Treasury Decision 3084, which said treasury decision reads in part as follows:

"'The use of the words beer, ale, or porter, and the well-known synonyms for same, such as Lager, Bock or Stout, either with or without prefixes or suffixes, is not permissible on labels for cereal beverages.'"

The plaintiff then claims that so much of this last regulation or treasury decision as prohibits the use of "Lager, Bock, or Stout" is in violation of law; that the prohibition of the use of said terms is not authorized by the statute nor any act of Congress; and that, on the contrary, said statute expressly authorizes the manufacture of such cereal beverages containing less than one-half of one per cent. alcohol by volume, and also the sale thereof when and so long as such beverages are denominated otherwise than as "beer, ale, or porter."

The bill further avers that the defendants are the duly authorized officers of the government to prosecute or to bring suits for the violation of the last regulation as well as the others, and that they have publicly threatened and now publicly threaten to enforce the same and especially said Treasury Decision No. 3084, and to prohibit the plaintiff from using the terms "Lager" and "Double Lager," and also threaten to prosecute it for using said terms and to bring numerous civil suits against them in the event they do not discontinue it, and threaten to cause the arrest of plaintiff's officers and salesmen and the confiscation of their property, and that by such threats and action plaintiff will be deprived of its property, its business will be destroyed, its customers will be afraid to deal in the products manufactured by it, and that it will be deprived of its labels and brands and the use of those terms in advertising its products. The bill prays for an injunction against defendants, prohibiting them from doing any of the threatened acts, and accordingly the plaintiff has moved the court to grant it a writ of injunction.

The defendants have moved to dismiss the bill for want of equity, which motion, of course, involves, upon its hearing, an admission that the averments of the bill are true. In this situation an interesting and important question is presented for determination, and in its consideration we shall treat Treasury Decision No. 3084 as a regulation. It was made by the Commissioner of Internal Revenue, was approved by the Secretary of the Treasury on October 26, 1920, and might be more effective as a "regulation" than as a mere "decision."

Title 2, section 1, of the act provides explicitly that the phrase "intoxicating liquors" 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 one per centum or more of alcohol by volume which are fit for use for beverage purposes.

Looking to the act we find that its declared purposes are, first, to forbid the manufacturing, second, the sale, and, third, the transportation of intoxicating liquors for beverage purposes. The liquors referred to were those which were intoxicating, and no others. Manifestly, therefore, nothing came within the purview of these provisions except such fluids as contained an amount of alcohol over one-half of one per cent. in the whole. Otherwise it was not intoxicating, and therefore was not intended to come within any of the provisions of the Volstead Act, nor, indeed, those of the Eighteenth Amendment itself. For the purposes of this hearing, at least, it is admitted by the defendants that plaintiff's products were not intoxicating.

In our efforts to reach a proper conclusion we find much help in the language of Mr. Justice Day, who, when delivering the opinion of the Supreme Court in United States v. Standard Brewery, 251 U. S. at page 217, 40 Sup. Ct. 140, 64 L. Ed. 229, said:

"Nothing is better settled than that in the construction of a law its meaning must first be sought in the language employed. If that be plain, it is the duty of the courts to enforce the law as written, provided it be within

the constitutional authority of the legislative body which passed it. Lake County v. Rollins, 130 U. S. 662, 670, 671; Bate Refrigerating Co. v. Sulzberger, 157 U. S. 1, 33; United States v. Bank, 234 U. S. 245, 258; Caminetti v. United States, 242 U. S. 470, 485."

And as bearing closely upon the exact question involved, viz., whether, when the statute as enacted by Congress in the respect now under consideration, includes only the words "beer, ale, or porter," the ancient maxim, "expressio unius est exclusio alterius"—the expression of one thing is the exclusion of another—should not be given much weight in determining whether an executive officer can include other words in making a regulation.

In United States v. Antikamnia Co., 231 U. S. at page 666, 34 Sup. Ct. 222, 58 L. Ed. 419, Ann. Cas. 1915A, 49, in speaking of the functions of the Secretary of the Treasury, the Secretary of Agriculture, and the Secretary of Commerce and Labor, who were empowered by the Food and Drugs Act (34 Stats. 768 [Comp. St. §§ 8717–8728]) to make certain "rules and regulations" for its enforcement, the Supreme Court said:

"It is undoubtedly one of regulation only—an administrative power—not a power to alter or add to the act."

In United States v. George, 228 U. S. 14, 22, 33 Sup. Ct. 412, 415 (57 L. Ed. 712), the Supreme Court said:

"The justification urged for the regulation was that the word 'domestic' meant household. This court rejected the contention and decided that the regulation transcended the power of the Secretary. We said: 'If Rule 7 (the regulation involved) is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can another. If he can abridge, he can enlarge. Such power is not regulation; it is legislation.'"

And in Waite v. Macy, 246 U. S. 606, 608, 609, 38 Sup. Ct. 395, 396 (62 L. Ed. 892) the court said:

"No doubt it is true that this court cannot displace the judgment of the board in any matter within its jurisdiction, but it is equally true that the board cannot enlarge the powers given to it by statute and cover a usurpation by calling it a decision on purity, quality or fitness for consumption."

The rules for our guidance, as thus clearly established by the Supreme Court, must be followed. We cannot assume any authority or power to disregard them. They require that the language used in the Volstead Act shall not be added to. That language must neither be overlooked, disregarded, nor altered, and especially as it is plain and unambiguous in the provision here under consideration. That act was an industrious and elaborate attempt to meet the entire demand for legislation for the enforcement of the Eighteenth Amendment. We may assume from public information that it was greatly and very fully considered in all its details—as much so possibly as any measure in recent legislative history. We may assume also that all its provisions were carefully worked out and met and expressed the exact intention of the legislative department. We must further assume that the Congress therein used the exact language and indeed all the language it desired to use as manifesting its judgment and its purpose in the premises. No other branch

of the government has the power to add to or change those words, and if any defects in them should be developed in practical efforts to carry the law into full effect, executive officers have no power to supply that lack or amend the defect. The power to amend, as well as the power to enact a statute, rests exclusively in the legislative department.

The phrase "intoxicating liquors" is of supreme importance in the Eighteenth Amendment. Without it nothing else matters. Nevertheless the amendment did not, in terms, undertake to define what should be regarded as "intoxicating liquors." Of necessity, therefore, in prescribing the practical means for enforcing the amendment Congress did define its most important phrase in exact terms in title 2, § 1, of the Volstead Act. In doing this Congress enacted section 1 of title 2 of the Volstead Act, already copied above. In addition section 37 of the same title is of importance, as it, in conjunction with section 1, furnished the basis for that one of the regulations made January 16, 1920, which is as follows:

"(c) The containers of beverages produced at dealcoholizing plants, distilleries, or industrial alcohol plants, must, before or at the time of removal from the premises where produced, bear a statement either on the commercial label or separate label that the beverage contains less than one-half of 1 per cent. of alcohol by volume. This statement must appear on every bottle or other container of such beverages and where such beverages are transferred to new containers a similar statement must appear on the new containers. Such beverages may not be denominated as beer, ale, or porter."

This regulation precisely conformed to the act. Under it plaintiff was granted a formal permit to carry on its business. It thereupon invested large sums therein and had manufactured large quantities of the beverages it describes in the bill, when that regulation called decision No. 3084 was made by the Commissioner of Internal Revenue and approved by the Secretary of the Treasury on October 26, 1920, and which provides that—

"The use of the words beer, ale, or porter, and the well known synonyms for same, such as lager, bock or stout, either with or without prefixes or suffixes, is not permissible on labels for cereal beverages."

The enforcement of this regulation threatened plaintiff with large losses and is what it seeks to enjoin upon the ground that it is not authorized by the Volstead Act, and is therefore beyond the power of the Commissioner.

If Congress had deemed it proper to put into the Volstead or other act the language used in the new regulation, of course no objection could then have been made to it, but Congress did not do so, and in this situation the Commissioner undertook to supply what he must have supposed was a defect in the legislation. If Congress had chosen to add to the words "beer, ale, or porter," the words "or any synonyms for same such as Lager, Bock or Stout," the regulation might have been authorized, but in the absence of those words from the act the rules plainly established by the Supreme Court make it clear that the Commissioner could not, even with the approval of the Secretary of the Treasury or otherwise, add those words to those used by Congress in the legislation it enacted, and the attempt to do so must be held to have

been unauthorized by law, and consequently not enforceable as against the plaintiff in this case. Congress, of course, could, if so desiring, have used those additional words, and, better still, might also have explicitly said what words should be regarded as synonyms, and not have left it to the conjectures of each new Commissioner of Internal Revenue or Secretary of the Treasury, or other executive officers, to enforce their possibly varying views as to what should be regarded as synonymous. This power of final "definition" is not given to the executive officers. United States v. George, 228 U. S. 22, 33 Sup. Ct. 412, 57 L. Ed. 712, supra.

We have, therefore, reached the conclusion that the motion of the defendants to dismiss the bill for want of equity on its face should be overruled, and that the motion of the plaintiff for an injunction against the defendants to the extent indicated in the bill should be sustained.

A decree accordingly may be prepared.

WENA LUMBER CO. v. CONTINENTAL LUMBER CO.

(District Court, S. D. Mississippi, S. D. February 14, 1921.)

Removal of causes ⇐103—Failure of defendant to plead after removal ground for remand.

Under Judicial Code, § 29 (Comp. St. § 1011), the filing of a plea, answer, or demurrer by the removing defendant within 30 days after the filing of the transcript is a part of the removal procedure, and on a failure to so plead within the time the court may, in the exercise of a legal discretion, grant a motion to remand.

At Law. Action by the Wena Lumber Company against the Continental Lumber Company. On motion to remand to state court. Motion granted.

J. N. Flowers, of Jackson, Miss., and Gex, Waller & Morse, of Bay St. Louis, Miss., for the motion.

Marshall & Wallace, of Gulfport, Miss., opposed.

HOLMES, District Judge. This suit was filed in the circuit court of Hancock county, and on petition of the defendant was duly removed to this court. More than eight months elapsed after the transcript was filed in this court before the defendant filed any plea, answer, or demurrer to the declaration. No effort was made to comply with the provision of the removal statute (Comp. St. § 1011) requiring the removing party to plead, answer, or demur to the declaration or complaint within 30 days after the filing of the transcript in the district court, and no satisfactory excuse is offered for thus ignoring the plain provisions of an unambiguous statute. At the second term of court after filing the transcript, the defendant, without asking or obtaining leave of court to plead out of time, filed a motion to quash the process and a plea to the jurisdiction of the court. Thereupon the plaintiff moved to remand the cause to the state court.

The right of removal is purely statutory, and one seeking the benefits of the statute must comply with its essential provisions. Notice of intention to remove is the first step in the proceeding, and pleading in some form is the last. The requirement to plead may not be mandatory or jurisdictional, in the sense that it may not be waived by the parties or extended by the court; but it is an essential step necessary to be taken by the defendant before "the cause shall then proceed in the same manner as if it had originally commenced in the said district court." Sec. 29, Judicial Code (Comp. St. § 1011). There has been no such waiver or extension here.

Whether to allow the defendant to plead after the expiration of the 30 days or to remand the cause is a matter that calls for the exercise of a sound legal discretion. Certain it is that the statute may not be disregarded with impunity, and failure to comply with it without any satisfactory excuse renders the cause subject to remand.

In this case the defendant has not asked leave to plead to the merits. It had the undoubted right to plead either to the merits or to the jurisdiction within the time designated, but that time has expired. Cain v. Commercial Pub. Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534. The plaintiff claims, and it is not denied, that serious prejudice may result to it by permitting the jurisdictional plea to be filed after an eight-months delay, and that this prejudice will be a direct result of the delay. This contention seems to be well taken. Failure to remand this cause would probably permit the defendant to gain an unfair advantage under the removal statute as a direct result of disregarding one of its plain provisions.

The motion to remand will be sustained.

ST. LOUIS UNION TRUST CO. v. MISSOURI & N. A. R. CO.

(District Court, E. D. Arkansas, W. D. February 21, 1921.)

Constitutional law ⇐297—Master and servant ⇐69—Railroad receiver's reduction of wages regulated by federal Transportation Act permissible, to prevent denial of constitutional guaranty.

In view of the provisions of Const. U. S. Amend. 5, the receiver for railroad property which has been operated at a continuous loss, both before and since the receivership, and where the gross earnings are insufficient to pay operating expenses, and money can no longer be borrowed on receiver's certificates, may be authorized to reduce wages of employees below the scale fixed by the United States Railroad Labor Board by decision No. 2, in effect May 1, 1920, without being subject to the penalty provided by Transportation Act, § 312.

In Equity. Suit by the St. Louis Union Trust Company against the Missouri & North Arkansas Railroad Company. On petition of receiver for instructions.

J. S. Rowland, of Harrison, Ark., for receiver.

TRIEBER, District Judge. The receiver appointed by the court in this cause has filed a petition asking for advice. In the petition it is alleged that effective February 1, 1921, after consultation with the judge of this court, and by his direction, the scale of wages of all officers and employees of the Missouri & North Arkansas Railroad Company was reduced to the basis in effect April 30, 1920; that objections to said reductions have been filed by certain classes of employees through their recognized representatives, and the receiver asked to continue the scale of wages existing by direction of the United States Railroad Labor Board in its decision No. 2, which became effective May 1, 1920. Attached to the petition is a very elaborate report of the condition of this railway ever since it was organized down to date. Exhibits are filed showing the income and operating expenses from 1907, when the road was built, to December, 1920, and an itemized statement of the earnings and expenditures for the years 1919 and 1920, the deficit for the month of January, 1921, the operating ratios for the years 1919 and 1920, and the salaries and wages paid to the employees in all the departments.

From the statements filed it is shown that, from the time the road was built and placed in operation to this date, there has never been a dividend paid to the stockholders, not a dollar of interest has ever been paid on the bonds, and that there has been a net loss of $2,445,-884.24 from the operation of the road. Omitting the deficit, while the road was under control of the government, which amounted to $1,168,644, the operation of the road, since the appointment of the receiver, including the interest paid on the receiver's certificates, the expenditures of operation to January 1, 1921, exceeded the gross earnings $985,898.20.

When the road was placed in the hands of the receiver in the foreclosure proceedings by the mortgagee in this action, the road was in such condition that it could not be operated with safety. A great many of the ties were rotten; more than 40 per cent. of the rails were worn out; the bridges were in an unsafe condition; there was little rolling stock, and not sufficient locomotives to operate the road. After a hearing, the court authorized the issuance of receiver's certificates in order to make the road safe for operation. A little over $2,000,000 of receiver's certificates were issued, the mortgagee assenting, that they be declared a lien prior to that of the mortgage. As the earnings were not always sufficient to pay the interest, after payment of operating expenses and taxes, some additional receiver's certificates had to be sold in order to meet the interest. There has been a deficit in the operation of the road since the road was turned back by the government to the receiver, but as the government paid the deficit up to September 1st, it is only necessary to consider deficits since then, which amounted to $412,702.20. The deficit for the month of January, 1921, amounted to $56,015.66. The monthly reports filed by the receiver in court, and which are open to the public, show these deficits. These deficits cannot be met, as no money can be borrowed at any price.

It is also shown that considerable expenditures will be necessary to put the road in condition to operate it with safety. It will require about 1,000 tons of rails to replace those worn out. Additional rolling stock will have to be purchased and other expenditures made, which are absolutely necessary if the road is to be operated.

The receiver's certificates heretofore issued are practically without a market, and if any new certificates are issued they could not be sold at any price. But, even if there were a market for them at some price, the court would be disinclined to authorize a sale of them, knowing that the interest thereon could not be paid. Courts must be just as honest as corporations and individuals, and if it incurs a debt, it must see its way clear to be able to pay at least the interest on it. To do otherwise would be practicing a fraud on the lenders. For this reason, to attempt to borrow money on additional receiver's certificates, assuming they could be sold, is out of the question.

Only one of two remedies is left: To stop the operation of the road, or to cut down expenses wherever it is possible. To cease operating the road ought only to be resorted to, if no other remedy is left. Industries have been established along the road in reliance on the operation of the railway. These industries are entirely dependent on this road, to obtain raw material and to ship to the market the finished material. Without this road being operated, the investments in these industries would be absolutely destroyed. Many of the farmers residing along the road, and large numbers of others who have purchased lands and settled along the road, have planted valuable apple orchards, and have no other means of sending their product to market, except this road. To deprive them of the means of marketing the fruit means the destruction of the orchards. The court would therefore not be justified to stop the operation of the road, if it is at all possible to continue its operation. Therefore the only other remedy left is to reduce the salaries and wages of the employees at the same time, if it can be done without reducing them below a level which will enable them to provide for themselves and their families. The salary of the receiver, who is also the general manager of the road, has been reduced by the court 20 per cent. and has been accepted by the receiver.

The important question is whether, in view of these facts, which are indisputable, the receiver would be subject to punishment under the provisions of section 312 of the Transportation Act of February 28, 1920, c. 91, 41 Stat. p. 473. It may be conceded that the act is a constitutional exercise of the powers granted by the Constitution to Congress. But it is not conclusive that a carrier, whose earnings are insufficient to pay the wages established by the Railroad Labor Board, and unable to obtain by loans the money necessary to comply with its order, can be punished for failing to comply with the order.

To require it to continue in business at a loss is beyond the powers of Congress or a state. In Brooks-Scanlon Co. v. Railroad Commission of Louisiana, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323, the act of the state of Louisiana requiring a carrier to continue the operation of a road at a loss was held to be unconstitutional, as depriving the carrier of its property. While the opinion fails to state that the

invalidity is by reason of the Fourteenth Amendment to the Constitution of the United States, it could rest on no other ground. Reaffirmed in Bullock v. State of Florida, 254 U. S. ——, 41 Sup. Ct. 193, 65 L. Ed. ——.

In this case, the Transportation Act having been enacted by Congress, the Fourteenth Amendment would not apply; but the Fifth Amendment to the Constitution does apply to acts of Congress. As the language used in both of these amendments is the same the same rule of construction must be applied to one as to the other. As stated in Twining v. New Jersey, 211 U. S. 78, 101, 29 Sup. Ct. 14, 20 (53 L. Ed. 97):

"If any different meaning of the same words [referring to the Fifth Amendment] as they are used in the Fourteenth Amendment, can be conceived, none has yet appeared in judicial decisions."

That it does so apply has been conclusively determined in Ft. Smith & Western R. R. Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. Ed. 862. In that case the question before the court was whether a railroad, not quite as badly situated as the Missouri & North Arkansas Railroad is, can be compelled to comply with the provisions of the act of Congress known as the Adamson Law, 39 Stat. 721 (Comp. St. §§ 8680a–8680d), and it was held that, although that act had been held to be constitutional in Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1026:

"It was not decided that there might not be circumstances to which the act could not be applied consistently with the Fifth Amendment, or that the act in spite of its universal language must be construed to reach literally every carrier by railroad subject to the act to regulate commerce."

It is true in that case both parties, the employer and employees, wished to go on as before; the receiver having made satisfactory terms with its men. In the instant case some of the employees have quit work and the others are protesting against the reduction of their wages. But the places of those who have declined to continue their employment have been filled by others equally competent and efficient, who are willing to accept the wages offered by the receiver, and, should the other employees see proper to quit, the receiver assures the court that he can fill their places, having many applications from competent men, who are willing to accept employment at the wages offered.

In the opinion of the court the receiver is authorized and directed to pay the wages in force prior to April 30, 1920.

THE MEXICO MARU.

(District Court, W. D. Washington, S. D. February 3, 1921.)

No. 2596.

1. **Collision ⇐69—Anchorage ground designated by city held lawful.**
In the absence of designation of anchorage grounds in a port by the Secretary of War, as authorized by Act March 4, 1915, § 7 (Comp. St. § 9959a), a vessel is protected in anchoring as customary on an anchorage ground designated by city ordinance and the port warden.

2. **Collision ⇐72(1)—Mutual faults of moving and anchored vessels.**
A vessel moving from harbor at night *held* in fault for collision with an anchored vessel, for moving at too great speed over the anchorage grounds in the foggy condition of the atmosphere, and the anchored vessel *held* chargeable with contributory fault, for failing to sound fog signals, on evidence that the fog was shifting and varying in density, rendering it uncertain how far away her lights could be seen, and that she was anchored near one corner of the grounds, where she was liable to be in the way of vessels leaving the harbor.

In Admiralty. Suit for collision by the Booth Fisheries Company of Delaware and others against the Japanese steamer Mexico Maru, Osaka Shoshen Kabushiki Kaisha, claimant, and the City of Seattle, intervener, with cross-libel by claimant. Decree holding both vessels in fault.

Bogle, Merritt & Bogle, of Seattle, Wash., for Booth Fisheries Co. and others.

Huffer & Hayden, of Seattle, Wash., for The Mexico Maru and others.

Walter F. Meier, Corp. Counsel and Edwin C. Ewing, Asst. Corp. Counsel, both of Seattle, Wash., for city of Seattle.

CUSHMAN, District Judge. The case is one of collision between two vessels, and the questions involved are almost entirely of fact. The Mexico Maru, hereinafter called the Mexico, a steamer 400 feet in length, at 12:55 a. m., October 30, 1918, left her wharf on the East waterway at the port of Seattle for Tacoma. At 1:33 a. m. she was in collision with the A. J. Fuller, hereinafter called the Fuller, a full-rigged American ship, 229 feet long, which was lying at anchor within a certain portion of Elliott Bay designated, in the year 1915, by a city ordinance of Seattle as an "anchorage ground."

It has been stipulated that the court shall first determine the fault of which vessel caused the collision, or whether both were in fault, before considering the other questions involved. A comprehensive statement of the vast amount of evidence taken is not feasible. The testimony of many of the witnesses can be reconciled, to some extent, on the assumption that, prior to about 2 o'clock, the denser fog was, for the most part, confined to the waterways along the face of the docks and off the shore of Harbor Island.

Taking into account the changing conditions of the fog, the drifting of the banks, the liability of witnesses to be mistaken in the matter of time and distances, the matter the particular witness had in hand as bearing upon his reason to observe and recollect the fog conditions, and further making allowance for the interest of the witnesses and the lapse of time after the occurrence and prior to the taking of testimony, many of the contradictions in the testimony are more apparent than real. Yet there is a large amount of testimony that it is impossible to reconcile.

As the tendency of witnesses aboard colliding vessels to be loyal to and partisans of their own ship is well recognized, when the testimony of such witnesses is not consistent, I have given the greater weight to the statements and admissions made by them against such recognized bias. The outstanding and, as the court considers, the controlling facts are as follows:

[1] Claimant disputes that the anchorage ground set apart by such ordinance was privileged ground, and contends that the city's action was contrary to the Act of Congress of March 4, 1915, c. 142 (38 Stat. p. 1053 [Comp. St. § 9959a]), which provides:

"Sec. 7. That the Secretary of War is hereby authorized, empowered, and directed to define and establish anchorage grounds for vessels in all harbors, rivers, bays, and other navigable waters of the United States whenever it is manifest to the said Secretary that the maritime or commercial interests of the United States require such anchorage grounds for safe navigation and the establishment of such anchorage grounds shall have been recommended by the Chief of Engineers, and to adopt suitable rules and regulations in relation thereto. * * *"

The War Department not having acted in pursuance of the statute and this being a usual and customary anchorage, claimant's contention is without merit.

It is shown that the Fuller had permission from the office of the port warden to tie up at buoy No. 2 in the anchorage; that she had been at that buoy for several days (since the afternoon of the 23d of October); and that the fact that she was at that buoy during this time was known to the pilot and captain of the Mexico, they having seen her there as late as the day before the collision. This renders immaterial any question as to the regularity of the permission to tie the Fuller up at that buoy.

[2] The East waterway lies west of certain wharves of the city, between such water front on the east and Harbor Island on the west, the fairway, or channel, north of the East waterway, extends along such water front between it and the anchorage. Harbor Island lies between the East and West waterways. The anchorage ground lies north of Harbor Island and between the channels or fairways, which are extensions of the East and West waterways. The anchorage ground is, roughly, half a mile or more square.

As Elliott Bay opens to the westward, all vessels, ordinarily, on entering or leaving the channel extending north of the East waterway, make an abrupt turn around the northeast corner of the anchorage

ground. Such vessels probably form more than half of the shipping entering and leaving the port of Seattle in the course of a year. Within the anchorage and adjacent to this corner, buoy No. 2 was located. Exactly how near the east and north boundaries is not shown, as the buoy went down with the Fuller. The Fuller was anchored some 1,000 feet west of the east boundary of the anchorage, and some 600 feet south of the north boundary. The Fuller, at the time of the collision, swung to the northwest of the buoy, all parts of her within the anchorage. The fairway east of the anchorage, opposite buoy No. 2 is approximately 1,900 feet wide.

There was a heavy fog, varying in density in the East waterway at 12:55, when the Mexico left her dock. It took her until 1:28 to run out of this fog. The point at which she did so, while not exactly established, must have been opposite the Skinner & Eddy shipyard. This point could not have been much farther than 2,500 feet from the Fuller.

Up to this time the first and fourth officers had been on lookout on the forecastle head, while the captain and pilot, together with the third mate at the engine room telegraph, a quartermaster at the wheel, and an apprentice officer keeping the log, were on the bridge. On passing out of this heavy fog, the captain testified that he had a visibility along the water front to the north for a half mile, meaning, evidently, that he could see the lights along the pier fronts for half a mile. Had it been clear in the ordinary sense, he could have seen the lights along the water front to Smith's Cove and the city lights on the hill beyond.

Capt. Oniya, on the bridge of the Mexico, testified that from this point, which he described as the wider part of the bay, the fog was not very thick, that it was misty, and that he noticed no change in it until the Mexico struck the Fuller, which occurred about five minutes later. The Mexico had to this point, where she came out of the heavy fog, been going under "slow"—"stop" signals, taking over 30 minutes to reach this point, which is not more than 5,300 feet from the wharf she had left. As she came down the waterway, she frequently sounded fog signals. Immediately after emerging from the fog north of the entrance of the East waterway, the pilot increased the speed and changed his course from north-northwest to west by south, and the captain recalled the first mate from the lookout. The latter officer went below, where he remained until the collision.

Prior to the change in course, the captain mentioned to the pilot the position of the Fuller. The pilot testified, and evidently calculated, that the Mexico, with her momentum, would be slow enough in responding to her helm to carry her so far north that, on making the turn, he would pass beyond where the Fuller was lying at the buoy. The true explanation of his miscalculation I find to be in the way the Mexico was loaded. Her draft was 11.3 forward and 20 feet 9 aft. Being down at the stern made her liable to turn more quickly than usual in response to her helm. The pilot probably did not make due allowance for this. He may not have known it, for, from the time he

came aboard until the Mexico left her wharf at 12:55, he was asleep a great part of the time.

Libelants' contention is unsupported by the evidence; this contention being that the Mexico left the fairway and cut across the anchorage immediately after passing the red spar buoy in the southeast corner of the anchorage. There must have been a heavy fog at this point, rendering such a maneuver unlikely. The pilot testified, and his pocket log of former trips corroborates him, that he never departed or took a departure in that manner, save in daylight and clear weather.

The testimony of those aboard the Mexico indicates that there was but one change of course. If the Mexico had left the fairway at this point on that course, she would have missed the Fuller. If the Mexico, so departing, because of being down by the stern, had turned more rapidly, as has been found, than the pilot calculated, this would carry her still further from the Fuller. If the pilot had knowingly taken a course across the anchorage in the direction of the Fuller, he would have been on the lookout for her, which does not appear to have been the case.

In reaching my conclusion, I have given much weight to the testimony of the witness Harding, who was night foreman for the Pacific Coast Coal Company. He is the only disinterested witness who testified to seeing the Mexico making this maneuver. He testified that he saw her come down the fairway and turn off the bunkers, upon which he was at work, and disappear in the fog in the direction of the Fuller. These bunkers are east of, and constitute the nearest point on the water front opposite, the point of collision. The Mexico must have begun to turn before she was directly opposite the bunkers.

At about 1:32, the captain of the Mexico saw the light of the Fuller and said to the pilot, "What is that light?" to which the pilot made no response. The pilot had been looking back, as he testified, over the starboard quarter, watching the lights on the Smith Building and the Great Northern Station, to see how fast he was swinging, and determine when he was on his course, which was the Duwaumish bell buoy. It may be that the glow of the city lights dulled his vision for a moment, or that he misunderstood the direction indicated by the captain's question. The reason is not important. Without question it was a few moments after the captain saw the Fuller's light before it was seen by the pilot.

The first time the captain was asked, he said it was 10 seconds after he saw the light before the pilot gave the order "Hard aport," and 9 or 10 seconds more before he gave the order "Full speed astern." Again, he testified that it was 6 or 8 seconds. The effect of his testimony is that he does not undertake to estimate the time with exactness; but it is apparent that there was a substantial lapse of time after he saw the light before the pilot observed it.

At the same time that the pilot saw the light, came the call from the lookout, "There is a light ahead! a light ahead!" The lookout was about 200 feet forward of the bridge, and probably did not see the light as soon as the captain, because of the thicker condition of the

atmosphere near the water. The contention that he did not keep a lookout far enough to port as the vessel turned is possible, but hardly tenable, as the order to the helmsman to steady her on her course was given before the light was seen.

Although the captain and pilot only saw the forward light of the Fuller, the lookout saw, at about the same time, both the forward anchor light, dead ahead, and the after one over his port bow. The third mate at the engine room telegraph saw two lights on the Fuller right after the order "Full speed astern." In about a minute after the pilot saw the light, the collision occurred, from which, and the opinion of the witnesses as to the distance, it would appear that the Fuller could not have been more than 300 feet distant when her light was seen.

The Mexico struck the Fuller at about right angles on her starboard bow. The Mexico backed away, crossed to the port side of the Fuller, and stood by until 2:25 a. m. In the meantime, the mate and watchman of the Fuller, the only men on her, came aboard the Mexico. The Fuller sank in 30 fathoms of water. Before the departure of the Mexico from the scene of collision, the fog had become thick over the entire anchorage and nearby waters of the bay. The lights upon both vessels were sufficient, properly placed, and burning.

The foregoing shows a clear fault on the part of the Mexico, in that she navigated across the anchorage at too high a rate of speed in the obscured condition of the atmosphere. So concluding, it is unnecessary to determine the question of the sufficiency of the lookout.

The remaining question is whether it is shown with sufficient certainty that there was fog or mist of such density that the Fuller was also at fault for failing to ring her fog bell. This is the most difficult of the various questions in issue to determine, because it was, not only night, but late at night, when the collision occurred. The condition of the fog was changing, as banks drifted north out of the East and West waterways, and as the fog passed or formed over the anchorage.

The tide was flood at 2:12 a. m. There must have been slack water for some time prior to the collision, which would allow the backed fresh water of the East waterway, into which emptied the Duwaumish river, to spread out upon the surface of the water of the anchorage. The temperature of the atmosphere is shown to have been 45° at midnight and 41° at 4 a. m. The temperature of the water is not shown.

Owing to the time of year—long after the melting of the snow in the mountains would chill the surface waters of the Duwaumish—I conclude that it was not a cold surface fog, but rather a "steaming pot fog"; that is, one where the water is warmer than the atmosphere. If it was a cold surface fog, one where the water chilled the moist-laden air near its surface, it would, probably, not have first appeared in the waterways, where the fresh water was then backed up.

When the fog became dense over the anchorage, no one testified that it came as a bank from the south, or drifted over the anchorage from the south. No one testified that there was any increase in the wind from that direction at that time to carry it over the anchorage. It

formed first in the waterway, where the fresh water would be held back by the incoming tide. Its appearance over the entire anchorage corresponds very nearly with the change of tide, when the backed-up fresh water would be released. This fog is described by the pilot and captain as rolling up above the ship and at times shutting out the stars.

This could not be a characteristic of a cold surface fog, for the cold surface would help to hold the colder, and therefore heavier, air nearest the surface. But the contrary would be true where the surface of the water was warmer than the air, for, as the air was warmed nearest the surface, it would rise, carrying the fog with it, and this probably accounts for this characteristic, as described by these witnesses. It may also account for the lack of uniformity as to the density of the fog described by the witnesses, as it is obvious that there would be more disturbance of the fog-laden atmosphere rising from a warm surface than when held by a cold one.

From this I conclude that the dense fog appearing over the anchorage after the collision was caused by the warm fresh water from the East and West waterways spreading over the anchorage as the tide slackened, and that it was forming at and prior to the time of the collision. This would afford an explanation of why the watchman of the Fuller considered the fog sufficient to ring his bell twice before the collision, once at 12:30 and again at about 1:10. A temporary lulling and moving of the air from the south would permit of its forming and being carried away.

Numerous witnesses testified as to a bank of fog passing out of the East waterway prior to the collision. Even allowing for a mistake in the recollection of time on the part of the witnesses, as to exactly when this bank of fog passed north opposite the Fuller, and assuming that it extended west over the anchorage, it would only account for the necessity on the part of Johanson (the watchman on the Fuller) to ring his bell once, and would leave the other fog unaccounted for, except that it was forming in the anchorage, or other banks, unnoticed by the witnesses, were passing over the anchorage from off Harbor Island.

Libelants contend that the witness Harding, who testified to seeing the Mexico turn off the bunkers and disappear in the fog, was mistaken, in that her disappearance is to be accounted for by her reaching a point, as she crossed the anchorage, where the screens back of her lights shut them from Harding's view. This is not persuasive, for Harding testifies that he was expecting a vessel in at the bunkers to load coal, and he thought the Mexico was probably the vessel; that he was watching her, and that he thought she was making a turn preparatory to coming into the bunkers. Under these circumstances, it is hardly to be presumed that a witness would be deceived as to whether the vessel was turning or not. While the lights of the Mexico might have been shut out in the manner indicated, this witness did not see the lights of the Fuller, which were in no manner obscured, unless by fog.

Beecher, pilot of the Mexico, says he could see a half mile along the water front, and the lights in such tall buildings as the Smith and Great Northern Station, and the lights on the hill. Other witnesses speak in the same way regarding the hill lights. The lights seen by him a half mile or more along the piers to the north as he came out of the East waterway at the time of turning for the Duwaumish bell buoy are not shown to have been of the limited power of the Fuller's anchor lights.

If the question to be determined was whether there was a heavy fog over the anchorage, the ability to see the shore lights would be more important than it is in this case. The glow of the city lights along the water front east of the anchorage may have been visible for half a mile; but I am convinced that the individual ship lights were not visible for that distance from the direction of the East waterway, or from the channel to the east of the anchorage, and probably for not more than half that distance.

In determining whether ship lights were or could be seen, it is necessary to attach much importance, not only to what the witnesses testify to having seen, but also to what they did not see, or failed to mention having seen. One reason for concluding that there must have been fog over the anchorage on this night is that it is about the only way to reasonably account for the imminence of the collision when the Fuller's lights were first seen by three apparently vigilant men on watch upon the Mexico. Save those on the colliding vessels, not one of the witnesses who heard the crash of the collision, or the halloing following the collision, claim to have been able to see the lights of either vessel at that time.

Johanson, the watchman aboard the Fuller, did not see the searchlight played from Pier 1 during the night prior to the collision; Pier 1 being less than a mile away. The operator of the searchlight testifies that he was unable to see the Fuller, although on the previous night he remembers having seen her in the rays of his light. Johanson testified to seeing the lights of the city on the hill; that, just before the collision, it "got a little kind of hazy," but that he could "see them plain." When asked about the lights of West Seattle at this time, he said:

"I could not see them as clear at the time of the collision as I could before 12 o'clock, but I could see them."

Other witnesses testified to being able to see the stars, even when in the heavier fog in the waterway and along the waterfront. This would tend to show that the fog was low-lying, and tend to explain the watchman's being able to see the lights on the hill.

The ship Corruthers lay at anchor about a mile to the south and west of the Fuller; but Johanson does not testify to being able to see the lights on the Corruthers. The watchman on the Corruthers on this night testified that he saw the Fuller's lights during the night prior to the collision and that later he heard shouting in the bay. Although there is some confusion on account of the time testified to by

this witness as to when he heard this shouting, it must have been from those on the Mexico and Fuller after the collision. He testified that he looked in the direction of the voice, but could not see the Fuller's lights.

Another witness on the docks, about half or three-quarters of a mile to the southeast of the Fuller, testified to having seen her lights after 12 o'clock. The effect of his testimony is that he saw the lights, but for a short time. Patrol No. 2, crossing the anchorage from West Seattle to Pier No. 1 at 1:17, also saw the Fuller.

Johanson, when asked the distance the Mexico was from the Fuller when he first saw her, said 400, 500, or 600 feet. Later he said 800 or 900 feet. The latter is the utmost distance claimed by him. He adds that it was "kind of dark and hazy." Again, he testified, when asked as to first seeing the Mexico:

"Well, back up toward that waterway; you could not see it very plain, any light, that was kind of foggy; but it was lined up the waterway somewhat east of Harbor Island."

If he was keeping an alert lookout, the fog is the only thing that will account for his not seeing the lights of the Mexico sooner. While the testimony of this witness is more or less contradictory, it fairly appears that he first saw the masthead light of the Mexico, and substantially at the same time her green light, later her red and green lights; that her green light then went out, and he saw her red light to the time of collision. His position on the Fuller was well back of the point of collision. He did not see her range light at the time of sighting her masthead light, and does not testify to having seen it at any time. The fact that, of her side lights, he first saw her green light, renders impossible the contention that his failure to see the range light was occasioned by her lights being in line. He probably did not see the range light because of fog—for the same reason that the pilot and captain of the Mexico did not see the aft anchor light of the Fuller.

The watchman on the Fuller, possibly to excuse himself from his duty to hail the Mexico, or ring his bell after he saw the masthead light and did not see the range light, testifies as to seeing the green side light. But, taking him at his word, the most reasonable explanation of that is that he did not see the range light because of fog, for, had the lights been in line, thereby intercepting the range light, he must then have known that the Mexico was headed directly for him, and should have given warning, for he had had experience enough to understand the importance and means of determining the course of an approaching vessel.

Libelants, in their answer to the cross-libel, aver that—

"For a period of approximately 15 minutes prior to the collision there had been no mist, or light, shifting fog, whatsoever north of the entrance of the East waterway, or in the vicinity of that portion of the Elliott Bay anchorage ground where the A. J. Fuller was anchored."

Capt. Bozarth, of the tug C. C. Cherry, testified to leaving Pier D with the tug Cherry at a quarter to 2; that, in crossing the anchorage to the West waterway, it was not foggy, but "it got a little misty."

A tendency is apparent upon the part of many of the witnesses, particularly those engaged in navigating boats about the bay on this night, to speak of the existence of "haze," "low-lying haze," and "smoke," and "a foggy condition," thereby avoiding the use of the statutory words "fog" and "mist." The reason for the requirement of a signal is the inability to see satisfactorily, and fine shades of distinction in descriptive terms should not be drawn. The Archie Crossman and the Gracie (D. C.) 106 Fed. 984.

"Fog, the name given to any distribution of solid or liquid particles in the surface layers of the atmosphere, which renders surrounding objects notably indistinct or altogether invisible according to their distance. * * *

"Two other words, 'mist' and 'haze,' are also in common use with reference to the deterioration of transparency of the surface layers of the atmosphere caused by solid or liquid particles, and in ordinary literature the three words are used almost according to the fancy of the writer. It seems possible to draw a distinction between mist and haze that would be fairly well supported by usage. Mist may be defined as a cloud of water particles at the surface of land or sea, and would only occur when the air is nearly or actually saturated; that is, when there is little or no difference between the readings of the dry and wet bulbs. The word 'haze,' on the other hand, may be reserved for the obscuration of the surface layers of the atmosphere when the air is dry. * * *

"These words are used quite irrespective of the nature of the cloud, which interferes with effective vision and necessitates the special provision; the word 'mist' is seldom used in similar connection. We may thus define a fog as a surface cloud sufficiently thick to cause hindrance to traffic. It will be 'thick mist' if the cloud consists of water particles; a 'thick haze' if it consists of smoke or dust particles which would be persistent even in a dry atmosphere.

"It is probable that sailors would be inclined to restrict the use of the word to the surface clouds met with in comparatively calm weather, and that the obscurity of the atmosphere when it is blowing hard, and perhaps raining hard as well, should be indicated by the terms 'thick weather,' or 'very thick weather,' and not by 'fog'; but the term 'fog' would be quite correctly used on such occasions from the point of view of cautious navigation. If cloud, drizzling rain, or heavy rain cause such obscurity that passing ships are not visible within working distance, the sounding of a fog horn becomes a duty."

The Encyclopaedia Britannica (11th Ed.).

Johanson, the watchman on the Fuller, testified to ringing the fog bell twice before the collision, the first time about 12:30 and again at 1:10, and each time for 10 or 15 minutes. Johanson said that his method of ringing the bell was to ring for half a minute with an intermission of 2 minutes, and that the mist cleared each time before he stopped, the last time 10 or 12 minutes before he saw the light of the Mexico. He further testified that, from the time he quit ringing the bell the last time to the time of the collision, it was "a little hazy, but wasn't foggy"; that, while ringing the bell the last time, he heard whistles of a steamer. This must have been the Mexico as she was coming down the waterway; but he says he could not tell where the whistles came from.

It is unquestioned, therefore, that there was fog in the anchorage a very few minutes before the collision. Within an hour prior to the collision, a bank of fog passed down the channel between the anchorage and the docks, and at the time of the collision had reached a point considerably north of the anchorage. There is testimony that the bank did not extend over the anchorage; but it is not of a very convincing nature.

At the time of the collision, another bank of fog had reached a point in this channel not more than half a mile to the southeast of where the Fuller was anchored. It was from this fog bank that the Mexico emerged just before making her turn across the anchorage prior to the collision. Although somewhat at variance with certain testimony of Pilot Beecher, it is reasonable to conclude that, in coming down the channel, the Mexico probably kept well to the west side of the channel, in order to keep off the pier heads. This would result in her not being more than half a mile from the Fuller when she emerged from the dense fog.

It is also shown that throughout the evening there was heavy fog in the East waterway and at times in the West waterway; that one of the patrol launches, in crossing the southerly part of the anchorage before midnight, encountered heavy fog off of Harbor Island. There is further testimony that, shortly prior to midnight, a fog was encountered by this launch about half a mile to the south and west of the Fuller, although its extent, density, and movement are not accurately described. That this fog remained in this locality until after the collision is rendered likely by the fact that the watchman on the Corruthers was unable to see the Fuller's lights at the time of the collision, as already noted, and the further fact that the captain of the tug C. C. Cherry did not notice the lights of the Mexico standing by after the collision, although within half a mile of her, prior to the time the Cherry's pump broke down, or during the 10 minutes that they were engaged in the repair of it, or until after he had started again on his course in the direction of the Mexico.

Half speed of the Mexico would be about 5½ knots. The fact that she increased to half speed at 1:28, and sighted the Fuller at 1:32 immediately ahead of her, coupled with the fact that she had not steered directly for the Fuller, but had executed the turn, substantiates the conclusion that she could not have been over half a mile from the Fuller when she came out of this fog bank.

The witness Harding testified that the Mexico did not blow fog signals for 2 or 3 minutes while in the fairway, nor until after she had passed from his vision, and until directly before he heard the crash. This evidence is corroborated by the manner in which claimant's witnesses testified as to the giving of fog signals, which claimant contends were continuously sounded. The pilot testified that the quartermaster was pulling the whistle cord. This is, in effect, testimony that he (the pilot) was not. The quartermaster testified that the pilot was pulling the whistle cord, which amounts to testimony that he (the quartermaster) was not.

This discrepancy in the testimony over blowing the fog signals on the Mexico may be explained by the fact that they were only being blown when she was passing through a bank, and that, during the considerable time that she was coming down the waterway, both the pilot and quartermaster sounded fog signals, and that, they not having been sounded in the channel off the anchorage, the recollection of the pilot and quartermaster, stimulated by their bias afterwards, leads each of them to believe that the other was sounding the whistles regularly before the collision.

In view of the number of witnesses who have testified to two blasts being blown prior to the collision, there can be no question that such was the fact, although the watchman on the Fuller testifies that he heard no whistles. Unless this can be accounted for by excitement on his part on account of the imminence of the collision, or, an account of the subsequent excitement after the collision, he has forgotten the whistles, it would lend color to the testimony of the witnesses on the Mexico that he was not on deck as the Mexico approached, but in the galley.

This failure to be sounding the fog whistle on the Mexico may be viewed in two aspects: First, as an admission that the weather condition was such as not to require that precaution; and, second, as added evidence of fault and negligence in the operation of the Mexico. Under the foregoing conditions, as shown, it must necessarily be considered as both. It was an admission that it was relatively clear, and was an added fault or negligence.

A number of witnesses on the patrol launches and two tugs testified as to its being clear over the anchorage. These men, particularly those on the patrol boats, made many trips each night about the bay, and were therefore familiar with their surroundings. These smaller boats would be easily and quickly stopped and maneuvered to avoid a collision. A foggy condition that would be a menace in the operation of a large vessel, such as the Mexico would prove no embarrassment whatever in the navigation of a small launch. This, probably, accounts for the fact that these witnesses on the launches and tugs describe the condition over the anchorage as clear. The effect of this testimony is that, when they say that it was clear, they mean that it was clear enough for themselves, in the operation of their boats, to avoid danger. If it had not been foggy, more witnesses along the busy water front, even at that late hour of the night, should have seen the Mexico as she came down the channel and turned across the anchorage.

Libelants contend that the Fuller's lights were visible over the anchorage for half a mile, and that this condition dispensed with the necessity for ringing the fog bell on her, The court can neither agree with the premise nor the conclusion, for it is apparent, taking into account the distances at which those on the Mexico saw the lights on the Fuller and the watchman on the Fuller saw the lights on the Mexico, as testified, that ship lights were not visible in this portion of the anchorage over a quarter of a mile.

While it is not legal authority, the following table from the Encyclopedia Britannica (11th Ed.) vol. 1, p. 588, as to the effects and

traffic requirements in fog, is evidence of what is recognized as necessary on the part of those so engaged in the navigation of vessels (the italics are the court's):

Name.	No.	On Land.	On Sea.	On River.
Slight fog or mist	1	Objects indistinct, but traffic by rail or road unimpeded.	Horizon invisible, but lights and landmarks visible at working distances.	Objects indistinct but navigation unimpeded.
Moderate fog	2	Traffic by rail requires additional caution.	*Lights, passing vessels and landmarks generally indistinct under a mile.*	*Navigation impeded, additional caution required.*
	3	Traffic by rail or road impeded.	*Fog signals are sounded.*	
Thick fog	4	Traffic by rail or road impeded.	Ship's lights and vessels invisible at ¼ mile or less.	Navigation suspended.
	5	Traffic by rail or road totally disorganized.		

In daylight, if the condition as to visibility were such that one could not see half a mile, no mistake would be made in pronouncing it foggy; and if, at night, lights that ordinarily would be seen two miles cannot be seen half a mile, it is "foggy," as the word is ordinarily understood. The fact that passing signals are only to be given when vessels are within half a mile and in sight of each other does not affect the question, nor limit the range of visibility to within half a mile which would require the ringing of a fog bell. The law does not require the bell only when lights cannot be seen, but also when the foggy condition renders it liable that they may not be seen.

The Fuller was lying in the anchorage not over 1,000 feet from its east boundary, nor more than 600 feet from its north boundary; that is, she was in the northeast corner of the anchorage, which, on account of the way in which vessels turned in entering and leaving the East waterway, is the most exposed portion of the anchorage. That vessels anchored in this portion of the anchorage, at buoy No. 2, were exposed to collision with such passing vessels, is obvious, and that it was realized by shipping men is shown by the fact that, previous to the collision, one vessel had moved from that buoy for this reason. This fact would render the failure to sound fog signals on a vessel in this position a fault, which in other situations, in like fog, would not constitute a fault. The Mary Weaver (D. C.) 124 Fed. 977.

The foregoing shows that the Fuller was in fault, in that her fog bell was not being rung at and prior to the time of the collision. It being shown that the fog was thick enough to require the ringing of a

fog bell on the Fuller, it is only necessary to determine whether the failure to ring that bell was a contributing fault to the collision.

It is libelants' contention that, as the pilot of the Mexico knew the location of the Fuller, the failure to sound the bell cannot be held to have contributed to the collision. Finding, as I have done, that the Mexico got off of her course and failed to give the Fuller as wide a berth as the pilot intended, because his vessel swung more rapidly than he calculated, and that he thereby got off his course without his knowledge, it is obvious that, had the bell on the Fuller been rung during the two or more minutes prior to the collision, the pilot on the Mexico would have had an added warning and opportunity to have correctly determined his position and avoided the collision.

The fault was therefore a contributing one. The Etruria (D. C.) 139 Fed. 925. Both vessels were at fault, and the damages will be divided. The Rosaleen, 214 Fed. 252, 130 C. C. A. 622.

AMERICAN BRAKE SHOE & FOUNDRY CO. et al. v. PITTSBURGH RYS. CO.

(District Court, W. D. Pennsylvania. May Term, 1918.)

No. 201.

1. **Constitutional law ⊂=135—Contracts by public service corporations not inviolable.**

   Contracts made by public service corporations, because of the interest of the public therein, are not to be classed with those personal and private contracts, the impairment of which is forbidden by constitutional provisions, and such contracts are not inviolable where, directly or indirectly, they affect rates to be charged the public, which on the one hand may not be made unreasonably high and on the other must be such as to afford the owners of the property a fair return on its fair value.

2. **Public Service Commission ⊂=19½, New, vol. 12A Key-No. Series—Court will not order receivers to pay license taxes in advance of state commission's determination of validity.**

   In view of Pennsylvania Public Service Act of 1913, creating a state Public Service Commission (Pa. St. 1920, §§ 18057–18214), and which as construed by the courts of the state vests such commission with power over rates and rate contracts, whether made before or after its passage by a public service corporation, a federal court having possession by its receivers of an extensive street railway system serving a large number of municipalities, many of which, under ordinance contracts granting franchises, have imposed license taxes on the company, will not order its receivers to pay such taxes in advance of a determination by the Public Service Commission of their reasonableness and validity.

3. **Judgment ⊂=738—Not conclusive against public as to facts not controverted.**

   The judgment in an action which involved rights of the public will not be held to create an estoppel against the public as to a fact which was assumed because no evidence was offered in regard thereto.

In Equity. Suit by the American Brake Shoe & Foundry Company and others against the Pittsburgh Railways Company. On petition of City of McKeesport to require payment by receivers of franchise taxes. Denied.

Howard W. Douglass, of McKeesport, Pa., for city of McKeesport.

Chas. B. Prichard and Geo. N. Monro, Jr., both of Pittsburgh, Pa., for city of Pittsburgh.

Gordon & Smith, Geo. E. Alter, and Geo. C. Bradshaw, all of Pittsburgh, Pa., for receivers.

Reed, Smith, Shaw & Beal, of Pittsburgh, Pa., for Consolidated Traction Co. (Pittsburgh Railways Co.).

ORR, District Judge. It appears from the petition of the city of McKeesport that it embraces within its limits what was formerly the borough of Reynoldton; the latter being now the Tenth ward of the said city. It appears, also, that the Pittsburgh Railways Company, which is now in the hands of receivers appointed by this court, was, at the time of the appointment of said receivers, operating lines of railway formerly owned and operated by the Dravosburg, Reynoldton & McKeesport Passenger Railway Company and the McKeesport Passenger Railway Company, both of which corporations, by various mergers, agreements, consolidations, and sales, have become part of the system of the Pittsburgh Railways Company.

With respect to the first of said two passenger railway companies, the borough of Reynoldton granted to the former a franchise by ordinance, which, among other things, provided that no license tax for borough purposes should be levied on said company for said franchise until after the expiration of five years from the beginning of operations, but further provided as follows:

"After the expiration of said period of five years, said company shall pay into the borough treasury such sums as license as counsel may hereafter provide for."

With respect to the second of said passenger railway companies, the city of McKeesport, then the borough of McKeesport, passed an ordinance similar to that which is described as the ordinance of the borough of Reynoldton. The period of 5 years expressed in both of said ordinances was later extended to a period of 15 years.

After the said several companies had commenced operations, and after the expiration of the periods of 15 years, as mentioned in the said ordinances, the city of McKeesport passed two ordinances, one as successor of the borough of Reynoldton, levying a license fee of $2,000 per year, and the other as successor of the borough of McKeesport, levying a license fee of $8,000 per year, and provided for notice of such licenses to be given to the Pittsburgh Railways Company. In addition to the license fees fixed by the ordinances, there is a 10 per cent. penalty provided for in case of failure to pay the same, when due, under the terms of the ordinances.

The petition prays for an order directing the Pittsburgh Railways Company, and the receivers thereof, to pay certain of such license fees which are in default. The court cannot close its eyes upon the picture, so often presented in this case, of a largely extended street railway system, serving, as it does, various municipalities, perhaps exceeding 50 in number. Every one of said municipalities is more or less dependent upon said system for the reasonable accommodation

of its inhabitants; yet, so far as has come to our knowledge, there is not one of them which did not exact some annual tribute from the Pittsburgh Railways Company at the time receivers were appointed. Such exactions do not appear to have been based upon any uniformity with respect to municipal requirements or with relation to the amount of service rendered to the people within their respective limits or the rentals therefrom. They are apparently the result of contracts more or less found in municipal ordinances. The variations between the ordinances indicate a disregard of substantial considerations in some of the contracts, in all of which the public are interested. The situation illustrated by the foregoing observations grows out of a lack of consideration of the obligations and duties of those who own public service corporations.

[1] In every consideration of the relations between public service corporations and the public, it is necessary that certain fundamental principals be kept in mind. The public has an interest in every contract entered into by a public service corporation, whether it be a contract by writing and signed by both parties thereto, or a contract arising by reason of the passing of a municipal ordinance and its acceptance by the public service corporation intended to be affected thereby. Such contracts, because of the interest of the public therein, are not to be classed with those personal and private contracts, the impairment of which is forbidden by constitutional provisions. The public service corporation cannot charge undue and excessive rates, for such conduct would be oppressive to the public. On the other hand, the public cannot continue to use the instrumentalities of the private corporation without permitting to the owners thereof a fair return upon a fair value of such property (not dividends upon inflated capital or interest upon excessive bonded indebtedness), for such refusal would amount to confiscation. To avoid oppression on the one hand, and confiscation on the other, should be the mutual desire of the parties interested in such contracts. Where the relative duties are equally balanced, that is to say, when the desire of all parties may be realized in accordance with the foregoing suggestion, it is plain that all the obligations of a public service corporation are, and must naturally be, met by those of the public who are served by it.

[2] The foregoing principles are really fundamental, and are growing more and more generally accepted as such, as appears by various recent decisions of the courts. An interesting case is Munn v. Illinois, 94 U. S. 113, 24 L. Ed. 77. There will be found an elaboration of some of the principles involved, with references to the common law of England, as well as to that of many of the states. By the Public Service Act of 1913 (Pa. St. 1920, §§ 18057–18214), Pennsylvania gave legislative expression, in more or less concrete form, to the foregoing principles, and created a commission with broad powers, to determine questions of contracts to which public service corporations might be parties. Certain contracts previously deemed valid have been held to have become inoperative when the public service law went into effect on January 1, 1914. In V. & S. Bottle Co. v. Manufacturers' Gas Co., 261 Pa. 523, 104 Atl. 667, it was determined that an agree-

ment between a manufacturer and a gas company, fixing the rate at which the latter would furnish gas to the former, became inoperative at that date. In Leiper v. B. & O. R. R., 262 Pa. 328, 105 Atl. 551, the court refused to enforce, in equity, a contract relating to rates entered into prior to the passage of the Pennsylvania act.

In Borough of Wilkinsburg v. Public Service Commission, 72 Pa. Super. Ct. 423, it was squarely held that the franchise of a street railway company conferred in accordance with the provision of the Constitution, "that no street passenger railway shall be constructed within the limits of any city, borough or township without the consent of its local authorities" (Const. Pa. art. 17, § 9), does not remove the subjects contained therein from the domain of legislative action, and that the general law designed to affect all public service corporations of the state applies equally to companies operating under ordinances which regulate the rates, as a condition precedent to the consent of the municipality, or under franchises in which the rates are not so regulated. In that case, the question was whether or not a street railway company could increase its passenger fares in Wilkinsburg, notwithstanding the fact that the ordinance of the borough granting the right to the company to lay its tracks in the streets prescribed certain maximum rates to be charged.

It is not necessary to review the authorities at great length. They confirm the principle that such contracts as we are considering in this case are not inviolable. If the public who use the instrumentalities of the public service corporation must pay a fair return upon the fair value of the property of such corporation, it is plain that the users must pay enough for the service to meet all the necessary expenses of operating the utilities afforded by such corporation, as well as the fair return upon the fair value thereof. The car riders, therefore, are called upon to pay all the expenses of operating the street railway system, and as well to pay to the owners a fair return upon the fair value thereof. The amount to be paid by the car rider necessarily depends, therefore, to a considerable extent, upon the contractual obligations to be met by the Railways Company. Such contractual obligations seem to be matters for the consideration of the Public Service Commission of Pennsylvania in the first instance. In other words, it is for the Public Service Commission of Pennsylvania, in the first instance, to determine whether any contract which has a relation to the fare to be paid by passengers is a valid contract or not. If such obligations of the Railways Company require the passenger to pay an excessive fare, the Public Service Commission may take cognizance thereof, because that Commission was inaugurated to determine rates to be charged by public service corporations, as well as to prevent discrimination with regard thereto.

As we have noted above, there are many municipalities which are served by the Pittsburgh Railways Company. The car rider upon a portion of the system, who may never have been in McKeesport or Reynoldton, in theory, is required to pay some portion of his fare in order to meet the demands of the city of McKeesport, if the contracts in this case are valid. Again, the car rider in the city of McKeesport

must in theory pay a portion of his fare to meet the franchise tax and the street-cleaning bill annually charged against the Railways Company by the city of Pittsburgh. The lack of uniformity in standards by which these annual charges have been made and heretofore exacted must necessarily cause a discrimination between the car riders upon one portion of the railway system and the car riders upon some other part thereof.

It appears in some part of the record in this case that the city of McKeesport has an annual bill against the Pittsburgh Railways Company for street cleaning, and it has appeared, time and again, that the city of Pittsburgh has an annual claim against the Pittsburgh Railways Company for street cleaning to the amount of $87,000, and that the city of Pittsburgh charges tolls upon its bridges for the transportation of the car rider. It is doubtful if, in either city, the cars, with the present motive power, make as much dirt as one huckster's wagon, and it appears, so far as the city of Pittsburgh is concerned, that no one pays any tolls on the bridges except the car rider. Those who ride in taxicabs, and indeed all others, pay nothing. As all these payments do increase the expenditures of the Pittsburgh Railways Company, they must, of necessity, have their effect upon the amount required to be paid by the car riders. The various questions, being matters which affect rates, surely ought to be matters within the cognizance, in the first instance, of the Public Service Commission of Pennsylvania. It is a matter of common knowledge that 5-ton automobile trucks pay nothing to the municipalities for the use of their streets, where as the car riders must pay for the passage of cars over tracks built expressly for their use.

The foregoing are but a few of the many observations which might be expressed to show the lengths to which the various municipalities have gone in their treatment of the street railway corporation. We have not overlooked the fact that there are police powers vested in municipalities, but we have in mind the distinction which is to be drawn between the powers of a municipality when acting in its governmental capacity—i. e., police powers—and those which belong to it in its proprietary or quasi private capacity. Los Angeles v. Los Angeles Gas Corp., 251 U. S. 32, 40 Sup. Ct. 76, 64 L. Ed. 121. Again, we necessarily recognize that the question whether a municipal ordinance is within the power conferred by the Legislature upon the municipality is one of state law. Atlantic Coast Line v. Goldsboro, 232 U. S. 548, 34 Sup. Ct. 364, 58 L. Ed. 721.

We have wandered far afield in making many of the observations hereinabove set forth, but have done so because of the great importance of the questions suggested and the great need for securing the proper co-operation between the various municipalities and the system of railways in the hands of the court. To return, however, to the path pointed out by the petitioner in this case, we must consider the proposition, raised by it, that because of previous litigation the right of the petitioner to recover the franchise taxes imposed by the ordinances has been judicially determined.

[3] Counsel for petitioner relies upon the case of City of McKeesport v. Pittsburgh Railways Co., as reported in 252 Pa. 142, 97 Atl. 184. It is true that the said ordinances were before the court in that litigation, but it is also true that the reasonableness of the charges by the municipality was not determined. It is expressly stated in the opinion of the court below, which was adopted by the Supreme Court, that the reasonableness of the charges were assumed because no testimony was offered with respect thereto. That being the case, there was no determination of the really important question which is before this court. Moreover, the litigation resulting in the judgment of that court was begun in 1911, long before the Public Service Commission of Pennsylvania was created. By the creation of the Public Service Commission a new factor was brought into existence, intended by the Legislature to have its part in prescribing the relations between public service corporations and municipalities. Further, the doctrine of estoppel by res adjudicata is much impaired by changed conditions, by lapse of time, and especially where the parties litigant are a municipality and a public service corporation. The rights of the public with respect to matters in controversy may be properly adjudicated, and yet, years later (in the present instance there has been a lapse of nine years), the conditions may have so changed that the public would suffer if the doctrine of res adjudicata would control their rights. The doctrine of res adjudicata appears to have grown up because of the fact that it was to the interest of the state that questions once decided should be forever removed from litigation for the peace and repose of society, but to enforce the rule upon unsubstantial grounds would work injustice. Vicksburg v. Henson, 231 U. S. 260, 34 Sup. Ct. 95, 58 L. Ed. 209. Where there are no purely private litigants, surely the public ought not to be estopped by any judgment or decree as to a fact which was assumed because no evidence was offered in regard thereto.

This court must refuse the petition of the borough of McKeesport, because it does not appear that the contract upon which it relies is a valid contract. This conclusion should not be accepted as a decision by the court that the contract is invalid, but as a statement that the validity of the contract has not been shown to the satisfaction of the court. Before this court will recognize any obligation on the part of the Pittsburgh Railways Company, or the receivers, to pay the sums sought to be recovered by the petitioner, the question of the validity of the contract must be determined in the first instance by the Public Service Commission of the state of Pennsylvania. If the Public Service Commission shall determine that the contract relied upon by the petitioner is valid, then the petitioner may renew its application to this court for the payment of such sums as may be proper.

UNITED STATES v. SLUSSER.

(District Court, S. D. Ohio, W. D. February 11, 1921.)

1. **Searches and seizures ⟸7—Waiver of objection to search.**
Consent of the owner that a person announcing himself a prohibition agent showing a badge and demanding the right might search premises *held* not a waiver of constitutional right to protection against unreasonable search.

2. **Searches and seizures ⟸7—Garage within protection of Constitution.**
The constitutional immunity from unreasonable searches and seizures *held* to extend to a garage on the premises of his residence and used by the owner personally and in part rented to others.

3. **Intoxicating liquors ⟸257—Unlawful search not made lawful by result.**
A search for liquor, which was unlawful when it began, does not become lawful because liquor is found.

4. **Intoxicating liquors ⟸249—Search of private garage without warrant unlawful.**
Entry by a prohibition agent without a warrant or consent of the owner into a private garage to search for liquor is unlawful.

5. **Criminal law ⟸395—Intoxicating liquors ⟸256—Liquor obtained through unlawful search cannot be used as evidence, but must be returned when petition filed before trial.**
Liquor found and seized by a prohibition agent through an unlawful search of a private garage cannot be used as evidence to convict the owner of the garage of an offense, or for the forfeiture of his property if petition for its return is presented to the court before trial, and the fact that city police officers aided in the search is immaterial.

6. **Intoxicating liquors ⟸250—Essentials to forfeiture of vehicle.**
Forfeiture of an automobile under National Prohibition Act Oct. 28, 1919, tit. 2, § 26, must be in strict pursuance to the terms of the statute, and the following elements are essential: (1) That an officer of the law discover some person in the act of illegally transporting liquor in the vehicle; (2) the seizure of the liquor so transported or possessed; (3) the seizure of the vehicle and arrest of the person; (4) that the officer proceed against the person and retain the vehicle, unless redelivered to the owner on giving bond; (5) conviction of the person and order of sale of the vehicle; (6) distribution of the proceeds.

7. **Intoxicating liquors ⟸249—Automobile seized without warrant held not subject to forfeiture.**
The finding and seizure by a prohibition agent of an automobile standing in a private garage with liquor in it, on an illegal search without warrant, *held* not to authorize forfeiture of the automobile under National Prohibition Act Oct. 28, 1919, tit. 2, § 26.

Proceeding by the United States against Harry Slusser. On application for return of property seized without warrant. Granted.

R. T. Dickerson and Allen C. Roudebush, Asst. U. S. Attys., both of Cincinnati, Ohio.

Galvin & Bauer, of Cincinnati, Ohio, for defendant.

PECK, District Judge. On application for the return of property seized without warrant. Slusser has been bound over to await the action of the grand jury on the charge of illegal transportation of liquor. His automobile, loaded with liquor, was seized in his garage by prohibi-

tion agents. He disclaims knowledge and ownership of the liquor, but that the results of the search may not be used in evidence against him, and in order to regain his automobile, he petitions for its return.

Two prohibition officers and two city policemen went to his residence, knocked, and were admitted. One of the agents displayed his badge and said they were there to search for liquor. Slusser said: "All right; go ahead." They searched his house, and, finding nothing but one quart bottle partially filled with whisky, proceeded to his garage, situated on the house lot. One door was not locked, and they entered. It contained three spaces, one of which he used; the other two he let for hire. Two of the automobiles therein, one his and one another's, were found to be loaded with bottles of whisky. The officers seized the automobiles, removed the lock from one of the doors, of which there were three, with a screwdriver, and drove away.

Slusser denies the ownership of the liquor, and testifies that he had rented his car and garage space for two days to a man named Klover, and that he was in ignorance of the presence of the liquor, or that the car was to be used for its transportation. The following conclusions are reached:

[1] First, as to the legality of the search: The search so permitted by Slusser, after declaration by the prohibition officer, with a display of his badge, that they were there to search the premises, was not by such consent as will amount to a waiver of constitutional rights, but, on the contrary, is to be attributed to a peaceful submission to officers of the law. There is nothing to the contrary in the cases cited by counsel for the government, viz. United States v. Gouled (D. C.) 253 Fed. 242; Ripper v. State, 178 Fed. 24, 101 C. C. A. 152; McClurg v. Brenton, 123 Iowa, 368, 98 N. W. 881, 65 L. R. A. 519, 101 Am. St. Rep. 323; State v. Griswold, 67 Conn. 292, 34 Atl. 1046, 33 L. R. A. 227.

[2] The right of the people to be secure in their houses and effects against unreasonable searches and seizures is not limited to dwelling houses, but extends to a garage used as this was, personally and for hire. If the rule be not so, then not only a garage, but every warehouse, shop, store, and office, and even a safe deposit vault, might be ransacked for liquor by officers upon suspicion. Such is not the law. The right to be protected against unlawful search and seizure extends even to a corporation. Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319. And a corporation cannot be said to occupy a dwelling house. In Jones v. Fletcher, 41 Me. 254, trespass quare clausum was maintained against an officer, who, with warrant to search the dwelling, searched the barn and seized liquor stored therein. See, also, People v. Marxhausen, 204 Mich. 559, 171 N. W. 557, 3 A. L. R. 1505.

[3] An unlawful search cannot be justified by what is found. A search that is unlawful when it begins is not made lawful when it ends by the discovery and seizure of liquor. It was against such prying, on the chance of discovery, that the constitutional amendment was intended to protect the people.

[4] Neither is the discretion of the officer, however good and well-intentioned, a substitute in law for a search warrant issued by a proper

magistrate. It is to the latter that the law has committed the discretion to say when a warrant shall issue; and it can only issue on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons or things to be seized. Constant reiteration of these fundamental principles is warranted by the fact that they seem to be so frequently overlooked.

The procedure for searches under the Volstead Law (41 Stat. 315) is prescribed by section 25 to be that defined in the Act of June 15, 1917, tit. 11, Compiled Statutes, § 10496¼a et seq. The entry without permission, express or implied, into a private garage, without warrant, on a mission of search and seizure, by prohibition agents of the United States, is unlawful. Even a search for stolen goods requires a warrant. It was so by common law before the adoption of the Constitution. Lord Camden in Entick v. Carrington, 19 Howell's State Trials, at page 1067.

[5] Second, as to the competency of evidence so procured: The evidence obtained upon an unwarranted search cannot be used either to secure the owner's conviction or to forfeit his property, if petition for its return is presented to the court before trial. Boyd v. United States, 116 U. S. 634, 6 Sup. Ct. 524, 29 L. Ed. 746. And it was there declared that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal for all the purposes of the Fourth Amendment and that part of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. Silverthorne Lumber Co. v. United States, supra; Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177. The fact that city police officers assisted in the search and seizure does not alter the result, inasmuch as federal officers participated therein and took charge of the property seized. Flagg v. United States, 233 Fed. 481, 147 C. C. A. 367.

[6] Third, as to the right of restitution: The forfeiture of an automobile, under the twenty-sixth section of the Volstead Law, must be in strict pursuance to the terms thereof. United States v. Hydes (D. C.) 267 Fed. 471; The Goodhope, 268 Fed. 694. The following elements are essential:

(1) That an officer of the law discover some person in the act of illegally transporting liquor in a vehicle.

(2) The seizure of the liquor so transported or possessed.

(3) The seizure of the vehicle and arrest of the person.

(4) That the officer proceed against the person and retain the vehicle, unless redelivered to the owner, upon giving bond to return it to the custody of the officer on the day of trial to abide the judgment of the court.

(5) Conviction of the person and order of sale of the vehicle.

(6) Distribution of the proceeds.

The highest degree of evidence, viz. that an officer of the law perceive some person in the act of illegal transportation, is necessary. Seizure of the vehicle can only be made when liquor is seized. The law

does not forfeit all vehicles at some time used for illegal transportation of liquor, but only those taken in the act. One may be convicted of illegal transportation, yet the vehicle will not be forfeited, unless seized at the time. U. S. v. Hydes, supra. The seizing officer is to have the vehicle in possession on the day of the trial of the person arrested, to abide the judgment in the same proceeding. Should the defendant be acquitted, the automobile must be released, for it is only upon conviction that its sale may be ordered.

[7] In the present case the automobile was standing in the garage with liquor in it. The defendant was in his house, eating his breakfast. The government does not claim that the defendant had theretofore been seen using it for the illegal transportation charged. The evidence might perhaps justify an inference that the liquor had been transported in the automobile to the garage, or that the liquor was loaded with intent to transport it from the garage, or that it was temporarily halted in the progress of transportation. But this is not the degree of proof required to warrant seizure. The evidence does not show that any one was discovered in the act of transporting. It is not necessary that the vehicle should be discovered while actually in motion, but it is necessary that some one should be discovered performing some act in furtherance of transportation, and the government's own evidence here shows that no one was caught in such an act at the time the seizure was made.

Furthermore, a seizure without warrant in a private garage, pursuant to an unauthorized search upon the charge of a mere statutory misdemeanor, is an unlawful seizure and cannot be the basis of a valid forfeiture under the twenty-sixth section of the Volstead Law. The right of an officer of the law to enter to arrest for, or prevent, felony or breach of the peace, in which actual or threatened violence is an essential element, is not here in issue. Commonwealth v. Wright, 158 Mass. 149, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; McLennon v. Richardson, 8 Gray (Mass.) 74; Commonwealth v. Krubeck, 8 Pa. Dist. 521.

Lastly, where there is no evidence to warrant the forfeiture of an automobile seized as the vehicle of unlawful transportation, except that obtained upon an unwarranted and unlawful search and seizure and so inadmissible, the automobile cannot be forfeited. There is in such case no competent evidence by which the government can prove its title. Under such circumstances the automobile would have to be returned. United States v. Fenton, 268 Fed. 221, does not go to this point. There the defendants were taken, with the automobile, on the highway, in the act of transportation.

The evidence must be excluded, and the automobile returned.

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

(District Court, S. D. New York. July 20, 1920.)

Copyrights ⇐66—Reproducing records "manufactured" in United States.

Disc records for reproducing a song copyrighted by complainant, sold by defendant in Canada, *held* subject to payment of a royalty under copyright Act, § 1e (Comp. St. § 9517), as "manufactured" in the United States, on evidence showing that in the process of manufacturing such records there are nine steps, eight of which, resulting in the completion of the copper stamper, from which the wax records are made, were taken in the United States, and the stamper then taken to Canada, where the actual playing discs were made, which comprised the ninth step of the process.

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

In Equity. Suit by G. Ricordi & Co., Incorporated, against the Columbia Graphophone Company. On motion to confirm report of special master. Motion granted.

See, also, 256 Fed. 699; 258 Fed. 72.

The following is the report of Thomas B. Felder, Special Master:

On the ——— day of January, 1920, Hon. Martin T. Manton, Circuit Judge, at a term of the United States District Court for the Southern District of New York, entered an order from which I quote:

"Further ordered, adjudged and decreed that the Columbia Graphophone Company account to the plaintiff for all disc records serving to mechanically reproduce the musical composition 'Dear Old Pal of Mine' manufactured by the defendant, and pay to the plaintiff two cents for every such disc record so manufactured by the defendant, and it is

"Further ordered, adjudged and decreed that this case is hereby referred to Thomas B. Felder, Esq., a master of this court, who is hereby appointed to take and state an account of all such disc records so manufactured under the plaintiff's United States copyright by the defendant, and to assess such damages and report the same to this court with all convenient speed."

By virtue of the authority conferred by said order, the undersigned, Thomas B. Felder, acting as Master, has had numerous hearings where evidence, both parol and documentary, was taken, arguments made, and briefs by counsel submitted. After carefully considering the evidence, the arguments and briefs of counsel, the undersigned begs to submit the following report:

The defendant, Columbia Graphophone Company, filed with the undersigned as master of this court, a statement showing that up to February 29, 1920, it had manufactured, under plaintiff's United States copyrights, 76,688 baritone solo and 13,755 violin solo disc records of the musical composition "Dear Old Pal of Mine." The plaintiff filed objections to this account stated on the ground that the defendant failed to include therein other disc records which plaintiff claimed were manufactured under its copyrights and therefore subject to the royalty. It was thereupon stipulated between the parties that in addition to the above there were 4,763 commercial records of the baritone solo and 1,920 of the violin solo which defendant claimed were made in Canada, the contention of the defendant being that there was no liability to plaintiff on account of these disc records. The issue therefore presented for decision is as to the liability of defendant to the plaintiff for the commercial disc records which were claimed to have been made in Canada.

In order to reach a correct conclusion as to the real issue involved, it is not only necessary to carefully examine and analyze the Copyright Act of March

4, 1909 (Comp. St. §§ 9517–9524, 9530–9584), but the evidence submitted as well. The following is the pertinent portion of section 1, subdivision (e) of the Copyright Act (Comp. Stat. § 9517):

"That whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured, to be paid by the manufacturer thereof; and the copyright proprietor may require, and if so the manufacturer shall furnish, a report under oath on the twentieth day of each month on the number of parts of instruments manufactured during the previous month serving to reproduce mechanically said musical work, and royalty shall be due on the parts manufactured during any months upon the twentieth of the next succeeding month. The payment of the royalty provided by this section shall free the articles or devices for which such royalty has been paid from further contribution to the copyright except in case of public performance for profit; and provided further, that it shall be the duty of the copyright owner, if he use the musical composition himself for the manufacture of parts of instruments serving to reproduce mechanically the musical work, or licenses others to do so, to file notice thereof, accompanied by a recording fee, in the Copyright Office, and any failure to file such notice shall be a complete defense to any suit, action, or proceeding for any infringement of such copyright."

The following is section 25, subdivision (e), of the Copyright Act (Comp. Stat. § 9546), which provides for the relief and damages in case of infringement in the manufacture of these commercial records:

"(e) Whenever the owner of a musical copyright has used or permitted the use of the copyrighted work upon the parts of musical instrument serving to reproduce mechanically the musical work, then in case of infringement of such copyright by the unauthorized manufacture, use, or sale of interchangeable parts, such as disks, rolls, bands, or cylinders for use in mechanical music-producing machines adapted to reproduce the copyrighted music, no criminal action shall be brought, but in a civil action an injunction may be granted upon such terms as the court may impose, and the plaintiff shall be entitled to recover in lieu of profits and damages, a royalty as provided in section 1, subsection (e), of this act: Provided also, that whenever any person, in the absence of a license agreement, intends to use a copyrighted musical composition upon the parts of instruments serving to reproduce mechanically the musical work, relying upon the compulsory license provision of this act, he shall serve notice of such intention, by registered mail, upon the copyright proprietor at his last address disclosed by the records of the copyright office, sending to the copyright office a duplicate of such notice; and in case of his failure so to do the court may, in its discretion, in addition to sums hereinabove mentioned, award to complainant a further sum, not to exceed three times the amount provided by section 1, subsection (e), by way of damages, and not as a penalty, and also a temporary injunction until the full award is paid."

I construe the above-quoted sections of the Copyright Act, in connection with the entire act, to mean the royalty provided for therein becomes payable by the month to the proprietor of the copyright upon the "manufacture" of the commercial records; hence it is all-important to decide the meaning of the word "manufacture" as used in the Copyright Act. If the records were "manufactured" in the United States by the defendant, its liability to pay the plaintiff two cents for each of such records is obvious.

Webster defines "manufacture" as follows:

"1. The operation of making wares or any products by hand or by machinery or by other agencies.

"2. Anything made from raw materials by the hand, by machinery, or by art, as cloths, iron utensils, shoes, machinery, saddlery.

"3. To make (wares or other products) by hand, by machinery, or by other agencies; as to manufacture cloth, nails, glass, etc.

"4. To work, as raw or partly wrought materials into suitable forms for use; as to manufacture wool, cotton, silk or iron."

The premises considered, it now becomes pertinent and material to briefly advert to evidence which is undisputed as to what was done "step by step" by the defendant in producing the 4,763 baritone and 1,920 violin solo disc records, which were sold in Canada, and which it is claimed, by reason of the fact that there are no copyright laws in Canada, were not embraced in the accounting. It appears that the process of manufacture of a commercial phonograph record involves nine distinct, separate and progressive steps which may be briefly described as follows:

1. The song which is to be sold in the form of a phonograph disc record is first sung by an artist, the sound waves thus produced by the rendition of the song are collected by device and recorded on a revolving wax-like tablet known as a blank. This blank revolves on a turntable of approximately 80 revolutions per minute, and as the song is sung, the sound box attached to a very fine sapphire jewel known as a recording stylus, is let down in the surface of the wax tablet and cuts into the same and the vibrations of the sound are engraved on this tablet in the form of a volute spiral. The wax record thus made is called a wax master record.

2. The wax master record is then prepared for electro plating by coating it with graphite, a metallic conducting surface.

3. The wax master record coated with graphite is placed in an electro plating bath and covered with a coating of copper. The copper shell, reproducing the recording on the wax master, is then stripped from the wax master. This is known as a copper master record.

4. The copper master record is then cleaned, silvered and waxed.

5. The copper master record thus coated is placed in an electro bath and a shell of copper is deposited thereon. This shell of copper is then stripped and represents a record that is in all respects the same as the original wax engraving. This is called a mother record.

6. The mother record is then silvered and prepared for an electro plating bath.

7. The mother record, coated with silver, is placed in an electro plating bath and a copper shell deposited thereon which when stripped is known as the working matrix, or a stamping matrix.

8. The copper stamper is then trimmed to size, a hole punched in the center, the surface prepared and then nickeled in order to prevent oxidation.

9. The nickel stamper is then placed in a press, a thermo-plastic material, consisting of clay, shellac, lamp black and flock (ground cloth), is placed on a steam table, the copper stamper is sweated into a die, and that is also placed on the steam table. The plastic material is then brought together with the stamper under great pressure and flows into the lines of the record, after which it is chilled and separated.

It appears that eight of the nine steps in the process of "manufacture" of the commercial records were taken by the defendant in the United States, and that the ninth step, or the step which resulted, speaking in the common vernacular, in putting the "finishing touches" upon the disc, was taken by the defendant at its factory in Toronto, Canada, where the various parts, such as wax blanks, wax masters, wax matrices, mother matrices, stamping shells and backed-up stampers, were shipped after they had been manufactured, as above stated, within the United States. In other words, the "manufacture," as I see it, commenced when the song was sung by the artist and recorded upon the wax master record, and every step taken thereafter, up to and including the one described in paragraph "8," was taken within the territorial limits of the United States.

In reaching a conclusion in respect of the issue presented, I am frank to confess that in view of the fact that there are practically no judicial "signboards" hung along the pathway that I have been forced to travel to "point the way," I have been much vexed in reaching a conclusion. The only judicial decision upon the subject is one rendered by Mr. Justice Hotchkiss of the Supreme Court in the case of Leo Feist, Inc., v. Columbia Graphophone Co. (no opinion filed). The examination of the record in this case discloses

that the defendant had obtained three licenses for the manufacture and sale of phonograph records of musical compositions. These license agreements referred to the Copyright Act, and by incorporation, the act became a part of the agreements. The defendant recorded the songs of these three compositions upon wax master records in the United States and shipped the copper stampers to Canada, where it proceeded to stamp out commercial records from these copper stampers in Canada. It was urged in that case that the Copyright Law had no extraterritorial jurisdiction and could not affect the sale of the records which were manufactured outside of the United States. In disposing of the issue presented in that case, the justice said: "I think the records must be deemed to have been manufactured in the United States. To hold otherwise would permit the defendant to work what would practically amount to a fraud upon both plaintiff's statutory and contract rights."

While, of course, this decision is not conclusive, it is nevertheless, in my judgment, entitled to consideration and weight. In this connection I might say that I have read and considered very carefully the elaborate, comprehensive and able brief filed by defendant's counsel. I have also examined very carefully the authorities therein cited. From this examination, I am unable to reach the conclusion that these authorities are either elucidating or controlling when applied to the facts of this case in as much as they all show that no part of the transaction involved in them took place within the territorial limits of the United States. In the case of Dowagiac Mfg. Co. v. Minnesota Plough Co., 235 U. S. 641, on page 650, 35 Sup. Ct. 221, 225 (59 L. Ed. 398), being one of the cases cited by defendant's counsel, the court says: "Some of the drills, about 261, sold by the defendants were sold in Canada, no part of the transaction occurring within the United States."

The articles involved in this case, while made in the United States, were not made by the defendant. In this case the court mentioned the case of Manufacturing Co. v. Cowing, 105 U. S. 253, 26 L. Ed. 987, in which damages were awarded for articles made in the United States and sold abroad. As to this transaction, the court holds: "The case of Manufacturing Co. v. Cowing, 105 U. S. 253, is cited as holding otherwise, but is not in point. There the defendant made the infringing articles in the United States. Here while they were made in the United States, they were not made by the defendant, the latter's infringement consisting only of selling the drills after they passed out of the maker's hands. The place of sale is therefore of controlling importance here."

All of the other cases cited, and which I do not deem it necessary to discuss in detail, seem to throw little, if any, light upon the issue involved for the reason I have stated heretofore, namely, that no part of the transactions, in any of these cases, took place within the territorial limits of the United States. In the light of the facts above recited and of the Copyright Law applied thereto, the conclusion becomes inevitable that the records involved must be deemed to have been manufactured in the United States, constat, defendant is liable to the plaintiff for the amount of royalties shown by the statements filed with the undersigned as master of this court, and in accordance with this finding, I respectfully submit as master, the following report:

Plaintiff is entitled to recover from the defendant on the accounting as follows:

78,688	records at	$.02	$1,573.76
13,755	records at	.02	275.10
4,763	records at	.02	95.26
1,920	records at	.02	38.40
			$1,982.52

All of which is respectfully submitted. The evidence taken is hereto attached and made a part hereof.

Nathan Burkan and Francis Gilbert, both of New York City, for plaintiff.

W. L. Goldsborough, of New York City (Emory R. Buckner, A. E. Garmaize, and Maxwell Steinhardt, all of New York City, of counsel), for defendant.

MANTON, Circuit Judge. The gist of this case is to determine what is meant by "manufacture." The various steps taken to produce the product which was shipped to Canada, were all essential to the manufacture of the records, which were finally finished and sold in Canada. I think, within the intent and meaning of the copyright statute, the defendant manufactured the records, which are sold in Canada, in the United States. I agree with the result reached by the special master and will confirm his findings.

Motion to confirm granted.

QUEREAU v. LEHIGH VALLEY R. CO.

(District Court, N. D. New York. February 5, 1921.)

1. **Railroads ⟸346(5)—Care on part of driver killed presumed.**
Where an intelligent man of mature years and familiar with the locality was struck by a train and instantly killed, while driving alone in a buggy over a railroad crossing at night, a jury may infer that he exercised the due care demanded by the situation and circumstances, and evidence is required to establish contributory negligence.

2. **Railroads ⟸350(7, 22)—Negligence held questions for jury in action for driver's death.**
In an action for death of a person killed on a railroad crossing, while driving alone on a dark and stormy night by a train going down grade, on conflicting evidence as to the warning signals given and the speed of the train, although it was shown that it ran 1,000 feet after the emergency brakes were applied before stopping, the questions of negligence of defendant and contributory negligence of deceased *held* for the jury.

At Law. Action by Dora E. Quereau, executrix of Wilson R. Quereau, deceased, against the Lehigh Valley Railroad Company. On motion by defendant to set aside verdict and for new trial. Motion denied.

See, also, 251 Fed. 986.

This is a motion made at the close of the trial to set aside the verdict of the jury, which was reasonable in amount, and grant a new trial on the grounds:

(1) That a former judgment of dismissal in the state court in another action between the same parties for the same cause, and on the same facts, substantially, is a bar to this action.

(2) That defendant was not guilty of any negligence which was the proximate cause of the accident and consequent death of Wilson R. Quereau, the plaintiff's testator.

(3) That said Wilson R. Quereau was guilty of contributory negligence, and that his own negligence was the cause of the accident and of his consequent death.

(4) Alleged errors on the trial.

John M. Brainard, of Auburn, N. Y., and Wm. H. Harding, of Syracuse, N. Y., for the motion.

Peter B. Cole and Thomas Woods, both of Syracuse, N. Y., opposed.

RAY, District Judge (after stating the facts as above). Wilson R. Quereau was struck and killed by the engine of defendant's passenger train on the evening of October 18, 1915, as he was crossing the railroad tracks at Rude street highway crossing and going east, on the borders of the village of Weedsport, Cayuga Co., N. Y., and said train was approaching and entering said village, coming from the south and proceeding in a northeasterly direction on a down grade, and approaching its passenger station in said village at a speed variously estimated by witnesses at from 18 to 50 miles per hour. It was a dark, stormy night, the winds coming from the westerly, and Quereau was riding alone in a top buggy, with back and side curtains down, which was drawn by one horse. There was no eyewitness to the collision, and, as plaintiff's testator was instantly killed, what occurred is matter of inference from the known and proven facts, showing the situation and conditions and what preceded and was found after the accident. It was claimed, and the jury found, that the defendant was negligent in either failing to give signals of its approach to the crossing, or in its rate of speed, or in both respects.

Almost immediately after the accident the dead body of Quereau and that of the dead horse were found on the embankment on the east side of the track and about 30 feet distant therefrom, and 2 or 3 rods north of the crossing; but the vehicle had been taken up by the pilot of the engine and actually carried thereon up to Graham street. This indicates that the horse was clearing the tracks at the moment of the collision, and that the buggy was then on the tracks. When last seen, Quereau was on Horton street, 275 feet from, and was approaching, the crossing. He was then on Horton street, which intersects and enters Rude street about 70 feet from the crossing. His horse was walking, and there was nothing to indicate he was in a hurry. He had no infirmity of body or mind, and as he had lived in the village some years and was an active business man, it is fair to assume, and the jury would have been justified in finding, as it undoubtedly did, that he was reasonably familiar with this crossing. Rude street runs east and west, and Seneca street crossing the next street crossing south, is substantially parallel therewith, and is 635 feet south therefrom. A cut, known as Pile Cut, through which defendant's railroad runs, is some 1,640 feet south from Rude street, at which place there is a curve in the railroad tracks. On the westerly side of the railroad tracks, south of Rude street, there were obstructions preventing a clear view of the tracks, except at intervals; but, when within 25 feet of the crossing, approaching it from the west on Rude street, as Quereau was doing, a person in the daytime could see as far south as Seneca street. At a point in Rude street 54 feet west of the first rail of the railroad track a person could first see the head of an engine approaching from the south when 294 feet away. At a point in the roadway of Rude street 35 feet 8 inches from the west rail of the track a person could first see the head of an engine approaching from the south at a distance of 474 feet.

The highway approach to the Rude street crossing from the west was difficult, in that the roadway was on a narrow unfenced embank-

ment, with sloping sides, rising from the intersection of Rude and Horton streets to the railroad tracks, which were on a fill 12 feet above the level of such streets and this fill extends both easterly and westerly. There were no street lights and no lighted buildings to illuminate the roadway or crossing, and hence a due regard for safety would demand that the traveler on the highway pay considerable attention to his driving and "watch out" that he kept in the traveled part of the highway. The space between the rails at this crossing was planked, and the planking extended a little on the outside of the rails, and was elevated about 3 or 4 inches above the roadbed. There was no flagman or gates or bell or gong signal of approaching trains at this crossing. As plaintiff's testator drove along and out of Horton street into Rude street, his view south was obstructed by a house on the southwest corner of Rude and Horton streets, and some orchard and other trees beyond. The foliage was dense at this time.

There was a sharp dispute on the trial as to the speed of the train and as to the giving of signals, when and where, and the character of those given. The evidence disclosed that there were other railroads running into and through Weedsport, and at such points that the deceased would have heard whistle signals given by locomotives running or even standing thereon, but not from the same direction as the ones coming from the south on defendant's road. The Erie Canal, on which barges and boats having steam whistles were in operation, was within plain hearing distance. The locomotive drawing the train on defendant's road, and which struck Quereau on the night in question, had been equipped by the locomotive engineer in charge of and running it with a steamboat whistle, which emitted a different sound from the ordinary steam locomotive whistle; that is, gave a low, sullen sound, and not the sharp or shrill sound of the locomotive engine in general use, and the plaintiff claims that, in view of the fact that steamboat whistles were in use on the canal, not far distant and within plain hearing distance, the plaintiff's testator would not necessarily be warned, and was not warned, of an approaching train or locomotive on defendant's road by this steamboat whistle on the locomotive, even if sounded; that it was confusing and inadequate and misleading.

It was the duty of Mr. Quereau to approach this crossing with care, and the greater care in view of the darkness, wind, rain beating on the covering to his carriage, and obstructions to his view, the existence of which it must be assumed he knew. The greater the danger, the greater the care demanded. If Quereau was impressed, or in view of the conditions and surroundings at the time in question, in the exercise of due care and caution, ought to have been impressed and would have been impressed, with the fact that there was danger in proceeding, it was his duty to stop until the presence or absence of danger in proceeding was ascertained. If, in view of the surroundings and conditions, he was impressed with a doubt as to the safety in proceeding, it was his duty to stop until such doubt was resolved in favor of safety. Otherwise he was not bound as matter of law to actually stop, but it was his duty to proceed with care, and to be on the alert and look and listen, and to look and listen with care and intelligently;

that is, with his brains and reasoning faculties, as well as with his eyes and ears. It must be taken for granted that he knew this train was due at about this time, and hence the greater care and watchfulness was demanded.

[1] On the other hand, Mr. Quereau was alone and is dead, and on the trial could not tell what he did or failed to do. Under such circumstances the same degree and amount of evidence as to care on his part was not required. The jury may presume or infer that a man of intelligence and mature years, and familiar with the location and dangers, would have been impelled and actuated by a desire to live and avoid danger and injury, and would have exercised that due care demanded by the situation and circumstances. In such a case as this, to establish contributory negligence, there must be evidence of facts or circumstances showing that the deceased failed to exercise that degree of care required by the law.

In Texas & Pacific R. Co. v. Gentry, 163 U. S. 353, 366, 367, 16 Sup. Ct. 1104, 1109 (41 L. Ed. 186), the court said and held:

"As already stated, no one personally witnessed the crossing of the track by the deceased, or the running of the flat car over him. Whether he did or did not stop, and look and listen for approaching trains, the jury could not tell from the evidence. The presumption is that he did; and if the court had given the special instructions asked, it would have been necessary to accompany it with the statement that there was no evidence upon the point, and that the law presumed that the deceased did look and listen for coming trains before crossing the track.

"In Continental Improvement Co. v. Stead, 95 U. S. 161, 164, the court, speaking by Mr. Justice Bradley, upon the subject of the relative rights and duties of a railroad company and the owner of a vehicle crossing its track, said: 'Those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen; and hence it will not be presumed, without evidence, that they do not exercise proper care.' This principle was approved in Baltimore & Ohio Railroad v. Griffith, 159 U. S. 603, 609. Manifestly it was not the duty of the court, when there was no evidence as to the deceased having or not having looked and listened for approaching trains before crossing the railroad track, to do more, touching the question of contributory negligence, than it did, namely, instruct the jury generally that the railroad company was not liable if the deceased by his own neglect contributed to his death, and that they could not find for the plaintiffs unless the death of the deceased was directly caused by unsafe switching appliances used by the defendant, and without fault or negligence on his part."

In Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 473, 474, 24 Sup. Ct. 137, 140 (48 L. Ed. 262) the court said and held:

"There was no error in instructing the jury that, in the absence of evidence to the contrary, there was a presumption that the deceased stopped, looked and listened. The law was so declared in Texas & Pacific Railway Co. v. Gentry, 163 U. S. 353, 366. The case was a natural extension of prior cases. The presumption is founded on a law of nature. We know of no more universal instinct than that of self-preservation—none that so insistently urges to care against injury. It has its motives to exercise in the fear of pain, maiming, and death. There are few presumptions, based on human feelings or experience, that have surer foundation than that expressed in the instruction object-

ed to. But, notwithstanding the incentives to the contrary, men are sometimes inattentive, careless, or reckless of danger. These the law does not excuse, nor does it distinguish between the degrees of negligence."

[2] It being presumed that Quereau stopped, looked, and listened, it might be inferred and found by the jury that he did not drive carelessly and recklessly in front of the approaching engine. A question of fact was presented for the determination of the jury. All the facts bearing on that question were for the consideration of the jury and its determination. In the face of the presumption, and in the absence of evidence on the part of the plaintiff overcoming it, it was for the defendant, by direct evidence or by proof of facts and circumstances, to show that Quereau did not look and listen intelligently and carefully. It may be argued that the train was in plain sight when Quereau should have stopped, looked, and listened, and that if he did he must have seen the approaching train, and that this is convincing and determinative proof, either that he did not look and listen, or that, if he did, he carelessly and recklessly drove in front of the approaching engine. The law does not, in the United States courts, fix the precise distance from the railroad tracks at which, or within or without which, the traveler on the highway, in the nighttime and in the midst of a storm, or at any time, must stop, look, and listen, or look and listen.

This was a dark, stormy night, with a heavy wind blowing. The rain was beating on the cover of the buggy. There was no artificial light. The highway ran east and west, the railroad tracks northeast and southwest, forming an acute angle, and this placed the approaching train to some extent, as Quereau approached the tracks, behind him. The train was running with steam off on a down grade. If the horse was walking at the rate of say 2 miles per hour, it moved 3 feet per second, and if the train was running say 30 miles per hour, it was making 44 feet per second. If Quereau stopped 35 feet, or 2 rods, from the west rail, and saw nothing, and was 12 seconds in getting on the track, it shows the train when he stopped was 528 feet away, running at 30 miles per hour, and out of sight. It may be the jury found that on account of the storm Quereau could not and did not hear the rumble of the train. Quereau could not constantly look in one direction. It was his duty to look in both. In the darkness he may have miscalculated his distance from the tracks when he did stop, and may have stopped too soon. In view of all the conditions and surroundings, I think the question of contributory negligence was for the jury.

Was the defendant railroad company, or its employees engaged in operating this train, guilty of negligence which was the proximate cause of the accident and resulting death? Was there evidence to justify a finding of such negligence? The contention of the plaintiff was and is that defendant was negligent in running its train at this place, under the circumstances and conditions known to it, at an excessive rate of speed, and that it failed to give adequate signals or warnings of its approach. The defendant well knew of the existence of this highway crossing, and was bound to apprehend that travelers on the highway might be there about to cross, or in the act of cross-

ing, as its train approached. It was therefore under obligation to run its train at a reasonable rate of speed as it entered the village and crossed streets, and with reasonable precautions, giving reasonable signals of its approach, to the end that such travelers might keep off the tracks, if approaching, or being thereon get off and out of the way of the approaching train.

In Continental Improvement Co. v. Stead, 95 U. S. 161, 164 (24 L. Ed. 403), Mr. Justice Bradley gave the holding of the court as to the mutual rights and duties of railroads and travelers at highway crossings, and this was cited, quoted, and approved by the Supreme Court in Baltimore & Ohio R. R. Co. v. Griffith, 159 U. S. 603, 608, 609, 16 Sup. Ct. 105, 107 (40 L. Ed. 274), Mr. Justice Bradley said:

"If a railroad crosses a common road on the same level, those traveling on either have a legal right to pass over the point of crossing, and to require due care on the part of those traveling on the other to avoid a collision. Of course, these mutual rights have respect to other relative rights subsisting between the parties. From the character and momentum of a railroad train, and the requirements of public travel by means thereof, it cannot be expected that it shall stop and give precedence to an approaching wagon to make the crossing first. It is the duty of the wagon to wait for the train. The train has the preference and right of way. But it is bound to give due warning of its approach, so that the wagon may stop and allow it to pass, and to use every exertion to stop if the wagon is inevitably in the way. Such warning must be reasonable and timely. But what is reasonable and timely warning may depend on many circumstances. It cannot be such, if the speed of the train be so great as to render it unavailing. The explosion of a cannon may be said to be a warning of the coming shot; but the velocity of the latter generally outstrips the warning. The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises, and when intervening objects prevent those who are approaching the railroad from seeing a coming train. In such cases, if an unslackened speed is desirable, watchmen should be stationed at the crossing.

"On the other hand, those who are crossing a railroad track are bound to exercise ordinary care and diligence to ascertain whether a train is approaching. They have, indeed, the greatest incentives to caution, for their lives are in imminent danger if collision happen, and hence it will not be presumed, without evidence, that they do not exercise proper care in a particular case. But, notwithstanding the hazard, the infirmity of the human mind in ordinary men is such that they often do manifest a degree of negligence and temerity entirely inconsistent with the care and prudence which is required of them, such, namely, as an ordinarily prudent man would exercise under the circumstances. When such is the case, they cannot obtain reparation for their injuries, even though the railroad company be in fault. * * *

"For, conceding that the railway train has the right of precedence of crossing, the parties are still on equal terms as to the exercise of care and diligence in regard to their relative duties. The right of precedence referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach. The duty of the wagon to yield precedence is based upon this condition. Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty. * * *

"The mistake of the defendant's counsel consists in seeking to impose upon the wagon too exclusively the duty of avoiding collision, and to relieve the train too entirely from responsibility in the matter. Railway companies cannot expect this immunity, so long as their tracks cross the highways of the

country upon the same level. The people have the same right to travel on the ordinary highways as the railroad companies have to run trains on the railroads."

And see Delaware, Lackawanna, etc., Railroad v. Converse, 139 U. S. 469, 472.

The defendant could not rely wholly on the rumble of its train as an adequate warning, nor on the mere ringing of the bell, which could be heard a short distance only with a wind blowing across the track and against the approaching train. And, said Mr. Justice Bradley:

"The speed of a train at a crossing should not be so great as to render unavailing the warning of its whistle and bell; and this caution is especially applicable when their sound is obstructed by winds and other noises."

In the instant case the wind was blowing against the approaching train, carrying the sound of bell and whistle, if given, away from Mr. Quereau. The direction of the wind was known, or ought to have been known, to the engineer of the approaching locomotive. The obstructions on the westerly side of the track were known to him, for they were of a permanent character. He was also fully aware of the existence of these streets a few hundred feet apart in the village and on its outskirts, and of the elevation of the tracks and the character of this crossing. Said Mr. Justice Bradley:

"Both parties are charged with the mutual duty of keeping a careful lookout for danger; and the degree of diligence to be exercised on either side is such as a prudent man would exercise under the circumstances of the case in endeavoring fairly to perform his duty."

And, again, said the learned justice:

"The right of precedence (in the railroad) referred to does not impose upon the wagon the whole duty of avoiding a collision. It is accompanied with, and conditioned upon, the duty of the train to give due and timely warning of approach."

The warning by bell or whistle is to be given at a time and distance from the danger point when and where it will be likely to avail, and it must be of a character likely to accomplish its purpose; such as a reasonably intelligent and prudent man would honestly believe would accomplish the purpose, all the known circumstances and conditions being considered.

In the instant case there was a sharp conflict in the evidence as to when and where signals were given and as to their character, as well as to the speed of the train. Witnesses are apt to honestly vary and conflict in giving estimates as to the speed of a moving train. The value of their testimony on such a point, conceding their honesty, depends largely on their intelligence, experience in such matters, opportunity for seeing and observing, and on whether or not their attention was called at the time to the speed of the train. It is also important whether their attention was called very soon after the occurrence to what they saw and observed, or a long time afterward. Persons who were seated in their homes, and who had no concern with whether or not a train passed close by and within plain and conceded hearing dis-

tance, and whose attention was not called to whether it passed or not, or signaled or not, until a considerable time thereafter, and who testify they did not hear the train or signal therefrom, carry little, if any, weight as against positive testimony that the train did pass and sound signals, when given by those who were interested and observing. Of course, the credibility of the witnesses is to be regarded. Other witnesses who were seated in their homes, and who were accustomed to watch and listen for trains, or a particular train, and who say they were observing as usual at the time, may testify, and their evidence is of weight.

In the instant case witnesses who were outside and observing this train testify as to what they saw and heard. It may be considered as positively shown that the whistle was sounded at Pile Cut, about 1,600 feet south of Rude street; but this might not be adequate warning to a person on Horton street, approaching Rude street. Proceeding south along Horton street, and before turning into Rude street, Quereau could have glimpses of the coming train, if he looked or was looking at the necessary points; but, generally speaking, his view and his hearing were obstructed by the intervening trees and buildings, and at some points by the make of the ground.

The testimony is in serious conflict as to the giving of signals by this train from the time of, or after, leaving Pile Cut. It was for the jury to settle this conflict. So of the speed of the train, estimated all the way from 18 or 20 miles per hour to 50 miles per hour. An estimate as to the speed of a train, made by a person having no well-grounded qualifications to form and give a reasonably accurate estimate, is of little or no value in such a case as this; but in this case the most of the witnesses showed that they had ability in this regard. Their qualifications in the matter were for the jury. The engineer of the train, whose duty it was to be on the lookout ahead, says he did not see the horse and wagon, or Quereau, until within about 10 or 12 feet of them.

The headlight threw its glare far ahead, at least about 200 feet, and the engineer could see from 50 to 100 feet ahead along the side of the engine. Immediately on seeing the horse and buggy, he applied the emergency brakes, but was unable to stop the train until something like 1,000 feet northeast of the crossing. All this is pertinent evidence bearing on the speed of the train, and tends to corroborate to some extent the evidence given in behalf of the plaintiff as to the speed. Certain of the witnesses, paying attention, testified to hearing the whistle, but said the sound heard was a far-away and faint sound. Some of the witnesses called by the plaintiff were on high ground to the east of these railroad tracks, and consequently better able to see and hear. They were not interested in the result. Many of defendant's witnesses, not all, were in the employ of defendant, and this indirect interest, if any, was for the consideration of the jury.

The presumption that Quereau exercised care in crossing the railroad is rebuttable, and may be rebutted by evidence showing that, if he looked, he must have seen the approaching train, and that, if he listened, he must have heard it; but the evidence in this case is not

satisfactory or sufficient in either respect. It was not such as to present a question of law for the decision of the court, but left both questions a question of fact for the jury, and its decision was in favor of the plaintiff and should not be disturbed.

The remaining question is: Is the judgment in the state court res adjudicata here? That is, was it a judgment on the merits? If so, it is binding and conclusive; otherwise, not.

The question of the effect of that judgment in the state court was fully and carefully considered by this court on the trial, as it was presented and raised by the defendant at the close of the evidence, and after the record of that trial had been put in evidence by the defendant. The opinion of this court on that question thus presented will be found in 251 Fed. 986, and on reflection and further examination I find no sufficient reason for changing my opinion. The provisions of the Code of Civil Procedure of the state of New York there cited seem to determine this question. In the suit in the state court the plaintiff did not ask for the direction of a verdict, but stood upon the evidence, and therefore there was no submission of the case on the evidence presented to the decision of the court, and no waiver of a jury trial. The plaintiff in the state court requested to go to the jury, and insisted on its right to do so. Reference is made to the opinion of this court in 251 Fed 986, without further going into the reasons there given; and being of the opinion that the question of defendant's negligence and of plaintiff's contributory negligence were for the jury, and that the judgment in the state court dismissing the complaint was not a judgment upon the merits but a nonsuit merely, the motion to set aside the verdict of the jury and grant a new trial is denied.

There will be an order accordingly.

MERCHANTS' NAT. BANK OF DAYTON, OHIO, v. YANCEY COUNTY.

(District Court, W. D. North Carolina, at Asheville. February 1, 1921.)

1. **Highways ⇐122—Statute as to special road tax repealed by implication by later statute.**

   Acts N. C. 1913, c. 603, creating the board of road commissioners of Yancey county, to be a body corporate to have general authority over all the roads in the county, with power to construct and maintain roads, make contracts, and issue bonds to the amount of $150,000, *held* to repeal Acts N. C. 1907, c. 193, requiring the commissioners of Yancey county to levy a special tax annually, to be set apart as a special road fund.

2. **Highways ⇐91—County not liable for indebtedness of abolished road board in excess of statutory limit.**

   Under Acts N. C. 1913, c. 603, creating a board of road commissioners of Yancey county, to have full charge of construction of all roads in the county, with authority to borrow money and issue bonds not to exceed $150,000, in amount, which act was repealed and the board abolished by Acts N. C. 1917, c. 113, the county of Yancey *held* not liable for indebtedness created by the board during its existence in excess of $150,000.

3. Highways ⇐91—Duty of county to apply fund pro rata on claims against abolished board.

Where the board of road commissioners of a county, which was a separate corporation, advanced money for the use of the county as a temporary loan, on the abolition of such board leaving unpaid obligations it was the duty of the county commissioners to apply the money due the board pro rata on all claims against it of which the commissioners had notice.

4. Highways ⇐91—Under statute validating indebtedness county held liable for indebtedness of abolished road board; "necessary expenses."

Under Act N. C. Aug. 26, 1920, c. 3, which, as amended by Act Jan. 14, 1921, provides that "all indebtedness now outstanding incurred by a county or municipality for necessary expenses is hereby validated," Yancey county *held* liable for an indebtedness incurred by its board of road commissioners, subsequently abolished, for labor and materials used in construction of public roads of the county, which under the decisions of the Supreme Court of the state was a necessary county expense.

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

In Equity. Suit by the Merchants' National Bank of Dayton, Ohio, against Yancey County, N. C. Decree for complainant.

Merrimon, Adams & Johnston, of Asheville, N. C., for plaintiff.
Hudgins, Watson & Watson, of Burnsville, N. C, for defendant.

WEBB, District Judge. This suit in equity was brought by the complainant, the Merchants' National Bank, of Dayton, Ohio, against Yancey County, N. C., for the recovery of two certain sums, to wit:

(1) The sum of $3,400, evidenced by a warrant or voucher dated October 26, 1916, bearing interest 12 months from date at the rate of 6 per cent. per annum, said voucher being in words and figures as follows:

$3,400.00. No. 1281.
Burnsville, N. C., October 26th 1916.

The treasurer of the board of road commissioners of Yancey county will pay to the order of the bearer thirty-four hundred dollars, payable twelve months after date at the Hanover National Bank, for New York, N. Y., with interest at 6% per annum.

Done by order of the board on 26th day of October, 1916.
W. B. Wray, Chairman.

Countersigned by J. D. Hughes, Secretary.

(2) The sum of $3,819.24, evidenced by warrant or voucher dated December 6, 1916, bearing interest 12 months from date at the rate of 6 per cent. per annum, which voucher is in words and figures as follows:

$3,819.24. No. 1301.
Burnsville, N. C., December 6th, 1916.

The treasurer of the board of road commissioners of Yancey county will pay to the order of the bearer, twelve months after date, three thousand eight hundred nineteen and $^{24}/_{100}$ dollars, payable at Hanover National Bank, New York, N. Y., with interest at 6% per annum.

Done by order of the board on 6th day of December, 1916.
W. B. Wray, Chairman.

Countersigned by J. D. Hughes, B20204
Secretary.

These warrants or vouchers were purchased or acquired by the complainant in this cause, and the complainant now contends that the defendant, Yancey county, is responsible for their payment and should be compelled to pay them.

The complaint alleges, and the court finds the same to be true, that the said warrants or vouchers were issued by the board of road commissioners of Yancey county for the purpose of taking up and paying outstanding warrants for work, labor, and materials which had been given from time to time in settlement of claims and amounts due for work, labor, and materials furnished to the board of road commissioners of Yancey county to enable said board to construct roads in Yancey county as provided they should do in the act of the General Assembly of North Carolina at its session of 1913 (Pub. Loc. Laws 1913, c. 603), hereafter referred to.

In this connection the court might state that it is admitted that the county of Yancey received the benefit of the items making up the totals of the vouchers sued upon, and that the county of Yancey received the benefit of all the money evidenced by these notes or vouchers.

The complainant contends that the county of Yancey is responsible for the payment of these obligations, and that the county received full value therefor, and that the work, labor, and materials for which said obligations were created have been accepted and used by the county on its public roads and highways and in their construction, building, maintenance, and repair. On the other hand, the defendant contends that it is not responsible in any way for the debts or defaults of the board of road commissioners of Yancey county, because, it contends, the board of road commissioners was a body corporate created by the Legislature of North Carolina at its session of 1913, and that in the act creating this board the board was permitted to issue bonds not to exceed in amount the sum of $150,000. The defendant further contends that, when the vouchers sued on herein were issued by the board of road commissioners, the entire $150,000 bond issue had been realized upon and had been expended, and that any debts or obligations incurred by the board of road commissioners in excess of $150,000 were void and not collectable from the defendant, Yancey county.

The complainant also contends that the Legislature of North Carolina, at its session of 1907 (chapter 193), made it the duty of the county commissioners of Yancey county to levy a special tax every year thereafter of not less than 15 cents on property, and not less than 45 cents on the poll; and the taxes from these levies were to be set apart as a special road fund; and the complainant contends that after the creation by the Legislature of the board of road commissioners of Yancey county said county commissioners of Yancey county failed and refused to levy the special tax provided for in this act, and contends that this county, by its commissioners, should now be compelled to collect enough money by levies under said act to pay this complainant, because, the complainant contends, it was the duty of the county commissioners to levy this tax and turn over the proceeds to the board of road commissioners during the entire existence of said board of road commissioners. As to this contention, the defendant says that the act of the General

Assembly of 1913 creating the board of road commissioners of Yancey county repealed the act of 1907, and therefore the county commissioners of Yancey county were not required to levy the special tax mentioned in said act of 1907.

[1] In view of these contentions, it might be well to state briefly what these two acts of the Legislature now under consideration provided. As stated above, the act of 1907 made it the duty of the county commissioners to levy a special tax every year thereafter of not less than 15 cents on property and not less than 45 cents on the poll; the proceeds from said levy to be set apart as a special road fund.

The act of 1913 created one D. M. Buck and others a board of road commissioners of Yancey county. This board was constituted a body corporate and given all the power and authority granted to corporations of like nature by the laws of North Carolina, and was given power to sue and be sued, to make contracts, and such other powers as are necessary to carry out any and all the provisions of the act. The act made it the duty of the board to take charge of the working, repairing, and maintaining, altering, and construction of any and all roads of Yancey county at that time maintained by the county as public roads, and the board was vested with all the power, rights, and authority to be vested in the board of county commissioners of Yancey county for the general supervision of the roads of said county and the construction and repair thereof. The board was also authorized and empowered in its discretion to issue bonds of Yancey county for the construction and repair of more roads in said county, not to exceed the sum of $150,000. The bonds were to be coupon bonds of such denominations as the board saw fit to make them, to bear 6 per cent. interest, and to be styled "Yancey county good roads bonds." Same were to be payable and redeemable at some time, not to exceed 41 years from time of issue, as the board might determine. A sinking fund to pay these bonds and interest was also provided for, and a special tax for such purpose. The board was also authorized to pay for and acquire tools, implements, teams, etc., and to condemn land, and also to employ labor and make contracts for any portion of any road under construction or repair.

In accordance with this act the board of road commissioners did issue a total of $150,000 of these bonds, but before doing so a suit was brought by the commissioners of Yancey county to prevent the issuance of the bonds, on the ground that the act creating the board of road commissioners was unconstitutional. The Supreme Court held the act constitutional (Commissioners v. Road Commissioners, 165 N. C. 632, 81 S. E. 1001), and the board of road commissioners proceeded to build roads in Yancey county.

The Legislature at its session of 1917 (chapter 113) repealed the act creating the board of road commissioners of Yancey county, with no saving clause except to declare the $150,000 of bonds to be a valid debt.

Now the question is: Is the county of Yancey responsible for debts contracted by the board of road commissioners in excess of the $150,000 bond issue authorized? I am of opinion that the act of 1913 creating the board of road commissioners of Yancey county in its broad, comprehensive, and detailed terms repealed the act of 1907 (chapter 193),

county, were not required to levy a special tax to be turned over to the and therefore the commissioners of Yancey county, representing the board of road commissioners of Yancey county during the existence of said board of road commissioners.

It is a general principle of law that, when a later statute is enacted covering the entire ground of the subject-matter (in this case the construction and maintenance of roads in Yancey county), it supersedes and impliedly repeals the preceding statute. Upon reading the two acts very carefully, I cannot conclude that it was the purpose of the Legislature to keep in force the act of 1907 after creating the board of road commissioners of Yancey county in 1913, prescribing their duties and providing that they might issue bonds to an amount not exceeding $150,000.

[2] Then, if Yancey county is not required to levy sufficient special taxes under the act of 1907 to pay the complainant in this cause, is the county liable generally under the act of 1913 or under any other act for the debts of the board of road commissioners? It has been pretty generally held, and definitely and particularly so held by the Supreme Court of North Carolina, that where a county or municipality is limited by the Legislature to the expenditure of a definite sum, in this case $150,000, any acts of such county or municipality creating a larger indebtedness are invalid. Burgin v. Smith, 151 N. C. 568, 66 S. E. 607; Highway Commissioners v. Webb, 152 N. C. 710, 68 S. E. 211.

The court in Burgin v. Smith, supra, says:

"The legislative department of the government has the power to control and govern the counties of the state as its creatures and political agencies, the conclusion is irresistible that in contracting a debt, even for a necessary expense, as the repairs of a courthouse, the Legislature has the power, if it choose to exercise it, to put a limitation upon the cost. The Legislature did, by the act (chapter 242, Laws 1901), limit the board of commissioners of McDowell county to $5,000 for the purposes of enlarging and improving the courthouse in McDowell county, and the commissioners had no power, in obeying the act of the Legislature, to exceed the limit prescribed for this expense."

The court in this opinion, at the same page, further says:

"Where the Legislature has interposed its will and plainly declared it, where it has by its act prescribed the limit of expenditure, even for a necessary expense for a county, it cannot, under the decisions of this court herein cited, be maintained that the commissioners can disregard and set at naught the legislative will by setting up a general power of contracting debts for necessary expenses, restrained only by the constitutional limitation of taxation."

The court continues:

"It is, however, suggested that the act under consideration limited the issue of bonds, and not the cost of the improvement of the courthouse, but this construction of the act is too narrow. It is manifest that it was contemplated that the proposed enlargement of the courthouse would not cost more than $5,000, and the Legislature placed this limit upon it, 'not exceeding the sum of $5,000,' and authorized the commissioners 'to issue coupon bonds or county script.' "

[3] I am therefore of opinion that Yancey county is not responsible for the debt created by the board of road commissioners in any event,

and particularly is it not responsible for debts created in excess of the $150,000 bond issue. However, it appeared from the oral testimony taken before me that during the life of the board of road commissioners this board had paid of its funds the sum of $11,958.75 in settlement of certain obligations which were really due and payable by the commissioners of Yancey county; in other words, the board of road commissioners advanced to the county of Yancey, through its commissioners, the sum of $11,958.75. After the abolition of the board of road commissioners, the commissioners of Yancey county evidently agreed that they held in trust a fund of $11,958.75 which belonged to the abolished board, and in consequence of this understanding the commissioners of Yancey county paid a number of claims, warrants, and vouchers held against the board of road commissioners, aggregating $7,999.23. These claims were paid, so far as the evidence shows, before the commissioners of Yancey county had any knowledge of the debt held by the complainant in this cause against the board of road commissioners. After paying the $7,999.23 referred to in the settlement of debts due by the board of road commissioners, there was still due from the commissioners of Yancey county to the board of road commissioners the sum of $3,959.52. While this amount was in the hands of the commissioners of Yancey county, they received notice of the claim sued on in this action, and after receiving notice of this claim the commissioners of Yancey county paid $4,433.43 for a bridge which had been purchased and built by the board of road commissioners.

[4] The court is of opinion that, after the commissioners of Yancey county received notice of the complainant's claim in this cause, the commissioners of the county had no right to apply the remaining sum in their hands, which was due to the board of road commissioners, to the payment of the debt of the bridge company, but the county commissioners should have prorated the sum of $3,959.52 between the bridge claimant and the complainant in this cause. The county commissioners holding a fund of that kind had no right to prefer one creditor of the old board above another. Therefore the court holds that, in accordance with this pro rata sharing, the county commissioners of Yancey county should have paid to the complainant in this cause the principal sum of $2,452; and the court would render judgment for this were it not for the last sentence of section 3 of an act entitled, "An act to amend the municipal finance act, and for other purposes relating to municipal and county finances," enacted by the Legislature of North Carolina at its special session on August 26, 1920 (chapter 3), and which act was shown the court after oral argument in this cause, viz.:

"All indebtedness now outstanding incurred by a county or municipality for necessary expenses is hereby validated, notwithstanding any want of power to incur indebtedness for the purpose for which such indebtedness was incurred, or any other defect or invalidity."

In view of this act of the General Assembly, and in view of the holding of the Supreme Court of North Carolina that building and repairing a county's public roads is a necessary expense, and in view of the admission of both sides to this controversy "that the county of Yancey got the benefit of the money sued for in this action," and it

being shown and admitted that said vouchers were issued for actual labor and materials furnished in the construction of Yancey county's public roads, the court holds that the Legislature of 1920 intended to validate such claims as the one sued on herein, and did validate said claim, it being a debt contracted in behalf of Yancey county, and there is no denial that the county received full benefit of such contract.

Judgment is therefore rendered in favor of complainant for the principal sum of $7,219.24 with interest on $3,400 from the 26th day of October, 1917, at 6 per cent. per annum, and with interest on $3,819.24 at the rate of 6 per cent. per annum from the 6th day of December, 1917. The court does not grant, at present, the complainant's demand for a mandatory injunction against the county commissioners requiring them to levy such tax as may be necessary to pay the above judgment, for the reason that it is the court's opinion that the county will do this, when its indebtedness is finally determined, without further compulsion.

Since writing the foregoing I have been furnished with a copy of an act of the General Assembly of North Carolina ratified January 14, 1921, which is as follows:

"Section 1. That chapter 3 of the Public Laws, Extra Session, 1920, be amended as follows: Insert a period in place of the comma after the word 'validated' in line 25 of section 3 on page 56, and strike out the remainder of said section.

"Sec. 2. This act shall be in force from and after its ratification."

This amendment, ratified on the 14th of January, 1921, simply strikes out of the above-quoted portion of the statute of August 26, 1920, the words "notwithstanding any want of power to incur indebtedness for the purpose for which such indebtedness was incurred, or any other defect or invalidity." This leaves the statute as passed by the Legislature of August, 1920, as follows:

"All indebtedness now outstanding, incurred by a county or municipality for necessary expenses, is hereby validated."

I cannot see that the amendment by the Legislature on January 14, 1921, has either changed the meaning or affected the substance of that portion of the act in question passed by the Legislature at its extra session in August, 1920. The act of 1920 now simply declares that "all indebtedness outstanding incurred by a county or municipality for necessary expenses is hereby validated," and that is the law now. The Legislature of 1921, when it amended this act on January 14, 1921, realized that the statute, left untouched, meant to ratify and validate all outstanding indebtedness of a county incurred for necessary expenses. It has been decided often by the Supreme Court of North Carolina that building roads and bridges by counties is a necessary expense. Indeed, the act of the Legislature of 1913 (chapter 603) which created the board of road commissioners of Yancey county was brought in question before the Supreme Court of North Carolina, and that court decided (165 N. C. 632, 81 S. E. 1001) that the statute in question was constitutional, and that the pledging of the faith and credit of the county for public road purposes is valid, and that such purposes were for

necessary expenses of the county. So, with the Legislature of 1920 declaring that all indebtedness then outstanding incurred by a county for necessary expenses is valid, and with the Supreme Court declaring that the building of roads and bridges as set forth in the act of 1913 (chapter 603) is a necessary county expense, I am of opinion that the act of the Legislature of January 14, 1921, did not change the status of the case, and that the judgment should be as above set forth. Indeed, there is much authority to the effect that, even though the Legislature of 1921 has repealed all of section 3 of the act of 1920, the judgment above recorded would not have been affected, for the reason that, when the Legislature validates an outstanding claim against a county or municipality, a subsequent Legislature cannot invalidate it. However, it is not necessary to pass on this question in the present case, as I hold, as above stated, that the amending act of January 14, 1921, does not repeal or affect the validating portion of section 3 of the act of August, 1920. So the judgment of the court is that the plaintiff have and recover of the defendant the principal sum of $7,219.24, with interest on the two separate items as above set forth.

This cause will be retained for further orders.

MOHAWK OIL CO. v. LAYNE.

(District Court, W. D. Louisiana. January 8, 1921.)

No. 110.

1. **Courts ⇐508(3)—Execution of void judgment of state court may be restrained.**
   If judgments of a state court are void wholly or as to a particular party, and the other requisites of jurisdiction are present, a federal court may enjoin their execution, notwithstanding Rev. St. § 720 (Comp. St. § 1242), providing that a United States court shall not stay proceedings in any state court.

2. **Lis pendens ⇐24(1)—Assignee of leases pending suit to annul held bound by decree holding leases were originally void.**
   Parties purchasing oil leases pending a suit against their vendor to annul the leases and after the filing of a sufficient notice of lis pendens were bound by the judgment holding that the leases, though good against the plaintiffs in that suit by reason of their acquiescence, were originally void.

3. **Judgment ⇐729—In suit to annul lease, held not to affect rights if subsequent lease was valid.**
   Where, in a suit to annul oil leases, a subsequent lessee appealed from a judgment for defendants, and the court held that the leases were originally void but that plaintiffs were estopped from asserting their invalidity and annulled the leases as affecting the rights of the subsequent lessee but reserved to the defendants their right to test the validity of his leases, the judgment had no effect as against the rights of the holders of the earlier leases to maintain them if the subsequent leases were void.

4. **Mines and minerals ⇐58—Leases held to prevail over earlier lease originally void but validated by acquiescence.**
   Where oil leases were originally void, but became valid as against lessors by reason of their acquiescence, a subsequent lease acquired before the validation of the earlier leases would prevail over them if valid.

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5. Judgment ⇐736—Held not to affect right to attack lease in subsequent suit without reservation to that effect.

Where a judgment holding that oil leases, though originally void, were valid as against the lessors by reason of their acquiescence, was not intended to affect the rights of the holders as against the holder of subsequent leases, they had a right in a subsequent proceeding to attack the subsequent leases without any reservation to that effect in the judgment.

6. Judgment ⇐642—Of Supreme Court held not rendered without hearing and hence was valid and binding.

Where, in a suit between the holders of different leases on the same oil lands, the state Supreme Court rendered judgment against plaintiffs on defendants' plea of estoppel based on plaintiff's admission in another suit that its leases were invalid but announced that it would consider an application for rehearing if plaintiff had no notice of the plea, but plaintiff moved for a rehearing attempting to explain the admissions on which the estoppel was based, and a rehearing was refused, the judgment was not rendered without a hearing but was valid and binding.

7. Judgment ⇐673—Not binding on party dismissed from suit because joining in applications for rehearing and certiorari.

Where, in a suit by parties claiming under an oil lease, against the holder of a subsequent lease, one of the plaintiffs was dismissed on an exception for misjoinder, it was not bound by a judgment of the state Supreme Court against the other plaintiff because it joined in applications to such court for a rehearing and to the United States Supreme Court for writ of certiorari both of which were denied.

8. Constitutional law ⇐278(1)—Estoppel ⇐9—Admission by transferee of leases of their invalidity held not binding on transferor.

Where the holder of an oil lease in transferring it reserved a mortgage and a vendor's lien and agreed to credit the transferee if the leases were held invalid, and in a suit to enforce the mortgage and vendor's lien the transferee alleged that the leases were invalid, such allegation, though held to estop the transferee as against third persons, could not under Const. U. S. Amend. 14, estop the transferor to assert the validity of the leases as against third persons.

9. Judgment ⇐452—Transferor of leases reserving mortgage and vendor's lien held entitled to restrain execution of judgment.

Where the holder of oil leases transferred them reserving a mortgage and a vendor's lien and agreeing to give the transferee credit if the leases were held invalid, and in a suit involving their validity judgment was rendered against the transferee on a plea of estoppel, the transferor was entitled to sue to restrain the execution of the judgment as against it.

In Equity. Suit by the Mohawk Oil Company against Mrs. Eula S. Layne. On motion to dismiss, and on application for injunction. Preliminary injunction continued in effect, and motion to dismiss overruled.

See, also, 270 Fed. 851.

Plaintiff, assignee of certain oil leases from Herndon and Raines to Dunson and associates, which it in turn had transferred to the Tex-la-homa Oil Corporation, brings this suit to have annulled two certain judgments of the state court, affecting said leases, and to enjoin the defendant herein from enforcing same.

The case is now before the court on motion of defendant to dismiss. The bill of complaint alleges that in 1916 Herndon and Raines executed oil and mineral leases to Dunson and associates, which leases were later acquired by Brown and Bernstein, and by them transferred to plaintiff; that Herndon and Raines filed suit in the state court for the annulment of said leases, and, their demands being rejected, appealed to the Supreme Court of the state. The

Supreme Court dismissed the appeal on the grounds that, pending same, Raines and Herndon had acquiesced in the judgment. See Raines et al. v. Dunson, 145 La. 526, 82 South. 690.

Layne, under whom the present defendant claims as legatee and sole heir, who had, pending the litigation, himself, taken a lease from Raines and Herndon, on the assumption that the Dunson lease was invalid, sought to intervene in the appeal of Raines and Herndon and urge his rights in the Supreme Court; but his intervention was dismissed, and he thereafter took an appeal from the judgment under article 571 of the Code of Practice, which is as follows:

"The right of appeal is given, not only to those who were parties to the cause in which a judgment has been rendered against them, but also to third persons not parties to such suit, when such third persons allege that they have been aggrieved by the judgment."

On this appeal the judgments of the lower court sustaining the Dunson leases were "annulled and reversed in so far as they affect the rights of Layne, appellant," and such leases were "avoided and annulled, in so far as they affect the rights of the appellant, Layne, reserving to the defendants or their assignees the right to test the validity of the leases held by Layne and which formed the basis of the appeal."

The Tex-la-homa Oil Corporation, Mohawk Oil Company, and Brown then filed suit against Layne in the state court attacking the validity of the leases. On an exception of misjoinder filed by Layne, the Mohawk Oil Company and Brown were eliminated from the suit on the ground that they had sold their interests in the leases which were then owned by the Tex-la-homa Oil Corporation. The suit proceeded with the Tex-la-homa Corporation as the sole plaintiff, and there was judgment in favor of Layne rejecting plaintiff's claim, from which judgment the latter appealed to the Supreme Court.

The Mohawk Oil Company, as assignee of the leases in question, had sold them, together with other leases and drilling paraphernalia, to the Tex-la-homa Oil Corporation, the consideration being $510,000 cash, certain shares of stock of the said corporation, common and preferred, and $1,500,000 in eight several deferred payments, to secure which a mortgage and vendor's lien on the leases was reserved. The Herndon and Raines leases being then in litigation, it was provided that, should the title to the same fail, the Tex-la-homa Oil Corporation should receive a credit on such deferred payments in the sum of $600,000.

Pending the appeal of the Tex-la-homa Oil Corporation, the Mohawk Oil Company instituted suit in the state court to foreclose its mortgage and vendor's lien on the leases and drilling equipment sold said Tex-la-homa Oil Corporation, for which corporation, in the meantime, a receiver had been appointed by this court. The receiver, through his attorneys (appointed by the court and not the same attorneys who had been in charge of the litigation with Layne) filed suit in the state court setting forth the terms of the contract by which said leases had been acquired from the Mohawk Oil Company, and alleging that it had been evicted from the Herndon and Raines leases, and that it had no title thereto; the same having been declared void by the Supreme Court of the state. The prayer of the petition was for the cancellation of the contract by which petitioner had purchased the leases and for repayment of the consideration paid. In the alternative, the petitioner prayed that the value of the Raines and Herndon leases be fixed at one-half of that of all the properties conveyed by said contract, and that its indebtedness for the balance due be credited with the sum of $1,575,000. Petitioner finally prayed for a writ of injunction restraining the sheriff of the state court from selling the property under the foreclosure proceedings instituted by the Mohawk Oil Company.

After argument in the Supreme Court of the appeal of the Tex-la-homa Oil Corporation in its suit against Layne, the latter filed in the Supreme Court a plea of estoppel, attaching thereto a certified copy of the record in the suit of the Mohawk Company against the Tex-la-homa Corporation last referred to, which plea was based on the assertion that the Tex-la-homa Oil Corporation had admitted and judicially asserted the invalidity of the leases in question.

The Supreme Court, without remanding the case for the taking of evidence on such plea, sustained the same, and dismissed the appeal. See Mohawk Oil Co. v. Layne, No. 23853 in the Supreme Court, not yet (officially) reported, 86 South. 322. Thereupon the Mohawk Oil Company and Brown joined the Tex-la-homa Oil Corporation, through its receiver, in application for rehearing, which was opposed by Mrs. Layne, and which the Supreme Court refused. The receiver of the Tex-la-homa Oil Corporation, the Mohawk Oil Company, and Brown then applied to the United States Supreme Court for a writ of certiorari or review of the judgment of the Supreme Court of the state, which application was likewise denied. 254 U. S. —, 41 Sup. Ct. 148, 65 L. Ed. —.

Plaintiff's bill in the present case alleges:

That the judgment on the Layne appeal involving the Dunson lease is null and void for the reason that the defendants therein were given no opportunity to contest the lease claimed and asserted by Layne; that such judgment was invalid against defendants who were not parties to said suit, and who had acquired title to the lease pending the litigation on the faith of the record which disclosed no notice of lis pendens;

That the judgment of the Supreme Court in the case of Tex-la-homa Oil Corporation against Layne (No. 23853) was null and void, even as to the Tex-la-homa Oil Corporation, the only plaintiff left in the case after the elimination by the trial court of the Mohawk Company and Brown, for the reason that the case was decided on pleadings filed for the first time in the Supreme Court without notice or opportunity given to contest the plea of estoppel, in violation of the Fourteenth Amendment of the Constitution of the United States, prohibiting the taking of property without due process of law.

That both of said judgments were invalid in so far as plaintiff is concerned for the reason that it was not a party to either and was not given an opportunity to be heard.

It is alleged that the denial of plaintiff's right to be heard in said suits was obtained by fraud and ill practices, and that, if plaintiff or Brown had been given a hearing, they could have shown that Layne had permitted his mineral leases to lapse, and if same had not lapsed, that the acquisition of same by him was the purchase of a litigious right, which they were entitled to have themselves relieved of on paying to him of the cost of such purchase, and that an effort was made on the part of Brown and plaintiff to ascertain the amount paid by Layne for the mineral leases without avail, and that, had plaintiff been given the opportunity before the dismissal of the Tex-la-homa Oil Corporation's appeal in its suit against Layne on the plea of estoppel, it could have shown that said plea of estoppel was not well founded for the reason that the allegations made by the receiver of the Tex-la-homa Oil Corporation were made in error of the true facts and because they were unsuccessfully made, and further constituted no estoppel in so far as Mrs. Layne was concerned, because she was not a party to the suit. That plaintiff was thus deprived of its property without a hearing, and without due process of law, and that it would be unconscionable and contrary to equity to permit the execution of such judgments as against plaintiff herein.

After argument of the motion to dismiss the present suit, and while same was under advisement by this court, plaintiff herein filed application for a temporary restraining order and preliminary injunction against defendant, alleging that she was attempting to execute said judgments by a rule in the state court on the pipe line companies who were purchasing the oil taken from said land, to show cause why the price thereof should not be paid to her. (Pending the litigation, it appears the lease had been developed by a third party, Ramsey, under an agreement between the Tex-la-homa Oil Corporation and Layne, by which Ramsey was to have one-half of the net profits and Layne or the Tex-la-homa Oil Corporation, as might thereafter be determined by the court, was to have the other half.) An order was signed temporarily restraining defendant from enforcing such judgments, and she was further ordered to show cause why a preliminary injunction should not issue. The answer to this latter rule to show cause presents substantially the same

issues presented in the pending suit, and the two cases, Nos. 110 and 111 on the docket of this court, will therefore be consolidated and considered together.

The motion to dismiss avers that this court is without jurisdiction; that the judgments of the state court in question constitute res adjudicata of all the issues herein presented; and that the bill does not disclose facts sufficient to constitute a valid cause of action in equity; that prior to the acquisition by plaintiffs of the Dunson leases, Layne had recorded, as provided by law, a notice of lis pendens, the effect of which was to bind future purchasers by the pending litigation; that pending Layne's appeal in the case against Dunson, the latter's assignees, who were later the assignors of the Mohawk Oil Company, as parties of the first part, and Layne, as party of the second part, in order to secure the development of the lease, entered into a contract with one Ramsey, party of the third part, by which, without prejudicing the rights of either Layne or the Mohawk Oil Company, the leases in question were transferred to Ramsey, who agreed to develop the property for the joint account of himself and a trustee named in the agreement, to act for the parties of the first and second part and to hold the funds received by him until the final termination of the litigation between said parties as to the validity of their respective leases. See Raines v. Dunson et al., 145 La. 1011, 83 South. 224.

The answer further avers that the filing of suit by the Mohawk Oil Company and Brown, together with the Tex-la-homa Oil Corporation, against Layne, in accordance with the reservation of their rights made by the Supreme Court in the case of Raines and Herndon against Dunson et al., was a recognition of the validity of such judgment, and that their joining in the application of the Tex-la-homa Oil Corporation for rehearing in the case against Layne in the Supreme Court, and their again joining the Tex-la-homa Corporation in its subsequent application to the United States Supreme Court for writ of certiorari or review, estops plaintiff herein from contesting the legality of the judgment rendered in such suit; that the judgments in question, being now final, defendant is entitled to have execution on same; and that this suit is based on false allegations and suppression of facts, and its sole purpose is to annoy and harass defendant and to delay her in the enforcement of such judgments.

Hall & Bullock and Wilkinson, Lewis & Wilkinson, all of Shreveport, La., for plaintiff.

Thigpen & Herold and Barret & Files, all of Shreveport, La., for defendant.

JACK, District Judge (after stating the facts as above). [1] If the judgments in question be void, or if they be void as to the plaintiff in this proceeding, the other requisites of jurisdiction being present, this court would have jurisdiction to enjoin their execution. The same right exists in the state courts under the well-established jurisprudence. See Sheriff v. Judge, 46 La. Ann. 29, 14 South. 427; Hibernia National Bank v. Standard Guano Chemical & Manufacturing Co., 51 La. Ann. 1321, 26 South. 274. As was said by the Supreme Court of the United States in Simon v. Southern Railway Co., 236 U. S. 123, 35 Sup. Ct. 257, 59 L. Ed. 492:

"Of course, the jurisdiction of the United States courts could not be lessened or increased by state statutes regulating venue or establishing rules of procedure, but, manifestly, if a new and independent suit could have been brought in a state court to enjoin Simon from enforcing this judgment, a like new and independent suit could have been brought for a like purpose in a federal court, which was then bound to act within its jurisdiction and afford redress. * * * The United States courts could not stay original or

supplementary proceedings in a state court * * * or revise its judgment. But by virtue of their general equity jurisdiction they could enjoin a party from enforcing a void judgment."

Under section 720 of the Revised Statutes (Comp. St. § 1242), it is provided that a United States court shall not "stay proceedings in any court of a state," but, as stated by the court in the Simon Case:

"* * * When the litigation has ended and a final judgment has been obtained—and when the plaintiff endeavors to use such judgment—a new state of facts, not within the language of the statute may arise. In the nature of the case, however, there are few decisions dealing with such a question, for where the state court had jurisdiction of the person and subject-matter, the judgment rendered in the suit would be binding on the parties until reversed and there would therefore usually be no equity in a bill in a federal court seeking an injunction against the enforcement of a state judgment thus binding between the parties. * * *

"There have, however, been a few cases in which there was equity in the bill brought to enjoin the plaintiff from enforcing the state judgment, and where that equity was found to exist appropriate relief has been granted. For example, in Julian v. Central Trust Company, 193 U. S. 112, a judgment was obtained in a state court, execution thereon was levied on property which, while not in possession of the federal court, was in possession of a purchaser who held under the conditions of a federal decree. It was held that the existence of that equity authorized an injunction to prevent the plaintiff from improperly enforcing his judgment, even though it may have been perfectly valid in itself.

"Other cases might be cited involving the same principle. But this is sufficient to show that if, in a proper case, the plaintiff holding a valid state judgment can be enjoined by the United States court from its inequitable use—by so much the more can the federal courts enjoin him from using that which purports to be a judgment but is, in fact, an absolute nullity. Marshall v. Holmes, 141 U. S. 597; Gaines v. Fuentes, 92 U. S. 10; Barrow v. Hunton, 99 U. S. 85."

In the Simon Case, Simon had obtained in the state court in Louisiana a large judgment against the railway company for damages for personal injuries on a cause of action which arose in Alabama. Process was served on the Secretary of State on the allegation that the defendant was a foreign corporation doing business in the state, whereas, in fact, it was not doing business in the state. The suit proceeded to judgment by default for a fraudulently exaggerated sum, without the knowledge of the railway company, which, on learning of the judgment, and that an attempt would be made by Simon to enforce it by fieri facias, filed suit in the United States court and obtained an injunction restraining him from doing so.

The case was first before the Supreme Court on Simon's application for writ of habeas corpus, he having been sentenced to prison for violation of the injunction. Ex parte Simon, 208 U. S. 144, 28 Sup. Ct. 238, 52 L. Ed. 429. Later the case came up on Simon's appeal from the decree granting the injunction. 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. In passing on Simon's appeal, the court, quoting from Marshall v. Holmes, 141 U. S. 597, 12 Sup. Ct. 65, 35 L. Ed. 870, said:

"'Authorities would seem to place beyond question the jurisdiction of the Circuit Court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the state court itself to set aside or vacate the judgments in question, it may, as between the

parties before it, if the facts justify such relief, adjudge that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him, and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a state court. "It would simply take from him the benefit of judgments obtained by fraud." And if a United States court can enjoin a plaintiff from using a judgment, proved to be fraudulent, it can likewise enjoin him from using a judgment absolutely void for want of service. * * *

"The ground of the decision in the Marshall Case, in Gaines v. Fuentes, 92 U. S. 10; Barrow v. Hunton, 99 U. S. 85; McDaniel v. Traylor, 196 U. S. 415; Arrowsmith v. Gleason, 129 U. S. 86; Johnson v. Waters, 111 U. S. 640; Sharon v. Terry, 36 Fed. Rep. 337, cited in Julian v. Central Trust Co., 193 U. S. 112; Dobbins v. Los Angeles, 195 U. S. 224; Howard v. De Cordova, 177 U. S. 609, is that while section 720 prohibits United States courts from 'staying proceedings in a state court,' it does not prevent them from depriving a party of the fruits of a fraudulent judgment, nor prevent the federal courts from enjoining a party from using that which he calls a judgment but which is, in fact and in law, a mere nullity. That conclusion is inevitable, or else the federal court must hold that a judgment—void for want of service—is 'a proceeding in a state court' even after the pretended litigation has ended and the void judgment has been obtained. Such a ruling would involve a contradiction in terms, and treat as valid for some purposes that which the courts have universally held to be a nullity for all purposes."

In that case, finding that service on the Secretary of State under the Louisiana statute would not be effective to give the state court jurisdiction over a nonresident defendant as to a cause of action arising in another state, the Supreme Court, without passing on the question of fraud, affirmed the decree of the Court of Appeals granting the relief sought.

The allegations of plaintiff's bill, if true, bring the case within the jurisdiction of this court, so that the court may proceed to the inquiry as to whether the judgments attacked were, in fact, void.

In the first case, Raines and Herndon v. Dunson, there was no question as to the court's jurisdiction as between the parties to the suit, that is to say, the plaintiffs and defendants, and Layne, a third party in interest, whose right to an appeal was specifically given by the Code of Practice.

[2-4] The court in effect held that, while the Dunson leases were originally void, the plaintiffs, Raines and Herndon, were estopped from asserting it, by reason of their having acquiesced in the judgment of the lower court holding the leases valid, but that such acquiescence would not, of course, affect such rights as Layne might have under a subsequent lease; and that, if Layne's lease was valid, it would take precedence over the Dunson leases, validated by the acquiescence of Raines and Herndon. It is true that Dunson's assignees, including the present plaintiff, were not given an opportunity to be heard in the proceeding in which the Dunson lease was decreed invalid, but they had purchased pending the litigation, after the filing of a notice of lis pendens, which, though not specific as it should have been, was, I think, under all of the circumstances, sufficient. Their rights, therefore, were no greater than those of Dunson and his associates. The judgment did not attempt to pass on the validity of the Layne lease which was not then in question, the court having to accept as true, for the purpose of his ap-

peal, the allegation of Layne that he had a valid lease. Consequently, it follows that said judgment was not void, that it was binding as between the parties and the Mohawk Company claiming under them, but had no effect; and was intended to have no effect, as against the rights of the assignees of Dunson to maintain their lease as against Raines and Herndon, and, likewise, as against Layne, if his lease was not valid. If the Layne lease was valid, having been acquired from Raines and Herndon before the Dunson lease was made good by their acquiescence, such lease would prevail over the latter.

In the second case, Tex-la-homa Oil Corporation, Mohawk Oil Company, and Brown against Layne, the court had jurisdiction of the one plaintiff left in the suit, Tex-la-homa Oil Corporation, and as against it the judgment is valid and binding.

[5] The assignees of the Dunson leases, made good by the acquiescence of Raines and Herndon, had the right, in a subsequent proceeding to directly attack the Layne lease, without any reservation to that effect in the judgment of the Supreme Court; and, consequently, the reference to such reservation in the subsequent suit filed against Layne had no effect whatever, as against the Mohawk Company, which, however, was bound by the judgment in the Dunson case for the reasons heretofore stated.

[6] The Supreme Court of Louisiana, in dismissing the appeal in the suit against Layne, without remanding the case for evidence on the plea of estoppel, acted on certified copies of the record in the lower court in the suit of the receiver of the Tex-la-homa against Mohawk Company. The court, however, took occasion to say that it did not appear that appellant had had notice of such plea, and that, if such were a fact, an application for rehearing would be favorably considered. Thereupon such application was filed by the receiver of the Tex-la-homa Corporation, but not on the grounds that he had received no notice of such plea, which the affidavit of opposing counsel showed he had, in fact, been given. The attorney for the Tex-la-homa Oil Corporation made an explanation of how the judicial allegations on which the plea of estoppel was based came to be made. The Supreme Court evidently did not consider such explanation sufficient, even though true, and refused to grant a rehearing. As to the Tex-la-homa Oil Corporation, the only party plaintiff then left in the case, the judgment on the plea of estoppel was not without hearing, and, so far as such corporation is concerned, is valid and binding.

[7] There has been, however, no judgment obtained contradictorily with the Mohawk Oil Company, plaintiff herein, sustaining the validity of the Layne lease. At the very threshhold of the suit to determine that question, the Mohawk Oil Company was thrown out of court on an exception of misjoinder filed by Layne. To sustain the contention of defendant herein that the Mohawk Oil Company is bound by the judgment in the last-named case on the ground that after being dismissed from the suit, on such exception, it joined the remaining plaintiff in an application to the state Supreme Court for a rehearing from its judgment sustaining the plea of estoppel and dismissing the appeal, and that later on it again joined with such plaintiff in an application to the Unit-

ed States Supreme Court for writ of certiorari or review, would be to hold that, by very reason of its efforts to obtain a hearing, it lost its right to be heard. It cannot be said that the Mohawk Oil Company has had its day in court. The issues made by it in its attack on the Layne lease have never been met and determined. If the defendant has any rights, they consequently cannot be affected by such judgment. Therefore the query is: Has the plaintiff property rights which he has not been given the opportunity to defend, and, if he has, would the enforcement of such judgment constitute a taking of his property without due process of law?

[8] Although the Mohawk Company had transferred the leases in question to the Tex-la-homa Oil Corporation, it was still the real party in interest. The credit portion of the price of the leases in question and others included with them was $1,500,000, and the contract of sale provided that, should the title to said Raines and Herndon leases be not valid, said Tex-la-homa Oil Corporation should be allowed a credit of $600,000 on such indebtedness. Not alone was the Mohawk Company warrantor of the validity of such leases, but it was the holder of a mortgage and vendor's lien on same to secure the payment of the balance of the purchase price. It had, under such contract, even reserved ownership in the leases until all deferred payments should be made, though this provision was perhaps waived by its election to foreclose its mortgage, rather than to rescind the sale. The Tex-la-homa Corporation was at the time in the hands of a receiver—it is now in bankruptcy.

The Mohawk Company was proceeding to foreclose this mortgage and enforce its lien, when, in its petition to enjoin such proceeding, the allegations were made by the attorneys for the receiver on which the plea of estoppel was based. Ordinarily, a warrantor is called in by the defendant to defend a petitory action or ejectment suit, but, in this case, the warrantor was not permitted to remain in the suit and establish the validity of the leases sold its vendee.

Is the plaintiff to be deprived of this valuable property right because the receiver of its vendee corporation, through its attorney appointed by the court, unfamiliar with the previous litigation, had declared that the title to the lease had failed? Should plaintiff be deprived of such a property right, even had the receiver, in making such allegations, been fully cognizant of the fact that the title to the lease was then being litigated in a suit pending in the Supreme Court? If so, then a bankrupt defendant in a petitory action may, by a confession of judgment, deprive his vendor of his lien and mortgage, and this though he may have purchased the property entirely on credit, and without paying one dollar cash to his vendor.

While one may be estopped by his own admissions or allegations, he cannot be estopped by the allegations of his adversary. After taking its appeal from the adverse judgment of the lower court, the effect of which was to invalidate its leases, the receiver of the Tex-la-homa Oil Corporation, thereafter appointed, could not, by shifting positions and declaring said leases void in a suit to rescind the contract by which they were acquired, in any wise prejudice the rights of the Mohawk Company if the leases were valid, in fact. Such allegations could be

pleaded as estoppel only to defeat the leases so far as the Tex-la-homa Corporation was concerned, just as the acquiescence of Raines and Herndon in the first suit was pleaded and held to have estopped them from denying the validity of the Dunson leases; but such acquiescence was held in no manner to have affected the rights of Layne.

It is true that rather an anomalous situation would be presented if the leases heretofore decreed invalid as to the party having the present title should now be decreed valid as to such party's vendor. It is not for this court at the present time to say how such a situation might be equitably adjusted. Perhaps the practical effect of holding the lease valid as to the Mohawk Company, while invalid as to its vendee because of the latter's judicial allegations, might be to give Layne the right to claim priority for his lease on payment to the Mohawk Company of the estimated balance due it by the Tex-la-homa Corporation on the Dunson leases, or, if this might be difficult to determine, owing to the fact that the Dunson leases were sold together with others, on payment to the Mohawk Company of the $600,000 agreed by it to be credited the Tex-la-homa Corporation on its obligation if the title to such leases failed.

That it was not intended by the Supreme Court of the state that its judgment dismissing on the plea of estoppel the suit of the Tex-la-homa Corporation should have, as against the Mohawk Company, the effect of finally invalidating the Dunson leases, would appear evident from its ruling on Layne's appeal in the Raines and Herndon Case. Referring to the cases cited in support of the contention, then made, that the effect of the judgment dismissing the appeal of Raines and Herndon on the ground of their acquiescence in the judgment was to cut off any claim that might be urged by Layne, the court said:

"In none of them (such cited cases) do we find that the courts have held that one litigant, by acquiescence, collusion, or otherwise, may bind or preclude other parties at interest against their consent or over their protest."

For a greater reason such allegations and acquiescence could not be held to bind a third party in interest when made in a suit seeking to avoid liability to such third party for the price of the lease alleged to be invalid.

[9] This very question of the right of the Mohawk Company to be heard is now pending on its appeal to the Supreme Court of the state from the order of the trial court eliminating it as a party plaintiff from the suit against Layne on the latter's exception of misjoinder. If the state district court was in error in thus eliminating the Mohawk Company as one of the parties plaintiff in such suit against Layne, it would seem that plaintiff would clearly have the right to enjoin the execution of the judgment, the effect of the enforcement of which would be to take from plaintiff valuable property before its rights could be heard and determined by the Supreme Court. On the other hand, if the state district court was not in error in holding that, under the state practice, the Mohawk Company had no standing in court to assert and defend the validity of the leases held by its vendee, in which the Mohawk Company was so materially interested, then, under the allegations of the

bill of complaint herein, this case is one in which it is peculiarly the province of a court of equity to grant its relief.

The plaintiff in its bill avers that the Layne lease is invalid and the grounds on which the allegations are based are serious. Whether they are sufficient, it is not for this court at this time to determine. It suffices to say that, taking for true the allegations of plaintiff's bill, except as otherwise shown by affidavits and exhibits filed, until the plaintiff has had a hearing and his rights have been adjudicated, he is entitled to the equitable writ of injunction under the Fourteenth Amendment of the federal Constitution, prohibiting the taking of one's property without due process of law.

While the first judgment complained of, that in the case of Raines and Herndon v. Dunson et al. (No. 23384) 145 La. 1011, 83 South. 224, in the Supreme Court of the state, is valid and binding against the plaintiff herein, that judgment did not, in itself, finally determine the validity of the Dunson leases, and can be enforced only in connection with the subsequent judgment in the case of Tex-la-homa Corporation v. Layne (No. 23853) 86 South. 322, in the Supreme Court, the effect of which was to finally invalidate the Dunson leases as against those held by Layne. But the judgment in the latter case was not against the Mohawk Company, which was not permitted to remain a party to the suit, and consequently such judgment was not, I think, intended to be binding on said company, as to whom it was void and of no effect. Consequently, plaintiff is entitled to an injunction as prayed for, restraining defendant from attempting to enforce said judgments.

It follows that the preliminary writ of injunction herein issued should be continued in effect, and that the motion to dismiss plaintiff's bill should be overruled.

A decree will be prepared and entered in accordance with the views herein expressed.

MOHAWK OIL CO. v. LAYNE.

(District Court, W. D. Louisiana. February 4, 1921.)

No. 110.

1. **Mines and minerals ⇐78(1)—Holder of lease not chargeable with failure to develop where third party developed under contract with both parties.**
   Where the holders of oil leases covering the same land joined in a contract with a third party permitting him to develop the property and hold the proceeds until the termination of litigation between the lessees, the holder of the later lease could not be charged with a failure to develop the lands, and it was wholly immaterial which party took the initiative in making such contract.
2. **Champerty and maintenance ⇐6(2)—Oil lease given pending suit to annul earlier leases not "litigious right."**
   Under Civ. Code La. art. 3556, § 18, and article 2653, relative to litigious rights, and article 2652, authorizing the party against whom a litigious right is transferred to release himself by paying the price of the transfer

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

with interest, an oil lease made by the owner of land while a suit was pending to annul an earlier lease was not a "litigious right" which the earlier lessee could purchase by paying the amount paid with interest.

[Ed. Note.—For other definitions, see Words and Phrases, Litigious Right.]

3. **Champerty and maintenance ⟸6(2)—No right "litigious" unless involved in litigation.**

Under the law of Louisiana, no right is "litigious" unless it is actually involved in the litigation.

4. **Champerty and maintenance ⟸6(4)—Offer to purchase alleged litigious right does not inure to one claiming under the offerer.**

Where the holder of an oil lease offered to pay the holder of a subsequent lease the amount paid by him for the lease with interest on the theory that it was a litigious right within Civ. Code La. art. 2652, the offer did not inure to the benefit of one subsequently purchasing the earlier lease from the party making the offer.

5. **Champerty and maintenance ⟸6(5)—Right to purchase litigious right must be exercised without undue delay.**

Under Civ. Code La. art. 2652, relative to the right of one against whom a litigious right is transferred to relieve himself by paying the price of the transfer with interest, he must in due time and without unnecessary delay elect to exercise the right or option conferred.

6. **Champerty and maintenance ⟸6(5)—Right to purchase litigious right not lost by agreement between parties and a third person.**

Where the holders of oil leases covering the same property entered into an agreement with a third person for the development of the property, the proceeds to be held until the termination of litigation, and the agreement provided that it was made without prejudice to the rights of either party under their respective leases, any right which the holder of the earlier lease had to purchase the other's lease as a litigious right under Civ. Code La. art. 2652, was thereby preserved.

7. **Champerty and maintenance ⟸6(5)—Earlier lessee not entitled to purchase subsequent lease as litigious right after discovery of oil and accumulation of large profits.**

Where parties holding oil leases on the same land entered into an agreement with a third party for the development of the land, the proceeds to be held until the termination of litigation and the holder of the earlier lease made no offer to buy out the subsequent lessee until oil had been discovered, and profits exceeding $183,000 had accumulated, it was too late to attempt to purchase the subsequent lease as a litigious right under Civ. Code La. art. 2652.

In Equity. Suit by the Mohawk Oil Company against Mrs. Eula S. Layne. On hearing on the merits. Decree for defendant.

Hall & Bullock and Wilkinson, Lewis & Wilkinson, all of Shreveport, La., for plaintiff.

Thigpen & Herold and Barret & Files, all of Shreveport, La., for defendant.

On the Merits.

JACK, District Judge. After denial of the motion to dismiss (270 Fed. 841), the case was submitted on its merits on an agreed statement of facts, substantially in accordance with the facts as alleged in plaintiff's petition as set forth in the foregoing opinion of the court; the pleadings having been so amended as to convert the suit into one to

clear a cloud from plaintiff's leases, resulting from the recordation of the Layne leases and the latter's claim thereunder.

Plaintiff bases its attack on the Layne leases on the same grounds on which it averred in its original petition it could have contested Layne's claim had it been given an opportunity to do so, that is to say, first, that the Layne leases lapsed because of the failure of the lessee to commence work within the time stipulated, or to pay the extension rentals as provided in the contracts; and, second, that Layne, by such leases, acquired a litigious right, and that plaintiff is entitled to avail itself of the provisions of article 2652 of the Civil Code, providing that—

"He against whom a litigious right has been transferred, may get himself released by paying to the transferee the real price of the transfer, together with the interest from its date."

On February 5, 1919, plaintiff's author, Brown, wrote Layne stating that he desired to avail himself of the provisions of the law relative to litigious rights, and that he stood ready to repay to him the amount which he (Layne) had paid for the leases, if he would state what that amount was. It appears that the cash consideration paid for the leases by Layne was $2,440, but that he had, in addition, agreed to pay the fees of the attorneys who had brought the suits for Herndon and Raines against Dunson et al., and, the amount of such fees being unknown to Brown, plaintiff avers that he could not make an actual tender of the full consideration paid by Layne.

The defendant denies plaintiff's allegation that Layne had failed to develop the land under his lease contracts, and in answer to plaintiff's second contention denies that the Layne leases constituted a litigious right, but avers that, if they did, plaintiff could not avail itself of the provisions of the article of the Civil Code relied on, because the offer was not made promptly after the acquisition of the leases by Layne, but only after protracted litigation, and when nearly a year had passed since the parties had entered into the contract with Ramsey for the development of the land pending the litigation. Layne's leases were taken July 25, 1917, subsequent to the filing of the Herndon and Raines suits. On February 28, 1918, plaintiff's authors and Layne executed the contract with Ramsey for the development of the land; on May 2, 1918, Brown and his associates brought suit against Layne for $100,000, damages for slander of title based on the allegation that Layne's leases were invalid, and that they constituted a cloud on plaintiff's title; on June 29, 1918, Layne's right to appeal from the judgment of the lower court sustaining the Dunson leases in the Raines and Herndon cases was sustained by the Supreme Court; and on February 5, 1919, while the slander of title suit was still pending (it was dismissed by plaintiff in June, 1919), Brown wrote his letter to Layne averring that his leases were litigious rights, to rid himself of which he offered to repay to Layne the consideration the latter paid therefor.

Opinion.

[1] I. No complaint is made by the landowners of any failure of Layne to develop their lands in accordance with his contracts. It is not necessary to determine whether the plaintiff may aver such ground for

forfeiture. Its contention is based on the fact that it was the plaintiff, rather than the defendant, who procured Ramsey to develop the lands; that the defendant merely acquiesced and consented. The lands were developed by neither of the lessees, but by a third party, acting under agreement with them, without expense to either, and it is wholly immaterial that plaintiff took the initiative in making the contract with Ramsey. The development of the land by Ramsey's assignee, the Fortuna Oil Company, inured to the benefit of the one or the other rival lessees, whose leases should be finally decreed paramount.

II. The contention of plaintiff that Layne acquired a litigious right from which plaintiff is entitled to be relieved on repaying defendant the price thereof presents the only serious issue in the case.

[2] Under the Civil Code, art. 2653, "a right is said to be litigious, whenever there exists a suit and contestation on the same." Again, in article 3556, section 18, of the Code, it is stated: 'Litigious rights are those which cannot be exercised without undergoing a lawsuit." By another article of the Code, No. 2447, the purchase of such litigious rights by officers of the court in which they are pending is a nullity.

The purpose of these provisions taken from the Code Napoleon, as stated by the French commentators, is, first, to put a restraint upon the cupidity of the purchasers of litigious rights, and, second, to put an end to litigation over such litigious rights. The leases to Dunson conveyed to him and to his assignees the exclusive right to explore and develop the land for oil (Saunders v. Busch Everett Co., 138 La. 1050, 71 South. 153; Rives v. Gulf Refining Co., 133 La. 178, 62 South. 623), and these leases being in contestation at the time the second leases were made to Layne, conveying to him a similar right, and the latter leases being of no effect if the first leases were valid, counsel contend that such transaction was the transfer to Layne of a litigious right. I do not think the right of the landowners to make a second lease based on the alleged nullity of the first lease can be said to have been the right then in contestation. It is true that the thing in dispute, the issue in the litigation, was the right of Dunson et al. to explore the lands in question for oil and other minerals, but that does not fully state the case; it was something more, it was the right to explore such lands for oil and minerals "under the terms and provisions of the lease contracts from Raines and Herndon to Dunson et al.," the nullity of which leases was then being asserted in the courts by the lessors. It is perfectly clear that the present plaintiff, who acquired the Dunson leases during such litigation, purchased a litigious right; that is to say, the right under such leases to explore the lands for oil and other minerals. The law invoked may apply as against the vendee of one of two distinct leases where the respective rights of the lessees are then in litigation, but that the law was never intended to apply in the case of a party taking a second lease from a landowner, who was at that time suing to annul a prior lease in favor of another party, is evident when the effect of such an application is considered.

Not one landowner in a hundred develops his own land. Even if he should be financially able to do so, not being in the oil business, he would not care to assume the risk. The usual and almost universal

custom is to lease the land to an oil operator, yet no operator would take such a lease of land on which there was a prior lease then in contestation, even though he had no doubt as to the invalidity of such lease. The reason is apparent, the way would thus be opened for such first lessee having an invalid lease to validate it by what in effect would be the forced transfer to him from the second lessee of the latter's valid lease, on the former's returning to him the price he paid. Thus the landowner, while awaiting the slow process of the courts to secure relief from a void lease, might, on the final termination of the litigation, find that all of the oil had been sapped from beneath his lands by wells on adjoining premises. The holder of such an invalid lease might thus, under one pretext or another, neglect to develop the land, and yet effectually prevent its development by another.

In this very case plaintiff claims that Layne's leases were forfeited by failure to develop, and in the preamble of the contract with Ramsey it was recited that the lands, if not developed promptly, would depreciate by reason of the drilling of wells on the adjacent lands, yet had this plaintiff's leases been canceled and had the landowners then sued Layne to revoke his leases for failure to develop, they would have been unable, pending the litigation, to secure development by another, and would have had to suffer their lands to be drained while they awaited the final decree of the court of last resort declaring the leases of no effect.

[3] Under the well-settled jurisprudence of the state, no right is litigious unless it is actually then involved in litigation. Pearson v. Grice, 6 La. Ann. 237; Means v. Ross, 106 La. 175, 30 South. 300; Sanders v. Ditch, 110 La. 903, 34 South. 860. Consequently, if a landowner, having made a void lease of his lands, without waiting to first file suit to have it so decreed, executes a new lease to another party, he does not thereby transfer to such party a litigious right.

[4] These articles of the Civil Code relative to litigious rights were copied from the Code Napoleon; their origin dates back to the Roman Law, many centuries before the ingenuity of man pierced the bowels of the earth, and from its secret reservoirs brought forth its liquid wealth. Such provisions of the Code were never intended to be applicable to cases of this character. They were intended to discourage the traffic in litigious rights, but they were not intended to work a hardship or injustice on the original owner of such a right when he appealed to the courts to have the void contract under which it was claimed by another so decreed. Where applicable, the law invoked was evidently intended to afford relief to the original litigant against whom the litigious right was transferred, whereas in this case both parties are assignees of the original litigants, both acquired an alleged litigious right, and it would seem that neither might therefore claim the privilege provided by article 2652 of the Code, although there is this difference in the position of the parties: Plaintiff's author, Brown, one of the original litigants, while such, made the offer to Layne, now relied on by plaintiff, but such offer to eliminate the then claimant under the alleged litigious right did not inure to the benefit of the subsequent purchaser (the present plaintiff) of such a right. Just as the purchaser of a litigious right does not succeed to the absolute and unqualified right

of his author to prosecute the litigation to final judgment, neither does he succeed to the right of such author, one of the original litigants, to rid himself of the claim of the assignee of the other original litigant.

[5] But if the article were applicable to plaintiff's case, it was necessary that he, in due time and without unnecessary delay, elect to exercise the right or option conferred. As was said by the United States Supreme Court in Cucullu v. Hernandez, 103 U. S. 117, 26 L. Ed. 322:

"It has been repeatedly decided by the Supreme Court of Louisiana that the purpose of article 2652 was to prevent litigation, and therefore a defendant who, instead of paying the price of the transfer, contests the suit and prolongs the litigation, defeats the very object of the article, and cannot exercise the privilege it gives"—citing Marshall v. McCrea, 2 La. Ann. 79; Leftwich v. Brown, 4 La. Ann. 104; Pearson v. Grice, 6 La. Ann. 233; Evans v. De L'Isle, 24 La. Ann. 248.

[6] Just how far short of final judgment one may go before seeking to avail himself of the provisions of the article depends largely on the facts of each case. The offer by Brown was not made until more than a year and a half after execution and recordation of Layne's leases, and almost a year after the contract with Ramsey, in which it was agreed that the proceeds of the sale of the oil which might be found on the lands should be held by the trustee to be finally paid to Layne or to the assignees of the Dunson leases as their respective contentions might be determined by the courts. This agreement, it is contended by counsel for Layne, was in effect an election on the part of plaintiff's author not to avail itself of the provisions of article 2652 of the Code, but to continue the pending litigation to final judgment. As against which contention, counsel for plaintiff directs the court's attention to the provision in the contract that it was "without in any way prejudicing the rights of either of them or of any one in said litigation now pending relative to said leases or the rights of either under their respective leases." The latter phrase of this saving clause, I think, was ample to protect whatever rights under said provision of the Civil Code the plaintiff then had. Within about two months thereafter, however, Brown, and his associates, brought suit against Layne for slander of title, alleging that his second leases constituted a cloud on those of plaintiff. This suit necessarily put at issue the validity or priority of the respective leases, but the suit was not pushed to trial. Thereafter plaintiff contested Layne's right to appeal from the judgment of the lower court in the Raines and Herndon suits against Dunson et al., sustaining the Dunson leases, and it was not until over six months after the Supreme Court of the state had sustained Layne's right to appeal that Brown made his offer to refund to Layne the price which he had paid for his leases. The litigation, at that time, had been prolonged so that one of the main purposes of the law, the prompt termination of litigation, could not have been subserved by the remedy provided by the Code. Still at the time of the offer, there had been no determination, even by the trial court, of the merits of the controversy, and I am inclined to believe that the offer would have been yet within sufficient time had the article been applicable and the status of the alleged litigious right remained the same.

[7] While one of the purposes of this article of the Code is to restrain the cupidity of a purchaser of a litigious right, its purpose is not, conversely, to encourage the cupidity of him against whom the right is asserted. Just as the latter may not await the result of the litigation, and having lost, then seek to avail himself of this provision of the law, neither may he await the result of changing conditions on the value of the thing in dispute. Particularly is this true of rights under an oil lease, which, in the lapse of a short time, may prove to be of fabulous value, or of no worth at all. Neither of the parties to this litigation himself undertook the development of the leased lands. They were fortunate enough to find a third party who was willing to do so on an equal division of the profits, and it was perfectly proper for them to thus rid themselves of the chance of loss of the costs of development, retaining the chance of gain—they each still stood to lose the respective prices paid the landowners for their leases. Had the law invoked been applicable, plaintiff's author should then, while the game was still a gamble, have offered to buy out the defendant, thus relieving the latter of the chance of losing, and himself assuming the chance of loss of the full amount, as against the chance of gain. This he did not do. Both parties continued to back their own judgment until the stem of the drill penetrated the rich petroleum bearing sands, and the precious oil gushed from the earth, as flowed the welcome water from the rock when smitten by the rod of Moses. Even then Brown did not hasten to make his offer. He did not do so until there had accumulated in the hands of the trustee, over and above his half of the cost of operation, a sum in excess of $183,000 (the proceeds are now far in excess of half a million and the wells are still producing). The amount in cash which Layne had paid Raines and Herndon for the leases was $2,440, with the assumption of their obligation to pay their attorney's fees. Brown, without regard to the respective merits of the conflicting claims of the litigants, well might offer at that late date to repay Layne the insignificant price, end the litigation, and secure to himself and associates the accumulated wealth for which they played.

Another article of the Code provides that an uncertain hope may be the subject of a sale, "as a fisher sells a haul of his net before he throws it; and although he should catch nothing, the sale still exists, because it was the hope that was sold, together with the right to have what might be caught." C. C. art. 2451 (2426). But it is evident that one having the option to buy the haul of a fisher's net must bind himself and take his chances before the net is cast. He may not thereafter so elect and claim the rich haul of enmeshed fishes safely brought to land.

Defendant is entitled to a decree rejecting plaintiff's demands, quieting her in her leases, dissolving the injunction heretofore issued, and ordering the trustees to pay over to her the funds in their hands. She is not entitled, however, to recover on her claim for damages for the dissolution of such writ. Layne and plaintiff's author, as before stated, had entered into an express contract for the development of the land by Ramsey, and for the holding by the trustee of the proceeds of the sale of such oil as might be recovered, other than that portion going to

Ramsey, until it was finally determined in the courts which of the litigants was entitled thereto. The plaintiff therefore clearly had the right to such writ of injunction to preserve the fund in the hands of trustees at the time named by the court, until the relative rights of such parties could be finally determined.

A decree will be prepared and entered in accordance with the views herein expressed.

THE LAKE MONROE.*

(District Court, D. Massachusetts. April 30, 1920.)

No. 1666.

1. **Collision ⇐49—Evidence held not to show fault of steamer colliding with fishing vessel.**
   Evidence *held* insufficient to establish the fault of a steamer for collision with a fishing vessel at sea at night, in changing her course, but rather that it resulted from an admitted change of course by the fishing vessel made under misapprehension of the course of the steamer.
2. **Collision ⇐77—Wrong position of lookout not contributing fault.**
   The fact that the lookout on a steamer was stationed on the bridge instead of forward *held* not a fault contributing to a collision where each vessel seasonably discovered the other and kept her under continuous observation.

In Admiralty. Suit for collision by John J. Matheson and others, owners of the fishing boat Helena, against the steamer Lake Monroe. Decree for respondent.

See, also, 258 Fed. 77.

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

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

Louis Goldberg, of Boston, Mass., for respondent.

MORTON, District Judge. [1] This is a case of collision between the Lake Monroe, an ocean-going cargo steamer, and the fishing vessel Helena. It occurred on October 8, 1918, at 7:50 p. m., in the vicinity of Highland Light off Cape Cod. The evening was clear. There was a heavy undersea, dying out after a storm.

The Lake Monroe was coming up the outside of the Cape. According to her log, she passed Highland Light at 7:30 p. m. Abreast it she changed course slightly to the west, running for the gas buoy off Peaked Hill Bars.

The Helena was bound south. She had no sails set and was running wholly under power. She was on or near her fishing ground, and her crew intended to begin fishing as soon as conditions became favorable for seining.

The accounts of the collision given for the opposing vessels are so conflicting that a rather extended discussion of the evidence is required. Matheson, the master of the Helena, testifies that he first made out the steamer's headlight almost ahead and apparently about

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

*Decree affirmed 271 Fed. 474.

three miles distant; that shortly afterwards he made out her green light; that the green light disappeared, and the red light showed in its place, whether because of a change of direction by the steamer or because the courses of the two vessels were converging he could not say; that the Helena did not at that time change course; that the red light showed on her port bow, and the steamer was then dead ahead; that the witness imagined the steamer would give way and change course to starboard, so that he himself changed course two points to starboard, i. e., from south southeast to south; that at the time of this change the vessels might be half a mile or a little further apart; that after his vessel was on her new course the steamer changed back and showed both lights; that at that time she was about four points on the Helena's port bow, and he thought everything safe; that "I walked forward again after changing my course, still watching her, and suddenly she changed back and showed her green light"; that the Helena blew one prolonged blast and right after slowed her engine to save herself from being cut in two; that her helm was put hard aport, and the collision then occurred; that the vessels came together "I should say at an angle of about 45 degrees," the steamer striking the Helena on her port bow; that his vessel was turned by the force of the collision and slid along the side of the steamer as the latter went by; that after the collision the steamer made a circle to the westward and came back to offer assistance; that the Helena was on fishing ground and he intended to commence fishing "as soon as it got dark. We fish when it gets dark and the water commences to get any phosphorous in it." On cross-examination the witness testified that at the time of his single blast signal the vessels were about 600 feet apart; that the Helena steered easily and would shift course "a point or two in a length or two."

This account of the accident is to some extent corroborated by Osier, the lookout of the Helena, by Greenleaf, who was her helmsman, by Hogan, who came on deck just before the collision, and by Devine, who had been on deck for about 15 minutes.

The testimony for the steamer is given by her captain, Berry, and her first officer, Larson. The most diligent effort has failed to disclose the whereabouts of her lookout and her helmsman. The failure to obtain their testimony is not to be counted against the respondent, because immediately after the collision the Helena refused offers of assistance, saying that she was not much injured; and it was not supposed that there had been a serious accident until after the men had left the steamer. Capt. Berry testifies:

That Larson was on watch on the bridge; that, owing to the heavy swell which had been breaking over the bow during the afternoon, the lookout was posted on the bridge instead of on the forward deck; that Larson and the lookout and he (Berry) were on the bridge, and there was a man at the wheel; that at the time in question the sea was not breaking over the bow, and it would have been practicable to have stationed a lookout there, but that the lookout could see fully as well, if not better, from his station on the lee side (the port side) of the bridge; that the Helena was first sighted when about 2½ miles distant, showing a white and green light, about a point and a half on the steamer's starboard bow; that she continued all the time on the starboard bow,

"making practically a course opposite to our own. * * * We were showing our green light to his green light. * * * We kept along that way until the vessel got very near our beam, past our bow, past our fore point on the bow, and was very near the beam, when all at once she turned and showed her red light as well as her green. And we thought at that time that she was a patrol boat and was about to speak us; and the first officer asked me at that time for the megaphone so that he could go out on the bridge and answer him. He asked me where it was, and I said, 'It is here,' and got it for him. And, as I supposed then, he [the other vessel] was coming down to cross our stern to speak us. * * * And as the first officer went out on the bridge to him, about that time I heard one whistle; and it took me all aback, I didn't know what to do. He was so close for him to blow me one whistle at that time; * * * I should think about 700 feet (distant), something of that sort. * * * I then told the man at the wheel to hard astarboard his wheel. If we had stopped at that time, with his coming, if we had offered to go astern or anything, by doing so it would have thrown our stern to port and we would have cut him right in two and sunk him; and, as I didn't have time to maneuver in that way, I told the man to put his wheel hard astarboard, and I also stepped over and helped him put the wheel hard astarboard so that if we should come together he [the other vessel] would get a glancing blow. Q. If the Helena had held her course, could there possibly have been a collision, Captain? A. No, sir. Q. Did you alter your course at any time, Captain, from the moment you sighted the Helena until the moment when you starboarded your wheel to avoid the collision. A. No, sir. Q. You kept your course throughout? A. Yes, sir."

Larson testifies substantially as Berry does, adding that the lookout had reported the green light to him and he answered the lookout; that at that time the light was about two points on the starboard bow and about 2 miles dead to windward; that the witness went to the starboard side of the bridge, where there was a box which served as a bearing compass and took bearings of the light; that he went over and took the bearing again and found it had broadened; that all this time the only lights showing on the approaching vessel were the white and the green; that when the other vessel was about seven points abeam she turned and showed red and green; that she was then about *half a mile* (italics mine) distant; that she then shut out her green and showed the red only; that she was then abaft the beam of the steamer; that he thought it was a patrol boat and asked for the megaphone, as the captain testified; that the Helena, rounding up alongside the steamer, collided with the steamer, her port bow striking the starboard side about 20 feet aft the steamer's stem; that no change of course was made by the Lake Monroe until just before the collision; that after the blow the steamer passed by the fisherman which slid astern. On this last point all the witnesses agreed.

Both Berry and Larson have unlimited licenses as masters of vessels of all sizes and in all oceans. Both testified with every appearance of truthfulness. Berry holds a responsible public position in the port of Boston. Neither is now connected with the Lake Monroe nor with the Shipping Board. Most of the witnesses for the Helena also appeared well on the stand. As far as appearance goes, Matheson and Greenleaf did not suffer by comparison with Berry and Larson. Matheson is, however, half owner of the Helena and heavily interested.

This résumé of the evidence shows how conflicting the stories of the accident are as given by the opposing parties. Certain facts—enough,

I think, to solve the case—do, however, appear with some clearness. When the vessels were about half a mile apart, they were on substantially opposite courses. Witnesses for the libelant say that they were practically head on to each other; witnesses for the steamer that only the green light of the Helena was showing on their own starboard bow, but that the courses appeared to be opposite and parallel. At that time the Helena turned to starboard—two points according to her own testimony; much more than two points according to Larson —without giving any signal, and held her new course until collision was imminent. Obviously, if when she changed course the Helena was dead ahead of the steamer, or if, as Matheson testifies, she had the steamer showing a red light slightly on her own port bow, no collision could have occurred without a turn of the steamer to port, which Matheson insists took place. On the other hand, if the Helena were on the starboard bow of the Lake Monroe, her new course took her directly across the steamer's path, and fully accounts for the accident.

The case therefore depends largely on the determination of the position of the Helena at the time when she made this unquestionable change of course. As stated, Larson and Berry place her on their starboard bow, and Matheson almost dead ahead of the steamer. Greenleaf, the helmsman of the Helena, testifies that the order from Matheson to change course came "just before the collision"; that the vessels approached on practically head-on courses for four or five minutes before he received the order to change course; and that, standing amidships, he saw the steamer's lights on the starboard side of the Helena's foremast. Osier, the lookout on the Helena, when asked on direct examination how the steamer's light bore when he first saw it, answered, "I should say probably three or four points off her [the Helena's] starboard bow." He changed this to "port bow"; but I felt by no means sure that his first statement was a mere slip of the tongue.

There is thus the direct and positive testimony of the steamer's officers that the other vessel was on their starboard bow showing green to green; the statement (as originally made) of the Helena's lookout that the other vessel was three or four points on her starboard bow; the testimony of the Helena's helmsman that he saw the other vessel over her starboard bow, and that the collision came just after the change of course by the Helena to starboard; and the testimony of Hogan, another of the Helena's crew, that the steamer "started to swing from us" at a time which was plainly subsequent to the Helena's change of course.

After a careful and prolonged study of the testimony, it seems to me that Matheson is probably in error in saying that the Helena was holding a steady course, showing her red to the steamer's green as the vessels approached; that they in fact approached nearly head on, each having the other slightly on her own starboard bow; that they would have passed in safety but for the sudden movement of the Helena across the Lake Monroe's bow; and that the Lake Monroe did not change course after sighting the Helena until she turned to port in her effort to avoid collision.

The inherent probabilities and the character of the Helena's injuries seem to me to support this view. No plausible reason is suggested why a loaded steamer should make such a wide and purposeless change of course as Matheson attributes to the Lake Monroe. An abrupt turn by the Helena, which was on her fishing ground ready to begin fishing whenever conditions became right, is far more likely. The Lake Monroe did not slow down at all before the contact. The injuries to the Helena were by no means so severe as would naturally be expected from an almost head-on collision, such as Matheson describes, with a heavy steamer proceeding at 7 or 8 knots. They are more nearly what would be looked for if both vessels were swinging and at the moment of contact had reached courses not so sharply opposed, somewhat as Larson testifies, although I think that the Lake Monroe's stem, not her side, struck the Helena. When the Helena signaled, the vessels were, as Berry and Matheson both agree, 600 or 700 feet apart. Berry says that the Helena was then so placed that a turn of the steamer to starboard would have cut her down, and that he therefore refused the signal and turned to port. If so—and Berry's statement carries conviction because he acted on it—the Helena must have been ahead of the steamer slightly on her starboard bow, and by no means so broad abeam as he places her, a location entirely consistent with the supposition that the Helena, being on the steamer's starboard hand, had changed course across the steamer's bow. As soon as the Lake Monroe began to swing to port under her hard astarboard helm, the bearing of the Helena from her changed rapidly. I do not believe that Berry and Larson are intentionally misstating facts, but that they have confused later positions with earlier ones—an error into which some of the Helena's crew have also fallen.

The Lake Monroe was camouflaged. One purpose of camouflage is to deceive as to the direction in which a vessel is proceeding. If there was sufficient light for the Helena to see the Lake Monroe, she may have been misled by the camouflage into a change of course which resulted in the accident.

As it devolves upon the libelant to establish by a fair preponderance of the evidence that the accident occurred in such a way as to impose liability upon the other vessel, it is only necessary to decide that upon all the evidence the collision does not appear to have occurred through the fault of the Lake Monroe, and I so find.

[2] Under the decision in The Sagamore, 247 Fed. 743 (C. C. A. 1st Cir.) 159 C. C. A. 601, probably the steamer's lookout should have been posted on the forward deck, but that fault, if fault it were, in no way entered into the accident. There was no failure of lookout on either vessel. Each seasonably discovered the other and kept the other under continuous observation. The dispute is as to the courses which the vessels took. If they were as the libelant claims, the Lake Monroe was at fault for not keeping out of the way of the privileged vessel and for changing course so as to cause the collision. If the courses were as the respondent contends, and as I think was the fact, the accident occurred solely because of the change of course by the

Helena. As was said by Mr. Justice Clifford in The Dexter, 23 Wall. 69 at page 74, 23 L. Ed. 84:

"Sufficient lookouts are required by the rules of navigation, but where it appears that the officer in charge of the deck saw the approaching vessel while she was yet so distant that no precautions to avoid a collision had become necessary, and that the want of a lookout did not and could not have contributed to the collision, the vessel omitting such a proper precaution will not be held responsible for the consequences of the disaster if in all other respects she is without fault."

See, too, The Farragut, 10 Wall. 334, 339, 19 L. Ed. 946

Decree dismissing the libel, with costs.

BRANCH v. FARMERS' LIFE INS. CO.

(District Court, D. Kansas, Second Division. October 27, 1919.)

No. 435, Law.

1. **Insurance ⇐351—Law governing life insurance contract, as to forfeiture for nonpayment of premiums, stated.**
Where an application for life insurance was made to an agent in Kansas, but forwarded to the home office of the company in Denver, where it was accepted, and where the policy issued was payable, the contract *held* governed by the law of Colorado, and not subject to the provisions of a Kansas statute as to forfeiture for nonpayment of premium.

2. **Insurance ⇐310(2)—Notice of forfeiture held sufficient under statute.**
Under Gen. St. Kan. 1915, §§ 5292, 5293, requiring a life insurance company to give 30 days' written notice before forfeiture of a policy for nonpayment of a premium, and providing that payment before expiration of that time should continue the policy in force, a letter written by a company to an insured, stating the amount of a premium past due and unpaid, and that by its terms the policy had lapsed, but offering in effect to accept payment and reinstate it, *held* a sufficient notice.

At Law. Action by Flora Branch against the Farmers' Life Insurance Company. Trial to the court. Judgment for defendant.

James Lawrence, of Wellington, Kan., for plaintiff.

Vermilion, Evans, Carey & Lilleston, of Wichita, Kan., for defendant.

POLLOCK, District Judge. This is an action brought to recover the contents of two life insurance contracts made by defendant on the life of one Ralph A. Branch, in which contracts the plaintiff, mother of the insured, is named as beneficiary.

[1] The contracts were made November 19, 1915. One is a contract for $1,000, numbered 1185; the other, a contract for $3,000, is numbered 1263. The annual premium on the first-mentioned policy of $21.86 was paid by insured, as was the annual premium falling due November 19, 1916. On the policy last mentioned the annual premium due when the contract was made only was paid. No other premiums were paid. The insured died in France September 18, 1918. It is thus seen the contracts, according to their terms, had lapsed

and ended for failure of the insured, or any one for him, to make payment of the annual premiums on which their continued obligation depended and was continued, unless, as by plaintiff contended, the statute of this state in force at the date the contracts were made is applicable to this case. This statute reads as follows:

Section 5292, Gen. Stat. Kan. 1915, provides:

"It shall be unlawful for any life insurance company other than fraternal doing business in the state of Kansas to forfeit or cancel any life insurance policy on account of the nonpayment of any premium thereon, without first giving notice in writing to the holder of any such policy of its intention to forfeit or cancel the same."

Section 5293, Gen. Stat. Kan. 1915, provides:

"Before any such cancellation or forfeiture can be made for the nonpayment of any such premium the insurance company shall notify the holder of any such policy that the premium thereon, stating the amount thereof, is due and unpaid, and of its intention to forfeit or cancel the same, and such policy holder shall have the right, at any time within thirty days after such notice has been duly deposited in the post office, postage prepaid, and addressed to such policy holder to the address last known by such company, in which to pay such premium; and any attempt on the part of such insurance company to cancel or forfeit any such policy without the notice herein provided for shall be null and void. The affidavit of any responsible officer, clerk or agent of the corporation, authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy shall be prima facie evidence that such notice has been duly given."

A jury to try the case has been waived, and the case stands submitted on the pleadings, stipulated facts, and written briefs and arguments of the parties.

In regard to the statute of the state above quoted, on which plaintiff must depend for any recovery, defendant contends, first, the contracts of insurance in controversy are Colorado contracts, and said statute has no application thereto; second, if the contracts are contracts of this state, as contended by plaintiff, and said statute is applicable to the facts of this case, the defendant contends it did comply with the terms thereof by giving the notice of forfeiture therein prescribed.

An examination of the contracts pleaded by plaintiff, the pleadings, and the stipulated facts discloses the applications therefor were made by the insured in the city of Wichita, this state, November 15, 1915, and were transmitted to the home office of defendant company in the city of Denver, Colo. The contracts, when matured, are made payable at the home office of the company in Denver. Treating the applications for the contracts made by the insured as proposals on his part to contract with defendant company, it is clear such proposals must first have been accepted by defendant before any binding agreement on its part came into existence. Such acceptance of the proposals made by the insured was in the state of Colorado, and the contracts in controversy were entered into in that state. In my opinion this makes the contracts Colorado contracts, governed by the laws of that state. As the statute of this state relied upon by plaintiff did not become a part thereof, hence the statute of this state is not applicable. May on In-

surance, page 64; Yonge v. Equitable Life Assur. Soc. (C. C.) 30 Fed. 902. As the state of Colorado has no similar statute affecting the terms or obligations of the contracts, it follows the obligations of the contracts had been fully terminated for nonfailure of payment of the annual premiums agreed to be paid long before the death of the assured.

[2] However, suppose, for the sake of argument, the applicability of the statute of this state above quoted to the facts of this case should be conceded; yet, in my judgment, plaintiff cannot prevail in this case, and for this reason: The contracts were confessedly valid when entered into by the parties. The prohibition contained in the statute above quoted has no relation whatever to the manner of the making of the contracts or their validity when made, but does relate merely to the manner of declaring the contracts at an end for failure to make payment of the annual premiums on which the life of the contracts continued to exist. As to each policy, after the annual premium agreed to be paid by the insured to continue the contracts in force became due and payable, and within the month next thereafter ensuing in which the insured reserved the right under the terms of the contract to still pay the premiums, and interest thereon, defendant company notified the insured, as follows:

"Dear Sir: In re Policy No. 1185. Permit us to remind you that the month of grace for the payment of your annual renewal premium, which amounts to $12.86, will expire December 19, 1917, and if not paid on or before that date your policy will necessarily lapse for nonpayment of premium, except as provided therein.

"If it is inconvenient for you to provide for an annual premium, you can keep your policy in force by the payment of a semiannual or quarterly premium, as indicated on the face thereof. The contract you hold provides protection at a less cost than you could secure same from any other company. Trusting that we will receive a remittance to cover premium as stated above on or before the date of expiration of your policy, we remain,

"Yours very truly, J. A. O'Shaughnessy, General Manager."

The month of grace in making payment after default, reserved in the contract, having fully expired, and payment of the annual premium not having been made, and the contract having fully terminated and ended according to its terms, defendant company on January 2, 1917, wrote and notified the insured as follows:

"Dear Sir: Failure to pay your premium, amounting to $21.86, due December 19, 1917, has caused your policy No. 1185 to terminate, except as provided therein. We shall be pleased to consider your application for reinstatement. Unless this is attended to at once, and you should desire reinstatement at a later date, it will be necessary for you to appear before our medical examiner for re-examination. If you are unable to pay the full amount in cash, we will accept part cash and the balance in note. Kindly advise us if this is satisfactory, and we will forward reinstatement blank and note to be signed for the deferred payment.

"Very truly yours, J. A. O'Shaughnessy, General Manager."

Now, if it be conceded the statute of this state above quoted is applicable to the facts of this case, and hence is a part of the law of the contract itself, and it be further conceded the effect of the act is to continue the contract in force, contrary to its terms, valid when

made, although the consideration for the renewal or continued obligation of the contract be never paid until the notice of the termination of the contract provided for in the statute is given to the insured, yet, in my opinion, the two letters above set forth constitute a substantial compliance with the statute. Nederland Life Insurance Co. v. Meinert, 199 U. S. 171, 26 Sup. Ct. 15, 50 L. Ed. 139, 4 Ann. Cas. 480. It is manifest the purpose of the statute was to compel insurance companies authorized to do business in this state, and having contracts of insurance in force in the state, to keep the holders thereof advised as to the date on which annual renewal premiums must be paid, to the end that such contracts might not, through the negligence or inadvertence of the assured, be terminated without opportunity to renew and continue the same in force during the life of the insured, by making payment of such annual premiums. That the letters written by defendant and mailed to the insured, above set forth, fully advised him in regard to all matters of which he should have knowledge, in order to keep the contracts in force, cannot be disputed. Hence they were sufficient notice under the statute.

It follows, on the pleadings and stipulated facts, judgment must go for the defendant.

It is so ordered.

WILMINGTON STEAMBOAT CO. v. HINES, Director General. THE CITY OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. February 14, 1921.)

No. 35.

Collision ⇐98—Steamer leaving dock and crossing ferryboat.

A collision between a steamer, which left her dock at Philadelphia after giving the proper signal and proceeded to back slowly down the river in the customary manner, and a ferryboat crossing the river to her berth below, which did not answer the steamer's signal as required by the pilot rules, but signaled her intention to proceed on her course, which she did until she struck the steamer, *held* due solely to the fault of the ferryboat.

In Admiralty. Suit for collision by the Wilmington Steamboat Company, owner of the steamer Philadelphia, against Walker D. Hines, Director General of Railroads. Decree for libelant.

See, also, 263 Fed. 234.

Lewis, Adler & Laws, of Philadelphia, Pa., for plaintiff.

William Clarke Mason, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This suit was brought to recover damages to the steamer City of Philadelphia (hereinafter referred to as the Philadelphia) owned and operated as a freight and passenger steamboat by the Wilmington Steamboat Company, and plying between Philadelphia and Wilmington, as the result of a collision with the ferryboat Mauch Chunk, running between Kaighn's Point and Philadelphia.

The collision occurred at about 7 o'clock, July 14, 1919, while it was still light, the tide being ebb. The Philadelphia had been lying, bow in, in her dock north of Pier 5 of the Chestnut Street Wharves at Philadelphia. On the south side of this pier were the ferry slips of the Ferry Company, in which the Mauch Chunk docked while discharging and taking on passengers and freight. The Philadelphia, being ready to depart, gave a signal of one long blast on her whistle and proceeded to back out of her dock. The customary method of leaving the dock upon an ebb tide was for the vessel to back out, turn downstream with the tide, and, after being in a proper position to do so, to round to, go ahead against the ebb tide, put her helm to port, and get on her course down the river. At the time the Philadelphia was backing out of the dock, the Mauch Chunk was coming up and across the river for the purpose of making her usual landing. The Philadelphia got out into the river and was in a position with her bow upstream, when the Mauch Chunk struck her on the starboard side aft of amidships and about abreast of the engine room, breaking in the Philadelphia's broadside along the main deck for a distance of about 50 feet. The libelant claims that the Philadelphia blew one long blast to indicate that she was leaving her dock; that she continued going slow astern, gave a short signal of one blast after she got straightened out in the river, and continued to go slow astern until the collision occurred; that she got no response to either of her signals; that when the collision occurred her engines were stopped and then started astern again to back away from the Mauch Chunk.

The respondent claims that, when the Mauch Chunk was proceeding in a northerly direction, the Philadelphia was seen starting to back out of her dock when the Mauch Chunk was about 1,000 feet out in the stream at a point opposite the ferry dock; that the master of the ferryboat, after hearing the leaving signal of the Philadelphia, blew a signal of two blasts, indicating his intention to hold his course into the dock; that immediately after this signal was given the engines of the Philadelphia were stopped, and when this was seen by the master of the Mauch Chunk he proceeded on his course toward the ferry dock to make his landing; that the Philadelphia was then drifting out into the river with her engines stopped; that after she had drifted out of her dock she started her engines backing down the river, instead of remaining in her dock until the Mauch Chunk had made her landing and as the Philadelphia continued backing down the river, she blew one blast of her whistle, whereupon the master of the ferryboat blew the danger signal, reversed his engines full speed astern, but nevertheless the collision occurred.

The fact that the leaving signal of one long blast was blown by the Philadelphia was not denied in the answer. It is established by the testimony of the master, the engineer, the pilot, and others who were upon the Philadelphia, and admitted by the master of the Mauch Chunk. Rule 5 of the Pilot Rules prescribes the signal of one long blast for vessels moving from their docks or berths, and provides that the signal shall be answered by a similar blast given by any approaching steam vessel that may be within hearing. The signal given by the Philadelphia

then was notice to the Mauch Chunk. The master of the Mauch Chunk however, gave no answering signal, but did give two blasts, indicating that he intended to keep the ferryboat upon her course into her dock. If the Philadelphia continued to back out after giving the warning signal, and gave one short blast after clearing her berth and was straightened out with the stream, obviously fully in sight of the Mauch Chunk, she was then governed by the Steering and Sailing Rules, and had a right to continue on her course astern, and the Mauch Chunk was under the duty of passing upstream across her bow if that was possible.

If, however, the engines of the Philadelphia were stopped upon getting a two-blast signal, the master of the Mauch Chunk had the right to assume that his course was clear and to proceed below the Philadelphia to make his landing. The preponderance of the evidence is in favor of the allegations of the libelant; that the Philadelphia gave the leaving signal, continued to go slow astern, cleared her dock, was swung by the ebb tide with her wheel astarboard, straightened out upon her course, gave the short, single-blast signal, and was proceeding down the river preparatory to rounding to when the collision occurred. What the Mauch Chunk did, therefore, was to attempt to cross the stern of the Philadelphia while she was on her course going astern down the river, and after she had given the signal of one blast, indicating that she intended to keep on her course, which was notice to the Mauch Chunk to pass upstream above her bow.

The evident intention of the master of the Mauch Chunk and so expressed by him by giving two blasts was to notify the Philadelphia that he intended to keep on his course, and he explains his action by stating that he saw that the Philadelphia had stopped backing when her stern was projecting a short distance beyond the pier, and, seeing this, considered he had a right to proceed. It is evident, however, from the testimony of the master of the Mauch Chunk, that, though he heard the long blast of the Philadelphia, he preferred to rely upon his eyesight rather than upon the signals prescribed by the Pilot Rules and the Steering and Sailing Rules. His testimony as to what occurred and what was in mind is somewhat confusing. He admits, however, that he could have avoided the collision by keeping his wheel to port and passing upstream above the Philadelphia. According to the respondent's witnesses, the collision occurred directly opposite the slip toward which the Mauch Chunk was proceeding; but the weight of the evidence is that it occurred opposite Pier 10 of the Philadelphia & Reading Railway's wharves, about 600 feet below the Philadelphia's dock. That being so, it seems beyond doubt that the Philadelphia did continue to go slow astern until the time of the collision, for it is improbable she would have reached the point where the collision occurred, 150 to 200 feet out in the stream and 600 feet below her dock, if she had been drifting with an ebb tide of but 3 miles an hour.

The master of the Guthrie, a government tug, which was lying at the end of the pier, testified that the Philadelphia was going slow astern until the collision occurred. The testimony that the Philadelphia gave the leaving signal of one long blast, and that she kept going astern until the collision occurred, was corroborated by the passengers on board

the vessel. There was considerable testimony to show that the method employed in taking the Philadelphia out of the dock was the usual and customary one, and must have been known to the master of the Mauch Chunk. To have stopped her engines when the master of the Mauch Chunk says they were stopped would have left the Philadelphia drifting in an ebb tide, and in all probabilities would have carried her against the Guthrie, instead of around it. The master of the Mauch Chunk must therefore have been mistaken in his observation, when he concluded that the Philadelphia had stopped her engines before leaving her berth. The Mauch Chunk had ample time and opportunity to clear the Philadelphia, and, according to the admission of her master, she could have done so, but he preferred to keep her upon her course.

It is found that the fault for the collision is in that the master of the Mauch Chunk, instead of answering the signal of the Philadelphia and keeping clear of her by crossing her bow upstream, as he should have done, kept upon his course, and, if he did give the two blasts, which he said he did, continued toward the dock without waiting for an answering signal from the Philadelphia. He was clearly guilty of negligence in causing the collision, the Philadelphia was clear of fault, and a decree may be entered for the libelant, with costs.

UNITED STATES v. RACHMIL et al.

(District Court, S. D. New York. January 29, 1921.)

1. **Conspiracy ⇐27—Overt act may be attempt to commit offense.**
   The overt act charged in an indictment for conspiracy, under Penal Code, § 37 (Comp. St. § 10201), may easily, if it does not necessarily, comprehend an attempt to commit the crime to which the conspiracy relates.

2. **Conspiracy ⇐27—Filing, but not preparation, of false income return, is attempt to evade tax.**
   In an indictment for conspiracy to evade payment of an income tax, the preparation, signing, and acknowledgment of a false return, alleged as overt acts, would not constitute an attempt to evade payment of the tax; but the filing of the false return with the collector, thereby putting it out of control of defendants, which was also alleged as an overt act, would be an attempt.

3. **Criminal law ⇐200(6)—Indictment for attempt quashed, after acquittal for conspiracy involving same act.**
   An indictment for an attempt to evade payment of the income tax levied by Act Feb. 24, 1919, will be quashed, where the defendants had been previously acquitted of a charge of conspiracy to evade payment of the tax, in which one of the overt acts alleged was the filing of the false income tax return, since that act would constitute the attempt charged in the second indictment.

Morris S. Rachmil and others were indicted for attempting to evade the income tax imposed by Act Feb. 24, 1919. On plea in bar and motion to quash, filed by defendant Bloom. Motion to quash granted.

Francis G. Caffey, U. S. Atty., of New York City (George A. Connolly, Sp. Asst. Atty. Gen., of counsel), for the United States.

O'Gorman, Battle & Vandiver, of New York City (George Gordon Battle and Isaac H. Levy, both of New York City, of counsel), for defendant Bloom.

KNOX, District Judge. The defendant Bloom was heretofore brought to trial, and acquitted, upon an indictment which, in one count thereof, charged him and his codefendants, Rachmil, Samuelson, and Rosenblum, with having conspired to defraud the United States; another count of the indictment charged as against the persons named a conspiracy to commit an offense against the United States, to wit, an attempt willfully to defeat and evade the income tax imposed by the Act of February 24, 1919 (40 Stat. 1058). Each count of the indictment alleged certain overt acts to have been performed by one or more of the alleged conspirators.

Having successfully withstood the former prosecution, the defendants Rachmil, Samuelson, and Bloom again find themselves under indictment charged with having knowingly, willfully, and unlawfully attempted to defeat and evade certain provisions of the aforesaid taxing statute. The defendant Bloom pleads in bar, first, that he has already been subjected to a trial of the offense charged in the present indictment; and, second, that all the issues of fact that would arise under a plea of not guilty to said indictment were presented upon the trial under the first indictment, and that said issues having been then adjudicated cannot again be the subject of further prosecution. Accompanying the plea in bar is a motion to quash, which, it is said, is addressed to the sense of justice and equity of the court.

[1] The gist of the crime charged in the first indictment was, of course, the alleged conspiracy to commit the substantive offense denounced by the Act of February 24, 1919; in order, however, to make that crime cognizable in this court, an overt act done in pursuance of and to effectuate the object of the conspiracy was required to be alleged and proved. Section 37, U. S. Penal Code (Comp. St. § 10201). It is impossible to tell, upon the general verdict of not guilty rendered by the jury before which Bloom was tried, whether there was a failure of proof as to the existence of the conspiracy, or the commission of the overt acts set up, or both. It is, however, none the less the fact that a conspiracy to commit an offense, and an act done in pursuance and to effectuate the object thereof, may easily, if it does not necessarily, comprehend an attempt to commit the crime as to which the conspiracy relates.

As is well known, the penal law only in rare instances denounces as a crime an attempt to do a forbidden thing; and it has undoubtedly been the practice, where more than one person has been engaged upon an attempt to commit an offense against the United States, to use the conspiracy section of the penal law as a medium of prosecution of persons whose efforts at law breaking fall short of the successful accomplishment of their ultimate object. In such capacity section 37 of the Penal Code has done yeoman service.

Inasmuch, however, as the Income Tax Law itself makes an attempt to evade its provisions a crime, it would seem not to be necessary to make frequent resort to section 37 in order to overtake wrongdoers upon the threshold of their transgressions. I do not mean to say that resort to section 37 may not be had; circumstances are conceivable where such action would be the part of wisdom and in the public interest. Neither do I mean to hold that a verdict of not guilty upon a conspiracy charge necessarily forecloses a further prosecution for the substantive offense.

For example, in the original indictment filed against the present defendants the overt acts set up were as follows: (1) That Rachmil and Samuelson prepared a fraudulent income tax return for Bloom; (2) that Bloom signed the alleged false, fraudulent, and incorrect income tax return; (3) that Rachmil signed the said return and acknowledged the signature of the defendant Bloom thereto; and (4) that the defendant Bloom filed and caused to be filed with the collector of internal revenue for the Third district of New York the said false, fraudulent, and incorrect income tax return.

[2] Were it not for the overt act last recited, I would decline to give further consideration to the motion to quash. In other words, the first three overt acts fall short of an attempt to violate the taxing statute. The parties might have conspired to violate the law, and have done things in pursuance of such conspiracy which in and of themselves could by no manner of means constitute an attempt to violate the law. Suppose, for example, that the parties had orally agreed to violate the law, and that thereafter one of the parties visited one of his co-conspirators for the purpose of discussing details of the conspiracy. Such action upon the part of one of the conspirators would constitute an overt act; but none would contend, I think, that the mere agreement and the subsequent discussion of details would constitute an attempt to violate the taxing statute. What was done up until this time would fall short of an attempt. The parties might, before actually attempting to violate the law, withdraw from their unlawful agreement—such withdrawal, however, an overt act having, as above suggested, been committed, would not make them immune from successful prosecution under the conspiracy statute.

When, however, a step which has for its purpose nothing less than an attempt to defeat the Income Tax Law has taken place, namely, the filing of the return with the collector of internal revenue, the act denounced by the Income Tax Law itself has occurred. I say this because the return is then placed beyond the control of the defendant, and the collector in usual course will use such return as a basis of assessing the tax. The attempt of the defendant, if the return be false and fraudulent, is complete.

[3] Therefore I do not think it possible to say that the second count of the previous indictment charged anything less than an attempt to evade the provisions of the Act of February 24, 1919. Upon a trial of the present indictment, the issue as to whether the return filed was false and fraudulent, would be a fundamental proposition. That

issue was involved in the previous trial, and to permit it to be litigated again would come so close to an encroachment upon the constitutional rights of the defendants as to warrant me to quash the present indictment.

In re TANORY.

(District Court, N. D. New York. February 24, 1921.)

Bankruptcy ⇐140(½)—Settlement under lease by bankrupt.

Where bankrupt, on leasing premises for a term at $75 per month, paid the landlord $225 as security for his performance of the contract, which sum, in his payment of rent to within 3 months of expiration of the term, was to be applied in payment of the remaining rent, and on the bankruptcy and vacation of the premises by the receiver the landlord accepted possession and rented to others, the receiver *held* entitled to recover the $225, less the rent due to the time he surrendered possession.

In Bankruptcy. In the matter of Joseph D. Tanory, bankrupt. On petition by Frank Cavallo for order requiring receiver to pay rent, and cross-claim by receiver. Cross-claim sustained.

This is a proceeding instituted by one Frank Cavallo, seeking an order directing the receiver of Joseph D. Tanory, the bankrupt, to pay over to him the sum of $50 as rent for certain premises in the city of Utica for the period commencing November 20, 1919, and ending December 12, 1919, during which time said premises were occupied by the receiver. This would be at the rate of $75 per month rent. The receiver claims that the bankrupt had paid to the petitioner, Cavallo, the sum of $225, which he contends should be returned to the trustee in bankruptcy, less $100, which sum represents the damages suffered by the petitioner for a part of the month of November and rent due from the receiver from November 20 to December 12, 1919, and which amount of damages and rent the trustee concedes is chargeable against the said sum of $225. The matter was referred to Frederick J. De la Fleur, as special master, to ascertain and report the facts, with his conclusions of law based thereon, and the special master has taken proofs and made and filed his report, and from the facts found the special master finds that the petitioner, Frank Cavallo, is entitled to retain from the sum of $225 held by him under the agreement between the parties the sum of $100, the amount of rent for said premises due him from November 1, 1919, up to and including December 11, 1919, when the premises were vacated by the receiver and turned over by him to Cavallo, the petitioner. The special master also finds and holds that the receiver is entitled to have returned to him from said Cavallo the sum of $125, which amount Cavallo now holds, and which is in excess of the damages sustained by him through the bankrupt's noncompliance with the rental contract and the rent due him from the receiver from November 20, 1919, up to and including December 11, 1919, the period of the occupancy of said premises by the receiver.

P. H. Fitzgerald, of Utica, N. Y., for petitioner.
Waters & Hodges, of Syracuse, N. Y., for receiver.
Lynch, Willis & Titus, of Utica, N. Y., for Utica City Bank.

RAY, District Judge (after stating the facts as above). Tanory, the bankrupt, went into possession of certain premises in the city of Utica May 1, 1919, under a lease, and continued in possession of same until about the 22d day of November, 1919. He paid the rent agreed

upon from May 1, 1919, to November 1, 1919. At the time of taking possession of the premises the said now bankrupt Tanory paid to the claimant, Cavallo, $225, pursuant to the second clause of the lease, and which sum of $225 the said claimant, Cavallo, still holds. November 22, 1919, the receiver appointed by the court in bankruptcy took possession of the premises, and continued in possession until the 12th day of December, 1919, at which time the property of the bankrupt in the store on said rented premises was sold at public auction. The receiver has not paid any rent for or during the time he was in possession, nor has the bankrupt paid any rent from November 1, 1919, to November 22, 1919, the date when the receiver took possession pursuant to the power conferred by the order of this court appointing him.

Tanory was adjudicated a bankrupt in involuntary bankruptcy December 11, 1919. The contract between Cavallo and Tanory, now bankrupt, dated April 8, 1919, provided that Tanory was to occupy as tenant a portion of the premises referred to for the term of two years, commencing May 1, 1919, and ending April 30, 1921. The contract also contained a provision reciting that the second party had that day paid to the first party the sum of $225, being the amount of three months' rent; that the party of the first part was to hold said $225 as security for the faithful performance by the second party of his obligations under the contract; that, in case the party of the second part should default under the agreement, then "he loses and forfeits said $225"; that, in case said party of the second part pays up his rent until the last three months covered by this instrument, then said $225 is to be applied on said last three months' rent.

By the terms of the agreement the monthly rental of the premises which Tanory, the now bankrupt, was to pay Cavallo, was the sum of $75, payable each month strictly in advance. The bankrupt had paid the petitioner the $225, which Cavallo retained and now has. The special master finds as a fact, and the finding is sustained by the evidence:

"That after the sale of bankrupt's stock of merchandise the purchasers of said stock continued to occupy said premises up to the 1st of January, 1920, and for said period paid petitioner (Cavallo) as rental for his said premises the sum of $50."

This rental paid by the occupants was accepted by Cavallo.

The special master also finds, and the finding is sustained by the evidence:

"That the petitioner Frank Cavallo received rent for said premises from temporary tenants as follows: For the month of January, 1920, $80, and for the month of February, 1920, $90. Said premises have been vacant since the month of February, 1920, up to April 20, 1920; said latter date being the date of the hearing in this proceeding before the special master."

The $225 above referred to, and paid Cavallo under the circumstances stated, was in the nature of security, and was not forfeited to Cavallo by the bankruptcy of Tanory. It remained the property of the bankrupt, subject to proper deductions under the terms of the agreement between the parties, and I think the special master has made all the deductions therefrom that the facts justify or the law applicable

permits, and that the conclusions of the special master are correct, and "that the said receiver is entitled to a return from said Cavallo (the petitioner herein) of the sum of $125." The balance of said $225 the special master has found to be the "damages sustained by him (Cavallo) through bankrupt's noncompliance with the rental contract and the rent due him from the receiver from November 20, 1919, up to and including December 11, 1919, the period during which said receiver occupied said premises." This allowance to Cavallo, the petitioner, compensates him for his damages and rent during the period the receiver occupied after his appointment, and the balance of said $225 Cavallo is not entitled to retain. If bankruptcy had not intervened, I think the bankrupt, Tanory, could have reclaimed the balance of said $225, or $125, and that, bankruptcy having intervened, and the matter having been treated as it was, and Cavallo having accepted rent as he did from occupants of the premises, the receiver in bankruptcy or the trustee is entitled to the difference, or $125, from Cavallo, as found by the special master.

There will be an order accordingly.

KEELEY v. KERR et al.

(District Court, D. Oregon. February 7, 1921.)

No. L-8659.

United States ⇐125—Emergency Fleet Corporation not subject to suit for tort of agent.

The United States Shipping Board Emergency Fleet Corporation, as a corporation organized for governmental purposes, *held* not subject to suit for a tort committed by an agent.

At Law. Action by Lee Roy E. Keeley against James B. Kerr and others. On demurrer to amended complaint by the United States Shipping Board Emergency Fleet Corporation. Demurrer sustained.

Lee Roy E. Keeley, of Portland, Or., in pro. per.

Roscoe C. Nelson, of Portland, Or., for defendants.

BEAN, District Judge. The case of Keeley v. Fleet Corporation et al. is an action at law, brought in the state court against sundry individuals, including the attorney for the Fleet Corporation, to recover damages for a tort. The complaint charged in substance that in March, 1919, the plaintiff commenced an action in this court on behalf of one Mrs. Dibbern against a boat claimed by the Emergency Fleet Corporation; that the Fleet Corporation appeared by its attorney, and immediately thereafter certain named defendants, in pursuance of a conspiracy with the other defendants, sought out Mrs. Dibbern and induced and persuaded her to breach her contract with the plaintiff and discharge him as her attorney, and for that he brings this action of damage.

A petition for removal of the case to this court was filed by all the parties jointly, and the case was removed here on the ground that the Fleet Corporation is a governmental agency, and that therefore the cause of action was one arising under the Constitution and laws of the United States. After the case had been transferred here, a motion, joined in by all the defendants, was made to strike out parts of the complaint, and it was sustained. Amended complaint was thereupon filed, to which the Fleet Corporation alone has demurred, on the ground that it does not state a cause of action against it.

The Fleet Corporation was organized in the District of Columbia by the Shipping Board, with the approval of the President, to build and equip ships; the government subscribing for all the stock of the concern. There is a question now before the courts as to whether the Emergency Fleet Corporation can be sued at all, or, if at all, whether it can be sued in this court for claims amounting to more than $10,000, but that question is not involved here, because it is settled that the government is not liable for torts of its agents, even though committed in the discharge of their official duties, and hence it was held in the Court of Appeals of this Circuit in Ballaine v. Alaska Northern Railway Co., 259 Fed. 185, 170 C. C. A. 251, 8 A. L. R. 990, that a private corporation maintained for governmental purposes, and in which the government owned all of the stock, could not be sued in tort. In that case the government had purchased, under authority of an act of Congress, all the stock of the Alaska Northern Railway Company and was using the railway for general purposes, and an action was thereafter brought against it for tort, and the court held it could not be maintained. That decision is, of course, the law of this circuit and conclusive upon this court. Hence, assuming for present purposes that the Fleet Corporation is an entity liable to be sued as any other corporation in matters arising out of its corporation business, it necessarily follows from the ruling in the Ballaine Case that an action cannot be maintained against it for a tort of the kind sought to be enforced here.

Now the bringing of the case here by the corporation or by the defendants did not amount to a waiver of its right to raise the question. It did not give new life to the action, nor deprive the defendant of any of its rights. It simply transferred the case, whatever there was in the state court, to this court, leaving the rights of the parties to be determined. And I am satisfied, under the Ballaine Case, this action cannot be maintained against the Fleet Corporation for a tort committed by its attorney.

It necessarily follows that the demurrer must be sustained, and the action dismissed as to the Fleet Corporation.

ERIE R. CO. v. BOSTON, C. C. & N. Y. CANAL CO.

(District Court, D. Massachusetts. March 1, 1921.)

No. 1594.

Admiralty ⇐39—Right of libelant to dismiss suit.

A libelant may of right dismiss a suit in personam, which has progressed no further than the filing of pleadings, and in which no orders affecting rights have been made.

In Admiralty. Suit by the Erie Railroad Company against the Boston, Cape Cod & New York Canal Company. On motion by libelant to discontinue. Motion granted.

Park & Mattison, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass., for libelant.

Currier, Young & Pillsbury, of Boston, Mass., for respondent.

MORTON, District Judge. It is settled in this circuit that in equity cases the complainant is entitled to dismiss as of right, unless the litigation has gone so far that substantial rights have accrued to the defendant out of it. Morton Trust Co. v. Keith (C. C.) 150 Fed. 606; Tower v. Stimpson (C. C.) 175 Fed. 130.

The present suit is a libel in personam; the pleadings have been completed, but no further steps have been taken; no interlocutory orders affecting rights have been made; and no evidence has been taken, either orally or by deposition. No rights have accrued to the defendant by virtue of the litigation.

Unless a different rule prevails for suits in admiralty from those in equity, it is clear that the libelant has the right to dismiss the libel. There does not appear to be any such distinction. In the Confiscation Cases, 7 Wall. 454, 457, 458, 19 L. Ed. 196, it was held that the Attorney General had the right to discontinue admiralty proceedings brought on behalf of the United States against the objection of the informer, who would be entitled to half the recovery. And the court said:

"Under the rules of the common law it must be conceded that the prosecuting party may relinquish his suit at any stage of it, and withdraw from court at his option, and without other liability to his adversary than the payment of taxable costs which have accrued up to the time when he withdraws his suit.

"Precisely the same rule prevails in the admiralty courts, and consequently the libelant has the right at any stage of the cause voluntarily to discontinue the same, and the only penalty to which he can legally be subjected, in the absence of any statutory regulation, except, perhaps, in prize cases, is the payment of the costs of the proceedings." Clifford, J., 7 Wall. 457, 458, 19 L. Ed. 196.

The libelant may as of right discontinue this suit. If it be a matter of discretion, I should exercise my discretion in the same way.

Motion allowed.

WHITE v. COTTRELL.

(Court of Appeals of District of Columbia. Submitted January 13, 1921. Decided February 7, 1921.)

No. 1381.

1. **Patents ⇐106(2)—Interference claims to be read in light of application from which taken.**
So far as the issue claims in an interference proceeding are taken from one of the parties, they must be read in the light of his application.

2. **Patents ⇐106(2)—"Gripper," as used in interference claims, defined.**
A "gripper," as used in issue claims in an interference proceeding involving sheet-feeding mechanism for printing presses, is a device which takes hold of or grips, and indicates something capable of a clamping action, and a party who has nothing of this character is not entitled to the claims calling for grippers.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding in the Patent Office between Joseph White and Charles P. Cottrell. From a decision granting him priority as to only part of the claims, White appeals. Reversed in part and affirmed in part.

L. T. Greist and William N. Cromwell, both of Chicago, Ill., for appellant.

Walter F. Rogers, of Washington, D. C., for appellee.

SMYTH, Chief Justice. White contends that he is entitled to priority over Cottrell in an interference relating to improvements in mechanism for feeding material in sheet form to a printing press. The issue originally involved 36 claims, 3 of which were awarded by the Commissioner to White, and the remainder to Cottrell. White appeals as to the claims denied him. Claims 1, 2, 9 and 36 are illustrative of the others.

1. "A sheet feeding mechanism for printing presses comprising endless means traveling in a partly circular and partly noncircular path for feeding the sheets to the press and devices carried by the sheet feeding means for bringing the sheets into both end and side register with respect to the printing form while they are in motion.

2. A sheet feeding mechanism for printing presses comprising endless means traveling in a partly circular and partly noncircular path for feeding the sheets to the press and devices carried by the sheet feeding means for bringing the sheets into both end and side register with respect to the printing form while they are in motion, and maintaining control of the sheets until they are brought under the control of the press.

9. A sheet feeding mechanism for printing presses comprising an endless carrier traveling in a partly circular and partly noncircular path having both a sheet stop for end registering the sheet and side grippers for engaging the side edges of the sheet.

36. In a sheet handling and register mechanism, a preliminary feeding means traveling faster than the impression cylinder, moving front stops against which the sheet is registered by the preliminary feeding means, a second feeding means taking the sheet from the preliminary feeding means and traveling at the speed of the impression cylinder and means for moving the second feeding means sidewise to side register the sheet.

White's right to make the claims is the gravamen of the case, for there is no question as to his priority as to the subject-matter if he can make the claims. The Law Examiner held with White as to all the claims. The Examiner of Interferences agreed with him. The Examiners in Chief reversed the Examiner of Interferences as to claims 9 to 26, inclusive, and affirmed him as to the remainder. The First Assistant Commissioner affirmed the Examiners in Chief as to claims 9 to 26 and 33, 34 and 35, and reversed them as to the others.

[1, 2] The issue claims are largely taken from Cottrell, and, so far as they are, must be read in the light of his application. Podlesak v. McInnerney, 26 App. D. C. 399; Sobey v. Holsclaw, 28 App. D. C. 65. Claims 9 to 26, inclusive, call for grippers. A gripper is a device which takes hold of—grips. It indicates something capable of a clamping action. The Examiners in Chief analyze the testimony quite fully and point out that White has nothing which responds to this element. His gages, they say, are not grippers in a strict sense, or in the sense in which Cottrell employs that term in his application. We think they are right. We also agree with them in awarding to White claims 1 to 8, inclusive, and 27 to 36, inclusive. These claims refer to "endless means" or "endless sheet carrier * * * for feeding the sheets to the press," or devices carried thereby "for side registering the sheets" and "maintaining control of the sheets until they are brought under the control of the press," or "laterally adjustable means" of such character. The Examiners in Chief held that White's intermediate mechanism may be termed a feeding means or carrier, in the same sense as Cottrell's. Other reasons are adduced by them. We think their reasoning meets every point raised by Cottrell. We concur in it.

Therefore the decision of the Commissioner of Patents is reversed as to claims 1 to 8, inclusive, 27 to 32, inclusive, and 36, and is affirmed as to the other claims of the issue.

Modified.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the hearing and determination of this appeal in the place of Mr. Justice ROBB.

STORY v. COTTRELL.

(Court of Appeals of District of Columbia. Submitted January 14, 1921. Decided February 7, 1921.)

No. 1382.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding in the Patent Office between Ward B. Story and Charles P. Cottrell. From a decision awarding priority to Cottrell, Story appeals. Affirmed.

Frank L. Dyer, of New York City, for appellant.

Walter F. Rogers, of Washington, D. C., for appellee.

SMYTH, Chief Justice. The invention involved in this interference relates to a feeding mechanism for printing presses. Cottrell was successful below, and Story appeals. In view of the question upon which our decision turns, it is not necessary for us to set forth the counts of the issue.

The Law Examiner overruled a motion by Story to dissolve the interference on the ground that Cottrell could not make the claims. He was sustained by the Examiner of Interferences. On appeal the Board of Examiners ruled in favor of Cottrell, and their decision was affirmed by the Commissioner.

When the interference came before the commissioner, Story abandoned his contention with respect to priority, and rested his case entirely upon the argument that Cottrell could not make the claims. The commissioner held against him and awarded priority to Cottrell. The line of reasoning pursued by the Commissioner in reaching his conclusion has been carefully examined by us in the light of the arguments adduced on behalf of Story, and we think his conclusion is sound. It would serve no good purpose to repeat that reasoning here, or to attempt to substitute for it reasoning of our own. The Commissioner's decision is available to any one who may desire to examine it.

We affirm the Commissioner's decision.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the hearing and determination of this appeal in the place of Mr. Justice ROBB.

MASSEY et al. v. RIDGE.

(Court of Appeals of District of Columbia. Submitted January 14, 1921. Decided February 7, 1921.)

No. 1386.

Patents ⇐113(7)—Concurrent findings by three Office tribunals sustained, unless manifestly wrong.

Where the three tribunals of the Patent Office were in accord in their findings in interference proceeding, the decision of the Commissioner of Patents in conformity therewith will not be disturbed, unless manifestly wrong.

Appeal from the Commissioner of Patents.

Interference proceeding between Nelson C. Massey and another and Herman De Witt Ridge. From a decision of the Commissioner of Patents, awarding a priority to Ridge, Massey and another appeal. Affirmed.

F. P. Warfield, H. S. Duell, and J. W. Anderson, all of New York City, for appellants.

W. J. Peck, of Peoria, Ill., and Theodore K. Bryant, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This interference has to do with dial scales, which are provided with means whereby the operator may read the weight value of the added counterpoise, as well as the minor load, at a point indicated by the pointer. The issue is one of originality. Ridge had an interview with Massey, Coleman, and Winters, officials of the Winters-Coleman Company, in which, he asserts, he disclosed his idea to them. After this interview, he says, the Winters-Coleman Company built one or more scales embodying his idea and sold some of them. The three tribunals of the Patent Office are in accord on the proposition that Ridge had a complete conception of the invention in its broader aspects and disclosed the same at that interview, and that whatever work was done by Massey and Ziegler thereafter inured to the benefit of Ridge, under the well-known employer and employé doctrine. Orcutt v. McDonald, 27 App. D. C. 228; Kreag v. Geen, 28 App. D. C. 437; Braunstein v. Holmes, 30 App. D. C. 328; Eastern Dynamite Co. v. Keystone Powder Mfg. Co. (C. C.) 164 Fed. 47. A study of the record and the arguments satisfies us that they are right; at least, that they are not manifestly wrong. In view of this, we must, according to the repeated rulings of this court (Greenawalt v. Dwight, 49 App. D. C. 82, 258 Fed. 982, and cases cited; Kennicott v. Caps, 49 App. D. C. 187, 262 Fed. 641; Hopkins v. Riegger, 49 App. D. C. 188, 262 Fed. 642; Maremont v. Olson, 49 App. D. C. 369, 265 Fed. 1009; Kitselman v. Reid et al., 49 App. D. C. 378, 266 Fed. 256), affirm the decision of the Commissioner, which is accordingly done.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the hearing and determination of this appeal in the place of Mr. Justice ROBB.

CURTIS PUB. CO. v. FEDERAL TRADE COMMISSION.

(Circuit Court of Appeals, Third Circuit. March 2, 1921.)

No. 2511.

1. **Contracts ⇐169—Must be construed with reference to environment and circumstances.**
   There can be no just construction of a contract, without an understanding of the general situation and the causes which led to the making of the contract.

2. **Monopolies ⇐17(2)—Prohibitions of Clayton Act limited to sales and leases.**
   The provision of Clayton Act, § 3 (Comp. St. § 8835c), making it unlawful to lease or make a sale, or contract for sale, of goods on condition that the lessee or purchaser shall not deal in the goods of a competitor of the lessor or seller, is limited to contracts of lease or sale by the clear meaning of its terms, and especially in view of its purpose to make invalid certain contracts of lease or sale of patented articles which the Supreme Court had shortly before held to be valid.

3. **Monopolies ⇐17(2)—Contract appointing district agents for distribution of magazines held not a "sale" contract.**
   A contract by a magazine publisher, whereby it appointed another as its agent in a limited district for the purpose of selling and distributing its magazines to retail dealers and to boys who sold at retail, the district agents not being required to purchase the magazines, but merely to receive and distribute them, and to pay the stipulated price for those which they did not return as unsold, is not a contract for sale of goods, so that the insertion of a clause therein forbidding such district agents to sell at wholesale the magazines of any other publisher without the consent of the principal did not violate the Clayton Act.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Sale.]

4. **Monopolies ⇐17(2)—Requirement of indemnity cash deposit held not to make agency contract a sale.**
   The provision of a contract appointing district agents for the wholesale distribution of magazines that the agents shall deposit with the publisher a cash sum as security for payment for the magazines distributed to them, which sum the publisher must account for to the district agent, and on which it must pay him interest, does not make the agency contract a contract for the sale of the magazines, within the provisions of the Clayton Act, since the deposit is merely a cash indemnity to secure the performance of the agent's agreement, and not a payment for the magazines shipped to him.

5. **Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Unfair competition, within Trade Commission Act, a judicial question.**
   Under the Trade Commission Act (Comp. St. §§ 8836a–8836k), making unfair competition in interstate commerce unlawful, without defining unfair competition, the determination of whether the acts established amounted to unfair competition is a judicial question, as it long had been in remedial suits at law for damages and injunction suits to prevent unfair competition.

6. **Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Court's supervisory powers under Trade Commission Act included determination of unfair competition.**
   Under the Trade Commission Act (Comp. St. §§ 8836a–8836k), giving to the Circuit Courts of Appeals supervisory powers over the decisions of the Trade Commission, but making the Commission's findings of facts

conclusive, the courts, in exercising their supervisory powers, can determine whether the facts established show unfair competition; the decision of that question by the Commission not being final.

7. **Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Decision on unfair trade in private suit is persuasive in proceedings under Trade Commission Act.**

Where, pending proceedings before the Trade Commission to determine unfair competition, a private suit was instituted by competitors against the company whose methods were under investigation, to restrain those methods as unfair competition, the decision in that suit for the defendant company, though it was not conclusive in the proceedings before the Trade Commission or on review thereof, is to be considered by the supervisory court, with a view to avoiding conflicting holdings under substantially similar states of fact.

8. **Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Court can consider proof not included in Trade Commission's findings.**

Under the Trade Commission Act (Comp. St. §§ 8836a–8836k), giving the Circuit Courts of Appeals power to review the decisions of the Trade Commission and to enter on the pleadings, testimony, and proceedings a decree, but providing that the Commission's findings of fact shall be conclusive, it is not only the province, but the duty, of the Circuit Court of Appeals to review the entire testimony, and to base its decree, not only on the facts found by the Commission, but also on those established by the testimony on which the Commission made no findings.

9. **Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Restrictive clause in contract with magazine distributing agents held not unfair.**

Where a magazine publisher had built up an extensive circulation by the employment of schoolboys as salesmen, and an essential element of the system was the use of district agents, appointed to receive the magazines from the publisher and distribute them to the boy salesmen, and to recruit and train the boys, the insertion in the contract appointing such district agents of a clause prohibiting them from wholesaling other magazines without the written consent of the publisher, which clause had never been enforced, except against two competing publishers, who had endeavored to reap the benefit of the first publisher's organization by inducing its district agents to distribute the competing magazines to the boys, was not unfair competition, and cannot be prohibited by the Federal Trade Commission under the Trade Commission Act.

10. **Trade-marks and trade-names ⇐80½—New, vol. 8A Key-No. Series—Evidence held not to show restriction of competitors.**

Evidence introduced before the Trade Commission that there was a magazine distributing agency, through whom the competitors of the publisher whose practices were under investigation could distribute their periodicals to all retail dealers throughout the country, shows that the clause in the contract appointing district agents which restricted such agents from wholesaling competing magazines without the consent of the appointing publisher did not prevent the distribution of the competing magazines.

11. **Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Question of monopoly important in determining unfair competition.**

Freedom of access by competitors to the consumer and entire absence of monopoly is an important element in the decision of cases of alleged unfair competition, under the Federal Trade Commission Act (Comp. St. §§ 8836a–8836k).

12. **Injunction ⇐9—Doubt as to right may authorize refusal.**

Injunction is so drastic and prohibitive a remedy, and its issuance by a court of equity so carefully safeguarded, that to have substantial doubt of the wisdom of its issue often suffices to withhold it.

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13. Trade-marks and trade-names ⇐80½, New, vol. 8A Key-No. Series—Supervision of Trade Commission exercised as other reviewing powers.

The power given the Circuit Court of Appeals to supervise the injunctive orders of the Trade Commission was intended to be exercised as those courts had been accustomed to exercise their reviewing power over injunctions by lower courts.

Petition by the Curtis Publishing Company against the Federal Trade Commission to review an order of the Commission requiring petitioner to desist from certain practices found by the Commission to be unfair competition. Order of Commission set aside.

Prichard, Saul, Bayard & Evans, of Philadelphia, Pa., and Joseph W. Welsh, John G. Milburn, and John G. Milburn, Jr., all of New York City, for plaintiff.

Claude R. Porter and James M. Brinson, both of Washington, D. C., and Joseph A. Burdeau, of New York City, for defendant.

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

BUFFINGTON, Circuit Judge. On July 5, 1917, the Federal Trade Commission issued a complaint against the Curtis Publishing Company, alleging that it had used unfair methods of competition in interstate commerce in violation of section 5 of the Act of Congress of September 26, 1914 (Comp. St. § 8836e), and had also violated the provisions of section 3 of the Act of Congress of October 15, 1914, commonly known as the Clayton Act (Comp. St. § 8835c). This was followed by an amended complaint on the 8th day of April, 1918. The Curtis Company answered these complaints, and thereafter a large amount of testimony was taken, to which we will hereafter refer. On the 21st day of July, 1919, the Trade Commission made its findings of fact, and from these findings drew the conclusion:

"That the method of competition set forth in paragraph 2 of said findings is, under the circumstances therein set forth, in violation of the provisions of section 5 of an Act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and that the acts and conduct set forth in paragrapn 3 of said findings are, under the circumstances therein set forth, in violation of the provisions of section 3 of an act of Congress approved October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.' "

The same day the Commission issued a restraining order on the Curtis Company to desist from continuing such alleged unfair method of competition. Thereupon the Curtis Publishing Company brought this proceeding to obtain a review of such order.

The Act of September 26, 1914, constituting the Trade Commission, provides as follows:

"Sec. 5. That unfair methods of competition in commerce are hereby declared unlawful. * * * Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or cor-

poration a complaint stating its charges in that respect. * * * The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition in question is prohibited by this act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. * * * If such person, partnership, or corporation fails or neglects to obey such order of the Commission while the same is in effect, the Commission may apply to the Circuit Court of Appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the Commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the Commission. The findings of the Commission as to the facts, if supported by testimony, shall be conclusive. * * * Any party required by such order of the Commission to cease and desist from using such method of competition may obtain a review of such order in said Circuit Court of Appeals by filing in the court a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith served upon the Commission, and thereupon the Commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the Commission as in the case of an application by the Commission for the enforcement of its order, and the findings of the Commission as to the facts, if supported by testimony, shall in like manner be conclusive."

In pursuance of the last provision of the statute quoted above, the Curtis Company by this proceeding seeks a review of the Commission's order, which order, together with the Commission's findings of fact and the conclusion drawn therefrom, are printed at length in the margin.[1] An examination of these findings of fact shows that

[1] "Paragraph 1. That the respondent, Curtis Publishing Company, is a corporation organized and existing under and by virtue of the laws of the state of Pennsylvania, having its principal office and place of business in the city of Philadelphia, state of Pennsylvania, and is now, and was at all times hereinafter mentioned, and for many months prior thereto, engaged in the publication, sale and distribution of weekly and monthly periodicals, in commerce among the several states and territories of the United States and the District of Columbia.

"Paragraph 2. That in the course of such commerce the respondent has entered into contracts with certain persons, partnerships or corporations *to sell* or distribute its magazines, by the terms of which contracts such persons, partnerships or corporations, have agreed, among other things, not to 'act as agent for or supply at wholesale rates any periodicals other than those published by the publisher,' the respondent herein, without the written consent of such publisher; that of such persons, partnerships or corporations approximately four hundred forty-seven (447), hereinafter referred to as 'dealers,' are and previous to entering into such contracts with respondent were regularly engaged in the business of wholesale dealers in newspapers or magazines, or both, and as such are as aforesaid engaged in the sale or distribution of magazines, or newspapers, or both, of other publishers; that many of said four hundred forty-seven (447) dealers, and many others who have become

no findings whatever have been made in reference to the greater part of the vast volume of testimony in this case, and it therefore becomes the duty of this court, with a view to giving due effect to such testimony, to here recite what the proofs disclose as to the operations of the defendant company in those matters in which there has been no finding of fact by the Commission. And indeed, in our opinion,

such wholesale dealers since entering into such contracts, bound by said contract provision as aforesaid, have requested respondent's permission to engage also in the sale or distribution of *certain publications* competing in the course of said commerce with those of respondent, which permission as to said competing publications has been *uniformly denied by respondent*; that in enforcing said contract provision as to said dealers, and in denying them said permission, respondent has prevented and now prevents certain of its competitors from utilizing established channels for the general distribution or sale of magazines or newspapers, or both, of different and sundry publishers; that such established channels are in most instances the principal and most efficient, and in numerous cases, the *only medium* for the distribution of such publications in the various localities of the United States; that such method of competition so employed by respondent in the course of such commerce, as aforesaid, has proved and is unfair.

"Paragraph Three. That in the course of such commerce the respondent has made sales of its magazines to or entered into contracts for *the sale* of the same with certain persons, partnerships or corporations, by the terms of which sales or contracts for such sales such persons, partnerships or corporations have agreed, among other things, not to 'act as agent for or supply at wholesale rates, any periodicals other than those published by the publisher,' the respondent herein, without the written consent of such publisher; that of such persons, partnerships or corporations approximately four hundred forty-seven (447), hereinafter referred to as 'dealers,' are, and previous to entering into such contracts with respondent were, regularly engaged in the business of wholesale dealers in newspapers or magazines, and as such are engaged in the sale or distribution of magazines or newspapers, or both, of other publishers; that many of said four hundred forty-seven (447) dealers, and many others who have become such wholesale dealers since entering into such contracts, bound by said contract provision hereinabove referred to, have requested respondent's permission to also engage in the sale or distribution of certain publications competing in the course of said commerce with those of respondent, which permission as to said competing publications has been uniformly denied; that in enforcing said contract provision as to said dealers, and in denying them said permission, respondent has prevented and now prevents *certain of its competitors* from utilizing established channels for the general distribution or sale of magazines or newspapers, or both, of different and sundry publishers; that such established channels are in most instances the principal and most efficient, and, in numerous cases, the only medium for the distribution of such publications in the various localities throughout the United States; that the effect of said contract provision has been, and is, to substantially lessen competition with respondent's magazines, and tends to create for the respondent a monopoly in the business of publishing magazines of the character of those published by respondent.

"Conclusions.—From the foregoing findings, the Commission concludes that the method of competition set forth in paragraph 2 of said findings is, *under the circumstances therein set forth*, in violation of the provisions of section 5 of an act of Congress approved September 26, 1914, entitled 'An act to create a Federal Trade Commission, to define its powers and duties, and for other purposes,' and that the acts and conduct set forth in paragraph 3 of said findings are, under the circumstances therein set forth, in violation of the provisions of section 3 of an act of Congress approved October 15, 1914, entitled 'An act to supplement existing laws against unlawful restraints and monopolies, and for other purposes.'"

such an examination and the ascertainment of the facts of such prior business dealings of the respondent company, is absolutely essential to a full understanding and a just determination of this case. Accordingly to the facts deducible from such testimony this court now addresses itself.

The Curtis Publishing Company is a corporation of the state of Pennsylvania. It was organized in 1883 with a capital of $2,500,000, which has since been increased to $25,000,000. Its business was the publication of periodicals, and from its incorporation until about 1897 that business was the publication of the Ladies Home Journal. In 1897 it acquired the Saturday Evening Post, and in 1911 the Country Gentleman. The Journal was a monthly publication; the other two, weekly. From 1883 to 1909, with the exception of a brief period of an experiment of circulation in 1906 through wholesalers, the Curtis Company distributed for these 26 years the Home Journal by mail and through the American News Company, the business of which latter company was the circulation and sale of newspapers and magazines through the United States. The arrangement between the Curtis Company and the News Company was one of a distributive agent and not of sale, the undistributed copies being returned to the Curtis Company by the News Company. The Curtis Company distributed the Saturday Evening Post by the same method for some two years after its acquisition, but in the latter part of 1899 it began to sell and circulate that publication by the addition of schoolboy agents to its selling staff; and in that connection we here note that, while the attempted use by some of the competitors of the Curtis Company of these schoolboys as the agency of magazine sale and personal delivery to customers is the end which these competitors have in view, yet, as the means of such control of the schoolboys, the vital, strategic factor underlying this controversy is the use and control of the distributing agents later referred to, who furnished the magazines to the boys, and who are the operative and vital connecting and controlling link between the schoolboys and the Curtis Company.

These combined agencies of the American News Company and the schoolboys organized by the Curtis Company were both employed by the Curtis Company for some 10 years thereafter. During this time the new schoolboy organization had grown to such extensive size, and had been so successful, that in 1910 the Curtis Company wholly discontinued its prior status of distributive agency with the American News Company, and thereafter its relation with the News Company was that of sale only, instead of agency; the News Company not having the right to return unsold periodicals to the Curtis Company. At that time the Curtis Company began also contracting with and sending its publications to independent wholesalers throughout the country, who were not related to, or connected with, the American News Company.

In addition to its contracts with the American News Company and the wholesale dealers in newspapers and magazines in the various cities and towns of the United States, the Curtis Company has also made contracts with persons and concerns who had not previously been engaged in the sale or distribution of periodicals, for distribution

through boys. The number of wholesale distributors of all kinds under contract with the Curtis Company was, by the testimony, shown to be 1,535.

The schoolboy selling organization of the Curtis Publishing Company was started by that company in 1899. At that time, as we have said, practically all magazines and periodicals were distributed through the American News Company. The Curtis Company, when it acquired the Saturday Evening Post, which was a weekly publication, conceived the idea of increasing its circulation through schoolboys. The success of the plan in selling the Post was such that it was extended to the Home Journal and the Country Gentleman. At first, these boy salesmen got their copies, not through local distributing agents, but direct from the Curtis Company in Philadelphia. But as their number grew it was found difficult to deal directly with them from the home office, and the Curtis Company therefore appointed district distributing agents in various localities, whose duty it was to distribute the periodicals to the boys, and who were likewise charged with the duty of recruiting and supervising the boys themselves. These distributing agents, largely drawn from the ranks of the schoolboy salesmen, are, as we have said, the permanent keystones and pivotal and controlling factor in the whole plan, for the schoolboy salesmen being, in the nature of things, a temporary and changing body, they must be constantly recruited, and this recruiting the distributing agents do. The distributing organization as a whole has been developed and is being carried on at large expense. At the present time it consists approximately of 1,500 district agents, having supervision of some 35,000 boy salesmen, and the organization is kept up at an expense of about $1,500,000 a year, and it is the principal agency employed by the Curtis Company in distributing its periodicals, and without control and undivided loyalty of which its business would materially suffer.

The proofs show that the circulation of the Post increased very rapidly with the use of these schoolboy salesmen, but that this was only brought about by the overcoming of many difficulties and the expenditure of large sums of money, and the education, so to speak, of the boys and their parents, and eventually by the use of local distributing agents, who, on the ground, did the work the Curtis Company originally did from the home office. The development of the system is set forth in the testimony of M. E. Douglas, as follows:

"Q. Did you encounter any difficulties in circulating through boys the way you did? A. Yes.

"Q. What were some of them? A. We found a prejudice in the minds of the parents and others against the idea of having boys sell magazines in this way. They looked upon the work of selling magazines as being the same as the work done by newspaper boys selling newspapers on the streets. There was a prejudice against it. They considered the newsboy's work as blind alley work. We had to make our methods different and our plans different in order to win the co-operation of the parents and teachers and others, and that required long and arduous work and the expenditure of a good deal of money. We had to inject into our plan an educational context in order to win the convinced participation of parents in our plan, with respect to boys.

"Q. What other difficulties did you have? A. We found the boys fickle, and we had to devise various ways and means of retaining their interest and

their efforts. Our effort was almost entirely to get steady customers, whom the boys might serve regularly from week to week, and we, of course, had to teach the boys how to do this, and tell them how.

"Q. Did you secure the co-operation of the parents and the teachers of the boys you had selling the Saturday Evening Post? A. We did.

"Q. Was the Post in the beginning known throughout the country? A. It was not known west of the Alleghenies.

"Q. What was the character of the boys who were selling the Saturday Evening Post at the time you mentioned? A. Almost all home boys and schoolboys, who sold nothing but our magazines.

"Q. Explain the plan you had of selling copies of the Saturday Evening Post, through boys. A. As I stated, the boys sent in their remittances and orders to Philadelphia, and we mailed the copies back to the boys. Then, in order to carry out or in order to accomplish our plans, we had to make it possible for the boys to learn how to sell. We began printing leaflets and pamphlets and house organs, in which we placed suggestions for the guidance of the boys, telling them what to say about the publications—telling them what to say about the articles or features of the publications. We, in short, had almost to put into the mouths of boys what they should say about the articles in the magazines, and we had to help them to identify the class of readers to whom to go. We had to associate the particular article with the prospective purchaser in the mind of the boy, in order that he might judge how to intelligently approach the reader who would be most apt to buy the particular article or issue. That required a good deal of work, in addition to the other necessity of getting the convinced participation of the parents of the boys in this proposed plan.

"Q. How did you obtain the participation of the parents and teachers? A. We built up a circulation of 25,000 to 40,000, and then we found it difficult to make further increases. The increases that had been made up to that point did not follow, and we began to analyze the reasons for that, and we found that it was—

"Q. How did you obtain the participation of the parents and teachers that you spoke about? A. By emphasizing the business training value of this work and pointing out what was involved in it.

"Q. How was that done? A. By concrete illustrations as to what was involved in that.

"Q. Was that done by traveling men or correspondence? A. We began with a few traveling men, in about 1901, and we gradually increased the force, so that we had traveling men as well as correspondence helping to this end.

"Q. What educational feature was incorporated in your method? A. Eventually we worked out the plan of the League of Curtis Salesmen.

"Q. The what? A. The League of Curtis Salesmen.

"Q. What was that? A. A league composed of the organization of our better boys—the boy reaching the highest rank in the league is assured of a good salaried position obtained by us for him. There are several ranks in the league. This was the culmination of our effort at imparting the educational content to the parents.

"Q. That was the culmination of your effort that began in 1899 or 1900, when you first started to break down this prejudice of the parents and teachers? A. Yes, sir.

"Q. Which you testified about? A. Yes, sir.

"Q. Was there anything with respect to the vocational training of boys, other than you have testified, with respect to the instruction that you gave them? A. Oh, yes; we have used moving picture films, and we have had conventions—

"Q. I mean at that time. A. In the early time?

"Q. Yes. A. We emphasized points like this: 'Boys in connection with this work have opportunities to learn something about the keeping of accounts, because they have accounts to keep with their customers and with the district agent, and we emphasized the desirability of learning salesmanship, by reason of the fact that the vocation of salesmanship is one of those vocations having a large number of people employed in it—larger, in fact than all but three

or four other vocations, perhaps. For instance, bookkeeping—that is taught in almost every public school, yet there are several salesmen for each bookkeeper, and you hardly find salesmanship taught in any high school—at least not one in a thousand.

"Q. At that time, in 1899 and 1900, the boys were in direct contact—that is, the boys who were selling the Saturday Evening Post—were in direct contact with the main office of the Curtis Publishing Company in Philadelphia? A. Yes, sir.

"Q. Did you have any local agents at that time—in the beginning? A. Not in the beginning.

"Q. What gave rise to the appointment of local agents? Just briefly explain that, Mr. Douglas. A. We found need of local supervision.

"Q. Local supervision of the boys? A. Local supervision of the boys, yes, sir; in order to adapt it locally—to meet local conditions—the plans I have described. That is when we began appointing district agents.

"Q. When did you appoint the first district agent of the Curtis Publishing Company? A. The first district agent was appointed in about 1901.

"Q. Who was it? A. Beverly Roy Dudley, of Richmond, Va.

"Q. Was he a boy salesman? A. He had been a boy salesman.

"Q. He had been a boy salesman? A. Yes, sir.

"Q. He was the first district agent appointed? A. Yes, sir; the first district agent appointed.

"Q. Who was the next agent appointed? A. I think the next was Wallace Greenbaum, of Denver, Colo.

"Q. Had he been a boy—a Curtis boy? A. Yes, sir; he had been a Curtis boy.

"Q. Did you keep on appointing district agents after that, from time to time? A. We appointed a few, and watched them to see what developed, and, as excellent progress followed, then we began appointing other district agents, just as fast as we could, everywhere.

"Q. Have you any idea about how many you had after the first six months—just approximately? A. We probably worked for about three months with a dozen, to see what the developments were. Then, within six months after that, I should say we had a hundred or two.

"Q. What was the main reason for your appointing these district agents, and what were they supposed to do? A. *We wanted a representative locally—an agent locally—who would coach these boys and train them as salesmen. We wanted to shift, with respect to this effect, the center of gravity from Philadelphia to these cities, and have an agent there who would coach these boys and do the same things we were doing at Philadelphia.*

"Q. Did that involve meeting with the parents and teachers? A. Yes, sir; that involved meetings with the parents and teachers.

"Q. What did the agent have to do at that time with respect to making any reports? A. Very soon—in due course, after we had appointed a considerable number of them, so it became a practical thing, then we began to ask them to make reports of sales by boys individually. Of course, when we appointed one of those agents, we turned over to the agent all the boys in the town who had been previously buying from us, and asked them to buy from the district agent, thereby giving the district agent the local organization to start with, giving them the boys we had been previously supplying, and, as soon as it became a practical thing, we had these agents report to us the sales by the boys individually.

"Q. So, after 1901, which was the beginning of the employment of district agents, you testified, I think, that you put in more from time to time at various places? A. Just as fast as we could.

"Q. Now, at that time, how were the district agents located and found—selected? A. They were placed largely by correspondence, for the reason that in the early days we did not have an adequate force of men. We had applications from a number of the boys, asking for appointment. In our house organs, we made mention of the arrangements that had been made with district agents.

"Mr. Daly: What question is he answering?

"Mr. Welch: He is answering how the district agents were selected and found.

"The Witness: In our house organs we made mention of the arrangements that had been made with Beverly Roy Dudley, and with Wallace Greenbaum, and with others, and this resulted in applications coming to us from boys in other cities, who wanted similar arrangements made.

"Q. Did you have any traveling men appointed then? A. We had a few; yes. Then, as we found this plan proving successful, we advertised. We advertised for persons to act as agents for us.

"Q. And this was covering the period from 1901 up to about when? That is, it was a continuing period, after 1901? A. Continuing period, yes.

"Q. Now, what was the character of the men, other than boys, that were appointed district agents? A. Chiefly retail dealers.

"Q. Retail dealers in what? A. News dealers, stationers, book stores, druggists, tobacconists, candy stores occasionally—every kind of a retail store.

"Q. Did you endeavor at first to obtain as district agents one of the boys who had been selling the Post? A. The preference was always given, under our original instructions, to one of the boys who had previously been selling, if there were one qualified for leadership of the others.

"Q. And, following that, your traveling men or you would appoint a retail dealer? A. *Some one qualified for leadership, chiefly retailers.*

"Q. And you kept on appointing—did you after that keep on appointing boys as district agents, wherever available? A. Yes; we still do so.

"Q. And still do it? A. Yes.

"Q. That is, boys who previously sold the Post and the Curtis publications? A. *Yes; there are thousands of boys, right now, looking forward to the time when they may get to be district agents.*

"Q. What did you do with respect to extending district agents or not? A. In about 1909, we began to use traveling men on a large scale, to appoint district agents in towns where we then had not appointed them."

From this it will be seen that the development of these district agents was a natural outgrowth of the commercial and fair development of the business; that the first district agent was appointed in 1901; that the first appointees were old boy salesmen; that on the district agents was placed the responsibility of personally dealing with the boys locally, instead of from the home office at Philadelphia; that beginning with a few such local distributing agents, the success of the movement developed rapidly; and, indeed, the very business of these distributing agents, which these two competing companies seek to share, namely, the boy force of these agents, was turned over to the agents originally by the Curtis Company itself.

As the plan of working through distributing district agents proved successful the Curtis Company began advertising for persons to act as distributing agents—"news dealers, stationers, book stores, druggists, tobacconists, candy stores, originally—every kind of a retail store." However, the preference was always given to one of the boys who had developed in the boy organization, and the extent of this preference for the boys was shown by the fact that, out of 1,700 or 1,800 distributing agents, the Curtis Company had had, in 1910, about 85 per cent. of boys and retail dealers. Indeed, the fact that from the boys there were being developed *trained* distributing agents, and that these distributing agents were *recruiting* new boys, shows how widespread and *correlated* the two factors were.

"Q. About how many district agents did the Curtis Publishing Company have in 1910, approximately, if you know now? A. About 1,700 or 1,800.

"Q. Did they have that many as early as 1910? A. I think so.
"Q. You testified that most of these district agents, in 1910, were boys and retail dealers. Can you give any estimate of what percentage were boys and retail dealers? A. About 85 per cent."

This general plan seems to have been original with the Curtis Company, the proof being that "at that time there was no other publisher of magazines which circulated its magazines through local district agents supplied directly by the publisher and by the boys." It will thus be seen that in its novelty and success it was a new factor, within its sphere, of developing a new, and not of operating an old, field of commerce.

Up to 1910 the distributing district agents sold their publications direct to the boys only, and retail news dealers were supplied by the American News Company. Shortly before that time, owing to business friction between the Curtis Company and the American News Company, the district distributing agents were left free to deliver copies of the Evening Post to retailers, and this arrangement was later extended to the Ladies Home Journal. Up to the year 1910 the Curtis Company's district agents wholesaled no other magazines than the Curtis Company's Post and Ladies Home Journal, a business practice to which no one is shown to have objected as unfair business competition. The expense of maintaining these sales through the distributing district agents and the boys at large amounted in 1908 to over $250,000 and in 1909 to over $376,000.

In 1912, the Curtis Company acquired, as we have said, the Country Gentleman and distributed it through its distributing district agents and boys and through the American News Company in the same way, and from that time on has continued to expend large sums for prizes, etc., among its distributing agents and the boys, approximately the following sums: 1913, $89,000; 1914, $88,000; 1915, $126,000; 1916, $184,000; 1917, $136,000. The personal character of the work of the local distributing agents and the personal relation of these boys to the Curtis Company and its local distributing agents was shown by the proofs. As a part of the boys' compensation, the company paid the dues in the Y. M. C. A. of a large number of boys; these membership fees now amounting to $2,500 a year.

A league of what is called "Curtis Salesmen" was formed among the boys, membership in which was dependent on their *standing* in their local school work and on their *efficiency* as salesmen, both of which features it was the *work* of the local distributing agent to oversee. The boys reaching the highest rank in this league were assured good salaried positions on leaving school, and their high character and the success in training them is proved on the record by the fact that at the time the proofs were taken there were 2,000 applications on file from some of the best business concerns of the country, asking for these boys. The personal character of this work of the local distributing agents and the co-operation of the company's traveling agents, in the organization of this league of the boys, and the time, patience, and expenses expended in its formation, are fully set forth on the record, and show, beyond all question, that this widespread, novel, and effec-

tive selling organization of distributing agents and boy salesmen is a part of the complainant's business, fairly and laboriously built up by it, and leaves no doubt that its morale, efficiency, and good will was a business asset, and in the distribution of magazines of great value, and its continuance and its success was, in the main, bottomed on the undivided loyalty of the local distributing agents and on their continuing to remain distributing agents of the Curtis Company alone.

The proofs show that the compensation of these boys and the distributing district agents was fair; taking, as an example, of the five cents paid by a customer to the boy for a copy of the Saturday Evening Post, two cents went to the boy, one-half of one cent to the distributing agent, and two and a half cents went to the Curtis Company for publishing and delivering the magazine to the district agent. Indeed, the personal character of the relationship and the distributing agents, as the prime element in the whole plan, is stated by Charles W. Eliot, late President of Harvard University, who says:

"The method of the Curtis Publishing Company in enlisting a large number of boys who are still at school in selling its publications, and teaching them how to sell the journals to the advantage of the company and to their own profit, gives a useful example of co-operation between schools and industrial companies in the training of boys. It is a first-rate example of vocational training, given by a commercial company during the period of school life. The Curtis Publishing Company's method has proved successful in several important respects: First, it has provided the company with a large body of *effective young distributors* of its products; secondly, it has kept thousands of boys in school longer than they would otherwise have stayed there; thirdly, it has taught them thrift and accurate accounting, an invaluable lesson; fourthly, it has given many thousands of boys a knowledge of the art of selling journals, which easily becomes available in many other businesses; fifthly, it places many boys in good situations on well-grounded recommendations, when, being fit for larger service, they leave the employ of the Curtis Publishing Company. The Curtis method has thus been of great service, not only to more than 50,000 boys, but also to employers in a large variety of industries. It should be clearly understood that boys who avail themselves energetically of the offers of the Curtis Publishing Company can still have half of their afternoons for play, and can earn by diligence out of school hours, not only their pocket money, but a considerable savings bank deposit in the course of four or five years. The winning of this deposit is likely to affect beneficially the whole future career."

The proofs show that 95 per cent. of these boys sell only the publications of the Curtis Company, and that, in view of their school duties and in deference to the wishes of their parents, the sales for the Curtis Company is the limit of their selling power, and if they sell other magazines they must cut down the Curtis sales. The proofs show that the Curtis Company expended in the maintenance of districts agents and boys in the four years, 1914 to 1917, both inclusive, over $5,500,000, and they abundantly satisfy us that this method of distribution is an entity made up of the joint activity and personal co-operation of district distributing agents and boy distributors and their relationship to the Curtis Company, each one of the three being dependent upon the other two for the proper co-operating and interrelated distribution of the respondent's publications and promptly furnishing the same to the reading public, and that this plan originated with, and was built

up by, the Curtis Company through years of patient effort and at great expense, and that it forms the basic, practical method of distributing and marketing the Curtis Company's publications and is a business asset of great value, and that the vital and basic element in this business is the undivided loyalty and personal interest and influence of the distributing agents.

After the success of this plan had been demonstrated by the work and money of the Curtis Company, it is to be noted as an evidence of business morality among the magazine publishers that but 2 of the 400 magazine publishers made any effort to take away from the Curtis Company the undivided services of its distributing agents. And it will be further noted this effort was involved in and became the subject of judicial consideration in a suit hereinafter referred to. Pictorial Review Co. v. Curtis Publishing Co. (D. C.) 255 Fed. 209. There the court, in its opinion, held as to the relative conduct of those 2 competitors:

"The defendant, in insisting upon maintaining the integrity of its system, is not in my opinion guilty of unfair trade. On the contrary, the complainant, in attempting to avail itself of this system, is engaging in unfair trade. That it cannot build up a system of its own, if it desires to do so and will go to the trouble and expense, I do not believe. It is attempting here to secure a preliminary injunction to prevent the defendant from contracting with the latter's district agents not to market the Pictorial Review through boys and dealers. To grant such an injunction would break up what I think is a perfectly legitimate system for the promotion of sales of the defendant's magazines, and would enable the complainant, without expense, to employ the organization built up and fostered by the defendant."

Turning, then, to the proofs in regard to the acts of the Curtis Company and these two competitors which form the basis of this proceeding, we note that in 1910 the Success Company, which published the Post Magazine, now the National Post Magazine, endeavored to make use of the Curtis organization. But from 1912 to 1917 the services of the boys in the organization described have been utilized solely by the Curtis Company. During that time a number of other magazines and periodicals had been wholesaled to retail dealers by some 366 of respondent's district distributing agents, out of a total of 1,375. This has been done with the understanding that no use should be made of the respondent's boy organization for the sale of the periodicals of such publishers. The proofs further show that about 1917 the two magazine companies, which published the four magazines referred to, undertook to avail themselves of this boy organization of the Curtis Company. One of these companies was the Pictorial Review Company, which published the Pictorial Review; the other the Crowell Publishing Company, which publishes four magazines, namely, Women's Home Companion, American Magazine, Farm and Fireside, and Every Week. These companies have built up a great business and great circulation of their magazines through the American News Company and by other means open to them, as to which reference is made in the testimony of Messrs. Beck and MacKinnon.

As we have seen, the Pictorial Company depended entirely, in the matter of single copy sales, on the American News Company and

its facilities. Seeing this, they sought to secure the local distributing agents who are under contract with the Curtis Publishing Company, "in order to secure a wider and more efficient and better service and more circulation." The proofs show the commercial significance of this effort was that—

"If we could reach all of the wholesalers in the country—that is to say, if we could do business with all of them—I think the doubling of our *single copy* sales" (that is, a sale by boys) "would not be unreasonable to expect on Every Week."

In addition to the effort to reach the distributing agents of the Curtis Company, the proofs show that efforts were made to reach the boys whom the distributing agents had. At first no objections were made by the Curtis Company, in a number of cases, to its district distributing agents handling these periodicals:

"With Every Week, as with Pictorial, we granted permission in a number of early cases, until it developed that the methods in use were contemplated to be generally objectionable to us."

These later-developed methods, after February, 1917, are shown by the proofs that—

"In the case of Every Week we found that they were beginning to sell through boys."

The letters of the Pictorial Company, which began about January 20, 1917, and were sent to the distributing agents of the Curtis Company, among other things, stated:

"We are ready to supply you directly with such copies of Pictorial Review as you can sell through boys, * * * Your boys should be able to do a corking business."

In the specific instructions sent out to give these Curtis distributing agents, they were directed by the Pictorial Review to "get your boys busy getting orders for regular monthly delivery." That the purpose was to undermine the sale of the Home Journal by the Curtis Company's boys is clearly indicated in a circular dated November 28, 1917, in which they said:

"Maybe you have some newspaper or route boys whom you could get started with a monthly delivery by offering them this bonus in addition to their regular four cents."

Thus, the testimony of Smith, of Washington City, is that an agent of the Pictorial Company came to his office and—

"wanted me to take some copies from the Washington News Company, and get my boys who were selling the Saturday Evening Post and the Ladies' Home Journal to try them out."

The proofs further show that it was to be done in an underhand manner; the witness stating:

"Before I had a chance to refuse it, it was offered to me with the suggestion that I could get it in my sister-in-law's, or my wife's or in the name of a couple of men who worked around the office."

The proofs further show that Smith was a sales boy who had grown up with the Curtis Company sales agency, having started with that

company when he was eight years old. The proofs show that Thomas had about 350 boys selling for him, and that he had received about 200 from the Curtis people when the work was turned over to him; that he had meetings with the boys at the Y. M. C. A. and the boys' homes. Thomas testified that Korb asked him to handle the Pictorial. "He said he would accept; if the boys wanted any copies, to let them have them." Thomas had been brought from Norfolk and Newport News, where he had been working for the Curtis Company, to Baltimore, and had taken charge of their business there. It is also to be noted that, while Korb was endeavoring to get the use of these 350 boys through Thomas, the latter was not the only wholesaler in Baltimore; that Cann, Wilson, and Grape were wholesalers who handled the publications of other magazine publishers, and who, it is fair to conclude, were all competitors of the Curtis Company, could get their service.

The Curtis Company's district agent, Kimbrough, at Richmond, was also approached. He had been connected with the Curtis Company for seven years; had grown up as one of their boy salesmen; had worked into the position of district agent and handled no other magazines. There were other wholesalers in Richmond, the proofs show, namely, the Richmond News Company and Levy & Co.; but Kimbrough was asked to handle the Pictorial.

"They said they wanted to get away from the American News Company, and would turn their store business over to me, if I would permit the sales with the boys, and I said I would refer the matter to the Curtis Publishing Company.

"Q. Those are the only boys you have? A. Yes, sir.

"Q. You distribute magazines through these boys? A. Yes, sir; Curtis publications, and they handle only Curtis publications, as far as I know."

The suggestion was likewise made to him that he could take an agency for the Pictorial in somebody else's name.

The proofs show these boys form a dependable body; that they had their own permanent customers; and they also show the personal work of Kimbrough. In these respects the testimony of Kimbrough was:

"Q. Did you have any talk with Mr. Korb, or did Mr. Korb say anything to you, about other Curtis agents handling Pictorial Review? A. Yes; he said that there was no objection on the part of the company, because Smith, at Washington, and Schafer, at Pittsburgh, were handling the Pictorial Review.

"Q. Was anything said about your brother? A. He did suggest that I could do that.

"Q. What do you mean by 'could do that'? A. That I could have taken the agency in somebody else's name.

"Q. How many boys have you? A. Well, it runs on an average of around 100.

"Q. Are they a pretty permanent body? A. They keep at a pretty permanent figure of about 100. I have one boy who was selling before I was district agent, and he is still selling, and others come and go, and last two or three years or a few weeks, and that is about the way it works out.

"Q. They have permanent customers or routes? A. Yes, sir.

"Q. What kind of boys are they? Where do you get them? A. Most of them from school lists and advertisements inserted in the papers, asking for nice, clean boys.

"Q. Most of them are schoolboys? A. Yes, sir.

"Q. Have you done any work instructing them, or holding meetings with them? A. Yes, sir; I have held meetings with them, and often they come and ask me where they can get customers, and I tell them the best I know how.

"Q. And do you do some Y. M. C. A. work? A. We have meetings with the Y. M. C. A., and the Y. M. C. A. has co-operated with us and loaned us their swimming pool."

It appears from the testimony that, at the time Kimbrough was thus asked to take these agencies and have the boys do the selling, Levy was the main wholesaler in Richmond at that time; the seeming object not being to get a dealer to handle their magazines, but to get a Curtis distributing agent, who could use the Curtis boys.

The testimony in regard to the situation at Rochester, N. Y., is also indicative of the real purpose the Pictorial Company had in view. In that city the wholesalers were the Rochester News Company, which was a branch of the American News Company, and the Manson News Agency. They were old, well-established concerns. Lazarus, the district distributing agent of the Curtis Company, had been such for 14 years and sold no magazines except the Curtis publications. He had about 220 boys, and they had their own customers. The value of the personal character and the personal work of a distributing agent, as used in the Curtis plan, is shown in the testimony of Lazarus:

"Q. How long have you had your Curtis contract? A. About 13 or 14 years.

"Q. You sell your papers, I presume, to dealers and to boys? A. To dealers and to boys; yes, sir.

"Q. How many boys have you? A. I have about 220 boys that sell the Posts and the Journals, and about 30 or 35 corner boys.

"Q. Newsboys? A. Newsboys; sell Curtis magazines and papers, etc.

"Q. Of the 220, do any of them do any selling other than Curtis publications? A. No, sir.

"Q. They have their own customers? A. Own customers; yes.

"Q. What kind of boys are these? A. They are all good class of boys. Their fathers are lawyers, doctors, and business people.

"Q. You went out and got these boys? A. Yes, sir; I went out and got those boys.

"Q. How did you get them? A. I have different ways of getting boys—boys that sell for me. They bring them to me, and then again I am in a business place where there are 340 offices in it, all lawyers, doctors, and all class of peoples, and their sons sell for me. They tell their boys to sell. Once in a while we would be offered different ways of getting them, through newspapers. Curtis has a way of putting it in the papers, you know, getting boys, and it is easy to get boys any way.

"Q. You never have any trouble? A. Never have trouble getting boys at all; no sir.

"Q. Do you work with the Curtis Company, with their own men there, in getting them and keeping them efficient? A. Yes, sir; I do.

"Q. And you report on these boys every week, the results of their efforts, do you not? A. Every week; yes, sir.

"Q. Are any of these boys members of the Curtis League? A. Yes, sir; well, we have about four master salesmen and about three league salesmen.

"Q. Any plain league members? A. Yes, sir.

"Q. Have you got any expert salesmen of the middle class? A. We have got some, I think. I am not sure. I think I have.

"Q. If they sell enough papers, they get advanced in rank in the league? A. Yes, sir; get advanced in rank in the league.

"Q. Do you have any contact with their school-teachers? A. Yes, sir; I do.

"Q. What do you do? A. I know them all personally. They are glad to send boys to me.

"Q. You work with the school-teachers in getting boys? A. Yes, sir; work with the school-teachers in getting boys. Then we also have about 10 boys that I guess the Curtis Publishing Company paid their way through the Y. M. C. A.

"Q. And you work with the Y. M. C. A. there? A. Yes, sir.

"Q. Do you know whether the Curtis Company has done that? A. Yes, sir."

The same proposition was made to him that was made to the others, stating that they wanted him to handle the publications through the boys. Lazarus testified that he sells 7,000 Posts and 4,500 Ladies' Home Journals; that "he don't handle other business, because Curtis magazines keep him busy"; and that he gives it all his time.

In Louisville, Ky., the Heverin News Company was the large wholesaler. It was not a branch of the American News Company. It handled a large number of magazines and newspapers, and had been long in the business. Goodman had been the district distributing agent of the Curtis Company for only three years, and his business was exclusively for them. He distributed to 117 boys and to some 215 retail dealers. He testified that he had had the fullest co-operation of the Curtis Company in obtaining boys for his work, and that the Curtis Company was in personal correspondence with every one of them; that these boys were appointed by name by the Curtis Company; that they received prizes or bonuses from that company, and printed matter. He testified that for every new boy he started in the work he received from the Curtis Company $1. Goodman testified that a representative of the Crowell Publishing Company had endeavored to get him to sell their Every Week in Louisville.

"One of the road men, he was trying to place Every Week in Louisville. He approached me, and I explained the situation, that I did not care to handle it, and he finally asked me if I had any relative or any brother working for anybody in the newspaper business, and I told him I had a brother working in the Louisville post office, and he suggested I place the agency in his name.

"Q. In your brother's name? A. And have our Curtis boys sell it, and by doing so, the agency not being in my name, they would not find it out.

"Q. Now, the Crowell man, of course, wanted to do the same thing for the boys, too, did he not? A. He wanted the Curtis boys to sell Every Week.

"Q. And thus reach the same customers that the wholesale dealer could not deliver to? A. No; Every Week wanted to draw the benefit of the Curtis work.

"Q. I know he wanted to get the benefit of the Curtis organization, but he was trying to reach these customers, was he not? A. He was trying to have the boys sell Every Week to some of their Post customers."

The substantial character of Goodman's magazine business is shown by his sales of 4,700 Posts a week, 2,300 Journals, and 750 Country Gentlemen.

Proofs in reference to Topeka, Kan., clearly show that the boy organization was what the Crowell Company was after, and not the general wholesaler. In Topeka, one Patterson was a wholesaler and is now handling 15 magazines; Miss Goodrich handled the Curtis publications alone. The representative of the Crowell Company came to Topeka four different times, endeavoring to induce her to take on his magazines and obtain the use of the Curtis boys. Miss Goodrich distributed the Curtis publications to 33 dealers and had 170 boys. She was the clerk of a church, and took up the work with the boys as

a vocational, altruistic work. She had parents' meetings once a month, meetings of boys of the Y. M. C. A., had them organized in teams, and got in touch with their work in the schools. It was this organization that the Crowell agent wanted to avail himself of. Her testimony shows the personal nature of the work:

"Q. You are intimate with a number of the parents of these boys? A. Yes; we have had parents' meetings once a month. The *parents* are interested in what the plan is doing for the boys; in fact, the whole game with me is a vocational plan, anyhow, and what it is doing for the boy, and I am not only getting these boys, but the parents and teachers at the schools. I had one high school teacher who came to me and asked for viewpoints about salesmanship. Salesmanship is taught in the high school at home, and the lesson that day was 'Selling Saturday Evening Posts.' I had another teacher who came and asked us what we could do for a boy who was late at school. I said that should not be, and I just told her to announce that a boy who reported late at school would not receive his copies until after school. She has spoken to me several times since, and she said that boy has never been late since.

"Q. You are in this because of your great personal interest in this vocational work? A. I surely am. The agent said I have such a good organization it was not necessary to go farther, and that he had a good proposition and would like to leave it with me. I said I could not take on the other publications without the consent of the Curtis Publishing Company, and, besides, I did not want to use the boy organization, because it was strictly a Curtis organization."

Miss Goodrich sold substantially 2,000 Posts and 2,000 Journals of each issue. The existence of another competent wholesaler in Topeka, and the continued persistence of the Crowell Company in endeavoring to get the boy organization which Miss Goodrich, the Curtis distributing agent, had built up as a distinctly Curtis organization, shows that the boy organization was the crux and aim of the Crowell Company's efforts, and the key to getting it was getting the distributing agent.

The testimony of Mrs. Sturdevant shows very clearly the personal, altruistic, vocational character of the work of the boys in the Curtis organization; the personal work of the district distributing agent in building up the organization and of the Curtis Company in aiding in its up-building; and the desire of the competing company to avail itself of this boy agency created by the Curtis Company. Mrs. Sturdevant was a district distributing agent in St. Louis, a city of such magnitude that obviously these competing companies could each get a competent wholesaler to distribute its magazines. In the face of this fact, an effort was made to induce Mrs. Sturdevant to give them the services of the boys of this Curtis organization. Her testimony shows that she gained her training under Curtis branch managers, and, as she said, she "learned the Curtis ideals and Curtis methods." She had 187 boys, all of whom were schoolboys. "I make it my business to know the parents of the boys in almost all cases, and know them personally, through the boy, either over the phone or by visiting at their home." She kept in touch with the boards of schools and got information from them in regard to the boys' school standing, "because the company required that the boy must make good marks in school." She had her boys subdivided into ten club organizations, and at the meetings—

"We have instruction on the selling features of the particular publication for that special week. We talk about the cover (of the Curtis publication), analyze it, and discover whether the cover is a good selling feature; whether the cover will sell the copy, or whether we must refer to something inside."

The work of the district distributing agent with the boys is supplemented by the traveling representative of the Curtis Company. The proofs show:

"Men came there at times for special efforts to get boys. Mr. McLarty, and last year Mr. Neer and Mr. Wehner, different Curtis representatives, came there. Then the company makes very special efforts themselves, by making prize offers to the boys."

As showing the personal character of the work in this organization, the same witness testified:

"Q. Now, during these six years' experience, during the time you were district agent, you had experience in watching these boys and instructing them? A. Yes.

"Q. Would you say that it had been beneficial to the boys as a whole? A. Oh, I know it.

"Q. Well, is there any particular respect that you could speak about in which it has benefited the boys? A. There is a boy (indicating picture) that I had from the time that he was a small boy, and this boy now is a bank examiner. * * * In the eighth grade, when he got about 14, his mother began to have trouble with him. She is a widowed mother. She appealed to me. So I took it up with Elmer, and got him to be a member of the League of Curtis Salesmen, promising him that if he would make certain sales he could do it. I kept him from quitting school, and I kept him from losing his grades, because the *company required that the boy must make good marks in school.* So I appealed to Elmer in that way, and through the principal of his school, Mr. R. L. Barton, and his mother and grandmother and Mr. Barton, we all worked together and showed him what it would mean to him to do this. And then, when he got out of school, he got a position in the Mechanics' American National Bank. I went to see Mr. Allen about three or four months afterward, and he said, 'If you have any more boys like that, send them to me and I will take them.' * * * Very much benefited. I have a small boy who is the son of a widowed mother, and he only sold five copies when he began, and was exceedingly stupid. I took it up with his mother. He could not keep account of his money at all. So she called me up and asked me if I thought Robert had better quit. I said, 'By all means, no; let me have him three months more.' He could not make change; in fact, he very seldom got home with as much money as he started out with for a while, and his mother considered it a bad investment. But his mother and I together have been very busy, and we co-operated with him. At the present time, at the last call his mother made on me in regard to it, she said, 'Robert is able now to go out and deliver all his copies'—he is taking ten copies now—'and to come in with the entire amount of cash, and he can make change.' He is only eight years old.

"Q. How old is Robert? A. Eight years old. And his mother has persisted in it, even at the loss of money, for the sake of principle and the boy, and she helps him keep his accounts every week. I had another boy, Douglas Crockwell. His father is in the wholesale leather business. And Douglas' father had had me teach his boy. He is not selling now, on account of the condition of his health. And his father told me that he makes Douglas account for every cent of his profits. Every week they go over the book that the gentleman showed here.

"Q. Yes? A. And they figure his profit, and a certain amount is laid away for spending money, and a certain amount is put aside in a permanent fund, and the father and Douglas attempt to account for every cent that is earned in prize money and bonuses and everything else."

We quote these things at length, not as showing the altruistic character of the organization, its worth to the boys, or as being a factor in the decision of this case, but simply to show that, whatever the boy sales agency of the Curtis Company was, the distributing agents and their undivided service to the Curtis Company constituted the foundation stone of the whole selling structure.

Mrs. Sturdevant handled no other than the Curtis publications. She was urged to take on Every Week by the Crowell Company, but declined. She felt that the boys were doing better work by concentrating on one publication; that, if she took on another publication, she would have to teach them the selling points of that publication, and that their parents did not want them to do so; that she placed no restrictions on the boys selling other magazines, where their customers wanted them to furnish them; that she finds that about 50 Posts is as much as a boy ought to handle; that she had not encouraged them to sell more.

The personal character and morale of the district agents and the boys are illustrated by the testimony of these witnesses:

"Q. Now, you are interested in your boys making all the money they can, aren't you? A. I am more interested in their learning to be men, business men.

"Q. Yes, I will agree in your case that is true; I think you are. A. Yes, sir.

"Q. And I think it is a very commendable thing. A. I do not emphasize the money as much as the other.

"Q. But I am asking you, would you like to have them make money, too? A. Oh, yes; the money is the measure of success in a way."

Mrs. Sturdevant declined to take on other magazines, saying:

"Well, I believe in the boys concentrating on one thing. I believe in concentration. I think it pays me and pays the boys. I believe that to handle one line of goods and handle it well is better than to divide up."

Mrs. Whittelsey, another district agent in St. Louis, had 35 boys on her staff, and handled no other publications than the Curtis. She was also approached with a view to get the use of her organization of Curtis boys:

"In August, 1917, I was asked to—a man came to the house. He told me he was representing Pictorial Review, and asked me if I would take it on. I said, 'No'; that I was not interested and I hadn't time. Well, he said it would not take any more time than I was devoting right now to it; that I had the organization, and could do it while I was distributing the other papers.

"Q. Did he mention the character of your organization in any way? A. Yes; he said they were a fine class of boys, and they could sell the papers while they were selling the other papers."

The testimony shows that the effort to get the distributing district agents' boys of this Curtis organization was carried out even in small communities. McNerney was a miner at Goldfield, Colo., and there was a wholesale news company and a branch of the American News Company in that district, which wholesaled every magazine that came into it except Curtis', which was the only one McNerney handled. He had a small organization of boys, which he had built up and

trained with the help of the Curtis Company, through their prizes and instructions. The personal character of the organization, distributing agent, and boys, and its relation to the Curtis Company, is shown by his testimony:

"Q. How did you come to sell Curtis magazines? A. Well, I was going to school and needed a little spending money, and I knew the district agent in Cripple Creek, and he thought he would give me a trial, and started me out with 20 Posts.

"Q. Did he give them to you, or sell them to you? A. He sold them to me.

"Q. Twenty Posts a week? A. That was the first week.

"Q. And when you bought those 20 Posts, and started to sell them, did you know you were a Curtis boy? A. Yes, sir.

"Q. How did you know that? A. Because he told me."

The testimony of Nelson, district agent at Omaha, shows clearly that the object in view was to get hold of the Curtis schoolboy organization. In that city, both the American News Company and McLaughlin, a wholesaler, handled magazines. Nelson had 135 boys, and handled nothing but the Curtis publications, which took up his entire time. The proofs show that his boys were schoolboys; that the traveling representatives of the Curtis Company had aided him in instructing them and taking the general supervision of their work; that the boys had received special encouragement from the Curtis Company; "I have one boy that won a trip for him and his mother to Washington for the inauguration of President Wilson, and also at the same time won a pony and cart and harness;" that other boys had won smaller amounts, and he himself had obtained bonuses on account of the work done as distributing agent, the largest being a check for $500; and that during the 16 years of his connection with the Curtis work he had earned bonuses approximating $2,000. He was urged to take up Every Week.

"The substance of their interview with me was that they wanted to get in with the boy organization, which I would not sanction, and that seemed to be about all there was to it."

The thoroughness with which this work of obtaining the use of the Curtis organization of boys was carried on is evidenced by the testimony of Dewey, a 16 year old schoolboy, who, in addition to his school work, had 10 boys selling Posts; the contract being carried in his father's name. The proofs show that the Crowell Company visited him, but the witness declined to handle the magazines, because they "were in direct competition with the Curtis magazines, and I did not want to work them together."

The testimony of Alexander McLean is very suggestive. His son started out, as a boy of 12 years of age, to sell the Curtis publications. He made such a success of it that they gave him a certain district, and after he had had that for 4 or 5 years the company proposed to McLean to take the entire North Side in connection with his son. The father gives an account of the training the son had from the Curtis Company in his work. He says:

"The most beneficial thing that ever happened to him. It has made a business man of him. The boy is now worth, as a boy 22 years old, he is worth probably $10,000. He has made all of that with the Curtis publications, with

the investments he has made of that money. And then he has got 375 boys; he is making business men the same way, practically out of all of them. They save their money; and the boy that don't save his money, he is no good at all. He might just as well turn him out. If the mother and the father don't take care of him, or both of them—it is the best business training for the child that has ever been put before the public, I don't care what it is. * * * He is worth probably $10,000 himself. Now, he has made that off of the Curtis people, and the investment he has made of the money he has made off of that. In other words, it has made a business man of him. I will take his word—it is personal, of course; it is my son—it has made a business man of him, that I will put him against any business man in the city of Chicago. That is what it has done for him.

"Q. You attribute that to his training as a Post boy? A. Yes, sir; the training that they have given, and what they are doing right now with every Curtis boy they have got. That is what it has done for them, always has done for them, and will do with them.

"Q. What is it they are doing now, with respect to the Curtis boys you have now? A. They give them free copies to start with. They give them all the encouragement they can in the way of teaching them how to sell goods and approach men, and go out and teach them how to save their money and what to do with their money. It is nothing but business training. It is not a little, quibbling business, either. The boys come to our place, and they buy them, and they sell them, just like they would in any other business. It is just as big business for these boys as Marshall Field's business is for him, and done the same way. The Curtis people furnish little books, and I have got one right here (indicating). It is as simple a set of books as you can usually find—teaches them how to keep books. These little children, 10 and 14, are taught just as well how to keep their accounts, just as well as Marshall Field's and the First National Bank, or anybody else, and the Curtis people have been doing that for years, as I know positively.

"Q. And these boys are also instructed right along in the proper methods of selling? A. They certainly are.

"Q. And in keeping their accounts? A. They certainly are.

"Q. And approaching— A. Approaching people.

"Q. —prospective customers? A. Yes, sir.

"Q. The merits of the article, and so forth? A. These little, bashful boys will start that business, and it makes them self-assertive; they can put a proposition to a man just as well as a man can, and sometimes better. I will take these boys that have been trained under these Curtis Publishing Company systems of training, and I will put them against men in our stores, and find them better, and we have 350 boys.

"Q. What is the class of the 350 boys? A. They are the best class that you can get; mostly schoolboys, naturally. They devote their half day, and one day, and may be two days to selling the Post. That is, the right kind of a boy, if he is drawing 50, he will stick to it until he sells them. If he is the wrong kind of a boy, he will bring most of them back. That is the kind of a boy we try to push along and teach him how to do it."

The proofs show that McLean and his son had 350 boys in their organization. While they allowed their boys to sell other publications occasionally, they did not encourage them, for the reason that a divided allegiance would destroy the efficiency of the organization. In that regard McLean testifies:

"As a business proposition, you cannot do two things, and do them practically alike. You are going to neglect one or the other. If they sell the Curtis Publishing Company's things and somebody else's they are going to neglect one or the other."

From these proofs on the subject-matter of which the Commission made no findings whatever, it appears by the undisputed testimony

that the Curtis Company through a series of years, at large expense, and by the creation of personal relations, had built up both a distributing and a selling organization that was efficient, personal in character, and that was—substantially—engaged in distributing and selling exclusively the Curtis Company's publications; that with a view to having this organization cease being the exclusive agents of the Curtis Company, and with a view to enlisting the schoolboy salesmen of the Curtis organization, the Pictorial Company and the Crowell Company began and carried on a widespread and systematic campaign, with the object of obtaining the service primarily of the district distributing agents and secondarily of the local boy salesmen of the Curtis Company. The proofs show that, in most localities where this attempt to get the distributing district agents of the Curtis Company to handle their publications was made, there were other wholesale distributors already employed in distributing other magazines, and through whom these two companies could have distributed their own. The proof, by those experienced in getting these periodicals—and there is no proof to the contrary—is that this boy organization is composed almost wholly of schoolboys, that the time at their disposal and their capacity to sell is limited, and that the ordinary limit of a boy's selling capacity is about 50 magazines; that, if the boy undertook to sell other publications, it would result in diminishing his sales of the Curtis publications, as these two firms are in competition with those of the Curtis Company, and the handling of the two publications by the same boy would destroy the morale and efficiency of the Curtis boy organization.

Such being the proven and undisputed facts, and the commercial gain to these two competing companies, if they had succeeded in their plan, being to break down an efficient selling organization which the Curtis Company had, through a long term of years, at great expense, and with much effort built up, the crucial question arises: Was the insertion by the Curtis Company in its contract with its distributing agents that without the written consent of the Curtis Company its distributing district agents "will not * * * act as agent for or supply at wholesale rates any periodicals other than those published by the publisher," evidence of unfair competition in business; or, stated in the common business thought of those in that branch of commerce, is it evidence of unfair business in magazine publishing to have an exclusive distributing agent? And, indeed, the question of unfair business is even narrower, when the test of unfair business is applied to what was actually done in this case; for, while the restrictive wording of the contract was broad in scope and covered all magazines and all publishers, yet in its practical enforcement it was only enforced against these 2 competitive firms, and was not enforced against some 400 other publishers and magazines who used the services of such agents in a fair commercial way and did nothing to undermine the loyalty, efficiency, and personal relation of these exclusive agents to their principal.

[1] Having thus considered the general situation which led to the making of these contracts, and without an understanding of environ-

ment and the causes which led to the making of a contract, there can be no just construction of a contract, let us now turn to the question of the violation of the Clayton Act.

In this regard, we note that paragraph 3 of the Commission's findings, which finds:

"The defendant has made sales of its magazines to, or entered into contracts for the *sale of the same* with, certain persons, partnerships or corporations, by the terms of which sales, or contracts for such sales, such persons, partnerships, or corporations have agreed, among other things, not to act as agents for, or supply at wholesale rates, any periodicals other than those published by the publisher," the respondent herein, without the written consent of "such publisher"

—was addressed to the Clayton Act. That act provides that it should be unlawful for one engaged in commerce—

"to lease or make a sale on contract for sale of goods, * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor * * * of the lessor or seller," etc.

Seeing, then, that a lease or sale is the thing forbidden by the Clayton Act, that in this case the alleged sale was made by written contract, and that this written contract of sale was the unlawful contract which the Commission forbade the Curtis Company to enforce, it is apparent that the first and basic question in the case must be directed to an examination of this written contract and a determining whether it is one for the sale of goods, etc., for, if it is not for a sale, the requirements of the Clayton Act, namely, "a sale or contract of sale," do not appear in this written contract, and therefore, no sale being shown in the record, it is the duty of the reviewing court to vacate an order to desist from violating the Clayton Act. So far, therefore, as the Clayton Act is concerned, the questions involved in the present case are: First, is the Clayton Act limited to sales on contracts for sales of goods? and, second, was the present contract one of sale?

The question of sale being the significant and controlling factor in the third finding, and that being determined, our next question would concern the second finding, which is the same, in substance, as the third finding, with the additional element that such written contract was alleged to be in the alternative, either for sale or *distribution*; and the next question, therefore, would be: Does the making and enforcement of the foregoing contract, whether it be a contract of sale or distribution, constitute unfair competition in business?

[2] Turning to the first question, let us determine whether the quoted clause of the Clayton Act is limited to sales or contracts of sales. The only answer to this is the act itself. Its words are "to lease or make a sale or contract for sale." It makes unlawful conditions, agreements, or understandings—

"that the lessee or purchaser thereof shall not use or deal in the goods * * * of a competitor or competitors of the lessor or seller."

The words "lease," "sale," "contract for sale," "lessee," and "purchaser," being the words used, and no other relation than lease and sale being mentioned, there is no expressed purpose in the clause quoted to make it cover any other subject than leases, sales, or contracts

for sales, and to embrace no other persons than lessees and purchasers. The words are so clear they require no construction, and to needlessly construe, in order to broaden the scope of the statute, whether done by the Trade Commission in administering, or by this court in supervising the administration of, the statute, would be for either or both such agencies to write into the statute what Congress has not expressly written. Not only has no ground been shown for contending that by necessary implication the statute covered other subjects than leases, sales, contracts for sales, or other persons than lessees and purchasers, but the Supreme Court had in Motion Picture Patents Co. v. Universal Film, 243 U. S. 518, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959, quoted below, indicated its view that the clause in question was passed to meet a clearly defined controversy which concerned leases and sales. The case of Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, involved the sale of a patented machine, and the decision upheld a sales condition that other than supplies made by the seller should not be used in its operation by the buyer. Such being the adjudged law of the land, the Supreme Court, in Motion Picture Patents Co. v. Universal Film, 243 U. S. 518, 37 Sup. Ct. 421 (61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959) not only overruled that case but changed the decided law, saying:

"It is obvious that the conclusions arrived at in this opinion are such that the decision in Henry v. Dick Co., 224 U. S. 1, must be regarded as overruled."

But in doing so that court suggested, as we have said, its view that Congress, in passing the quoted section of the Clayton Act, had done so in order to meet the decision in Henry v. Dick, supra; the opinion stating:

"We are confirmed in the conclusion which we are announcing by the fact that since the decision of Henry v. Dick Co., 224 U. S. 1, the Congress of the United States, the source of all rights under patents, as if in response to that decision, has enacted a law making it unlawful for any person engaged in interstate commerce 'to lease or make a sale or contract for sale of goods * * * machinery, supplies or other commodities, *whether patented or unpatented*, for use, consumption or resale, * * * or fix a price charged therefor * * * on the condition, agreement or understanding that the lessee or purchaser thereof shall not use * * * the goods, * * * machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.' 38 Stat. 730."

And in that connection it will be noted that in the dissenting opinion in Henry v. Dick (see 224 U. S. 50, 32 Sup. Ct. 381, 56 L. Ed. 645, Ann. Cas. 1913D, 880) the Chief Justice, with two Justices concurring, suggested the very congressional action which, we submit, was afterwards embodied in the Clayton Act, stating that their dissent would—

"serve to make it clear that if evils arise their continuance will not be caused by the interpretation now given to the statute, but will result from the inaction of the legislative department in failing to amend the statute so as to avoid such evils."

That, shortly after this decision was rendered, Congress passed the clause in question, gives additional weight to the view that Congress—

"as if in response to that decision, has enacted a law making it unlawful for any person engaged in interstate commerce 'to lease or make a sale or contract for sale of goods,'" etc.

[3] Seeing, then, that the interstate commerce acts made unlawful by the Clayton Act were limited to the lease and sale of goods, we turn to the second question, namely: Did the present contract "lease or make a sale or contract for the sale of goods"? We say "present contract," for as that contract is the one now used, and whose future use is the practical commercial factor involved, we pass by all the preceding contracts, and confine ourselves to the one on which the Curtis Company stands as the assertion of its lawful right to contract with its distributing agents. Turning, then, to this present contract of the Curtis Company, which is Exhibit D of its answer, and the pertinent parts of which are printed in the margin,[2] we note, first that the agreement, which is entitled a "District Agency Agreement," is in form and verbiage an appointment by a publisher of an agent, and

[2] To appoint the said party of the second part as district agent * * *

"2. To supply the district agent with copies of the Saturday Evening Post and of the Country Gentleman at two and one-half cents (2½¢) each, and of the Ladies' Home Journal at nine and three-quarters cents (9¾¢) each, transportation charges prepaid, provided that if the district agent fail to prove himself entitled to the wholesale rates by wholesaling each publication to subagents, and by sending on time, the required fully itemized, subagents' sales reports, or if the district agent fail to maintain a net sale of his quota of *any one* publication, as required by clause 8, the publishers may then charge three cents a copy for the Saturday Evening Post and for the Country Gentleman and eleven cents a copy for the Ladies' Home Journal, or may, at their option, terminate the contract after thirty days' notice and appropriate the cash security;

"3. To give credit to the district agent, as the price paid, for unsold copies returned *in accordance with the regulations governing returns, as stated on the order blanks last issued by the company;* * * *

"8. To sell at least ——— copies of each issue of the Saturday Evening Post, at least ——— copies of each issue of the Ladies' Home Journal, and at least ——— copies of each issue of the Country Gentleman;

"9. To supply subagents, both boys and dealers, with the Saturday Evening Post and the Country Gentleman at three cents a copy for resale at five cents a copy, and with the Ladies' Home Journal at eleven cents a copy for resale at fifteen cents a copy, and to make deliveries early on the morning of the sale date;

"10. To refrain from displaying, delivering or selling any copies to boys, dealers or retail customers *before* the authorized sale date, as specified on the printed order blank furnished by the publishers;

"11. To refrain from selling any copies in any territory known to be controlled by another agent under contract; * * *

"13. To refrain hereafter from wholesaling to boys or dealers (and from attempting to influence any Curtis agent to sell) any periodicals other than those published by the Curtis Publishing Company, and to refrain from furnishing any other publisher or his agent with the names and addresses of any Curtis agents, without first obtaining the approval of the publishers; * * *

"16. To permit the publishers to retain, throughout the life of this agreement, possession of the $——— herewith remitted by the district agent as cash security for his performance of his several obligations hereunder."

an agent for limited territory and for a mutually optional time, for the purpose of (a) selling and (b) distributing its magazines. Now, there are no words in the contract which purport or contemplate the sale of such magazines, and there is express provision, if (a) a sale, or (b) a distribution, to third parties, is not effected, the magazines consigned are to be returned to the publisher. Indeed, the nature of the transaction, the necessary haste to get the magazines into the hands of the boys at once, shows of itself that there was no reason for transferring title by sale. It was not the handling of commodities of which sales would naturally be made. It was a contract for distributing and speeding up deliveries of an article whose whole value depended on the haste with which it passed from the agent's possession. Confirming these statements, we note that in clause 1, "appoint the said second party as district agent for the Saturday Evening Post," etc., are words aptly used in constituting an agency, viz. "appoint," and of restricted territory, "district agent."

We note that clause 3 provides for the return and credit, at consignment prices, of unsold copies, and that clause 5 provides for the payment of interest at 5 per cent. on the money deposit, made by the agent, as security for the magazines consigned. As to the agent making sales of the magazine, clause 8 obligates him to sell a certain number of copies of the magazine, and clause 9 binds him to deliver the magazine to dealers and boys "early on the morning of the sale date" and at certain specified prices. We also note that, by clause 10, the agent binds himself not to display, distribute, or sell any of the magazines before an authorized sale date, and by clause 11 not to sell any copies in territory controlled by another agent. All of these and other details that might be cited evidence that the relation created by this contract, and by its expressed terms meant to be created, was one of agency, and that there is an entire absence in the contract of any terms or words usual or requisite to effecting or evidencing a sale, as well as of circumstances inviting or necessitating a sale.

[4] We have not overlooked the fact that the contract provides for the maintenance by the agent in the hands of the publisher of an advance sum of money sufficient to indemnify the publisher for all magazines forwarded. But in our judgment this deposit cannot, in view of the right of return, be regarded as a payment, but rather as an indemnity to secure payment, for all copies the agent does not return. It is a fund on which the publisher is obliged to pay a substantial interest rate. It is an indemnity, and the fact that such indemnity is in money, instead of a bond or obligation to pay money, is of no significance, and the crucial question still remains: Is the contract which it indemnifies one of sale to a buyer, or consignment to an agent, for subsequent sales or distribution? It is, moreover, an indemnity fund for which the Curtis Company is bound to account to the agent. Nor is the accounting price of the magazines even fixed by the contract. It depends on the future efficiency of the agent. Nor is the fact to be overlooked that the contract, taken as a whole, could not be satisfied by the mere fact of sale to a buyer, for, if the transaction ended with a sale by the publisher, the whole spirit and purpose of the contract

would be lost, which is that the distributing agent should distribute to the boys and the boys distribute to their personal customers.

The subject of the contract is a large quantity of magazines, and the object of the contract is not to vest ownership of them in the other party to the contract, but to pass those magazines by the use of other agencies into the hands of the public. And the object of placing these magazines in the hands of the public is not alone to get from the real buyer of the magazine its comparatively small price, but by placing it in the hands of a vast number of buyers to thereby enable the publisher to obtain that advertising patronage which is the financial mainstay of all such periodical publications. It has therefore seemed to us that the unique character of the subject-matter of this contract, the object the publisher had in view, and the phraseology, conditions, and obligations of this contract, unite to make the contract one of consignment to a distributing agent, who was furthering the business of his principals, and not one of a buyer, who thereby acquires title for his own individual purposes.

Such being the case, we hold the Commission erred in the legal construction of this contract, and therefore had no proof before it to find, as it did in its third finding, that "the respondent has made *sales* of its magazines to, or entered into contract for the *sale* of the same, with certain persons," etc., and therefore its legal conclusion from such findings, viz. "that the acts and conduct set forth in paragraph 3 of said findings are, under the circumstances therein set forth, in violation of the provisions of section 3" of the Clayton Act, was in error, as was also the part of its decree which enforced such conclusion.

[5] Having thus found that the distributive agency contract was not a violation of the Clayton Act, we next turn to the third question, namely: Does the making and enforcing of that contract, whether it be a contract of sale or distribution, constitute unfair competition in business? What is unfair competition in business? Now, while Congress has enacted, as we have seen, "that unfair methods of competition in commerce are declared unlawful," it has not defined unfair competition, or specified what shall constitute unfair competition. From this absence of definition, it is reasonable to infer that it was in the mind of Congress that, as unfair competition had long been a subject of judicial scrutiny, determination, and was involved in remedial suits at law for damages and of injunctive suits in equity, to prevent continuance, the definition and ascertainment of what constituted unfair competition was a legal question which the law could determine. Indeed, in the nature of things, it was impossible to describe and define in advance just what constituted unfair competition, and in the final analysis it became a question of law, after the facts were ascertained, whether such facts constitute unfair competition in business, for the test of fairness, as of fraud, is the application by the law of moral standards to the actions of men.

While it was the exclusive right of a jury in a case at law to find the facts in any given case, it still remained the duty of the trial judge, before entering judgment, to decide whether from those facts the

injury of unfair competition in business could be lawfully inferred. So, also, when the case was in equity, while it was the province of the judge to find the facts, it also was his duty, and as well the duty of a reviewing court, to decide whether, upon those facts so found, the injury of unfair competition in business existed. Presumably, with this recognized existing jurisdiction of federal courts over cases of unfair business competition in mind, Congress passed the Trade Commission Act, the pertinent parts of which we have heretofore noted in the margin.

[6] Such, then, being the existing and by the act unchanged jurisdiction of such courts in reference to questions of unfair competition between business competitors generally, and that jurisdiction being exercised on well-established legal principles, it follows that, when Congress invoked an exercise of supervisory power on the part of such courts over the action of the Trade Commission, and enacted that this supervisory power should be exercised before the orders of the Trade Commission could be enforced, it would seem to follow that the supervisory powers which the court was meant and intended to exercise were the usual powers exercised in the usual way by those courts when exercising their power to review, and, while the act provided that the findings of fact made by the Commission were final and conclusive, it still remained the duty of the supervising court to determine the same legal questions which a supervising court had in reviewing actions of the trial court, namely, whether under all the facts found by the Trade Commission a case of unfair business competition was established. That Congress meant to invoke some supervisory power precedent to the Trade Commission enforcing its orders is apparent, and unless that invoked jurisdiction meant in effect to submit to the judgment of the Circuit Court of Appeals the legal question whether the facts found by the Commission established that the competition was by the judgment of law unfair, and if that supervisory power did not charge the Circuit Court of Appeals with the legal duty of judicially deciding whether the facts found were such as warranted injunctive relief by the Commission, we may well ask the question: What supervisory power did Congress intend should be exercised by the Courts of Appeals? For, if such supervisory power, which is one of substance and judicial in its nature, is not to be exercised by that court, then it is manifest that the supervisory power which Congress invoked was one of mere shadow and not of substance.

To our mind, the situation is wholly different from that of the Interstate Commerce Commission. There the basic question is the fixation of rates, which is a question of business discretion, and in no sense a legal, judicial, or moral one. Manifestly, Congress did not mean to confer upon the Trade Commission the power to grant injunctions in cases of business competition, where courts would not be justified in granting injunctions. Indeed, when Congress, in invoking such reviewing and supervisory power, said "the court * * * shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter *upon the pleadings, testimony and proceedings* set forth in such transcript, a

decree affirming, modifying or setting aside the order of the Commission," it was using language which aptly described the customary jurisdiction and power theretofore exercised by Circuit Courts of Appeals in reviewing cases of alleged unfair business competition.

Such, then, being the supervisory jurisdiction conferred on this court, we turn to the question before us and inquire whether the record as a whole, which includes, not only the findings of fact made by the Commission, but also the proofs in regard to which the Commission made no findings, disclose a case of unfair business competition on the part of the Curtis Company, which warrants a decree which in effect enjoins them from successfully continuing a distributing and selling agency they have utilized for years.

[7] Before taking up that question, we note the fact that, while this proceeding was pending before the Trade Commission, the Pictorial Review Company invoked the jurisdiction of the United States District Court for the Southern District of New York, by a bill filed against the Curtis Publishing Company, to enjoin unfair business competition. That court, in an opinion reported at 255 Fed. 208, said:

"What complainant evidently desires is, not merely to sell to these wholesalers, which it can do already in cases where the wholesalers have a retail trade, and to the extent of that retail trade, but to avail itself of the organization of the Curtis boys, built up by the ingenuity, labor, and capital of the defendant. The defendant, in insisting upon maintaining the integrity of its system, is not in my opinion guilty of unfair trade. On the contrary, the complainant, in attempting to avail itself of this system, is engaging in unfair trade. That it cannot build up a system of its own, if it desires to do so and will go to the trouble and expense, I do not believe. It is attempting here to secure a preliminary injunction to prevent the defendant from contracting with the latter's district agents not to market the Pictorial Review through boys and dealers. To grant such an injunction would break up what I think is a perfectly legitimate system for the promotion of sales of the defendant's magazines, and would enable the complainant, without expense, to employ the organization built up and fostered by the defendant."

An examination of that case shows that, upon facts which in no wise controverted the fact findings of the Commission heretofore set forth, that court held the Curtis Company's course did not constitute unfair business competition. We see no reason to differ from the conclusion reached by that court, and, unappealed from as it is, it judicially and finally adjudged that as between these companies the Curtis Company has not been guilty of unfair competition in business. And such matter being as between these parties finally adjudged, two things follow: First, the competition of the Curtis Company is adjudged not unfair; and, second, no court could thereafter, in a suit between these parties, issue an injunction to enjoin such competition.

Of course, the decree in that case, where private rights only are concerned, binds only the parties, and can in no way affect the jurisdiction of the Trade Commission; but the fact that while the business relations of these parties were under review by the Commission one of the parties invoked, as it had a right to do, the jurisdiction of a court in equity and sought to enjoin such alleged unfair competition, and that court, after hearing, held that the defendant's business operations did

not constitute unfair competition, but, on the contrary, the complainant's actions did, and the Trade Commission thereafter, upon similar facts shown to it, held the Curtis Company was guilty of unfair competition in business, the mere existence of such an anomalous and contradictory holding of legal conclusion upon the same general facts in and of itself suggests that, in the exercise of our reviewing, supervisory, jurisdiction, it is for us to decide whether the legal question before the Trade Commission was rightly decided by it, and in deciding that question we may give due consideration to the reasoning and opinion of the court referred to, with a view to avoiding conflicting holdings under substantially similar states of fact.

[8] But, before taking up that question, let us make it clear that we are not violating, or in any way ignoring, the statutory limitation on our supervisory reviewing jurisdiction, namely, "that the finding of facts, if supported by testimony, shall be conclusive." The findings of fact by the Trade Commission we have quoted in full. Those findings we accept as established, and they are the sole foundation on which the order of the Commission is bottomed. "From the foregoing findings, the Commission concludes," is its own statement.

But the case did not turn on this restricted phase, which, in our judgment, totally ignores the real situation, and makes no finding on those facts which are really determinative of the question whether the competition of the Curtis Company was unfair business competition. That real situation, as we have seen from the uncontradicted proof, among other features, consists of, first, the creation, through years, with great effort and large expense, of the Curtis Company's schoolboy selling organization; second, that the district distributing agents constitute the control, morale, recruiting, and existence of the schoolboy selling organization; third, the efforts of two competitors to appropriate that selling agency to themselves, with the undisputed consequence of undermining its morale and destroying its efficiency; and, lastly, that the purpose of the Curtis Company in putting in its contract the clauses objected to was not to interfere with commerce, or with the circulation of the 400 magazines, but solely to thwart the unfair plan of 2 unfair competitors, who sought to undermine the undivided loyalty of the Curtis distributing district agents, and through them disrupting the Curtis school boy organizations.

Now, it is very apparent that, where the supervisory review by the Circuit Court of Appeals, which Congress invoked, provided that that court "shall have power to make and enter *upon the pleadings, testimony and proceedings* set forth in such transcript, a decree," it is the province, and indeed the duty, of the reviewing court, to consider, not merely the findings of the Commission, but the whole record, the whole proofs, and the whole proceeding, and to say, first, whether, in view of all the proofs, the limited facts found by the Commission really passed on the pertinent and decisive facts, and so warranted an injunction; and, second, if such limited facts do not reach the merits, and do not alone legally justify and warrant a decree of unfair competition and injunctive relief, then, since Congress has enacted that the Circuit

Courts of Appeals "shall make and enter *upon the pleadings, testimony and proceedings* set forth in such transcript, a decree affirming, modifying or setting aside the order of the Commission," it is quite clear that it is not only the province, but the duty, of the Circuit Court of Appeals, and indeed the expressed purpose of Congress that such reviewing court should itself examine the pleadings, the entire testimony and proceedings, and upon such inclusive examination determine whether the facts found by the Commission and the proofs on which the Commission made no findings, and which the court, in the absence of such finding, itself finds and determines, legally established a case of unfair business competition by the Curtis Company.

[9] Taking, therefore, the record, proofs, and pleadings as a whole, we hold as a legal and judicial conclusion that the proofs are not such as can support a judgment or decree of unfair competition on the part of the Curtis Company toward the Pictorial Company and the Crowell Company. That company legitimately, and in course of fair business dealing, built up and recruits by its distributing district agents a selling agency of schoolboys, the whole efficiency of which consisted in undivided loyalty and single-hearted service, primarily of the district agents, and secondarily of the boys, to that company. The whole situation was unique. This was not a case of commerce in the ordinary channels of salesmanship. The Curtis Company, by the personal work of their distributing agents, selected boys of tender years, whose work and business was school work, whose time was limited, and whose capacity of salesmanship was restricted to a magazine that sold for 5 or 10 cents, and to a sale of approximately not exceeding 50 copies. Had the magazine been one that sold for 25 or 30 cents, it is quite evident the boys could not have sold it. Were they to try to sell more than 50, it would be at the expense of their school duties, their play time, and the wishes of their parents. There can be no doubt under the proofs that the Curtis Company, in building up this boyselling organization through the distributing district agents, was not throttling or indeed dealing with the ordinary channels of commerce, but was enlarging the sphere of commerce by enlisting in its service the selling power of schoolboys, who, but for this organization, would not only not have taken part in present commerce, but who would have missed the commercial training the Curtis Company alone gave them for future commerce, and the Pictorial Company and the Crowell Company had no hand in giving them, and indeed it seems to us that these companies will, if this injunction here complained of was enforced, succeed in really throttling commerce, by disrupting and destroying an efficient agency which is extending commerce.

[10] Moreover, it is clear that these companies, as well as other publishers, already have full, unrestricted, circulation agencies. The proofs show that the American News Company still continues its general business of distributing the publications of all publishers who choose to use its service; that there are upwards of 400 different magazines which are distributed and circulated solely through its agency and the United States mail, and that its service reaches every retailer of

magazines in the United States. In that regard the proof of the scope of the distribution facilities of the News Company and of their being open to and used by the particular competitors of the respondent, toward whom they are alleged, in this proceeding, to have used unfair business competition by the contract in question, and that the retailers to whom the contract forbids its distributing agents to furnish other magazines can be, and in fact are, furnished with all other magazines, including the magazines of the complaining competitors of the Curtis Company by the American News Company service. All this is shown by the proofs of the Government, in the testimony of witnesses, among whom we quote from Thomas H. Beck, of the Crowell Company, a complaining competitor:

"Q. Will you now describe how the distribution of magazines is made through the American News Company—how do they operate? A. We supply our publications to them, and they distribute them through their branches, and their branches redistribute to retail news dealers. They cover the entire country with that service. * * *

"Q. Have you been able to reach all the retail dealers through the agency of the American News Company? A. Yes; we can reach all the retail news dealers through the American News Company. We can reach them—in other words, you can ship to them, because, if their location and address are known, you can make the shipments. * * *

"Q. Now, you have not depended on the American News Company entirely as a matter of getting your magazines to the people? A. Yes, sir; in the matter of single copy sales, we practically depend on them."

The proofs further show that through these retailers they reach the boy salesmen who get their supplies from these retailers. In that regard, the same witness, speaking of the retailer, says:

"He gets the star edition for sale over his own counter, and gets the boy edition for sale to the boys.

"Q. Do you know of any place or locality where a retailer could not get, through the American News Company, the star edition of the magazine you refer to, and your other magazines? A. I do not."

To the same effect is the testimony of B. A. Mackinnon, circulation director of the Pictorial Review, a magazine published by the Pictorial Company. Mr. Mackinnon's testimony was:

"Q. Is it not possible for any retail dealer in any part of the United States to get copies of your magazines through the American News Company, for sale? A. Yes, sir.

"Q. And it has always been so; is not this the fact? A. As far as I know: yes, sir."

It will thus be seen that the retail dealers in every part of the United States were reached for many years by the Curtis Company and its competitors, and that this service and method of reaching the retailer's customer and of the dealer selling to boy salesmen is now open to and used by the competitors of the Curtis magazines. From this it will be seen that when the Curtis Company, by clause 13, kept its distributing agents from "wholesaling to * * * dealer * * * any periodical other than those published by the Curtis Company * * * without first obtaining the approval of the publishers," they did not

prevent or hinder such retailer from getting the publications of these other publishers through the American News Company.

It will also be noted that, in dealing with the magazine business, we are not dealing with anything that has been made the subject of monopoly, sole supply, or by deprivation of which the public has been deprived of anything it desires. There is no suggestion in the arguments or proofs in the record that any person who desires any one of the 400 magazines of the country, including these competing magazines, cannot readily get such magazine from any retailer to whom he applies in person, have it regularly delivered to him by a boy salesman who deals with such retailer, or directly from the publisher through the mails. Indeed, the latter agency is the customary one by which we usually get our magazines.

[11] We note these facts, because this freedom of access to the consumer, and the entire absence of monopoly and nondeprivation of the public, have been regarded as an important element in the decision of cases of alleged unfair business competition. Thus in Ford v. Boone, 244 Fed. 341, 156 C. C. A. 627, the Circuit Court of Appeals of the Ninth Circuit says:

"It is to be borne in mind that the plaintiff has no monopoly of the automobile business, but only of one out of almost innumerable kinds of cars, all differing in detail one from the other, but of the same general type, and all designed to be used in the same general manner, and for the same general purpose. If, as was admitted to be the fact in the Motion Picture Patents Company Case, the plaintiff's car were wholly indispensable to the carrying on of a great industry, and if its plan of marketing were such as to constitute an instrument of oppression or favoritism, then the courts should perhaps be astute to discover means by which to disorganize its system and to encourage competition between the salesmen or distributors of its product; but such is not the case."

Indeed, there is no proof in this record that any harm has been done in the past by the business methods followed by the Curtis Company, nor is there any proof that commerce has been in any way throttled thereby. By this order of the Commission, an injunction is now issued, which, whatever may be said to the contrary, disrupts and forbids continuation of a business course openly pursued for years, and takes away, without compensation, the asset of good will, which cannot be bought with money, but which is the result of years of personal service and loyalty.

[12] Injunction is so drastic and prohibitive a remedy, its issuance by a court of equity so carefully safeguarded, that to have substantial question of the wisdom of such issue often suffices to withhold. To doubt is to decide, and this well-founded principle of equity in itself would lead a court of original jurisdiction to deny the strong arm of injunctive relief. But in this case the foundation of our order is, not doubt, but certainty; for, accepting in their entirety and finality all facts found by the Commission, but taking the whole record and the proofs on which the Commission has made no finding, we are satisfied, as the statute provides, "upon the pleadings, testimony and proceedings set forth in the transcript," the charge of unfair methods of competi-

tion could not be legally adjudged. If this was a case where a trial court had submitted these proofs to a jury from which to find a verdict of unfair business competition, a reviewing court would be constrained to set such verdict aside as not having testimony to support it.

[13] In passing this act and granting to a commission power, in a new and untested field, to issue injunctions which should stop and prohibit commerce, we are of opinion that Congress, in invoking the reviewing supervision of federal courts, experienced in review, meant that those courts should exercise that reviewing power as they had been accustomed to do it theretofore. So viewing the statute, and so examining the whole record, we consider it the duty of this court to make effective the power of "setting aside the order of the Commission" which Congress so enacted.

Let a proper decree be drawn.

In re EILERS MUSIC HOUSE (two cases).

OREGON EILERS MUSIC HOUSE v. SITTON (two cases).

(Circuit Court of Appeals, Ninth Circuit. February 14, 1921.)

Nos. 3529, 3548.

1. **Bankruptcy ⇐440—Decision reviewable only by appeal.**
   Where a decision of a District Court involves questions of both fact and law, it is reviewable by appeal, under Bankruptcy Act, § 24a (Comp. St. § 9608), and not by petition for revision.

2. **Bankruptcy ⇐288(1)—Adverse claim must have substantial basis to exclude summary jurisdiction.**
   A court of bankruptcy *held* to have jurisdiction in a summary proceeding to order assets which are a part of the general estate of the bankrupt turned over to its trustee, notwithstanding an adverse claim thereto by another corporation, which has been acting as a subsidiary of bankrupt, and all of whose stock is owned by bankrupt.

3. **Bankruptcy ⇐140(½)—Assets held by subsidiary corporation part of estate.**
   Where bankrupt, which was a wholesale and retail dealer in musical instruments and merchandise, with a number of branches, purchased the stock of another corporation doing a retail business, and after operating it separately for a number of years moved its business into its own establishment, where it took over the retail branch of bankrupt's business and a large amount of its merchandise, for which bankrupt received no consideration of value, and was thereafter held out to creditors as a subsidiary or agency of bankrupt, the property and assets held by such corporation *held* a part of bankrupt's estate.

Ross, Circuit Judge, dissenting.

Petition to Superintend and Revise Decree in Bankruptcy of and Appeal from the District Court of the United States for the District of Oregon; Robert S. Bean, Judge.

In the matter of the Eilers Music House, bankrupt; H. W. Sitton, trustee. On appeal and petition to revise by the Oregon Eilers Music House. Petition to revise dismissed. Affirmed on appeal.

This matter arises out of the bankruptcy of Eilers Music House, an involuntary bankruptcy proceeding instituted in February, 1918, with respect to the Eilers system of houses in certain fields of mercantile business. In the matter of Eilers Music House, a corporation, bankrupt, petition was filed in the District Court to require surrender and delivery of bankrupt's property, and thereupon order to show cause was issued and served upon the Oregon Eilers Music House. The Oregon Eilers Music House replied, and after preliminary motions the court made an order of reference of the proceedings to a special master, who thereafter filed findings and conclusions, and recommended a decree requiring the surrender of the assets of Oregon Eilers Music House to the trustee in bankruptcy of Eilers Music House. To the report of the master Oregon Eilers Music House filed exceptions, and thereafter the District Court in bankruptcy affirmed the report of the special master and by decree awarded possession of the assets of Oregon Eilers Music House to the trustee of Eilers Music House, bankrupt. By petition to superintend and revise the decrees, and by appeal, Oregon Eilers Music House asks reversal of the order of the District Court. Inasmuch as the issues and the evidence pertaining thereto are so fully stated in the report of the special master, we append such report, which is as follows:

"It is claimed by the petitioner that Oregon Eilers Music House is an agent or subsidiary of the bankrupt. It is alleged that Eilers Piano House, the predecessor of the bankrupt, and, indeed, the bankrupt, under another name, in the year 1908, purchased Graves & Co., a corporation, acquiring its capital stock through officers and directors of Eilers Piano House in trust for the corporation, and that the Music House has ever since owned and possessed Graves & Co., now Oregon Eilers; that, while Oregon Eilers is doing business as a separate corporation, it is nevertheless, and in fact, an agent or representative of the bankrupt, and should be required to turn over the assets in its possession to the trustee.

"Oregon Eilers Music House totally denies the allegations in the petition as appertains to the ownership of Oregon Eilers, claiming that the bankrupt corporation, long prior to bankruptcy, disposed of all the stock of Graves & Co., or Oregon Eilers, and disclaims that Eilers Music House ever owned Oregon Eilers, or any part of it. Extensive hearings have been had upon the issues described and a large amount of testimony has been taken. Prolonged analysis of this testimony, much of which is immaterial, would result in making this report burdensome, so the facts found will be stated in narrative form, together with such inferences and conclusions as I deem them to warrant. For convenience the bankrupt, Eilers Music House, will herein be called 'Music House,' Oregon Eilers Music House, 'Oregon Eilers,' and the Graves Music Company, or Graves & Co., 'Graves Company.'

"Prior to the year 1902, H. J. Eilers, familiarly known as Hy. Eilers, A. H. Eilers, and S. J. McCormick were engaged in the business of selling musical instruments in Portland, Or., the firm being known as Eilers, McCormick & Co. In that year these individuals incorporated their business under the name of Eilers Piano House, and continued to operate as such until the year 1910. They were the sole owners of the business, except as a few shares of stock became scattered now and then among a few of their employees, associates, or relatives. In the main, H. J. Eilers was the owner, manager, and directing head of this corporation. It transacted a large business in the piano field, both wholesale and retail, and for the greater portion of the time, up to and including 1910, and as far as 1912, did an exceedingly prosperous business according to the books, and as the testimony developed.

"As appears by the minutes of the Piano House, in February, 1908, it purchased Graves & Co. in accordance with the desires of its owners, A. H. and S. J. Eilers and S. J. McCormick, and agreed to pay for the stock of that company $48,000, paying $1,000 in cash and executing 47 $1,000 notes. The capital stock of Graves & Co. was thereupon taken over in the name of the two Eilers and McCormick, as the minutes state, in trust for the Piano House. H. J. Eilers took 50 shares, A. H. Eilers and S. U. McCormick 24 shares each, and 1 share each was apportioned to G. A. Hoffman and F. W. Graves; thereafter the Piano House, or its stockholders, operated the Graves Company

business. It was conducted, as it had been theretofore, in the same location, and it did the same general character of business down to the year 1916. There is no doubt that the Piano House in the first instance paid the consideration due to Graves Company for the transfer. It pledged the sum of $94,000 of its liquidated assets to the stockholders of Graves Company as collateral to secure the payment of its $47,000 notes. It went its security at the banks, guaranteed the payment of its real estate rental leases and other obligations, and the transaction was entered upon the Piano House books as a purchase by it.

"In April, 1910, the Music House, the bankrupt, came into existence through the initiative of the same individuals, H. J. and A. H. Eilers and S. J. McCormick, and it thereupon took over all of the assets and assumed all the obligations of the Piano House. Its capital stock was apportioned to, or taken by, the same individuals, substantially in its entirety. During this time, as heretofore stated, the Piano House was in a prosperous condition, entirely solvent, and was at all times able to meet and discharge its obligations to all its creditors, among whom were the stockholders of Graves Company, since payment of the purchase price due on that transaction had not been completed when the Music House came into existence. The same solvent condition existed in February, 1908, when that purchase was made. It is asserted by Eilers and his associates, and I find it is proven by the testimony, books of the bankrupt, and documents in evidence, that while, apparently, the purchase of Graves & Co. was made to appear, by the minutes of the bankrupt and method of bookkeeping, as a purchase by the Music House of the Graves & Co. corporation, it nevertheless was purchased by and in the interests of the individual stockholders, and that the alleged purchase by the Piano House or the Music House was a paper transaction altogether. The testimony had developed the fact that the corporation was used by these stockholders as their banking house. Whatever individual income they possessed or acquired was deposited with the corporation, for which they were given credit; dividends were frequently declared from the profits made by the corporation and these stood on its books to their credit in large sums. They checked through the corporation in payment of their private individual obligations and all such payments were debited against them upon its books. In fact, the corporation was their bank; the testimony showing that none of the three carried any individual deposit in any bank.

"It further appears that the payment of the obligations due the stockholders of Graves & Co., as they came due, were immediately charged on the books of the bankrupt to the account of the several stockholders. For example, whenever one of these notes of $1,000 and accumulated interest was paid by the bankrupt with its check, the amount of such payment was uniformly charged upon its books against the accounts of the several stockholders in proportion to the amount due from each upon such payment. Memoranda of these charges are found running through what is termed B. O.'s, C. O.'s, or D. O.'s. These payments were entered through what was known on the books of the company as Graves Music Company Investment Account, so that, if the bankrupt was called upon to pay, let us say, $1,175 to the stockholders of Graves & Co. upon a note falling due for that amount, including interest, there would be made a memorandum of the transaction, to be posted in the journal, charging A. H. Eilers, S. J. McCormick, and H. J. Eilers with their proportion of that payment and the investment account would be credited therewith. Such practices continued until the said purchase price was fully paid, and hence there can be no reasonable doubt that Eilers and his associates at all times considered that they, and not the corporation, purchased the stock of Graves & Co., and that they merely used the Music House as a medium to accomplish the transaction. Furthermore, neither the stock or assets of Graves & Co. were at any time carried upon the books of the Music House as an asset, as was done in the case of subsidiary concerns and corporations, as to the ownership of which by the Music House there has never been any contention. Hence I find as a fact that, if it was permissible for the stockholders of the Music House, while the corporation was entirely solvent, and while they had upon its books credits to an extent more than

sufficient to cover the payments made by it on their behalf and charged back to their private accounts, to make this purchase for themselves in contradiction to the recorded acquisition of the same in trust for the corporation, as declared in its minutes, it was accomplished by what took place at the time.

"When the Music House came into existence, in 1910, it was called and considered by those interested as a consolidation, that is to say, Eilers and his associates had gradually spread out, since the original incorporation of the Piano House in 1902, until they had branches in various cities throughout the Pacific Coast, variously known as Seattle Eilers Music House, San Francisco Eilers Music House, Boise Eilers Music House, Bellingham Eilers Music House, and so on. These branches were feeders to the parent house in Portland. They were owned by the Music House, and entirely under its domination and control, or the control, in short, of H. J. Eilers, the managing director of the Music House. They may be appropriately termed a part of the Eilers system, and, by the ownership and control of the corporate stock, these various businesses were directed and manipulated, acquired, and disposed of, in the interest of and as a part of the Eilers fortune. In the main, the Music House purchased from wholesalers and manufacturers all the goods sold by the various subsidiaries, who in turn purchased from the Music House, made reports and remittances thereto, and cleared their paper through it. But I find no evidence in the record that indicates the Graves Company business, during these years, was thus allied to the Music House.

"As thus developed, the Music House continued to prosper and grow, up to about the beginning of the year 1913, when its first financial difficulties appeared, due to its inability, by reason of changed banking policies throughout the country, to expeditiously clear or dispose of its paper, or secure loans through or from the banks in the liberal allotments it had theretofore been privileged to do, and its business as a consequence began to show a loss, so much so that in the year 1913 it became necessary for it to pass into the hands of a creditors' committee, who advised and directed a scheme of partial liquidation. The control of the creditors' committee continued for something more than a year, during which time a large amount of indebtedness due to banks throughout the Pacific Coast was paid off, and it was hoped that reviving business conditions upon the coast would relieve its failing symptoms. Such, however, was not the case, and the evidence discloses, very clearly I think, that by the fall of 1916 the Music House became and was insolvent, and so continued down to the time it was declared bankrupt in February, 1918. It may be true that on the face of its books, bookkeeping values alone considered, a solvent condition appeared, but liquidation by disposition of the assets at a fair market value could by no means have been accomplished at any time within 18 months preceding actual bankruptcy, as administration has since demonstrated to a certainty.

"In the interval between 1913 and the fall of 1916 the Music House operated under a lease the entire premises at Broadway and Alder streets, in Portland, known as the Megley-Tichner Building. It occupied for its own purposes and conveniences commodious quarters therein. Graves & Co., during the same period, conducted its business in its location, Fourth and Morrison streets, also under a lease. For the greater portion of the time mentioned the latter corporation had been nominally operating under the direction of F. W. Graves, but Hy. Eilers was the real boss, as he was in every Eilers establishment. At this time, to be exact, October, 1916, a material change in the relationship of these two concerns, the one to the other, was accomplished, as I shall now detail at some length. The Music House was then insolvent, and engaged in a persistent effort to postpone absolute collapse. The then financial condition of the Graves Company does not distinctly appear, but I believe it to have been in little better condition, very likely in a failing condition. This is to be noted by the fact that its leasehold was a fixed liability, which it found burdensome, and of which it was at all times seeking strenuously to be rid, nor has it been claimed by any one that its business was then enjoying any marked degree of prosperity.

"Mr. F. W. Graves, the founder of this institution, a man of wide and useful experience in musical trade, and in whom undoubtedly reposed intimate

knowledge of its affairs, thus reflects his opinion of it: 'My private reason [for approving the change] is that I was afraid Graves Music Company would go busted, and I did not want to see it go bust; so I was willing to have the name changed to Eilers, and that would save our name [Graves] from the maelstrom, if it should come, and I was fearful that it might come, and so that was my reason, and as a director I voted for it.' The changed aspect, relation, and operation of these two concerns from this point on, as will now be noticed, were the result of the design and policy of Hy. Eilers as the principal stockholder and the sole managing director of both. His associates concurred merely as of course, and as a matter of form.

"In August, 1916, supplementary articles of incorporation of Graves Company were filed in the office of the Secretary of State, by which the name was changed to Oregon Eilers Music House. Between that date and October 27, 1916, Graves Company, henceforth Oregon Eilers, was moved, together with its operating force, business, and assets, whatever they were, almost in the entirety into the Music House Building at Broadway and Alder. Fourth and Morrison was not entirely abandoned at that time but what remained, and the attendant business, were insignificant. The small portion retained was so only because they had not succeeded in disposing of the leasehold. Subsequently it was practically abandoned. The reasons for and the benefits sought to be obtained by this move, as effecting generally the Eilers' business, are well explained by Hy. Eilers: 'We found in our liquidating operations that Portland had the greatest amount of assets in use so far as the Eilers Music House was concerned; then, when the chance came, as we thought, to rent the Fourth street to the Southern Pacific, as I have already explained, naturally we hit on the scheme of saddling the conduct of the retail business upon the Graves Music Company. We thought we had a first-class valuable leasehold on Broadway, and I think still we had, and we wanted to keep that; we had induced the Spaldings to take the corner for $500 a month; then we figured that if we could get Graves Music Company in there to help pay another $500 a month that we could splendidly keep that thing afloat, and at the same time concentrate the entire business into one place; Eilers Music House would get relief from the pay roll and operating expenses of carrying on the business, which would all be taken over by Graves Music Company, and in that way all the collections coming into Eilers Music House would serve to help pay off indebtedness, or to carry out the liquidating process. Now, then, in this work Eilers Music House had a lot of dormant or fixed assets. If Eilers Music House went out of business altogether, like it had done in many places, that sort of stuff would become of variable value, but by having the Graves Company certify in its corporation name, make it Oregon Eilers Music House, they could utilize all of these assets in its own current operations, and besides, of course, would fall heir to the Eilers patronage and following in the city; that was the way and that was why the $45,000 worth of various assets * * * were transferred in the manner that has already been set forth.'

"Accordingly, Mr. Eilers caused to be turned over by the Music House to Oregon Eilers, property in nature and value as follows: [Here follows itemized list of musical instruments, store equipment, etc., of the value of $45,000.] It thus appears clearly, from the nature and description of this property, that it was the intention Oregon Eilers should step into the shoes of the Music House, obtain the advantage of and value in the advertising campaigns which the Music House had conducted for many years, should adopt its advertising signs, its objects of art, ornaments, and other furnishings, and assume the character appropriate for the conduct of the entire retail trade. Needless to say, the advantages and values thus obtained by Oregon Eilers in assumption of the Eilers trade-name, its good will and advertising were as valuable, perhaps more valuable, than the very substantial quality and proportion of assets it thereby accumulated.

"This transaction never was approved by the board of directors of the Music House, so far as the minutes disclose, though it seems to have been run through its books as a sale to Oregon Eilers in consideration of the issuance to it of $45,000 of the capital stock of the latter. No other, different, or addi-

tional consideration passed. The value of this capital stock was problematical; it could not, in any event, have been very great. It does not appear ever to have been of any value to the Music House and is of no value to its trustee. Oregon Eilers at that time had an authorized capital of $200,000, of which $195,000 was issued, and no visible assets existed that anywhere near justified such a capitalization, or set the value of the stock to anything like par. This eliminated the Music House from the retail field in and about Portland as a competitor of Oregon Eilers; it reduced its appreciable assets to the extent of $45,000, to say nothing of its loss as a selling medium, gained through long years of extensive and expensive advertising, and thus entirely swept away its earning ability in that field, whatever it was. At the same time it served to increase the assets of Oregon Eilers to the extent of $45,000, in real, live property, and put it in position to be urged forward by its owners.

It is claimed by Hy. Eilers that, before he executed this change or consolidation, he advised the creditors of what was in contemplation and that much correspondence passed concerning it. Whether such creditors objected, or were in a position to object, or whether, if they had, it would have availed them, does not appear. However this may be, it does appear that on December 18, 1916, Mr. Eilers indicted a letter to his creditors (and by creditors I mean wholesalers), the retention of whose confidence meant the breath of life to his institutions, in which he assumed to inform them fully and at length of the conditions in the trade along the Pacific Coast, the progress made by the Music House toward liquidation, the attendant difficulties, the urgent necessity for further extensions, of his hopes of ultimate success, and finally of the functions of Oregon Eilers as an assistant in the enterprise. The effect of this letter, it seems to me, could not be otherwise than to cause the creditors to catalogue Oregon Eilers as a unit or constituent part of the entire Eilers organization. I quote:

"'* * * Of late we have incidentally been asked to look into the situation with some of the other houses on the Coast, and we can say without fear of contradiction that ours are in better condition, and we manage our affairs in a better manner, and have been getting along, better, than any of them; but we ought not to be expected to attempt the impossible. Where manufacturers that we paid off have extended credit to others on the Coast, they cannot find that they have gained anything. After all, our institution, what there is left of it, is the best qualified merchandising institution along the coast, and while no manufacturer is looking for output now, it cannot be that situation will continue with them very long. Eilers Music House will be needed by many a manufacturer as definitely as Eilers Music House needs assistance of these manufacturers now. So far as the Northwest is concerned, it is practically in shape as reported heretofore, although the establishment of the Oregon Eilers Music House has proved a very difficult problem, because the selling could not be gotten under way. It has been a matter of several months of very close and hard work to get the institution into shape so that it would carry the load, but this result we are confident has now been achieved. It is proposed, during the ensuing year, to have the Music House proceed without much attention from the undersigned, with Mr. F. W. Graves in charge of the Oregon Eilers Music House, assisted by Mr. McCormick and Mr. Mainer, and with A. E. Barnickel and Mr. Cornell and a corps of assistants looking after the residuary interests of the Eilers Music House. Eilers Music House proper must keep on doing business in a wholesale way here in order to show earnings, to take care of shrinkages, and also to produce enough paper to take care of collections and cancellations of the paper held as collateral by some of the banks. The work is well organized and well under way. Thus, promptly on the 1st of January, the writer will be left free to take hold of the work in California, which can and will undoubtedly be made to pay and pay handsomely, provided it is determined to go ahead; that is, provided some way is found now to retain the unsecured credit now remaining in the business for some definite time.'

"In January, 1917, Hy. Eilers went East, and while there entered into agreements with his creditors, or some of them, covering the retirement of

old obligations, and in some detail a plan whereby the Eilers House should obtain new goods for future operations. Mr. Eilers produced at the trial of this matter the contract negotiated by him with the American Piano Company, which he states is typical of the others, as follows:

"'Résumé of Agreement between Mr. Hy. Eilers, Mr. H. S. Irvine, and the American Piano Company.

"'It is understood and agreed that old indebtedness notes of the Eilers Music House shall be retired as follows: One-half (½) of the amount of notes falling due shall be in customers' lease paper bearing six per cent. (6%) interest and not running longer than thirty (30) months, and one-half (½) to be paid by renewal notes, the first of which notes shall mature on August 18, 1918, and subsequent renewal notes to mature each thirty (30) days thereafter. Such settlements shall be in the hands of the American Piano Company prior to date of maturity of old indebtedness notes. It is distinctly understood that renewal notes are not subject to re-renewal. Customers' paper shall be guaranteed and absolutely assigned under form of assignment agreeable to the American Piano Company.

"'Music Account.—All music rolls for the various Eilers Companies shall be purchased by the Eilers Music Company of San Francisco, and the American Piano Company will accept their five (5) months note in settlement of monthly purchases, such notes to bear interest at six per cent. (6%) and are to be met at maturity without renewal. The Oregon Eilers Music House, it is understood, will control operations in the north for Portland and Spokane, and purchases for these points shall be made by the Oregon Eilers Music Company of Portland, to be settled for under trustee terms or cash promptly within sixty (60) days of date of shipment. It is also understood that purchases for Boise, Idaho, shall be made by and through the Oregon Eilers Music Company. Trustee settlement shall conform to terms and conditions of the Trustee Account. In the south it is agreed that the Eilers Music Company shall operate from San Francisco, and their purchases from the American Piano Company shall be on a consignment basis, with interest after thirty (30) days, providing for goods to be paid for when sold and settlements to be made in trustee paper; Eilers Music Company of San Francisco agreeing to sign a contract with J. R. Shale, Trustee.

"'In consideration of the above agreements, the Eilers Music Company agrees toward the end of the year, in November and December, to make their settlements with the American Piano Company in as much less than sixty (60) days as possible. In general, it is further agreed that, on the return of Mr. Eilers and Mr. Irvine to San Francisco, they will promptly check up all consigned goods on hand unsold and report the same in detail, which the American Piano Company will reconsign as of January 1st with interest accumulated, starting new accounts to cover. All goods sold shall be promptly settled for by the Eilers Music Company of San Francisco or by other Eilers Houses, to which such pianos were shipped. All settlements in the future are to be made promptly as agreed; no discounts to be allowed beyond regular discount period provided, to wit, sixty (60) days.

"'Customers' paper purchased by trustee and customers' paper purchased in retiring old indebtedness notes shall not extend beyond thirty (30) months, and is to bear interest at six per cent. (6%) per annum. It is further agreed that collections to be made by Eilers Music House on customers' paper purchased in retiring old indebtedness notes shall be remitted promptly each month as due, with detailed statements, covering same. Repossessions wil be exchanged promptly for paper of like amount and like time. In purchasing paper in settlement of old indebtedness notes, accumulated interest shall not be considered in the value or face of paper. [Signed] For E. M. H. [Eilers Music House], per Hy. Eilers, Pres. [Signed] For E. M. Co. [Eilers Music Co.], Hy. E. [Hy. Eilers], Dir. American Piano Company, [Signed] by J. N. Shale, Supt.'

"After a careful reading of this contract there can be discerned therefrom no thought existing in the mind of either contracting party of any division or

separation between or among the many Eilers enterprises. If I can understand the import of plain language, the implication passed out to these creditors in the documents above quoted is direct and positive that, although 'the establishment of Oregon Eilers Music House has proved a difficult problem,' it had been accomplished and by the contract it stepped into the breach to do its share in the rescue work; indeed, was to 'control operations in the North for Portland and Spokane.' What were the operations there referred to? As a distinct and independent organization, Oregon Eilers had no interest in the general scheme thus outlined for the revivification of this business, and had no right whatever to control for its own self and profit operations which then belonged in equity and good conscience to the creditors of Eilers Music House. As an agent, instrument, adjunct, or branch of Eilers Music House, however, it had a vital interest and a right to 'control operations,' if that was deemed by the parties expedient for the interest of all.

"Everything being thus set for a fresh start, as it were, the manner of doing business now becomes interesting and important as shedding light upon the aims and intentions of those in control, as outlined by the testimony of Mr. Eilers and the contracts and engagements into which he entered with the creditors. As stated, Oregon Eilers had now been planted, root and branch, in the Eilers home garden at Broadway and Alder. Much testimony was taken touching the interdependency of all corporate operations there as reflecting the existence of several units so organized, operated, and controlled as to constitute a cohesive whole; a business dynasty, as it were, with the parts severally functioning, but all to the same purpose, and all answerable to the same supreme authority. This character of evidence places in undisputed command of each and every interest Hy. Eilers, the creator thereof and the chief votary and proprietor. His position as such was so understood by every one connected with the organization. As one witness, when asked on cross-examination by whom Oregon Eilers was organized, replied: 'A. Well, I suppose by Hy. Eilers. He organized everything up there. Q. How did Hy. Eilers organize it? A. He probably told them to organize it. That is the way he organized all his companies. It was a one man concern.'

"A clear understanding of the manner in which the Eilers business was conducted, as applied to the relation of any part to the whole, may be had from the testimony of Mr. A. E. Barnickel, who was connected with the Music House in one capacity or another from the date of its organization in 1902 to the date of the failure in 1918. From his testimony, as well as that of others, these facts are established:

"In October, 1916, there were in existence and doing business the following Eilers corporations: Eilers Music House (the parent corporation), Oregon Eilers, Eilers Talking Machine Company, all situate in the Eilers building at Broadway & Alder; Spokane Eilers, Boise Eilers, Tacoma Eilers, and Eilers Music House of California. There may have been others, but of this many we are sure. Of the above, Eilers Music House owned the capital stock of Eilers Music House of California, Boise Eilers, Tacoma Eilers, and Eilers Talking Machine Company. It owned one-quarter of the capital stock of Oregon Eilers. Oregon Eilers, in turn, owned the stock of Spokane Eilers. In turn, the Eilers family and a few associates owned the stock of Eilers Music House and also three-fourths of the stock of Oregon Eilers. Hy. Eilers owned the greater majority of all such stock, and controlled and operated the whole outfit, practically as he determined. As pertains to the houses outside the city of Portland, while technically distinct corporations, with different officers and boards of directors, 'their instructions were received from and were given to them by Mr. Eilers, both in the way of financing and also their selling policy.' Broadly speaking, the operations were carried on by a direction that 'the branch houses would purchase the amount of merchandise that they needed from the parent house, and in turn would pay for the merchandise by discounting these customers' contracts or notes or leases, and the parent house would then give them credit for 72 per cent. of the face of the contract or 72 per cent. of the balance

of the contract; then we, in turn, would send that paper East, and would get our proceeds from that paper on the same basis. * * * Eilers Music House had a large warehouse on Fifteenth and Pettigrove streets; the pianos were received from the factory and placed there, and shipped to the branch houses, and then, if a piano was sold, it was naturally delivered to the customer, and then, if repossessed, advice on that repossession was sent to Portland, and the Portland house, having rediscounted the paper, would recall it. In the meantime the piano that was repossessed at one of the branch houses would probably have been resold, and another contract was executed on it, and it was probably assigned again.'

"The parent house did all the purchasing, and resold to the branches, in order to give it the greatest possible purchasing power; the branches were frequently called upon to issue their notes for the accommodation of the parent house, who negotiated them for greater credit. In the period of distress between 1916 and 1918, and even before, it became necessary for the whole organization to indulge in the practice of kiting checks; that is, the branches would issue their checks to the parent house, which would deposit them and take credit therefor, and in turn it would issue its checks to the branches, who likewise deposited those checks to their credit, and thus banking balances would in a way be maintained. With respect to the companies and business at Broadway and Alder, the three companies there situate participated in all such transactions, and the business was handled identically in the same way; but these additional features are to be observed with respect to them:

"The Music House owned the lease upon the premises occupied by them, and Oregon Eilers and the Talking Machine Company each paid rent direct to it; each corporation kept its own books, but the same clerks and help largely, if not entirely, took care of this work. Oregon Eilers took credit for all retail sales made on the Music House floor; it had access to the Music House and Talking Machine Company's stock in trade, the same as they had, and, if it desired those goods, it took them, as they, in turn, did with its stock, and a credit was passed from the one to the other, as the case might be. It turned its paper to the Music House, which in turn discounted it; their paper was handled by the same collateral clerk. The Music House and Oregon Eilers had a common cashier, also record, file, and stock clerks; there was a common shipping department and a common shipping receipt; for the greater portion of time a common letter head was used. All three issued accommodation paper to the other branches when needed. One large electric sign emblazoned the name of 'Eilers' before the world, and the warp and woof of all advertising was founded upon that one name. In short, for anything that appeared upon the surface, there was discernible there but one business, and, mere corporate entities aside, that is all there was in fact. There were many individual corporations, it is true; but they were simply mediums for the convenient and orderly dispatch of the multifarious Eilers businesses, parts and parcels of the same general enterprise, and nothing else whatever can be made out of it.

"Nor is the mind the less invited to the conclusion that the shadow rather than the substances of corporate entity obtained, and that the purpose, intent, and design was that all these corporations should be, and were, owned, operated, and controlled by and for one common interest, when the builder of the structure himself betrays his cognizance of its significance, on the eve of bankruptcy, by such language as this: 'January 23, 1918. Mr. A. E. Barnickel, Portland, Oregon—Dear Mr. Barnickel: There is one thing certain now—if we can't have Oregon Eilers and Spokane Eilers thoroughly separated from E. M. H. (Eilers Music House), some folks may make an attempt to have them all tarred with the same stick, and this should not happen. Very truly yours, Hy. E. [Hy. Eilers.]'

"The conclusion to be reached upon the situation thus created seems to me to be obvious. As Judge Sater says (In re Rieger [D. C.] 157 Fed. 614): 'The rule is clearly stated in Bank v. Trebein Co., 59 Ohio St. 316, 52 N. E. 834, as follows: "In contemplation of law a corporation is a legal entity, an ideal per-

son, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted—convenience in the transaction of business, and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. But the fiction cannot be abused. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction; and, when this is made to appear, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no such corporation had been formed, on the ground that fraud vitiates everything into which it enters, including the most solemn acts of men * * * The good faith of the parties to such a transaction must be determined by its legal effect on the rights of others. If its legal effect works a fraud on their rights, the finding of a court that the parties acted in good faith is simply an erroneous conclusion of law from the facts."'

"Within the operation of this rule, however fair and above board the conduct of Eilers and his associates may have been in the manipulation of these corporations is of no importance. However well the state of their minds may have been disposed of at the time is of no advantage to them, if the effect of their conduct was injurious to the rights and destinies of the creditors, and if by their manner and form of doing business and the treatment of their corporations they indubitably lead their creditors to understand and believe the direct opposite of what they now maintain. The assets of an insolvent corporation do not, at least in this state, first of all, belong to the stockholders as represented by the capital stock. Those assets are a trust fund to be held for the payment of the debts of the corporation, and any disposition of them to deplete the estate is a legal fraud upon the creditors, whether so intended by the participants therein or not.

"And so it seems to me anachronistic to say that the officers and chief stockholders of the Music House, a failing and insolvent corporation, may lawfully determine to transfer to Oregon Eilers, of which they are likewise the officers and chief stockholders, a large amount of Music House property for something of no substantial value; may take from the former one of its principal branches of business and sources of income; may lead its creditors, by their contracts, representations, and engagements, to believe that whatever was done was done and performed in furtherance of the determination successfully to liquidate the debts and put upon a sound foundation the Eilers businesses; may in fact for almost two years combine, handle, and operate the several corporations for that purpose and with that design; yet are at liberty, when the immersion in failure actually comes, to segregate from the mass that portion which seems to have value, upon the ground solely that it is a distinct corporate entity in which they hold the stock. The persons involved are estopped to do this by every consideration which a court of equity may draw upon. In such cases equity looks through and beyond legal fictions, and deals with the parties and the properties irrespective of corporate forms, upon the theory that now to contemplate Oregon Eilers as an independent organization, which its promoters may take to themselves from the general assets, is a legal fraud upon the creditors. This principle has been many times applied and is abundantly established by the following cases: In re Holbrook Shoe & Leather Co. (D. C.) 165 Fed. 973; In re Clere Clothing Co. v. Union Trust Co., 224 Fed. 366, 140 C. C. A. 49; In re Rieger (D. C.) 157 Fed. 613; In re Looschen Piano Co. (D. C.) 261 Fed. 93, 44 Am. Bankr. Rep. 190; Hunter v. Baker Motor Vehicle Co. (D. C.) 225 Fed. 1006.

"The challenge to the jurisdiction of this court to dispose of the controversy in a summary proceeding is overcome by the conclusion that these assets are a part of the general estate of the Music House, and merely held by Oregon Eilers as an agent or branch thereof. The jurisdiction of this court is not ousted by the circumstance that an adverse claim has been set up. Before there is an ouster the claim must have such foundation in law and in fact as to make it appear to the court highly probable that it exists, can be maintained, and is asserted in good faith. Remington on

Bankruptcy, § 1654½ et seq.; Schweer v. Brown, 130 Fed. 328, 64 C. C. A. 574; In re Holbrook Shoe & Leather Co., supra. As to how the assets of Oregon Eilers should be disposed of I make no recommendation, further than to say it appears to be the rule in such cases that those assets are first applied in satisfaction of the claims of its individual creditors. This question, of course, is not embraced in the order of reference.

"For the reasons assigned, I recommend that an order be entered herein, directing the officers and directors of Oregon Eilers Music House to surrender the assets now in their possession to the trustee of Eilers Music House for administration according to law."

The District Court reviewed the exceptions and the testimony which had been heard before the referee, and affirmed the report of the special master, except as to a finding that as a matter of fact, when the stock of Graves & Co. was purchased, it was understood it should be done for the use and benefit of the individual stockholders of the Piano House. The court regarded this as a conclusion not warranted by the testimony. Thereafter decree was ordered confirming the report of the master, and ordering the trustee to take immediate possession of Oregon Eilers Music House and all of its assets and property as part of the bankrupt estate.

Ralph R. Duniway, of Portland, Or., for petitioner and appellant.
W. C. Bristol, of Portland, Or., for respondent and appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

PER CURIAM. [1] As the controversy involves facts as well as legal questions, petitioner is confined to a remedy by appeal under section 24a of the Bankruptcy Act (Comp. St. § 9608), and as a consequence the motion of the respondent to dismiss the petition for revision is well taken and must be sustained. In re Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725; In re Craig Lumber Co. (C. C. A.) 266 Fed. 692.

[2, 3] We have carefully considered the whole case upon the issues of fact and law, and have regarded it as properly before us by appeal, and as the opinions of the District Court and the referee, and the findings made by the referee, fully cover the substantial issues of the controversy, we do not think it necessary to restate the evidence or to enter upon further discussions of the legal principles applicable thereto. We are satisfied that the case was rightly decided and that the court properly entertained jurisdiction. Babbitt v. Dutcher, 216 U. S. 113, 30 Sup. Ct. 372, 54 L. Ed. 402, 17 Ann. Cas. 969; Clere v. Union Trust Co., 224 Fed. 366, 140 C. C. A. 49; Hunter v. Baker Motor Vehicle Co. (D. C.) 225 Fed. 1015; Linn & Lane Timber Co. v. United States, 196 Fed. 593, 116 C. C. A. 267.

Respondents' motion to dismiss the appeal is denied. The decree is affirmed.

ROSS, Circuit Judge (dissenting). These cases have been argued and submitted together; one being a petition for the revision of proceedings in bankruptcy, and the other an appeal from the decrees of the court—the complaining party, a corporation styled Oregon Eilers Music House, being uncertain regarding its true remedy. In such circumstances, that it was justified in resorting to both appeal and petition to bring up for review the rulings of which it complains is well

settled. Chavelle v. Washington Trust Co., 226 Fed. 400, 141 C. C. A. 230, and cases there cited.

The record shows that the bankrupt, a corporation called Eilers Music House, was adjudged bankrupt by the court below in the year 1918. April 30, 1919, the trustee filed and presented to the court a very voluminous petition, verified upon his "belief," by which he asked the court for an order requiring the corporation known as the Oregon Eilers Music House to turn over to him as such trustee a large amount of property that the petitioner alleged belonged to the bankrupt.

Among other things, the petition alleged that in February, 1908, a corporation known as the Eilers Piano House acquired by purchase the property and business of a corporation doing business under the name of Graves & Co., taking the capital stock thereof in the names of the officers and directors of the Eilers Piano House, but in trust for that corporation, such stock having been paid for by its funds; that in April, 1910, the bankrupt corporation was organized, and that a few days thereafter the Eilers Piano House conveyed to it all of the property in question, in consideration of which the Eilers Music House assumed and agreed to pay all the debts and liabilities of the Eilers Piano House, but that in pursuance of a scheme of the officers of those two corporations, and for the purpose of preventing the property of Graves & Co. from passing to the Eilers Music House, they caused Graves & Co. to be reorganized into another corporation known as the Oregon Eilers Music House, under which name the latter proceeded to do business, but that in fact it was the agent and representative of the bankrupt corporation and held all of the said property therefor.

An order to show cause having been made and served upon the Oregon Eilers Music House corporation why the order petitioned for should not be made, that corporation appeared and filed an answer to the petition, duly verified, in which it first objected to any jurisdiction in the court over it by virtue of any matters set forth in the petition, alleging, among other things, that it was a corporation organized and existing under the laws of Oregon, separate and distinct from the Eilers Music House corporation, and alleging that the Oregon Eilers Music House corporation is the Graves Music Company, Incorporated, and was organized and in existence years prior to the organization of the bankrupt corporation, and that the latter is a minority stockholder in the Oregon Eilers Music House corporation, and a debtor thereto. and further that the Oregon Eilers Music House corporation has no property or assets belonging to the bankrupt, and asking that the petition be dismissed.

The answer also put in issue many of the allegations contained in the petition, denying, among other things, the allegation that the Oregon Eilers Music House corporation is a constituent or subsidiary part of the business of the bankrupt corporation, or an agency thereof. The answer admitted that the petitioner, as trustee of the bankrupt corporation, has and holds 457 shares, of the par value of $45,700, of the capital stock of the Oregon Eilers Music House corporation, and as affirmative matter the answer alleged that long prior to Febru-

ary, 1908, there was a corporation of Oregon incorporated and existing under the name of Graves & Co., Incorporated, and that on the 8th of that month and year the stock of that company was bought by the Eilers Piano House corporation, organized in December, 1901, under the laws of the same state, which stock was so bought for the purpose of selling it to certain individuals, which was done, they paying therefor, and that thereafter the Eilers Piano House corporation had no interest in the stock of Graves & Co., Incorporated; that the Eilers Music House corporation was not incorporated until 1910, and never had any interest in Graves & Co., Incorporated, which corporate name was thereafter changed to Graves Music Company, until in 1916 the Eilers Music House corporation, then a solvent and going concern, sold its Portland retail business, good will, and certain personal property to the Graves Music Company for $45,000 of the stock of that company and caused the Graves Music Company to change its name to Oregon Eilers Music House, and caused the latter to move part of its business to the building at Broadway and Alder streets leased by the Eilers Music House, taking a sublease from the latter of a part of the building, which transaction was all consummated in good faith and for value in 1916, long before the bankruptcy of the Eilers Music House corporation; that the only interest the latter has in the Oregon Eilers Music House corporation is that of a minority stockholder owning $45,700 of its capital stock, and that it is a debtor to the Oregon Eilers Music House corporation to the extent of $31,764.59 for merchandise and cash delivered by the latter to the Eilers Music House corporation at its special instance and request prior to its being adjudged a bankrupt; that the two last-mentioned corporations had mutual dealings as separate and distinct corporations, and that on March 12, 1919, the Oregon Eilers Music House corporation duly presented and proved its claim in the bankruptcy proceedings against the Eilers Music House corporation for $31,764.59, and also has pending certain other claims against the bankrupt for certain property; that when the receiver of the bankrupt was appointed he was given full information regarding the organization and business of the Oregon Eilers Music House corporation and given access to its books and records. The prayer of the answer was that the petition be denied and dismissed, with costs against the petitioner.

The view taken by the court below is best shown by this excerpt from its opinion filed June 21, 1919:

"The only question, I take it, in the case, is whether the court has jurisdiction, based upon the allegations of the petition, if true, to make an order summarily requiring the defendant corporation to turn over property in its possession to the bankrupt concern or its trustee, and that depends entirely upon the question as to whether the property in fact belonged to the bankrupt at the time the petition in bankruptcy was filed. The bankruptcy court has jurisdiction in a summary proceeding to require a bankrupt or any agent or representative of the bankrupt in possession of its property, to turn it over to the trustee; but it has no jurisdiction in such a proceeding to determine a bona fide dispute as to the title to property not in the possession of the bankrupt at the time the petition is filed, and which is claimed by an adverse party.

"This case presents that issue as a question of fact, and I do not know any way it can be determined until there is some evidence in reference to the matter. If the allegations of the petition are true, then this property would seem to belong to the bankrupt and should be turned over to it. If the denials in the answer are true, and the affirmative matter set up correctly portrays the facts, then the court has no jurisdiction, but the remedy of the trustee is a plenary suit or in some other proceedings.

"So I take it this motion should be overruled, and the matter come to hearing upon the averments of the petition and the denial and affirmative matter set up in the answer. In view of the necessity of a prompt disposition of this matter, as should be the case in all bankruptcy proceedings, an order will be made referring it to the referee in bankruptcy as a special master, to examine into the question and report."

Upon the reference to the special master a large amount of evidence, oral and documentary, was introduced, resulting in voluminous findings by him, with the recommendation that an order be entered "directing the officers and directors of Oregon Eilers Music House to surrender the assets now in their possession to the trustee of Eilers Music House for administration according to law," to which numerous exceptions were taken, considered by the court below, and overruled, and the recommendations of the master embodied in the decree of the court.

I think the court was in error in undertaking to determine the issues between the contesting parties as one of the incidents of the bankruptcy proceedings before it, and am clearly of the opinion that the Oregon Eilers Music House corporation was entitled to have those issues tried and determined in an independent suit. The case of Looschen Land & Building Co. et al. v. Milson, In re Looschen Piano Case Co., decided by the Circuit Court of Appeals for the Third Circuit July 3, 1920, is, I think, directly in point. 266 Fed. 359.

In the case of Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, it was not denied that the property in question belonged to the bankrupt, but the proposition was (see pages 13, 14, 15) that as matter of law, the property having come into the hands of a third party as agent of the bankrupt before the filing of the petition in bankruptcy, the bankruptcy court had no power by summary proceedings to compel its surrender to the trustee, even though the agent asserted no adverse claim to it. The court held against the contention, and sustained the power of the bankruptcy court to take the property by summary process. It is manifest that that case is entirely different from the present one.

As in effect said in the excerpt from the opinion of the court below above quoted, undoubtedly, if the facts set up in the answer of the Oregon Eilers Music House corporation be true, the property in dispute could not be summarily taken from it and turned over to the estate of the bankrupt. And it being equally clear that no court could be justified in assuming that the facts so alleged and sworn to were not true, the necessary conclusion is, I think, that the party in possession of the property in good faith claiming to own it, as was the case here, was and is entitled to hold it until its alleged right thereto should be adversely determined in a plenary suit. Otherwise, in every such case, where the representative of the bankrupt claims the property,

the bankruptcy court has exclusive jurisdiction to decide the question of ownership in a summary way.

These views find some support in the following observations of the learned judge of the court below, in confirming the master's report and decreeing the delivery of the property to the trustee of the bankrupt:

"Upon the issues thus joined the case was referred to the special master who, after exhaustive and elaborate hearings, filed a report in which he detailed the facts as he understands them and reaches the conclusion that the assets of the Oregon Eilers were in truth and in fact a part of the assets of the bankrupt's estate, and recommends that an order be entered requiring that they be turned over to the trustee. I have read this testimony time and again; I have examined it in the light of the arguments and briefs, and I am forced to concur in the views of the special master, although I do not agree with some of his findings of fact. He finds that as a matter of fact at the time the stock of Graves & Co. was purchased it was understood it should be done for the use and benefit of the individual stockholders of the Piano House, but I am of the opinion that this was a conclusion not warranted by the testimony. The records of the corporation and the entire transaction are against any such conclusion. The contract entered into for the sale of the stock was made in the name of the Piano House and for its benefit. It was done in pursuance of resolution of the Piano House and was paid for by the Piano House.

"It is true that charges were made on the books against the account of individual stockholders for a part, if not all, the moneys used in paying the notes of the Piano House, but I am not able to determine whether that was merely a bookkeeping transaction or for some other purpose. The status of the accounts of these respective stockholders does not appear very clear from the testimony. It is in evidence, I believe, that at the time those charges were made there stood upon the books to the account of these gentlemen individually a credit sufficient to cover these charges, but whether there were any other obligations is not so clearly disclosed. In January, 1914, an audit of the books seems to have been made, at which time it was reported that there were stockholders' bills receivable outstanding amounting to $202,000. Whether any of this was outstanding at the time this transfer was made is not apparent. At the time of the bankruptcy, an expert examination of the books disclosed that there was about $400,000 due the corporation from these several stockholders, but I do not take this to be very material.

"The stock was purchased and paid for by the Piano House, it became the property of the Piano House, and the Piano House, as far as the record discloses, never has parted with that stock, and when it transferred its business and assets to the bankrupt, it naturally transferred this stock and the interest therein, together with the other assets. So that on the whole I am of the opinion that the report of the special master must be confirmed, and an order of that kind will be entered."

Surely, it seems to me, the party in possession of the property, in good faith claiming to own it, was entitled to have the omissions, doubts, and uncertainties that the court below thus found to exist in the summary proceedings, tried and determined in a plenary suit between the contesting parties.

In my opinion the appeal should be dismissed, with costs thereof against the appellant, and the decrees of the court below of June 21, 1919, and July 20, 1920, should be reversed, with costs to the petitioner, and the cause remanded to the court below for further action in accordance with the views above expressed.

LYONS v. EMPIRE FUEL CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1921.)

No. 3474.

1. **Costs ⊂=199—Not required to be taxed during term when judgment was rendered.**
   Where judgment was for the amount of the verdict "and costs," no amount being specified, in the absence of any statute or rule of court, there is no requirement that the costs shall be taxed during the term at which the judgment was rendered.

2. **Appeal and error ⊂=87(10)—Order denying for want of power allowance of costs reviewable.**
   An order, made after judgment, denying a motion of plaintiff for allowance of costs or expenses, when based on want of power in the court to make the allowance, *held* reviewable.

3. **Attachment ⊂=193—Expense of keeping attached property taxable as costs.**
   Where coal when attached was in barges owned by plaintiff and was kept in them by the marshal until sold, plaintiff was entitled to have the reasonable rental value of the barges during such time taxed as costs, or to have it allowed as an expense incurred by the marshal on distribution of the fund produced by the sale, and a motion for such allowance is timely, if made at any time before distribution.

4. **Judgment ⊂=735—Not conclusive of matter not in issue.**
   A judgment for damages for breach of a contract for carriage of coal by plaintiff, in which he used a number of barges, *held* not to include the value of the use of the barges by the marshal for storage of property attached in the action.

In Error to the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Action at law by John E. Lyons against the Empire Fuel Company. Plaintiff brings error to review orders denying two motions. Reversed.

See, also, 262 Fed. 465.

Murray Seasongood, of Cincinnati, Ohio (Robert P. Goldman, of Cincinnati, Ohio, on the brief), for plaintiff in error.

Frank E. Wood, of Cincinnati, Ohio, for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. This proceeding is an outgrowth of the main suit between the parties hereto, in which a judgment for damages in favor of plaintiff in error, for alleged breach of a contract for river carriage of coal, was affirmed by this court. 257 Fed. 890, 169 C. C. A. 40. The present writ is brought to review the action of the District Court in refusing to allow plaintiff compensation for the use of his barges, in which defendant's coal (then in the barges) was seized by the marshal by virtue of a writ of attachment, and was by that officer kept stored therein during the interval between the time of seizure of the coal (October 31, 1917) and its sale (December 4, 1917). The entire gross proceeds of the sale ($6,600) were placed by the marshal in the registry of the court; the order of sale having re-

quired that officer to hold the entire *net* proceeds of the sale "subject to the further order of this court."

Plaintiff first asked that he be allowed, as part of his costs of suit, the asserted reasonable rental value of the barges—the marshal to be required to include the same in the taxable costs. This motion was denied, for the reasons, first, that the motion came too late, because not made at the term in which the judgment for damages was entered; and, second that the barge rental sought was really damages rather than costs, and that whatever recovery plaintiff was entitled to on that account had been included in the judgment for damages rendered in the main suit. Plaintiff then moved that in distributing the proceeds of sale under the attachment, then in the registry of the court, there be first paid to plaintiff, as an expense thereof, the reasonable rental value referred to. This motion was overruled, without statement of reasons therefor.[1] Error is assigned upon each of these refusals.

[1] 1. In our opinion both plaintiff's motions were seasonably made. As to the motion to tax as costs: The judgment in the main suit not only covered the damages awarded by the jury, with interest thereon, but expressly included "costs," without designation of amount and without limitation as to time of taxation. The costs had not then, and so far as appears have never yet, been taxed. We know of no universal requirement that original taxation of costs be had during the term at which the judgment is rendered, in the absence of express order, or of statute or rule of court to that effect. There is no federal statute or general rule so requiring; plaintiff asserts, without challenge, that the court below has no such rule, and such is not the practice in this court. Plaintiff does not ask a retaxation of costs, nor a new or modified judgment regarding them, but only a determination that the storage expenses be included as costs. It is difficult to see that the proposed taxation involved a greater measure of judicial action than is frequently involved in taxation of costs, especially as related to expenses of preparing and printing record on appeal. But, in our opinion, the form of the judgment for costs amounted to a reservation of the right of later taxation.[2]

As to both motions: Plaintiff had shown no lack of diligence. The marshal's return to the writ of attachment showed the levy and the placing of the seized property in charge of a watchman. He returned, "Fees, $16.48," but without mention of expenses, which manifestly, as applied to the situation here, related only to the future. Pending the execution of the order of sale, plaintiff presented to the marshal a written claim for barge rental at the rate of $10 a day for each barge from the date of levy, stating his expectation that this rental would be paid "out of the proceeds of the sale of the coal." The court's order for the sale gave to the purchaser thereunder a "rea-

[1] Presumably this motion also was denied for supposed lack of legal right in plaintiff. The record does not indicate that any discretion was exercised or that the "reasonable rental value of the barges" was passed upon.

[2] It awarded "the amount of the verdict * * * with interest * * * and costs," without mention of amount of costs, and without blank for the insertion thereof.

sonable time, not exceeding 12 days after sale," in which to remove the coal from the barges, should the purchaser so desire, upon payment of "the reasonable rental" of "$10 for each barge per day from date of sale." The reasons for sale, as recited in the order therefor, included not only the perishable nature of the property, but "the expenses of keeping the same." This, in connection with the requirement that rental be paid by the purchaser, not unreasonably suggests a recognition of the possible existence of storage expenses.

The entry of the judgment of the District Court, which in terms awarded plaintiff costs, gave each party leave to file bill of exceptions within a certain period after the close of that term, and reserved full jurisdiction respecting the allowance of bills of exceptions. Writ of error from this court was taken out 10 days later. This court affirmed the judgment below on April 11, 1919; mandate, however, being stayed at defendant's request to allow application to the Supreme Court for writ of certiorari, and the stay was still operative when defendant filed bill in the court below to restrain collection of the judgment. This court, on January 6, 1920, reversed the order of the District Court which allowed temporary injunction, and directed the dismissal of the bill (262 Fed. 465, 472), later staying mandate pending application to the Supreme Court for writ of certiorari, which was denied by that court on March 22, 1920. 252 U. S. 582, 40 Sup. Ct. 393, 64 L. Ed. 727. On the next day plaintiff herein, in writing, reminded the marshal of the former claim made for rental, and requested payment out of the proceeds of the sale of the coal. This not having been done, the motion for recovery of such rental as costs was entered four days later. The motion was denied on June 29th; the motion for distribution, before referred to, was entered on July 26th, and was denied August 16th then next. It thus appears that there was no unreasonable delay on plaintiff's part in seeking recovery of barge rentals before the issue of the first writ of error from this court, inasmuch as the question of jurisdiction in the District Court was involved therein (257 Fed. at page 892, 169 C. C. A. 40), and lack of jurisdiction would have defeated the right to rental recovery. The same considerations applied pending the suit to restrain collection of the judgment. Plaintiff has plainly exercised a high degree of diligence in the assertion of claim to rentals.

[2] 2. The District Court having denied plaintiff's applications for compensation not in the exercise of a judicial discretion, but for a supposed lack of legal right to entertain or allow them, its action is reviewable. In re Mich. Central Railroad (C. C. A. 6) 124 Fed. 727, 59 C. C. A. 643; Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

[3] 3. While it seems to us the District Court had jurisdiction to entertain and act upon plaintiff's applications and tax the rental value as costs, yet, in any event, plaintiff was, in our opinion, clearly entitled to have the reasonable value of such use ascertained and allowed in the distribution of the proceeds of the sale, unless his right thereto is concluded by the judgment for damages. The practice in the attachment suit was governed by the Ohio statutes on that sub-

ject, which provide for selling the attached property when for the benefit of the parties "because of its perishable nature or the cost of its keeping." G. C. Ohio, § 11843. Presumably the District Court acted under this statute. The expenses of preserving, storing and selling attached property are payable out of the proceeds thereof. McLain v. Simington, 37 Ohio St. 660; Ramsay v. Overaker, 1 Disn. (Ohio) 571. The incidental fact that plaintiff himself provided the place of storage should not be enough to deny right to reasonable compensation. Had the use of plaintiff's barges not been permitted, the marshal must have made other provision of some kind at the expense of the property stored. The marshal can thus not be said to have been an involuntary party.

As already seen, the court by its order of sale expressly reserved control over the disposition of the fund, and that control has never ceased, the entire gross proceeds being still in the custody of the court for distribution. We see no reason, on either principle or authority, why the expenses of storage may not properly be allowed at any time previous to actual distribution and as incident thereto, by analogy to the practice in receivership and assignment cases. See G. C. Ohio, § 11842; Owens v. Ramsdell, 33 Ohio St. 439; Carpenter v. Dick, 41 Ohio St. 295.

[4] 4. The question remains whether plaintiff's right to recover the barge rentals in question is concluded by the judgment in his favor in the main suit. There are considerations which, standing alone, would at first blush lend color to this claim: Plaintiff alleges in his petition that by reason of the breach of his contract for coal carriage he has "sustained and is sustaining an actual daily loss of $225 per day" from the time performance of his contract was to begin, and that he will "continue to do so until and unless the defendant performs its part" of the carriage agreement, and that his equipment therefor, which includes the barges here in question, is necessary to the proper and full performance of the contract, and that he cannot use any portion thereof for any other purposes or for any other service without rendering himself unable to perform that contract. But the petition does not, in our opinion, claim the rental value of the barges as the measure of recovery; if it did, such was neither the correct nor the permitted measure, which, as properly given to the jury, consisted, first, of reasonable expenses necessary to the performance of the contract (which we construe as meaning preparation for performance), the items thereof, so far as referred to in that connection, being expenditures in the hiring of a digger and in preparing a boat or scow for such use; and, second, profits measured by the "difference between the cost of doing the work and what he [plaintiff] was to receive for doing it." The charge submitted plaintiff's theory of loss of profits as the difference between a daily gross earning estimated by plaintiff at $350, less a daily expense, similarly estimated at $125, leaving a daily net profit of $225 during the entire year the contract was to run.

As the case was submitted, the statements in the petition regarding the need of the barges and plaintiff's inability to use them otherwise than in performing the contract in question were merely incidental to

the question of damages, except so far as they may be considered as an unnecessary assertion that plaintiff could not have reduced his damages by using his outfit for other purposes—unnecessary because defendant carried the burden of proof on the subject of minimizing damages. Campfield v. Sauer (C. C. A. 6) 189 Fed. 576, 580, 111 C. C. A. 14, 38 L. R. A. (N. S.) 837. Moreover, the jury was expressly and properly instructed to reduce the recovery to which the plaintiff would otherwise be entitled by deducting therefrom whatever amount plaintiff could have earned by reasonable effort and reasonable expense not in fact resorted to. Not only was the question whether plaintiff had used due effort to minimize his damages within the issues under the evidence generally, but the specific fact of the attachment of the coal appeared in evidence, and plaintiff testified that—

"He was getting $10 per day for each barge containing the coal attached on the order of the court beginning December 4th."

Whether or not defendant then actually knew that plaintiff was claiming rentals from the marshal, the record was such as to permit defendant to claim, and the jury to find, that plaintiff should be charged with such rentals. If defendant failed to make such claim because not to its interest to do so, or for any other reason, it gains nothing thereby. In our opinion the recovery must be held, as matter of law, not to have included the rentals which accrued not only after performance by plaintiff was begun, but after actual performance had ceased on account of defendant's alleged refusal to permit further performance on plaintiff's part. The size of the verdict, which was less than one-eighth of the amount plaintiff claimed, is not out of harmony with this conclusion.

5. It follows that the court below was in error in so dismissing plaintiff's claim for compensation. Its action is accordingly reversed, and the record remanded, with directions to ascertain, under appropriate evidence, the amount of reasonable compensation which plaintiff should receive for the use of the barges, and to allow the same to him in connection with the distribution of the proceeds of the sale of the attached coal.

GEAR GRINDING MACH. CO. v. STUDEBAKER CORPORATION.

(Circuit Court of Appeals, Sixth Circuit. February 19, 1921.)

No. 3292.

1. **Patents ⇐328—1,104,589, for gear grinding machine, valid and infringed.**
The Ward & Taylor patent, No. 1,104,589, for a gear grinding machine, *held* to disclose invention not invalid for double patenting or abandonment, and infringed by one of defendant's practices.

2. **Patents ⇐328—1,155,532, for trimming mechanism for shaft grinding machines, valid and infringed.**
The Ward patent, No. 1,155,532, for trimming mechanism for grinder wheels of shaft grinding machines, *held* valid and infringed.

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

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Gear Grinding Machine Company against the Studebaker Corporation. Decree for defendant, and complainant appeals. Reversed.

D. A. Usina, of New York City, and Melville Church, of Washington, D. C. (Whittemore, Hulbert & Whittemore, of Detroit, Mich., on the brief), for appellant.

Edward Rector, of Chicago, Ill. (F. P. Fish, J. L. Stackpole, and R. A. Brannigan, all of New York City, on the brief), for appellee.

Before KNAPPEN, DENISON, and WARRINGTON, Circuit Judges.

PER CURIAM. Suit brought by appellant for infringement of the Ward & Taylor patent, No. 1,104,589, of July 21, 1914, for a "gear grinding machine," and patent to Ward, No. 1,155,532, of October 5, 1915, for "trimming mechanism for grinder wheels of shaft grinding machine." The District Court held both patents invalid, so far as sued upon. We think it advisable to dispose of this case upon a brief statement of our conclusions and, as to most of them, only summary reasons therefor, but without the elaboration which in some respects the case would otherwise justify.

[1] 1. The Ward & Taylor patent involved invention. Looking backward, their advance seems a short step and one which might have been within the limits of mere skill; but they accomplished a new result, in a fair sense of that word, and, practically speaking, created a new method of manufacturing gears of precision. The need was of long standing, but all former attempts to grind such gears had failed commercially. Those skilled in the art generally thought it could not be done along the lines upon which Ward & Taylor succeeded. Their method has received very large public acceptance and approval. Such a patent ought not to be stricken down, unless in a clearer case of noninvention than is shown here.

2. The Ward & Taylor patent in suit is not invalid because of double patenting, as compared with the older Ward & Taylor patent. This is because the two are not for the same invention. We reach this result in view of our own decisions upon this subject, the recognized Patent Office practice thereon, its careful consideration in this case by the Patent Office, and the absence of any controlling decision by the Supreme Court which we think to the contrary. On its facts, the case is unique. Neither patent is wholly generic, or wholly specific, as to the other. Each partially has both characters. The two belong, conventionally, in separate classes of machinery, though there is a confusing overlap. Theoretically, the later patent effects no extension of the monopoly term of the earlier, and it is not certain that the claims in suit have that practical result. We are not satisfied to sustain this defense.

3. Considering abandonment as a question of fact, the invention of the patent in suit was not abandoned by what occurred during the prosecution of the earlier patent, nor by the issue of that patent, nor

by the subsequent delay. Such abandonment depends upon intent, actual or imputed. The actual intent did not exist, and the circumstances do not require that the intent be by law imputed, as against the truth.

4. It is not distinctly urged, if at all, by defendant, that the disclosure made by the issue of the earlier patent, in the lack of any then existing application for the subject-matter of the later patent, amounts to a dedication or abandonment in law of all matter which was disclosed and not claimed, and which could not have been claimed, in the earlier patent. It is, to say the least, not clear enough that such dedication exists to justify us in reaching that conclusion in a case where the point has not been argued. It can be considered to better advantage in some cases where counsel earnestly rely upon it, nor do we intend to intimate any opinion thereon.

5. The defendant's first practice, consisting of the use by it of the Bath machines in their original form, was an infringement of claims 3, 7, and 8. The splined shafts which defendant ground are gears in a generic sense, and, even if not, are certainly within the expression "gears or the like." The method of grinding and the object and the results are, in a generic way, the same with the ordinary type of gear, and with these shafts. This breadth of construction of claims 3 and 8 brings them near to having the character of aggregation, as distinguished from a true combination, but we think it does not carry them across the line into invalidity.

6. So far as concerns infringement of these three claims, there is no distinction between defendant's second practice, continued until shortly before the bill was filed, and its third practice then adopted. In each case the grinding wheel was dismounted from its working position, taken to another location, there mounted and trimmed, then dismounted and returned to its grinding position, and mounted again. Defendant then and thereby ceased to use the combination "in a machine for grinding gears" of "the grinding wheel" and "the work-holding mechanism" and "trimming means co-operating with the grinding wheel." The grinder wheel was not trimmed "while thus mounted" as a part of the grinding machine. Defendant's successive mountings and operations departed from the employment of that organized unit, the existence and operation of which were advanced as the reason for persuading that the application covered a true combination, and not an aggregation of separable machines. We do not overlook the fact that the defendant has accomplished this achievement by taking two machines, which, so far as their construction goes, infringe, and by doing part of the work on one, and part of the work on another, in each case letting part of the mechanism remain inactive; but it is the patentees' necessary dependence upon the co-operation of all the elements in one machine in order to make the claims valid that also makes this achievement possible. We cannot say that the difference between the two methods of operation is so negligible as to demonstrate the absence of patentability. It follows that the Ward & Taylor claims in suit are not infringed by defendant's second and third practices.

[2] 7. The Ward shaft grinding patent is fairly to be regarded as a relatively specific improvement upon the relatively generic Ward & Taylor patent, and, so considered, it involves invention and is valid as compared with that patent. Ward devised a grinding wheel suitable for a much longer pass than upon the ordinary gear, of a form specially adapted to shape accurately the bottom rather than the sides of the indentations, and of a form never before used and difficult to maintain, and conceived a trimming device which would semiautomatically maintain or restore that peculiar form. The adaptation of the Ward & Taylor idea to the shaft grinder indicates inventive thought.

8. There was also invention in this patent when compared with the other existing art, although here again the failure of the former art to produce anything that was quite right, and the fact that splined shafts never had been simultaneously ground upon bottom and sides, and that experts thought it could not be done, and the fact of later general public acceptance, all co-operate to induce a conclusion which without them would be doubtful. As to claim 7 the severest test of invention is found by saying that Ward took the trimmer of the Brown & Sharpe worm grinding machine (which, though its use was secret, seems to be a reduction to practice antedating Ward) and substituted for the face trimming diamond reciprocating in the same plane a trimmer diamond reciprocating in an arc a form known in other trimmers. This does not necessarily negative invention in Ward's new combination. It is distinctly simpler than the worm grinder trimmer, which contemplated simultaneous action upon the three edges, and secured the necessary relative length of stroke by properly proportioning racks and pinions. Ward avoided these complications by grouping three successively operated trimming points. He made a device adapted to produce a form of wheel which was itself new. Substituting the concave arc produced new and serious difficulties, and to maintain the sharper corners was not before thought feasible. The whole claim structure was incidental to the production of a specifically new thing—a wheel for grinding splined shafts—and this thought is expressed in this claim.

It is of importance against defendant, although we do not rest upon that point, that defendant's vendor, from whom it purchased the infringing machine, engaged in a long contest in the Patent Office with Ward over priority of invention, and was beaten, and the patent office, on several appeals, sustained the patentability of what Ward had done, and did this even as against public use proceedings. If the result of the interference had been the other way, the defendant would now be enjoying the same monopoly which it is now resisting.

9. The Driggs-Seabury prior use defense is not sufficiently proved. Ward was the first to conceive, and he proceeded with fair diligence to reduce to practice and to apply for this patent. In the meantime the Driggs-Seabury use developed by it was not carried beyond the experimental state—commercially speaking—and was abandoned.

10. The infringement of all the claims of the Ward patent sued upon by the Bath machines in their original form is conceded. All these claims were in interference and they were all predicated upon the Bath

machine. Defendant's second practice infringed claim 7, which is devoted, as it rightly may be, to the trimming mechanism alone, segregated from a complete machine, and capable of more or less independent use in performing one of the steps of the complete operation. Claims 10, 13, and 14, we think, call for the combination of the working and the trimming parts in one unit, and this combination is broken when part of the work is done upon one machine and part on another. The question of infringement is substantially the same as with reference to claims 3 and 8 of the other patent.

When we come to the defendant's third practice, it is clear that for the same reason claims 10, 13, and 14 are not infringed. Then we have only claim 7 to consider. While it is true that the margin of invention between the prior art and this claim is close, it does not follow that, when once invention is found, the claim should be denied a reasonable scope of equivalency. What Ward invented was a trimming mechanism which would semiautomatically restore the peculiar predetermined shape of this wheel upon three edges—the face and two bevels—and he has not inserted in his claim terms of limitation which prevent preserving this invention. Defendant says it has not the "divergent edge trimmers," and also says that it is using only the old Brown & Sharpe radial grinder without substantial change. If this latter allegation were accurate, it would, of course, be a good answer; but it is not. The Brown & Sharpe device was capable of doing the work which Ward's device would do, provided it was handled with sufficient care by a sufficiently skilled workman; but it called constantly for his trained eye and hand. The Ward device was so set, and for the time being adjusted, that its operation was practically automatic, and that it could be manipulated by an ordinary workman, and would not go wrong unless he interfered with the adjustment.

In order to accomplish, in a substantial degree, this result, defendant has added to the Brown & Sharpe device two stops for adjustment to and from the grinder wheel, whereby, when one is employed, the predetermined arc radius for the concave face trimmer is given, and, when the other is employed, a proper distance for the diagonal edge trimming is secured. It has also added two stops, one of which insures the proper angle for trimming one edge, and the other of which, when used, makes certain a proper corresponding angle for trimming the other edge. It has also removed the opposing set screws from the secondary slide, which were intended to prevent free reciprocation of that slide and to permit only accurate adjustment and firm setting, and thereby it has enabled the secondary slide to be used for trimming a plane surface, when the Brown & Sharpe device would trim nothing but an arc. These modifications make the trimmer semiautomatic, and demonstrate that the defendant has been instructed by Ward in its scheme of changes of the old device, and also tend strongly to support the conclusion that Ward made an invention in the subject-matter of this claim.

It is true that the claim calls for a concave face trimmer and "divergent edge trimmers," and its draftsman doubtless had in mind that there would be three trimmers in existence at the same time, while the

defendant uses the same trimmer first for the face, then for one edge, then for the other; but there is no essential difference in operation. Ward used first the concave trimmer, and then one edge trimmer and then the other. Only one was in operation at a given time. It is a small step from this to a device which has only one trimmer, but has slides and stops so adjusted and fixed that it will go first to one position, and then to the second, and then to the third, without intelligent guiding. The circumstances do not require a literalness of construction which would make defendant's device a successful avoidance of claim 7.

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

ATKINS v. GARRETT.

(Circuit Court of Appeals, Fifth Circuit. February 15, 1921.)

No. 3559.

1. **Corporations ⟸121(1)—Limitation of actions ⟸68—Accrual of right of action for conversion of stock stated.**
   A seller of corporate stock, to be delivered at a later time on payment therefor, who took the purchaser's note, to which a certificate for the number of shares bought was attached as collateral, is not chargeable with conversion because he sells that particular stock, his obligation being fulfilled by the delivery of the requisite number of shares of the same stock; but his refusal to make delivery on tender of payment of the note constitutes a conversion, and from that time prescription against an action for conversion begins to run.

2. **Trover and conversion ⟸46—Measure of recovery for seller's conversion of stock stated.**
   In an action for conversion of stock by a seller, brought after his refusal to make delivery on tender of the agreed price, the measure of recovery is the value of the stock at the time of the conversion, and defendant cannot then avoid liability by a tender of the stock, which in the meantime has declined in value.

3. **Damages ⟸40(1)—Interest statute applicable to pending suits.**
   Acts La. 1916, No. 206, providing for allowance of interest from the date of judicial demand, *held* to apply to an action for damages pending at the time of its passage, and to authorize allowance of interest from date of suit.

In Error to the District Court of the United States for the Western District of Louisiana; George Whitfield Jack, Judge.

Action at law by James W. Atkins against L. C. Garrett. Judgment for defendant, and plaintiff brings error. Affirmed.

See, also, 261 Fed. 587.

J. D. Wilkinson, of Shreveport, La. (Cook & Cook and Wilkinson, Lewis & Wilkinson, all of Shreveport, La., on the brief), for plaintiff in error.

G. W. Hardy and Edward Barnett, both of Shreveport, La., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. June 25, 1915, James W. Atkins, plaintiff in error, sold to L. C. Garrett, the decedent of defendant in error, 50 shares of the capital stock of the Lenzburg-Crichton Gas & Oil Company, accepted in payment Garrett's note for $5,000, payable 60 days thereafter, and attached to the note, as security, a certificate for the stock. Garrett failed to pay the note at maturity, and on September 8, 1915, Atkins brought suit on it in the state court, and prayed for a sale of the stock which he held as collateral. Garrett, being a citizen of Alabama, removed the case to the United States District Court for the Western District of Louisiana, whereupon Atkins dismissed it, and on October 30, 1915, filed the present suit, which is one to dissolve the contract of sale, under article 2561, Civil Code of Louisiana, and tendered Garrett's note back to him. February 1, 1916, Garrett tendered payment of the note, together with interest and costs of suit, which Atkins declined to accept. October 20, 1916, Garrett filed an answer in reconvention, claiming damages for the conversion of the stock, and praying in the alternative for the delivery to him of the specific 50 shares represented by the certificate, and also for the dividends which had been declared and paid on the stock, less the amount of the note, with interest.

A few days after the note was given, and before it was due, the Lenzburg-Crichton Gas & Oil Company struck oil, and on August 10, 1915, declared a dividend of 8 per cent. on the capital stock. October 23, 1915, the company struck oil again, and, prior to Garrett's demand in reconvention, paid dividends which in the aggregate amounted to 107½ per cent. of its capital stock. Of these dividends, one of 25 per cent., which was the second one, was declared on January 15, 1916, and another of 25 per cent. was declared on February 15, 1916. The stock had a market value of $200 per share in October, 1915, but there was no direct testimony as to its market value on February 1, 1916, the date of Garrett's tender of payment. Atkins sold the stock represented by the certificate on September 11, 1915, but held more than 50 shares of capital stock continuously from the time the note was given until May, 1917, when he sold out his entire holdings at $18 per share.

July 20, 1918, the District Court held that Garrett's tender of payment came too late, and entered judgment in favor of Atkins, revoking and setting aside the sale of stock, and rejecting Garrett's demand in reconvention. This judgment was reversed by this court in Garrett v. Atkins, 261 Fed. 587. Thereafter Atkins pleaded the prescription of one year in bar to Garrett's demand in reconvention, and tendered to Garrett 50 shares of the capital stock of the oil company, claimed to be worth par, and the dividends and interest thereon, less the amount of the note and interest, which tender the District Court refused to require Garrett to accept. By written stipulation, the trial was held by the court without a jury, and resulted in a judgment for Garrett in the sum of $10,400, with interest thereon from October 20, 1916, subject to a credit of $5,000, with interest thereon from August 25, 1915, to February 1, 1916. It is apparent that the trial court fixed the value of the stock at $200 per share, and added to that the dividend of

August 10, 1915, which was declared before the note became due, allowed Garrett interest from the date of his demand in reconvention, and, on the other hand, allowed Atkins interest from the date the note became due to the date payment was tendered.

The assignments of error assail the judgment, because it is based upon the value of the stock, and also assert that the amounts awarded, even upon that basis, are incorrect.

[1] In Louisiana, actions ex delicto are barred by the prescription of one year, while actions ex contractu are not barred until the expiration of ten years. It is not claimed that the conversion of the stock actually occurred more than a year prior to the filing of Garrett's demand in reconvention, but only that it was so alleged therein. On the contrary, plaintiff in error takes the position that there was no conversion until he sold out his holdings of stock in May, 1917.

Plaintiff in error was not bound to deliver the particular certificate he retained as security, and which he sold on September 11, 1915; but his obligation would have been fulfilled by the delivery, upon tender of the purchase price, of any similar 50 shares of capital stock. 21 R. C. L. 682. But when plaintiff in error failed and refused to deliver 50 shares of the capital stock upon tender of the purchase price on February 1, 1916, he then became liable for a wrongful conversion. 26 R. C. L. 1110, 1112. It therefore becomes immaterial whether Garrett's demand was barred in one year or in ten years, because less than a year had elapsed since it accrued.

[2] There is no merit in the contention that Garrett was not entitled to recover the value of the stock as damages, because he prayed, in the alternative only, for the delivery of the specific shares he contracted to buy. It was only in the event the court denied the primary demand that a less measure of relief was sought.

It follows that the court did not err in entering a judgment for the value of the stock. It is contended that the value of the stock should have been fixed as of May, 1917, because until that time plaintiff in error had on hand more than the number of shares he agreed to sell to Garrett, and also that, at least, the court should have required Garrett to accept the stock tendered at the trial.

These contentions are manifestly untenable, because they lose sight of the tender of the purchase price theretofore made. The positions assumed by plaintiff in error have shifted with the fortunes of the Lenzburg-Crichton Gas & Oil Company. Almost immediately after the sale to Garrett, the stock rose in value above the contract price. Plaintiff in error first sought to apply the stock to the payment of his note, and, when it appeared probable that he would be thwarted in that effort, he abandoned it, and then, having already sold the stock again and to a third party, he sought to have the contract of sale to Garrett revoked. For awhile the company was very prosperous and paid out large dividends, but the value of the stock continued to be greater than the purchase price agreed upon and the dividends declared and paid combined. During that period, plaintiff in error quite naturally preferred the stock itself to the purchase price and the dividends.

Finally, however, during the progress of this litigation, the stock of the company declined, until its value was less than either contract price or dividends. Plaintiff in error now insists, in the event he cannot defeat Garrett's claim outright, upon being credited with the purchase price and dividends, and charged only with the depreciated value of the stock.

That the value of the stock was correctly fixed as of the date of its conversion is abundantly supported by the Louisiana decisions. Arrowsmith v. Gordon, 3 La. Ann. 110; Marchesseau v. Chaffee, 4 La. Ann. 24; Vance v. Tourne, 13 La. 225; Schlater v. Gay, 28 La. Ann. 340; Stoner v. T. & P. Ry. Co., 45 La. Ann. 115, 11 South. 875; Kory v. Layman, 108 La. 247, 32 South. 441.

It is argued that there was no evidence as to the market value of the stock on February 1, 1916, when it was converted. The case having been tried before the court without a jury, by stipulation, the findings will not be disturbed, if supported by the evidence. It is admitted that in the preceding October the stock had the value fixed by the court. From January 15, immediately preceding, to February 15, immediately following, the date of conversion, a dividend of 25 per cent. the largest for a like period of time, was declared and paid. At this particular time the company was in its most prosperous condition and showed its greatest earning power.

[3] Neither does there appear to be error, as contended, in allowing Garrett interest from October 20, 1916, the date of his answer in reconvention, instead of from the date of judgment. Although this suit was brought before the passage of Act 206 of the 1916 Acts of the Legislature of Louisiana, which for the first time permitted interest from the date of judicial demand, yet the judgment was entered after the act became effective. In a case construing this act under similar circumstances, the Supreme Court of Louisiana allowed interest from judicial demand. Bradley v. Shreveport Gas, Electric Light & Power Co., 142 La. 58, 76 South. 230.

There is no merit in the contention that interest should have been allowed on the note from its due date to the date of judgment, in view of the tender made.

The judgment is affirmed.

SHEDD et al. v. CALUMET CONST. CO.*

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

No. 2779.

1. Attachment ⟸7—Action for tort is "action for recovery of money."

Under Burns' Ann. St. Ind. 1914, § 947, authorizing attachments in "actions for the recovery of money," an attachment is authorized in tort actions for damages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Action for Recovery of Money.]

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 450, 65 L. Ed. —.

2. **Damages ⟸42—Cost of redredging and additional cost of more expensive method of doing work held proximate result of interruption of work.**
Where defendants wrongfully interrupted plaintiff's dredging operations, and the trenches dredged filled up to some extent, and the delay also carried the work later into the fall season, and necessitated the use of a more expensive method of doing the work, the cost of clearing out or redredging the excavations, and of the more expensive mode of construction, were damages proximately resulting from the tortious act.

3. **Judgment ⟸627—Conclusive in favor of contractor employed by party whose rights were adjudicated.**
A judgment in favor of the M. Co. against defendants, adjudging that the M. Co., under a grant from defendants, had a lawful right to lay pipes at a particular point in the bed of a lake, was conclusive, in favor of a contractor employed by the M. Co. to do the work, that defendants' interference with the work was wrongful.

4. **Torts ⟸27—Evidence as to negotiations for settlement and abandonment thereof held immaterial.**
Where defendants wrongfully interrupted plaintiffs' dredging operations, and, after resumption of the dredging, again interfered with the work, evidence, in an action for damages, that the work was resumed in pursuance of negotiations for a settlement with the party employing plaintiff to do the work, and that the second interference was because of the abandonment of such negotiations, was properly excluded as immaterial.

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

Action by the Calumet Construction Company against Edward A. Shedd and another. Judgment for plaintiff, and defendants bring error. Affirmed.

Fred Barnett, of Hammond, Ind., for plaintiffs in error.

F. C. Crumpacker, of Hammond, Ind., for defendant in error.

Before BAKER, ALSCHULER, and PAGE, Circuit Judges.

ALSCHULER, Circuit Judge. [1] A tort action in attachment was brought in the Indiana state court by defendant in error company against the Shedds, plaintiffs in error, and removed to the federal court. The service was by publication. One of the alleged errors is in the overruling of the Shedds' motion to quash the attachment and service, upon the ground that the statutes of Indiana do not authorize attachment in actions in tort. The statute authorizes attachment upon the grounds therein stated, "where the action is for the recovery of money." Section 947, Burns' R. S. Ind. 1914. Notwithstanding the statute has been long in force, we are unable to find that this question of its construction has been passed upon by any Indiana court of review, and counsel on both sides say it has not. The right of attachment exists by statute, and concededly, where the statute does not clearly authorize attachment in actions ex delicto, the right does not exist. In some of the states, where, as in Indiana, the right of attachment is given in actions "for the recovery of money," it has been held applicable to actions in tort as well as in contract. Davidson v. Owens, 5 Minn. 50 (Gil. 50); Thompson v. Stringfellow, 119 Ala. 317, 24 South. 849; Cain v. Perfect, 89 Kan. 361, 131 Pac. 573; Collins v.

Stanley, 15 Wyo. 282, 88 Pac. 620, 123 Am. St. Rep. 1022; Kidd v. Seifert, 11 Okl. 32, 65 Pac. 931; Lagerwahl v. White, 154 Ky. 162, 156 S. W. 1079; Carolina Agency Co. v. Garlington, 85 S. C. 114, 67 S. E. 225; Sturdevant v. Tuttle, 22 Ohio St. 111.

The statutory expression, "for the recovery of money," is surely broad enough to include such actions, which manifestly have for their sole purpose the recovery of money. In the absence of any limitation by construction of the Indiana courts, we do not, under the circumstances, feel warranted in circumscribing it as contended for, and we therefore hold that the alleged error predicated on the denial of the motion to quash the attachment is not well grounded.

[2] It is insisted that the damages alleged and recovered for do not appear to be the proximate result of the tortious act of plaintiffs in error. It seems that the Shedds were owners of a large tract of land in Indiana fronting on Lake Michigan, including in the tract what is known as the Wolf river outlet into the lake. They had sold about 18 acres of it to the Western Glucose Company, on which the latter constructed a manufacturing plant. In the conveyance to the Glucose Company they were granted by the Shedds an easement over about half a mile of their intervening land between the lake and the Glucose tract, for laying thereon two pipes, one for a lake water intake, and the other for a sewer outlet to the lake. The line for the pipes was not fixed, but the direction was pointed out, and the pipes were therefore laid to within a short distance of the lake shore. The Glucose Company transferred its property and easement to the American Maize Products Company, which last concern entered into contract with defendant in error, whereby the latter agreed to extend the pipes from the termini to the lake and under its bed, the water pipe 2,000 feet and the sewer pipe 200 feet, at a stipulated price per lineal foot. The pipes were to be laid in trenches connecting with the manholes near the shore line, to which the pipes had theretofore been laid and in the same general direction. For the purpose of carrying out its contract the Construction Company entered into a contract for the use of a dipper dredge at a cost of $21.50 per hour. By means of the dredge trenches were excavated in the bed of the lake, and were almost completed for laying the pipes therein, when the Shedds appeared, ordered the work stopped, and under threats of prosecution prevented the work from going on, and placed a custodian in charge to prevent further work. It was the contention of the Shedds that their grantees and successors had no right to extend the pipes into the lake at that place, which was just east of a long pier the Shedds had constructed as the westerly side of an entrance into a proposed Wolf Lake harbor, but that the pipes should have been laid west of such pier, and outside of such Wolf river outlet or harbor entrance.

The work was suspended for a few days, during which there was considerable filling up of the trenches that had been made, and after some negotiation it was again resumed, and continued for quite a number of days, whereupon the Shedds again interfered and stopped the work, which was thus again interrupted for a number of days, during which there were storms which greatly damaged the trenches. There-

upon the Maize Company obtained in the state court a temporary injunctive order against the Shedds, restraining them from further interfering with the work, and under the protection of such injunction the work was completed. But it appears that during the interruption, not only was there considerable filling up of the excavation which had been made by the dipper dredge, but the delays incident to the interruption threw the work so much later into the fall season that some of the work could not then well be carried on by the dipper dredge method, but required the construction of cofferdams, thus greatly increasing the cost. It was this additional cost of clearing out or redredging the excavations already made, and of the more expensive mode of construction alleged to have been occasioned by the delay, that constitutes the damage for which the action was brought, and is the basis of the verdict and judgment.

We are of opinion that work of this nature is such that it is not comparable to and does not fall within that class of cases where, notwithstanding the wrongful act, the wrongdoer cannot be held for damage resulting from a wholly independent intervening cause. We think it is fairly apparent that in undertaking such work as this there is inherently considerable risk and chance arising from conditions which are more or less problematic. One who undertakes to do such work of necessity speculates more or less upon the weather, for it seems that a channel of this kind, while remaining open, is easily subject to being damaged through filling by the agitation of the water through rough weather, and under such circumstances, where there is an unlawful interference with the work, the one causing it must contemplate that such damage may easily ensue during the delay. It is true that damaging weather might have been experienced, had there been no interruption, and such have been at the constructor's risk; but it is manifest that the longer the trench lies open the greater the liability to injury from filling up, and where the delay is through the wrongful act of another, the added risk, reasonably to be anticipated, be it from the weather or other causes, is upon the wrongdoer, and hence also the ensuing loss.

[3] It is contended that as to the Construction Company the record affords no evidence whatever that the Shedds wrongly interfered with their operations. It appears that after the temporary injunction was granted there was a full hearing in the state court of the issues in that cause, and it was there definitely found and decided that the plaintiff therein, the Maize Company, had, under the grant from the Shedds, the lawful right to lay these pipes in the place they were, and were being laid, at the time of the interference by the Shedds. This adjudication the District Court regarded as settling the question of the right of the Construction Company to do the work as it was being done when interfered with, upon the assumption that the Construction Company, though not party to that suit, was in privity with the Maize Company, under the contract with the latter, and in this we agree with the District Court. Nor can it be said, as is claimed, that the adjudication of the state court was effective only from the time it was made, which was long after the laying of the pipes had been completed.

The adjudication created no new rights, but only determined the rights of the parties under the grant from the Shedds, to the effect that the right existed all the time to lay the pipes along the lines on which the Construction Company was laying them when interfered with by the Shedds.

[4] It is insisted that there was serious error in rejecting the proffered testimony of witness Mecartney to the effect that, when the work was resumed after the first interference, it was in pursuance of negotiations and of a pending proposition for settlement, which, because of abandonment by the Maize Company, was never carried out, and that the second interference was because of such abandonment by the Maize Company. In our view the evidence was not material. The damages were predicated upon the consequence of the unlawful interference, and if work was resumed under agreement, pending negotiations for settlement, it would seem that this resumption of the work probably prevented the incurring of still larger damages than those represented by the judgment, and whether the second interference followed the failure of the Maize Company for any cause to make a settlement, it did not in our judgment affect the question of right of recovery of damages which the unlawful interference by the Shedds did actually cause. Counsel are quite right in saying that, if the Construction Company was in privity with the Maize Company, it would be bound by the acts of the Maize Company with reference to these negotiations. But the rejected evidence would in our judgment have been likewise inadmissible against the Maize Company, were it, instead of its contractual privy, seeking the recovery.

The judgment is affirmed.

UNITED STATES FIDELITY & GUARANTY CO. v. BLUM.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921. Rehearing Denied March 9, 1921.)

No. 3503.

1. **Pleading ⇐34(6)—Complaint on accident policy held sufficient after verdict.**
   A complaint to recover the amount of an accident insurance policy which alleged that insured died in a certain city, and that his death was effected through external, violent, and accidental means, to which complaint no demurrer was filed, is sufficient after verdict for plaintiff when all intendments operate in its support.

2. **Insurance ⇐646(7)—Burden to establish accidental means requires exclusion of suicide.**
   In an action on an accident insurance policy, the burden on plaintiff to make out a prima facie case by showing death by external, violent, and accidental means requires plaintiff to show that death did not result from suicide, which is the antithesis of death by accidental means.

3. **Insurance ⇐646(7)—There is disputable presumption against suicide.**
   In an action on an accident insurance policy, there is a presumption that death was not suicidal, which is disputable, but can be overcome only by proof tending to establish suicide sufficient for the jury's consideration.

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4. Insurance ⇐646(6)—There is presumption cause of death was natural not accidental.
In an action on an accident insurance policy, where there is no evidence either way, there is no presumption that death occurred through accidental means, but the presumption is rather that it was the result of natural causes.

5. Insurance ⇐665(5)—Accident can be proved by circumstantial evidence.
In an action on an accident insurance policy, plaintiff must introduce evidence that an accident causing the death occurred, but this does not require an eyewitness to the accident, or direct proof thereof, but that fact, like any other fact, may be established by circumstantial evidence.

6. Insurance ⇐665(5)—Circumstances held not to preclude hypothesis of accident as cause of fall.
Evidence that the window from which insured fell to his death was wide open, with a chair near by, that it was large enough for him easily to pass through it, and that he was subject to dizzy or fainting spells at which time he sought fresh air, shows circumstances which do not negative a hypothesis of accidental means as the cause thereof.

7. Insurance ⇐646(7)—Circumstances showing suicide rebut presumption of accident.
When a man is found dead under circumstances showing clearly that he killed himself, there can be no presumption that his death was accidental.

8. Insurance ⇐455—"Accidental death" and "death through accidental means" distinguished.
There is a distinction between accidental death which may be an unexpected or unintentional result of a voluntary act, and death from accidental means, which must result from some unforeseen or unintended act.

9. Insurance ⇐668(12)—Evidence held to carry to jury issue of suicide.
In action on an accident insurance policy for the death of insured, caused by a fall from a window, evidence *held* sufficient in connection with the presumption against suicide to take to the jury the issue whether he committed suicide.

10. Insurance ⇐668(11)—Evidence held not to show conclusively death was due to natural causes.
In action on an accident insurance policy, where insured was killed by a fall from a window, evidence that insured was subject to dizzy and fainting spells, at which times he sought the open air, *held* not to require the direction of a verdict for the insurance company, because showing that his death was due to natural causes, and not accident.

11. Insurance ⇐646(6)—Death from external and violent means presumed to be accidental.
Where insured was found dead after a fall from a window which was sufficient to produce death, and the condition of his body was some indication that death resulted therefrom, and therefore was caused by violent and external means, there is a presumption that it was accidental.

12. Insurance ⇐466—Sickness causing accident is not concurring cause of death.
A policy insuring against death effected directly and independently of all other causes by accidental means imposes liability on insurer where death resulted from a fall from a window caused by fainting or dizzy spells unless death would have resulted therefrom without the fall, since in such case the fall is the proximate cause of the death and was accidental.

13. Insurance ⇐668(11)—Evidence held sufficient to take to the jury the question whether death was accidental.
In an action on an accident insurance policy, evidence that insured fell from a window under circumstances not excluding the hypothesis of ac-

cident *held* sufficient to take to the jury the question whether the death was occasioned solely by accidental means.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Estelle L. Blum against the United States Fidelity & Guaranty Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Coy Burnett, of Portland, Or., and Jos. A. McCullough, of Baltimore, Md., for plaintiff in error.

Preston, Thorgrimson & Turner and Lyons & Orton, all of Seattle, Wash., for defendant in error.

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

WOLVERTON, District Judge. This is an action by the defendant in error to recover damages for the death of her husband, Samuel Blum, under a policy insuring against accident issued by the plaintiff in error. The policy covers "loss or disability resulting from bodily injuries effected directly and independently of all other cause through external, violent and accidental means (excluding suicide, sane or insane, or any attempt thereat)."

At the close of plaintiff's case a motion for nonsuit on the part of the defendant was denied. At the close of the entire evidence the defendant demurred ore tenus to the sufficiency of the evidence to carry the case to the jury and in the alternative moved the court for a directed verdict in its favor. Both were denied by the court. The verdict was for plaintiff.

The assignments of error are three:

First, that the court erred in denying defendant's motion for nonsuit.

Second, in overruling the demurrer to the evidence.

Third, in refusing to instruct a verdict for the defendant.

All for reasons: (1) That the complaint fails to state a cause of action; (2) that there was a total failure of proof of death from accidental causes: (3) that there was a total failure of proof of any death effected directly and independently of all other causes through external, violent, and accidental means; and (4) that there was a total failure of proof of death caused in any manner covered by the provisions of the policy of insurance.

There was no demurrer to the complaint; nor were there any exceptions reserved to any instructions given by the court or any refusal of the court to give requested instructions.

The complaint simply alleges, so far as material here:

That on January 12, 1917, "the said Samuel Blum died in the city of Seattle, county of King, state of Washington. His death was effected through external, violent, and accidental means."

The answer denies the latter clause, and for an affirmative defense alleges:

"That the policy relied upon by the plaintiff expressly excludes from the risks assured death effected through suicide, sane or insane, or any attempt thereat, and the death of the said Blum was effected through suicide or an attempt thereat, and not otherwise."

Thus are presented the particular issues upon which the case was tried and went to the jury.

[1] The suggested insufficiency of the complaint is not insisted upon in the briefs; nor was it at the argument. Even if it had been, the complaint must be held to be sufficient after verdict, when all intendments operate in its support.

Nor is the demurrer to the evidence insisted upon. There is therefore but one assignment of error that calls for notice, namely, the one relating to the refusal of the court to direct a verdict for the defendant. Thus is presented but the one question whether the testimony adduced at the trial was sufficient to warrant the court in sending the case to the jury. This requires a statement of the salient facts as disclosed by the evidence.

Blum was past 40, had been in business for a number of years, and was prosperous, having acquired an estate rated at $125,000. With this he was satisfied, as it was remunerative, and he was not eager to accumulate greater wealth. He was happy and contented in his domestic relations, and was esteemed and trusted in his social and business relations. On January 1, 1919, certain of his property in Alaska was burned, news of which came to him on the 2d. This greatly depressed and worried him at the time, and he complained of loss of sleep, and that he could not get the Alaska fire out of his mind. His condition of mind improved somewhat, however, prior to January 12th, the date of his death.

As bearing upon this, and as respects his disappearance from his office when last seen therein, Laura Lawson testified, among other things, that she was a public stenographer and had a desk in Blum's office, but in a room separate from his, with a door communicating, and that she did his stenographic work; that Blum was in the office on the morning of the 12th when the witness came in about half past 9; that he asked her, as was his habit, how he looked, to which she replied, "You look like you had a good night's sleep." He smiled, but remarked, "Well, I slept sound, but I was full of dope," or something of that order. He was worrying, and his head ached all the time from worry and nervousness. He was told not to worry, that there was nothing to worry about, and he said, "That is all they tell me," and wished he could see it that way. She further testified that the worry started with the fire at Valdez; that he was like anybody else when there is something on his mind, and walked forth and back, and would talk about it. He received telegrams from time to time about the fire, and when he found one thing to be all right, then he would wonder if something else was all right, and kept saying if he had been up there he would feel differently, but because he was down here naturally he imagined a whole lot was really worse than it was. He manifested his worry by walking forth and back, and putting his hand up to his head, and would say "so much all during the day" that he

could not collect his thoughts. Witness never heard him say that before the 1st of January. She saw no outward indication of any change relative to his being worried between the 2d and 12th of January, and he complained that he could not sleep. Mrs. Blum was with him in the office in the morning of the 12th, and they went out for an automobile ride. As he left he said he was going up to the house to take a nap, and would be back some time during the afternoon. He came back around half past 2 or 3 o'clock, walked into his office and came out again, and walked forth and back in the two rooms, and, probably half an hour later, said he was going to get shaved, remarking, "We have to keep clean anyhow, no matter what happens." He was gone an hour, or a little longer, and came into the office again, and walked forth and back. Witness was busy at the time he went out again. As he passed her desk, he said he was going for a little walk, and would be back in a few minutes. He went out into the hall; then came back into the office. He then started pacing forth and back in both rooms, and did that for probably 10 or 15 minutes, and then went into his own office, half closing the door as he went. Very shortly, in a minute or a minute and a half, witness missed him from his office, and on going in found he had disappeared. Then it was ascertained that he had fallen from the window in the room to the sidewalk below. Witness testified that Blum showed no indication of faintness on the day that he died, but it was developed on cross-examination that he had a fainting spell in the office several days previous thereto, but was revived shortly by a stimulant. This testimony has corroboration.

The barber, Mr. Hurd, relates that Blum came into his place about 4 o'clock, took off his coat and hat, got a paper from the porter, and walked back and forth across the floor until a chair was ready for him, which was about 20 minutes. While shaving him, witness asked if he had been sick, to which he replied "No," but said that he had not slept for two weeks. When asked what was the matter, he said, "That fire—I can't get it off my mind," and further, "I just feel awful; I never felt this way in my life before; I feel terrible."

Mrs. Estelle L. Blum, wife of deceased, testified that their married life had always been happy, and that Blum was kindly towards every one; that he had a habit, when engaged in thinking or discussing business or otherwise, of pacing the floor, which he did at home as well as in the office. The news of the fire at Valdez came on January 2d, while they were at breakfast, and Blum went down at once to ascertain if there were further news. Witness could not recall any special time of his being dizzy, but remembered that he did complain of dizziness; that he would often want the fresh air, and when he did he would throw up the window or open the front door, and at times would go outside. He showed a worried condition during the period following the news of the fire. The news came very slowly. He worried about the insurance, or rather as to the responsibility of the companies in which he was insured. When assured of their responsibility, he was very much relieved. Then he was in doubt whether he would be allowed to continue in his mercantile business while

awaiting fire adjustment, but was assured later that he would, and that worry was disposed of. Again, he worried over the uncertainty of the safety of his papers in the vault, but was relieved when he had news that they were all right. After that he still continued to be perturbed about the health of his cousin Meyer Blum, who was associated with him in business in Alaska, and that worried him somewhat up to the time of his death. The conditions in Valdez were a constant topic of their conversation. While the other things had cleared up, he continued to worry somewhat about Mr. Meyer Blum's health. He always worried about his cousin's health, both before and after the fire. After the fire he was very, very wakeful, but each night he obtained more sleep. He never had been a good sleeper, said the witness; "he had never slept a night through, all our married life." After the fire he slept better each night than the preceding, and each day was an improvement over the preceding day. About 8:30 on the morning of the 12th witness and her husband left the house in an automobile, and drove down to the boat landing, to see Mr. Ford, the insurance adjuster, off for Valdez. Blum was in very good spirits, and appeared well physically, and "he seemed his natural self." His conversation at the dock with Ford was jovial, and he interested himself with the purser of the boat for Ford's convenience on the voyage. From the dock they went to Blum's office, where they remained for perhaps half an hour. In the meanwhile Blum was walking up and down, and the conversation was general. From the office the two went for a ride, and eventually drove home. Blum complained that his feet were cold, and that he was sleepy, and he lay down on the bed. Witness made him comfortable, and he fell asleep. He slept about an hour and a half, and they had lunch together. He lit a cigar, and remarked, "I feel fine; I feel better than I have for days," and departed for his office. He was averse to taking medicine to induce sleep.

Blum is described as a man 5 feet 7 inches in height and weighing 190 pounds. The stool or window seat of the window from which he escaped was 39¼ inches above the floor. The window seat is 12⅛ inches in width. From this there is a drop of 1¼ inches, with the wood sill sloping an inch; then another drop of 2¼ inches to the surface of a stone sill 17¼ inches in width, which slopes one inch. There is then a further drop of 4½ inches to a stone belt course, which runs around the building and projects an additional 9 inches, with a half-inch slope; the entire width of the coping, including the window sill, being 43⅝ inches, and the drop on the whole 10 inches. The window opening, when the lower sash is raised to its limit, as it was found after Blum disappeared, comprises a space of 28½ inches in width by 33½ inches in height. An ordinary office chair was found standing near, with its back to the window.

Two witnesses observed the deceased while falling to the sidewalk —one when he was a few feet above the walk, and the other apparently just as he left the window ledge. He encountered a guy wire of the electric lighting system in his fall, and the globe of the arc light was broken. They describe him as falling limp, with his arms hanging

lower than his head, but not directly over the head like a person diving.

At the trial, when it was shown that death had ensued from external and violent means, it was agreed between counsel that plaintiff had made out a prima facie case. Thereupon the defendant proceeded with its case. A question has arisen as to which of the parties had the burden of proof.

[2] We think it indisputable that, while the plaintiff made out a prima facie case by showing death by external and violent means that the defendant was required to overcome, yet in the end it was incumbent upon the plaintiff to establish by a preponderance of the evidence the fact as alleged by her that death was effected through external, violent, and accidental means. This is a burden which the plaintiff could not escape.

Suicide is the antithesis of death by accidental means, and, of course, if it appears that Blum took his own life, plaintiff cannot recover under the policy. But this does not shift the burden. The clause in the policy requiring that death shall result through accidental means independent of all other causes devolves the burden upon plaintiff that she substantiate this also before recovery can be had. Travelers' Insurance Co. v. McConkey, 127 U. S. 661, 666, 8 Sup. Ct. 1360, 32 L. Ed. 308; National Masonic Acc. Ass'n v. Shryock, 73 Fed. 774, 20 C. C. A. 3.

The deceased came to his death by one of three means. He either died through natural causes (that is, by sudden demise) and fell from the window, or he voluntarily threw himself therefrom, or he fell from the window or the coping outside through accidental means.

[3, 4] There is a presumption that death was not suicidal. This is disputable, but to overcome it, there must be proof of a tendency to establish the fact sufficient for the jury's consideration. Without else, there is no presumption that death ensued through accidental means. The presumption is rather that it was the result of natural causes. Laessig v. Travelers' Protective Ass'n, 169 Mo. 272, 280, 69 S. W. 469. So we get back to the burden that plaintiff must sustain, which is to show that death came through accidental means, and this independently of all other causes, with the presumption of death through natural cause to overcome, and that it was not suicidal in her favor. Was there evidence under this hypothesis sufficient to carry the case to the jury?

[5] It goes without saying that, in order for plaintiff to recover, there must be evidence that an accident occurred conducing to the injury. This does not mean, however, that there must be eyewitnesses to the accident or direct proof of the pertinent fact. The fact is susceptible of proof, as any other given fact, and it may properly be deducible by inference and presumption from facts proven; that is, the fact of accident may be established by circumstantial evidence, as other pertinent facts may be established under the rules of evidence. Brunswick v. Standard Acc. Ins. Co., 278 Mo. 154, 213 S. W. 45, 7 A. L. R. 1213.

[6] Much speculation is indulged in as to how Blum got out of the window. It is obvious, however, that a man of his size and activity by

stooping could have readily stepped from the chair, which it may be that he did, across the window seat to the coping outside, and could have sat down on the window seat or safely stood on the coping to get the air, if that were his purpose. The stone sill under the window seat was 17¼ inches in width, with a slope of but an inch, while extending beyond that and 4½ inches lower, was the belt course 9 inches in width, with a half-inch slope. One does not have to enter the realm of conjecture to affirm that a man of Blum's physique, with his senses about him and his ordinary activity in movement, could safely have adjusted himself outside the window so that he would not have fallen in getting the air, if such were his purpose. It is also a reasonable hypothesis that Blum fainted while in the act of stepping through the open window, and in fainting pitched forward with such momentum as to cause his body to slide over the coping and be precipitated to the street below. These, with other hypotheses as well, might reasonably account for his getting out of the window without suicidal intent.

It is obvious from these observations that the circumstances and conditions present as shown by the evidence do not repel all reasonable hypotheses of accidental death or death by accidental means.

[7] When a man is found dead under circumstances showing clearly that he killed himself, there can be no presumption that death was accidental (Supreme Tent, K. of M. of the World v. King, 142 Fed. 678, 73 C. C. A. 668), or that it was from natural causes, for that matter. Johns v. Northwestern Mutual Relief Ass'n, 90 Wis. 332, 63 N. W. 276, 41 L. R. A. 587, is an apt illustration of the postulate. There the assured was found dead in a cistern. The aperture through which entry took place was so small that it could not, by any reasonable hypothesis, be inferred that he fell in while casually walking or passing over the cistern. So it was held that the inference of self-destruction was so strong as to overcome any presumption of accident that might otherwise be indulged.

Such is not the case at bar, for it is fully apparent that death might have occurred through other causes, or by other means. The question, then, whether death was suicidal was one among others to be submitted to the jury.

Counsel for plaintiff in error suggests a hypothesis which supposes that the deceased, not having been affected with dizziness, had voluntarily placed himself head foremost at the outer ledge of the window, and so near the outer edge as to be within the danger zone and beyond the point where the laws of gravity and friction would tend to hold him; that is, in a position where the laws of gravity would tend to pull him over the ledge to the sidewalk beneath. If such were the case, it is argued that, although the fall might have been involuntary, the means which he selected would be voluntary, and the injury following could not be held to have been occasioned by external, violent, and accidental means. Another hypothesis of a similar nature is stated, but the one noted is sufficient for intelligent discussion of the legal proposition invoked.

[8] A distinction is sought to be made between an accidental death and death through accidental means. The distinction seems to be borne

out by authority. Olinsky v. Railway Mail Ass'n (Cal.) 189 Pac. 835. Accidental death is aptly illustrated by the case of Shanberg v. Fidelity & Casualty Co. (C. C.) 143 Fed. 651, where the assured, while engaged in carrying a door, fell down and expired. An autopsy disclosed that he had a ruptured heart. It was held that death did not result from "extraordinary, violent, and accidental means, independent of all other causes," within the meaning of the policy, and that the rupture of the heart was the result, and not the means through which it was effected.

Another case (Martin v. Interstate Business Men's Acc. Ass'n [Iowa] 174 N. W. 577), is where the insured ate oranges, engendering gastritis which caused death. It was held that the act of selecting the oranges was voluntary, and that the consequences, although unexpected or unintentional, could not be said to have resulted through "accidental means."

In further illustration of the distinction, the Supreme Court has apparently approved an instruction:

"That, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

This instruction was given in a case arising from the circumstance of the injured person jumping from a platform. Two other persons jumped from the platform at the same time and sustained no injury, and the case turned upon whether there was anything accidental, unforeseen, involuntary, or unexpected in the act of jumping from the time the deceased left the platform until he alighted upon the ground. A verdict for the beneficiary was upheld. Mutual Accident Association v. Barry, 131 U. S. 100, 121, 9 Sup. Ct. 755, 33 L. Ed. 60.

Now, extending the doctrine of this latter case to what might have happened with Blum, if he deliberately placed himself in a position where he would fall, realizing that such would be the result of his act, then it could not be said that his injury came about through external, violent, and accidental means within the terms of the policy; this because the act would be voluntary and deliberate, and the result could not have been unforeseen. But if he voluntarily placed himself in a position of danger, even recklessly though it may have been, and through accident, by misstep or miscalculation, or through the force of gravity not anticipated or foreseen, and was precipitated from the window ledge, the cause of the injury would have been through accidental means within the meaning of the policy.

After all, however, these are hypotheses that went to the jury under the evidence, and we must assume under proper and applicable instructions, as no exceptions are here to any instructions given or to any requested and not given.

Again, there is brought into the controversy the supposition that Blum's condition of health may have contributed directly or indirectly to his injury; it being argued that, where disease or physical infirmity concurs in producing death, the risk is not covered, because, while

death may have resulted from accident, it would have to be shown that the accident was the sole cause of death. Be this as it may, we must again assume, under the state of the record, that the jury was properly instructed in the premises and that they gave attention to the evidence in view of the rule of law applicable. But more of this later.

Another feature of the controversy is that Blum might have jumped from the window while in a condition of mental irresponsibility; that is, while in a state of melancholy, when his impulse was to take his own life.

Upon this question medical experts were called, with the result of a divided and discordant opinion. Thus it became a matter for the jury to determine, and their finding respecting it was comprised by the general verdict.

Within the range and scope of the testimony, certain experts in physics gave evidence touching the possibility of the deceased's falling out of the window, supposing him to have been in certain defined positions in relation to it, and including also the chair that was found by the window immediately after his disappearance.

This testimony is interesting and highly instructive, as bearing upon the hypotheses concerning which their opinions were desired. But there is an obvious infirmity attending it, in that it did not cover other reasonable hypotheses respecting positions in which the deceased might have been immediately prior to his falling from the window or from the ledge outside.

Coming again to the one question involved, whether the evidence was sufficient to carry the case to the jury, we will give attention to some of the different phases of the evidence and the inferences that the jury was at liberty to draw therefrom.

[9] Blum had been a man in comparatively good health up to the time he received news of the fire in Valdez. He had been afflicted with dizziness on occasions, which induced him to seek the open air, from which he invariably obtained relief. Further than this, he had not slept well in later years. But these were matters to which little attention was paid, and which were not vital so far as his general health was concerned. After the news reached him from Valdez, he became greatly perturbed and worried, complaining of his head and of being unable to collect his thoughts, and at one time, a few days before his death, he had a fainting spell in the office. Aside from this, there were indications that he was restless, and felt bad, even as he had never felt in his life before. This evidence formed the basis of an inquiry as to whether he was not suffering from an attack of agitated melancholia, and whether or not it led to the taking of his own life. This was disposed of, and properly so, by leaving the matter to the jury for its determination. The evidence was such that a reasonable inference might have been drawn either way, and was unquestionably sufficient to require submission to the jury.

As we have seen, the presumption is that he did not commit suicide, and, further, the testimony in the case is not of such a nature as to exclude all reasonable hypotheses of death through accidental means. So the question of suicide, sane or insane, was properly one for the

jury. Pythias Knights' Supreme Lodge v. Beck, 181 U. S. 49, 53, 21 Sup. Ct. 532, 45 L. Ed. 741.

There being testimony in the record sufficient for the jury's consideration as to whether death resulted from suicide, we may proceed to another phase of the inquiry; that is, whether death might have resulted from natural cause, as by apoplexy, heart failure, or the like.

[10] Here, again, Blum's state of health was a matter for consideration, along with the fact that he in some way got out of the window, whether by struggle after death had stricken him, or by his own volition while retaining his mental and physical activities.

It is possible that he may have gotten out of the window while in an effort to get the air, and then have been stricken and life become practically extinct before he fell to the sidewalk. There is some indication that such might have been the case. An eyewitness saw the body almost at the instant it left the window ledge, and he says it appeared to be limp with the arms hanging downward. But this is only one of the many circumstances to be taken into account. While such a thing was possible, it was within the province of the jury to inquire whether it was a probable inference to be drawn, under all the circumstances surrounding his death. It required the exercise of physical effort to get out of the window. This he was fully able to put forth when he was last seen, but a minute or two before he disappeared. So the postulate that he dropped dead after getting on to the window ledge is attended with questionable probability.

[11] There is this as well to be considered—which was also for the jury—that the fall itself was sufficient to produce death, and the condition in which the deceased's body was found was some indication at least that death resulted therefrom, and of course by violent and external means.

"That the courts will presume," says the court in Jenkin v. Pacific Mut. Life Ins. Co., 131 Cal. 121, 124, 63 Pac. 180, 181, "that the death was the result of an accident, when nothing more is shown than that it was brought about by a violent injury, and the character of such injury is consistent with the theory of accident, seems to be a rule upheld by the great weight of authority."

Again the court says, in Nichols v. Commercial Travelers' Eastern Accident Ass'n, 221 Mass. 540, 543, 109 N. E. 449, 450, a case in which the deceased was ejected from a sleeping car berth while the car was in motion, either through his own volition or involuntarily, through a screen in the window comprising a space of from 24 to 25 inches in width by 18 inches in height, and was found dead under circumstances indicating that death was caused by a fall from the car:

"When a man is found dead under such circumstances, when the marks on the body show the cause of death and all the circumstances exclude the theory of disease or injuries intentionally inflicted by a third person, it may be inferred that the death was accidental and was not the result of intention or design."

The principle involved is concretely stated in 1 C. J. 495, as follows:

"The fact of death does not of itself create any presumption that it was the result of an accident; and where, in order to make out plaintiff's case, it is necessary to base a presumption that death resulted from an injury on a presumption that the insured sustained an accidental injury, no recovery can be had. Where, however, it is apparent that the injury to or death of the insured was the result of external and violent means, and the issue is as to whether it was due to an accident, within the meaning of the policy, or to some cause excepted by the policy, the presumption is in favor of accident and against the existence of facts bringing the case within any of the exceptions of the policy, such as insanity of the insured, intentional injury inflicted by a third person, lack of due care and diligence, self-inflicted injuries, and suicide. These presumptions may, however, be overcome by facts and circumstances establishing the contrary."

The authorities are generally to the same purpose. See Buckley, Adm'x, v. Massachusetts Bonding & Insurance Co. (Wash.) 192 Pac. 924, where a number are reviewed.

[12] Recurring again to the suggestion that death may have been the result of concurring causes, that is, of disease and accident, and therefore not within the terms of the policy, because of the language covering death "effected directly and independently of all other causes," under such conditions the inquiry simply resolves itself into one of proximate cause.

"A sick man," says the court in Bohaker v. Travelers' Insurance Co., 215 Mass. 32, 34, 102 N. E. 342, 344 (46 L. R. A. [N. S.] 543), "may be the subject of an accident, which but for his sickness would not have befallen him. One may meet his death by falling into imminent danger in a faint or in an attack of epilepsy. But such an event commonly has been held to be the result of accident rather than of disease."

In the same case it is observed that:

"The language of this contract to the effect that the 'accidental means' must have operated 'independently of all other causes' to produce the death does not change the general rule of law that the proximate, and not a remote, cause is the one to which the law looks."

Our attention has not been called to any clause in the policy that precludes recovery on the ground that disease has operated concurrently with "accidental means" to produce injury or death. The court is not required to search beyond the active, efficient procuring cause, to the cause of a cause, so that, as the court further observes:

"When one single predominant agency is disclosed, directly producing as a natural and probable result the injury, which is accidental, and which operates independently of other like causes, then the effectual means required by the policy have been found."

The language of Judge Taft in Manufacturers' Accident Indemnity Co. v. Dorgan, 58 Fed. 945, 954, 7 C. C. A. 581, 590 (22 L. R. A. 620), is illustrative and highly instructive. He says:

"If the deceased suffered death by drowning, no matter what was the cause of his falling into the water, whether disease or a slipping, the drowning, in such case, would be the proximate and sole cause of the disability or death, unless it appeared that death would have been the result, even had there been no water at hand to fall into. The disease would be but the condition; the drowning would be the moving, sole, and proximate cause."

So to apply the principle here, unless it can be said that Blum's disease, if it can be so termed, or if he was so afflicted—about which there is a serious question under the evidence—was the proximate cause of his injury and death, then we must look elsewhere for the active and efficient cause. It is obvious that, under the evidence, it cannot be said, as matter of law, that disease was the proximate and efficient cause of Blum's death. The case, as we have previously observed, was one, therefore, for the jury's determination as respects the real and producing cause of death.

[13] True, the jury cannot be permitted to find its verdict upon conjecture and surmise; but, from a careful survey of the entire testimony found in the record, we are assured that there is afforded a much more stable basis for inference and deduction, and that it was quite sufficient whereon to submit the case to the verdict of the jury.

We find no error in denying the motion for a directed verdict for the defendant.

Affirmed.

UNITED STATES v. SISCHO.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1921.)

No. 3499.

1. **Customs duties ⇐62—Statute requiring manifests to state cargo were to aid in collection of duties.**
   Rev. St. §§ 2806–2809 (Comp. St. §§ 5503–5506), requiring merchandise brought in to be included in manifest, and imposing a penalty for violation, were designed to enable the government to collect the duties on dutiable articles coming into this country from foreign ports.

2. **Customs duties ⇐129—"Merchandise" "capable of being imported" includes only lawful imports; "chattels;" "capable."**
   Within Rev. St. § 2766 (Comp. St. § 5462), defining "merchandise," as used in that title, as including goods, wares, and chattels of every description, capable of being transported, merchandise means any movable object of trade or traffic, "chattels," which may include every species of property less than freehold, obviously only refers to chattels personal, which include all things movable, and "capable" means fit, or adapted, or possessing legal capacity for, so that the phrase "capable of being imported" refers only to things which may be lawfully imported.

   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Capable; Chattel; Merchandise.]

3. **Statutes ⇐188—Words given common meaning, unless limited by context.**
   Words of common use are to be understood in their natural, plain, ordinary, and genuine signification, as applied to the subject-matter of the enactment, unless such meaning is limited by the context.

4. **Customs duties ⇐129—Master not liable for penalty for omitting smoking opium from manifest; "merchandise."**
   Under Comp. St. §§ 8800, 8801, prohibiting the importation of opium prepared for smoking, such opium is not "merchandise," as defined by Rev. St. § 2766 (Comp. St. § 5462), since it cannot be lawfully imported, and therefore the master of a vessel is not liable for the penalty imposed by Rev. St. § 2809 (Comp. St. § 5506), on merchandise brought into the country without being shown on the vessel's manifest; the words "brought into," as used in section 2809, not having the effect of enlarging the definition of merchandise, contained in section 2766.

5. Statutes ⇐224—Meaning of words and phrases not fixed by use in unrelated statutes.
The signification of words and phrases is not to be fixed by their use in totally unrelated statutes.

6. Customs duties ⇐129—Opium statute held not to change construction of merchandise in customs laws.
Comp. St. § 8801f, subjecting a vessel which brings in opium not included in its manifest to the penalty imposed by Rev. St. § 2809 (Comp. St. § 5506), on the vessel and the master for merchandise brought in without being included in the manifest, does not enlarge the construction of the word "merchandise," as used in the Revised Statutes section, so as to include opium prepared for smoking, which could not be lawfully imported, within the Revised Statutes section.

7. Customs duties ⇐129—Statute extending penalty to vessel held not to extend it to master.
Comp. St. § 8801f, subjecting a vessel which brought in opium prepared for smoking, which was not included in its manifest, to the penalty imposed by Rev. St. § 2809 (Comp. St. § 5506), on the vessel and the master for merchandise brought in without being included in the manifest, did not make the master of a vessel, which brought in such smoking opium, liable for the penalty.

Hunt, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Northern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by the United States against Wesley L. Sischo to recover a penalty. Judgment for defendant (262 Fed. 1001), and the United States brings error. Affirmed.

Robert C. Saunders, U. S. Atty., and Robert E. Capers, Asst. U. S. Atty., both of Seattle, Wash., for the United States.

Daniel Landon, of Seattle, Wash., for defendant in error.

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

WOLVERTON, District Judge. This is an action instituted by the government, under section 5803, Comp. Stat. 1918, to recover a penalty imposed by the collector of customs against the defendant, Wesley L. Sischo, in the sum of $6,400, for importing into this country 100 five-tael tins of opium, prepared for smoking purposes, without including the same in the ship's manifest. Sischo was the owner and master of the gasoline launch by which the opium was brought in, and the penalty was imposed under section 2809 of the Revised Statutes (Comp. St. § 5506). The question involved for decision is whether Sischo was subject to be penalized by the collector of customs for not having included the opium in the vessel's manifest.

Section 2806, Revised Statutes (Comp. St. § 5503), inhibits the bringing of any merchandise from any foreign port into the United States in any vessel, unless the master has on board manifests in writing of the cargo, signed by such master. Sections 2807 and 2808 (Comp. St. §§ 5504, 5505) provide what the manifests shall contain, and how the merchandise destined to be delivered at different districts or ports shall be listed and arranged thereon. Section 2809 reads as follows:

"If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

By section 2766 (Comp. St. § 5462):

"The word 'merchandise,' as used in this title, may include goods, wares, and chattels of every description capable of being imported."

[1] These statutes were obviously designed to enable the government, among other things, to collect the duties upon all dutiable articles coming into this country from foreign ports, and to that end it was desirous that it be advised by the manifests of what merchandise capable of being imported was aboard ship, so that the proper assessment of duties could be made by the collector of customs.

Let it be observed that the master is subject to a penalty equal to the value of all *such* merchandise not included in the manifest, and if *such* merchandise not so included is consigned to or belongs to the master, it shall be forfeited. Thus the master, as it relates to his own goods, is not only penalized to the extent of their value, but he loses his goods as well—a very drastic punishment—all, it must be noted, for failure to manifest them. But it seems that he is not further penalized as a smuggler, or for an attempt to introduce goods into the United States without paying the duty to which they are subject, by reason of such failure.

Smuggling is a distinct offense, and is denounced by different statutes, and penalized according to the nature of the act and the article or goods involved, and is more particularly defined by section 5798, U. S. Comp. Stat. 1918 (Compact Edition), which reads in part:

"Provided, that for the purposes of this act [of June 22, 1874, § 4, 18 Stat. 186], smuggling shall be construed to mean the act, with intent to defraud, of bringing into the United States, or, with like intent, attempting to bring into the United States, dutiable articles without passing the same, or the package containing the same, through the custom house, or submitting them to the officers of the revenue for examination."

The importation of opium into the United States in any form is declared to be unlawful, with the exception—

"that opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only," under regulations of the Secretary of the Treasury, "and when so imported shall be subject to the duties which are now or may hereafter be imposed by law." Section 8800, U. S. Comp. Stat. 1918 (Compact Ed.).

Section 8801 denounces the importation of opium contrary to law, and affixes a penalty of forfeiture, accompanied by fine and imprisonment, making the offense a felony. Section 8801f makes provision as follows:

"Whenever opium or cocaine or any preparations or derivatives thereof shall be found upon any vessel arriving at any port of the United States which

is not shown upon the vessel's manifest, as is provided by sections 2806 and 2807 of the Revised Statutes, such vessel shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes."

The defendant, Sischo, has been prosecuted under section 8801, Comp. Stat. 1918. He was convicted, and is now serving a term in the penitentiary. The opium found in his possession was forfeited to the government, as was also his gasoline launch. Under what sections the forfeiture of the opium and the vessel was exacted does not appear.

[2] The inquiry here presented turns wholly upon the meaning to be attributed to the phrase "capable of being imported." Does it apply to such merchandise as may lawfully be imported into this country, or does it apply to all goods, wares, and chattels, of whatsoever nature, that might be brought in, whether of prohibited introduction or not?

It must not be overlooked that the statutes with which we are dealing are customs statutes, and are designed for the enforcement of the collection of revenues assessable upon dutiable articles. To this end, no doubt, it is required that all merchandise capable of importation shall be contained in the ship's manifests, so that the customs officers may determine what is subject to duty and what is not. It would not be expected that articles prohibited introduction within the United States would be mentioned in the manifest, because the presumption would be that the master would not bring them in, for if he did he would breach the law, and subject himself to the penalty imposed for importing prohibited articles. Congress, therefore, had no occasion to legislate in these statutes for the protection and the enforcement of the payment of duties on merchandise which it did not intend should be brought in under any conditions.

[3] But why should Congress deem it necessary to qualify the term "merchandise" by the phrase "capable of being imported," if it intended to comprise all goods, wares, and chattels of whatsoever nature, or, we may say, all such as are susceptible of being carried from one country into another?

"Words of common use are to be understood in their natural, plain, ordinary, and genuine signification as applied to the subject-matter of the enactment." Endlich on Interpretation of Statutes, § 2.

But it is self-evident that such meaning may be limited by the context. "Merchandise" signifies, in general:

"Any movable object of trade or traffic; that which is passed from hand to hand by purchase and sale; specifically, the objects of commerce; a commercial commodity or commercial commodities in general; the staple of a mercantile business; commodities, goods, or wares bought and sold for gain." Century Dictionary.

"Chattel" is a term of broader signification, and includes:

"Every species of property, movable or immovable, which is less than a freehold." Bouvier's Law Dictionary.

But of course Congress did not intend by the use of that term to include chattels real, and it is only chattels personal to which the law alludes.

"Personal chattels are properly things movable, which may be carried about by the owner; such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another." Bouvier's Law Dictionary.

The word "capable" is used in different senses, but among the synonyms given by the Century Dictionary are "qualified," "fitted," "adapted."

Now, if Congress meant by its definition of merchandise to embrace all goods, wares, and chattels capable of being transferred from one place to another, or of being transported, why did it not so enact—why did it say "capable of being imported" instead? We must attribute to Congress some apt purpose in choosing language to define or express its meaning. It is clear that "capable of being imported" and "capable of being transferred from one place to another," or transported, are not equivalent expressions, and we must assume that Congress understood the distinction, and therefore chose the former to express more precisely its purpose and meaning. Things that are prohibited entry into this country are not, in a legal sense, adapted to or susceptible of entry; and, Congress seeking to be specific, may we not reasonably infer that it used the phrase "capable of being imported" designedly and deliberately to include those things importable, and not all things transferable or transportable? One of the secondary meanings given the word "capable" is:

"Having legal power or capacity: as, a bastard is not capable of inheriting an estate." Century Dictionary.

The word in that sense has been given judicial interpretation. In Burgett v. Barrick, 25 Kan. 526, it is held that the language "capable of contracting," used in the local statute, was to be understood as "'legally capable of contracting,' and not that a minor is mentally and physically capable of contracting." So the word may be applied to things impersonal as well, and thus to things capable of being imported, and, so applied, may signify things lawfully capable of importation. It was so applied in Re Henderson and City of Toronto, 29 Ontario Reports, 669, where it was held that a document not entitled to be registered was not an "instrument capable of registration."

[4] Stress is laid upon the words "brought into," as used in section 2809, as somehow interpretative of import, or imported. But it must be borne in mind that they qualify "merchandise," and merchandise gets its meaning from section 2766 (Comp. St. § 5462), accompanied with the restrictive words "capable of being imported." These expressions are found in the same title, and are to be construed in pari materia.

In United States v. Merriam et al., 26 Fed. Cas. 1237, 1239 (No. 15,759), in construing the language of section 4 of the act of July 18, 1866 (14 Stat. 179 [Comp. St. § 5785]), which reads, "that if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any goods, wares, or merchandise, contrary to law," the court says:

"Now, to import, in its general signification, means to bring into the United States. Why, then, are these additional words, 'or bring' into the United States, used? Tney are either mere surplusage, or they mean something more

than what is included in the words 'to import,' according to their ordinary signification. To import goods, wares, and merchandise into the United States, in the connection in which the words are here used, evidently means an importation in the ordinary manner, so far as the means and manner of importation are concerned, but contrary to law. 'To bring' goods, etc., into the United States, in the connection in which the words are used, means the introduction of goods, etc., into the United States by any other means or in any other manner than that of importation proper, contrary to law."

This language as used has relation to the bringing in of dutiable articles contrary to law. The court, in United States v. Chesbrough (D. C.) 176 Fed. 778, 783, in consideration of section 3082, R. S. (Comp. St. § 5785), adopts this view, and concludes:

"These words in my opinion have a plain meaning, and call for no interpretation. They comprehend the bringing into this country of dutiable articles."

According to these cases, the words "import" and "bring in" are not synonymous, and their special bearing here is that they are to be construed with reference to the connection in which they are employed. The statutes under consideration were and are contained in a different title, and are unrelated to the subject-matter with which we are dealing. In the case of United States v. Caminata (D. C.) 194 Fed. 903, 904, wherein was involved the second section of the Opium Act of February 9, 1909, 35 Stat. 614 (section 8801, Comp. Stat.), the court expressly agreed with the argument of the United States attorney, wherein was used this language:

"This act is not a customs law, designed to avoid fraud upon the revenue, but is purely a prohibitory statute, absolutely forbidding the bringing into this country from abroad of an article deemed by Congress to be injurious to the health and morals of our people. The act has no relation to the customs system."

We do not think the language of the Attorney General (21 Ops. Attys. Gen. p. 94) is conclusive, wherein he says:

"The word 'merchandise' is used in different senses in different parts of our customs legislation. In Revised Statutes, §§ 2766 and 3111, it covers any tangible personal property. In sections 2795 and 3113 it means property imported into the country, whether for sale or not. In the act of 1875 it has a narrower meaning, but still includes all personal property not imported for the use or enjoyment of the importer himself."

[5] The learned Attorney General had not before him the exact question here involved, and his attention was perhaps not specifically called to the particular and peculiar language of section 2766. The comment is valuable, however, in that it subscribes to the interpretative principle that the meaning of the word must be sought for with respect to the especial sense in which it is used in the particular statute where it is found. It is a bootless task, therefore, to attempt to fix the signification of words and phrases by their use in totally unrelated statutes.

[6, 7] Our attention has been called, arguendo, to section 8801f, Comp. Stat., supra, as a legislative construction of the word "merchandise," and as to what should be included in the manifest. This statute was adopted at a much later date, and we should bear in mind that opium and its derivatives, except smoking opium, are subject to importation for medicinal purposes, and it is no doubt the intendment of sec-

tion 2809, R. S., that such merchandise should be included in the vessel's manifest. It is capable of being imported in the sense that its importation is not unlawful. Otherwise, it was competent for Congress to extend the provisions of section 2809 to require all opium, whether its importation were lawful or unlawful, to be shown on the vessel's manifest for the purpose of penalizing the vessel. Certainly Congress did not go further than to apply section 2809 in its enlarged sense to opium and its derivatives, and for the one purpose of penalizing the vessel, not its master.

From these considerations, we are led to the conclusion that it is the intendment of the statute here in review that the word "merchandise" shall comprise only such goods, wares, and chattels as may be lawfully brought into this country, and that the defendant was not legally subject to be penalized for not having included the opium—that is, smoking opium—in the vessel's manifest.

HUNT, Circuit Judge (dissenting). The statutes pertaining to entry of merchandise—Chapter 4, Collection of Duties on Imports—provide that no merchandise shall be brought into the United States from any foreign port in any vessel unless the master has on board a manifest containing certain specific information. Sections 2806–2808, R. S. U. S. (Comp. St. §§ 5503–5505). Section 2809 (Comp. St. § 5506) provides that—

"If any merchandise is brought into the United States in any vessel whatever from any foreign port without having such a manifest on board, or which shall not be included or described in the manifest, or shall not agree therewith, the master shall be liable to a penalty equal to the value of such merchandise not included in such manifest; and all such merchandise not included in the manifest belonging or consigned to the master, mate, officers, or crew of such vessel, shall be forfeited."

Section 2766, R. S. U. S. (section 5462, U. S. Comp. St. 1916), provides as follows:

"The word 'merchandise,' as used in this title, may include goods, wares, and chattels of every description capable of being imported."

The controlling statute which provides for liability of the master to the penalty is section 2809. The terms of that section seem to us plainly to refer to merchandise "brought" into the United States and not included in the manifest.

I cannot find substantial ground upon which to hold that goods of every description "capable of being imported" shall be only such goods and wares and chattels as may be lawfully entered through the customs houses, or to which is attached the right of the United States to assess and collect duties. The fact that the goods brought in may be prohibited from being entered does not relieve the master from including them in the manifest, as required by sections 2806–2808. "Capable" of being imported means, under the terms of section 2766, such goods and chattels as can be brought over—not lawfully brought over and entered, but such as can physically be brought. Section 2766 is to be read, I think, not as one of limitation as to the right to import under the law, nor as defining what may be lawfully entered in the customs houses,

but as a comprehensive inclusion of all goods that it is possible to transport from another country into this. There is nothing tangible in the way of goods, wares, and chattels which may not be brought within the term "merchandise," whether intended for trade or not. In 21 Ops. Attys. Gen. p. 94, Mr. Olney held that the word "merchandise" was used in different senses in different parts of the customs laws. He said:

"In Revised Statutes, §§ 2766 and 3111, it covers any tangible personal property. In sections 2795 and 3113 it means property imported into the country, whether for sale or not. In the act of 1895 it has a narrower meaning, but still includes all personal property not imported for the use or enjoyment of the importer himself."

Suppose a cargo of liquor is brought over, or a quantity of aigrette or osprey plumes, or skins of wild birds, none of which may lawfully be brought into the country; would not the statute defining merchandise include them? Or must the collectors of customs hold that, because those articles are contraband, they need not be put upon the manifest; that merely because they cannot lawfully be imported they are not "merchandise," hence cannot be brought into the country, and the master of the ship who brings them, and has not included them in the manifest, is not liable under section 2809? Such a construction seems to me to be too restrictive of the words of the statute.

In section 8800, Comp. St. 1918, Congress provided that after April 1, 1909 (Act Jan. 17, 1914):

"It shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof" except "for medicinal purposes."

It was also provided by section 2 of the act that if any person shall fraudulently or unlawfully "import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law," he shall be punished and the opium shall be forfeited. And again in section 3 of the act (Comp. St. § 8801a) it was provided that all smoking opium or opium prepared for smoking found within the United States on and after July 1, 1913, shall be presumed "to have been imported after April 1, 1909." In these sections it seems clear that "imported" is used in its ordinary sense. In volume 27 of the Opinions of the Attorneys General, p. 440, the question arose whether, under the general statutes (sections 2962, 2971, 2976 and 3005, R. S. U. S. [Comp. St. §§ 5646, 5657, 5662, 5690]) regulating depositing in bond and transshipment of "merchandise" smoking opium brought from a foreign country and destined to another foreign country could be entered for warehousing and for immediate exportation by another ship. The ruling was that under the general customs law "the entering of merchandise for immediate exportation and without intent that it shall enter the commerce of the country is not an importation," and that since smoking opium was not subject to the payment of duties, and the bringing of opium into port by one ship for immediate exportation by another is not importation, its transfer from one vessel to another could be lawfully made. No question seems to have been made whether smoking opium was or was not merchandise.

In United States v. Chesbrough (D. C.) 176 Fed. 778, defendant was indicted for violating section 3082, R. S. U. S. (Comp. St. § 5785),

which provides that, if any person shall fraudulently "import or bring into the United States * * * any merchandise, contrary to law," such merchandise shall be forfeited and the offender shall be punished. It was contended that the words "import or bring" and "merchandise," as used in section 3082, exclude articles brought in as baggage, and the argument was that the importation of merchandise contrary to law, which was penalized by the section, is the importation of general merchandise as distinguished from baggage. But it was held that the limitation sought to be placed upon the word "merchandise" was entirely too restricted, and that the proper construction was to give to the word "merchandise" a natural, plain, and ordinary signification. It was also contended that the word "import" should be given a technical rather than an ordinary meaning, but it was held that a technical definition could not control in the case of dutiable merchandise brought in as personal baggage. The court said that the words "import or bring" were not necessarily synonymous, and that Congress, having used both words, intended to give the broader scope to the statute, and to comprehend the bringing into the country of dutiable articles. The reasoning of the case is applicable to the words used in section 2809, that if any merchandise is "brought" into the United States. I think the broader object of the statute is attained by this view.

In United States v. Caminati (D. C.) 194 Fed. 903, defendant was prosecuted for smuggling smoking opium. The court cited the Act of Congress of February 9, 1909, c. 100, § 1, 35 Stat. 614 (Comp. St. § 8800), which prohibits the importation of opium into the United States except for medicinal purposes, and section 2, which makes such importation penal, and held that the phrase "import or bring," as used in section 3082, may or may not be synonymous, according to the legislative purpose for which they are used, but that the word "import" should not be limited to the actual landing of goods, but should be understood to have been used in the light of the legislative purpose, which was to prohibit the bringing of opium into the country, rather than to provide for the violation of a customs law designed to avoid fraud upon the revenue.

Again, section 8801f, Comp. St. 1918 (section 8 of the Act of January 17, 1914), provides that whenever opium is found upon any vessel arriving in port of the United States, "which is not shown upon the vessel's manifest, as is provided by sections 2806 and 2807 of the Revised Statutes, such vessels shall be liable for the penalty and forfeiture prescribed in section 2809 of the Revised Statutes." This section confirms the opinion that the word "merchandise," as used in section 2809, includes opium, even though denied entry. The rulings of the Treasury Department define opium as covering all forms of opium known to the trade, including smoking opium; and the Secretary of the Treasury (Treas. Dec. No. 32083) has made provision for cases where prohibited opium is found on board a vessel "not manifested," by directing that in such case the fine should be paid, as it does not fall within the provision of section 2810 of the Revised Statutes (Comp. St. § 5507). Section 2810 has reference to instances where part of the cargo without proper manifest is unshipped, except such as is accounted for

by the master, and where the manifests have been lost or mislaid without fraud, or are incorrect by mistake. In such an event no forfeiture or penalty shall be incurred under section 2809. In the Customs Regulations of 1915, article 97, section 2809 is quoted, and it is advised that, in all cases where opium is found on board a ship not manifested, the fine specified in section 2809 shall be imposed.

With respect to the value of the smoking opium, the rulings of the Treasury Department provide that, for the purpose of assessing the fine under section 2809, supra, the value of the prohibited opium is the foreign value. Treas. Dec. No. 32083, December, 1911. In the present instance the value of $6,400 was fixed by the customs officers as based upon the statements of the defendant below, who said that he had paid that sum for the opium in British Columbia. In a case of this character this was sufficient evidence of the value.

For these reasons, I believe judgment should be reversed, and the case remanded for a new trial.

THE OWEGO.

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 94.

Shipping ⇐104—Vessel not liable on contract of charterer.

A steamship, under a time charter, which was not a demise, and whose master, as required by the charter party, on request of the charterer, signed bills of lading for a shipment received at a stated rate of freight *held* bound only by the contract expressed in such bills, and not liable to the shipper for the difference between the rate named therein and the rate previously agreed upon between the shipper and charterer.

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

Suit in admiralty by Herman & Herman, Incorporated, against the steamship Owego; the Owego Steamship Corporation, claimant. Decree for libelant, and claimant appeals. Reversed.

Duncan & Mount, of New York City (R. T. Mount, of New York City, of counsel), for appellant.

Loomis, Barrett & Jones, of New York City (H. L. Loomis, of New York City, of counsel), for appellee.

Before WARD, HOUGH and MANTON, Circuit Judges.

WARD, Circuit Judge. The parties have submitted a very incomplete record, and the District Judge has entered a decree for the libelant, without giving any reasons whatever for his conclusion. We must do the best we can with such a situation.

October 4, 1916, the owners of the steamer Owego chartered her to the Federal Forwarding Company for the term of one year from date of delivery, which was January 28, 1917. The charter was not a de-

mise, and obviously intended that the master should sign bills of lading; article 9 providing:

"9. * * * And the charterers hereby agree to indemnify the owners from all consequences or liabilities that may arise from the captain signing bills of lading or otherwise complying with the same."

And it was further provided:

"All bills of lading given for cargo shipped under this charter party the charterers undertake and agree shall contain the following clause: 'The ship in addition to any liberties expressed or implied herein shall have the liberty to comply with any orders or directions as to departure, arrival, routes, ports of call, stoppages or otherwise howsoever given by his majesty's government, or any department thereof, or any person acting or purporting to act with the authority of his majesty or his majesty's government or of any department thereof, or by any committee or person having under the terms of the war risks insurance on the ship the right to give such orders or directions, and nothing done or not done by reason of such orders or directions shall be deemed a deviation.' Should charterers fail to insert said clause, master shall have the right to refuse to sign such bills of lading."

November 2, 1916, the libelants made a freight engagement with the Federal Forwarding Company to carry 1,500 tons of dyes and chemicals within a period of 8 months at $1.75 per 100 pounds, no steamers being named. This was the contract of the Forwarding Company and not of the owners of the steamer Owego.

Some time in January, 1917, the Federal Steamship Corporation notified the libelants to have a shipment ready for delivery to steamer Owego between January 23d and 27th, and the libelants did deliver goods and received a receipt for them of the Federal Line, signed by the Federal Steamship Corporation. January 31, 1917, the Federal Steamship Corporation tendered bills of lading for the shipment at the rate of $3 per 100 pounds, instead of $1.75 per 100 pounds, as previously agreed upon with the Federal Forwarding Company. Their goods being stowed aboard the steamer, the libelants paid this freight under protest.

The claimant offered forms of bills of lading in evidence, which did not show by whom they were signed. They conclude with an attesting clause as follows:

"In witness whereof, the master or agent of the steamer hath affirmed to three bills of lading all of this tenor and date; one of which being accomplished, the others to stand void.

"Dated the 29th day of January, 1917."

Assuming that the bills of lading were signed by the master or the agent of the steamer, they bound the steamer. The decree of the court below necessarily implies that the libelants made the freight engagement relied upon and paid the excess freight demanded under protest.

The freight engagement was made November 2, 1916, when the relations between the Forwarding Company and the owners were governed by the charter party of October 4, 1916. The only explanation offered of the appearance of the Federal Steamship Corporation is by reference to a charter party said to have been made by the Forwarding Company as agent of the owners to the Steamship Corporation dated

December 1, 1916. That charter is not shown to have been executed, and is by its terms not to go into effect until the termination of the charter of October 4, 1916, which had at all the times herein mentioned a year to run. Therefore it does not explain. At all events, whether tendered by the Forwarding Company or by the Steamship Corporation, the bills of lading in question, signed by the master or agent of the steamer, bound the steamer.

Without going further into the established maxim that the ship is bound to the cargo and the cargo to the ship, we may certainly say that after the goods have gone aboard it gives each a lien upon the other to secure performance of the contract of transportation, viz. the ship to carry on the terms and at the rate of freight agreed on and the shipper to pay freight at the rate agreed upon. Vandewater v. Mills, 19 How. 88, 15 L. Ed. 554. But the contract of November 2, 1916, was not the contract of the shipowner, and the only contract which binds ship and owners is the bill of lading. For any breach of the engagement of November 2, 1916, the libelants must look to the Federal Forwarding Company, the party making it.

The decree is reversed.

In re MINA.

(District Court, W. D. Pennsylvania. February 10, 1914.)

No. 9581.

Bankruptcy ⊜188(2)—Property held under conditional sale contract passes to trustee.

Under the law of Pennsylvania and Bankruptcy Act, § 47a(2), as amended by Act June 25, 1910 (Comp. St. § 9631), which vests a trustee with all the rights of a creditor holding a lien by legal or equitable proceedings, property *held* by a bankrupt under a conditional sale contract, and passing into the hands of his receiver, cannot be reclaimed by the seller.

In Bankruptcy. In the matter of George Mina, doing business as the Keystone Garage, bankrupt. On petition of the Pure Oil Company to reclaim property. Denied.

Morris, Walker & Boyle, of Pittsburgh, Pa., for creditors.
John W. Dunkle, of Pittsburgh, Pa., for Pure Oil Co.

ORR, District Judge. The Pure Oil Company claims the ownership of a certain pump for the measuring of gasoline, and as well certain equipment connected with said pump, which was sold by it to the bankrupt upon a contract of conditional sale, and which is now in the hands of the receiver in bankruptcy.

The terms of the contract of conditional sale need not be set forth. The contract was in writing, and generally provided for the retention of title in the conditional vendor until payment by the vendee of the purchase price. Such contracts have always been deemed good, as between the parties thereto, under the law of Pennsylvania. Hineman v.

Matthews, 138 Pa. 204, 20 Atl. 843, 10 L. R. A. 233; Durr v. Replogle, 167 Pa. 347, 31 Atl. 645; Christ v. Zehner, 212 Pa. 188, 61 Atl. 822. Indeed, those very cases, well recognizing the validity of the contract between the parties thereto, impliedly, if not expressly, hold that such contracts are not valid as against those creditors of the conditional vendee who had issued execution and seized the property which was the subject of the condition of sale. The relations of the conditional vendor to the conditional vendee, and of both to the creditors of the latter, are conveniently to be found in Duplex Printing Press Co. v. Clipper Publishing Co., 213 Pa. 207, 62 Atl. 841. That was a cause where a receiver appointed for an insolvent corporation, in pursuance of creditors' bill, was held to have the rights of a levying creditor to the extent that a sale by him passed a good title against the conditional vendor.

With respect to the status of the parties to the conditional sale, counsel for claimant insists that while the law of Pennsylvania may have been as expressed in those cases, yet, since the passage of the Pennsylvania Sales Act of 1915 (P. L. 543), the law has been otherwise. He relies upon a provision in section 18 of that act, in conjunction with the first paragraph of section 20. The former is as follows:

"Sec. 18. First. Where there is a contract to sell specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.

"Second. For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, usages of trade, and the circumstances of the case."

The first paragraph of section 20 is as follows:

"Sec. 20. First. Where there is a contract to sell specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of possession, or property in the goods until certain conditions have been fulfilled. The right of possession or property may be thus reserved notwithstanding the delivery of the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer."

We are satisfied that the position taken by counsel for the claimant is not tenable. The act, taken as a whole, is an act, as shown by its title, "relating to the sale of goods." It is intended to be an embodiment of the law relating to sales as such law was to be found in the legislative enactments, the judicial decisions, and customs, in the state of Pennsylvania. It was not intended to declare the rights of general or lien creditors of either party to a sale. Especially must it be held that it does not affect the creditors of a conditional vendee. Not only from its omissions, but also from the fact that the same Legislature passed at the same session, an act entitled:

"An act defining conditional sales, and regulating the recording and effect thereof, and providing penalties." Act 1915 (P. L. 866).

The later act is limited in its operation to contracts whereby goods or chattels attached or to be attached to real property or chattels real are sold and delivered upon the condition that title shall not pass until the purchase money is paid. It is unnecessary to dwell upon the pro-

visions of this later act, but it is well to note that the Legislature was careful to provide that such goods and chattels should not become fixtures if the provisions of the act were followed, with respect to form of contract and the place for recording the same.

Until some other legislation is enacted by the General Assembly of Pennsylvania, the law, so far as it relates to contracts like the one before us, must be deemed to be the same as it existed prior to the passage of the act relied on by plaintiff's counsel. The receiver of the bankrupt, by reason of the provisions of the amendment to the Bankruptcy Law of June 25, 1910 (Comp. St. §§ 9586–9656), is vested with the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings upon the pump and its equipment, just as fully as the receiver appointed by the state court, in Duplex Printing Press Co. v. Clipper Publishing Co., supra.

The petitioner is not entitled to a return of the property described in its petition. Therefore its petition must be dismissed.

GOODRICH-LOCKHART CO. v. SEARS et al.

(District Court, E. D. Kentucky, at Frankfort. February 4, 1919.)

No. 799.

1. **Attorney and client ⟸63—Attorneys held in privity with plaintiff, whose agent was member of syndicate employing them.**
   Where plaintiff's agent procured an option for the purchase of land, and attorneys were employed by a syndicate of prospective purchasers, of which plaintiff, through the agent, was a member, to give an opinion as to the title, the attorneys were in privity with plaintiff, and under the fiduciary relation to it of attorneys to a client.

2. **Fraud ⟸13(1)—Representation may be fraudulent, though having basis of truth; "fraudulent representation."**
   A representation made with fraudulent intent is fraudulent, where its implications are false, and made with intent to deceive, though there be a basis of truth underlying it.

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

3. **Attorney and client ⟸114—Opinion of attorneys as to title of land held fraudulent.**
   An opinion furnished prospective purchasers of land by attorneys *held* fraudulent, in the specific false statements as to the attorneys' opinion respecting the title, in the false inference intended to be thereby conveyed, and in essential matters concealed and withheld, which it was their duty to disclose.

4. **Vendor and purchaser ⟸43(1)—Purchaser held not to have affirmed contract induced by fraud.**
   Where plaintiff purchased land, taking the deed in the name of its agent in reliance on a fraudulent opinion as to the title, given by attorneys in collusion with the vendor, and subsequently took a substituted deed to itself, and executed a note and mortgage for the balance of the purchase price, but at the time thought there would be only a comparatively slight deficiency in acreage, the execution of the papers and acceptance of the new deed did not constitute an affirmance of the original purchase with knowledge of the fraud.

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5. **Vendor and purchaser ⇐113—Purchaser entitled to rescind, when vendor cannot give title to material portion.**
Where the false representation inducing the purchase of land relates to the quantity, and the vendor is unable to convey title to a material portion, constituting the principal inducement to the purchase, this is such injury as entitles the purchaser to rescind.

6. **Vendor and purchaser ⇐37(3)—False opinion of attorneys in collusion with vendors held representation of fact; "trade talk."**
Where attorneys in collusion with a vendor gave a prospective purchaser an opinion as to the title to the land, which was fraudulent and not their real opinion, such opinion was not mere "trade talk," but a representation of fact, and constituted ground for rescission.

7. **Corporations ⇐661(2)—Foreign corporation, doing business without complying with statute, is entitled to sue to rescind contracts.**
Assuming that a foreign corporation was carrying on business in Kentucky, and that its failure to comply with Ky. St. § 571, prevented it from enforcing a contract for the purchase of land, it might nevertheless sue to rescind the contract for fraud

8. **Corporations ⇐661(2)—Foreign corporation's right to sue for rescission not defeated by prayer for alternative relief.**
The right of a foreign corporation, doing business in Kentucky without compliance with Ky. St. § 571, to sue for rescisson of a contract on the ground of fraud, is not defeated by a prayer for reformation as alternative relief.

9. **Vendor and purchaser ⇐341(5)—Purchaser on rescission entitled to recover payment to third person as commission.**
On rescission of a contract for the purchase of land for fraud, the purchaser was entitled to recover the amount paid by it, including an amount paid to a third person on behalf of the vendor as a commission.

10. **Vendor and purchaser ⇐341(6)—Purchaser, on rescission, entitled to recover payment from vendor and attorneys participating in fraud.**
Where plaintiff's purchase of land was induced by the joint fraud of the vendor and attorneys giving a fraudulent opinion as to the title, plaintiff was entitled to a decree for the amount paid against all of them on a rescission of the contract.

11. **Vendor and purchaser ⇐341(5)—Allowance of interest on rescission by purchaser is discretionary.**
On rescission of a contract to purchase land by the purchaser, the allowance of interest on the amount paid is discretionary.

12. **Vendor and purchaser ⇐341(6)—On rescission for fraud, interest allowed against parties receiving price.**
On rescission of a contract to purchase land for fraud of the vendors and attorneys in collusion with them, interest would be allowed against each of the defendants on the amount received and retained by them.

13. **Vendor and purchaser ⇐341(5)—On rescission for fraud, purchaser entitled to recover expenditures on account of purchase, but not other expenditures.**
On rescission of a contract to purchase land for fraud, the purchaser is entitled to recover expenditures on account of the purchase before discovery of the fraud, but not expenditures in investigations prior to the purchase or expenses incident to the suit for rescission.

14. **Conspiracy ⇐16—Suit to rescind for fraud held not barred by statute applicable to conspiracy.**
A suit to rescind a contract to purchase land on the ground of fraud of the vendor and attorneys employed to give an opinion as to the title is

not barred by Ky. St. § 2516, requiring actions for conspiracy to be commenced within one year, which relates only to the technical common-law writ of conspiracy.

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

15. **Vendor and purchaser ⊂=337—On rescission for fraud, purchaser held entitled to lien to secure repayment.**

On rescission of a contract to purchase land, the purchaser is entitled to a lien on the land to secure repayment of the purchase price and payment of expenses, which he may be entitled to recover, and to have a decree of sale to enforce such lien.

16. **Appeal and error ⊂=278—Exceptions not brought to court's attention by agreement dispensing with specific exception.**

Exceptions to the testimony in a suit in equity are not properly brought before the court by an agreement that exceptions noted at the taking of the testimony shall be considered by the court without specific exception thereafter, as the court cannot be required to search the record for exceptions.

In Equity. Suit by the Goodrich-Lockhart Company against Oscar A. Sears and others. Decree for plaintiff in accordance with the opinion.

Dinsmore & Shohl, of Cincinnati, Ohio, Charles Stuart Guthrie, of New York City, and A. Floyd Byrd, of Lexington, Ky., for complainant.

Forman & Forman, of Lexington, Ky., and Worthington, Cochran & Browning, of Maysville, Ky., for defendant Sears.

O'Rear & Williams, of Frankfort, Ky., for defendants Harkins.

SANFORD, District Judge. This cause was submitted before me on testimony previously taken, consisting mainly of depositions, and in part of oral testimony introduced at the preliminary hearing before Judge Cochran, with various documentary exhibits. I have had no opportunity to hear the witnesses testify or to observe their demeanor on the witness stand. I have, however, carefully considered all the evidence, and the arguments and briefs of counsel. The volume of evidence and its various ramifications as applicable to the many disputed questions of law and fact, is such that it is not practicable, within the reasonable limits of a written opinion, to state the evidence in detail, with justice to the contentions of ether side. I shall hence merely state, without elaboration, the general conclusions of law and fact which, after careful study, I have reached in reference to the various controlling matters in issue.

[1] 1. J. Smith, to whom the defendant Sears gave the option, acted in the transaction in question as the agent of the plaintiff company, in which he was a stockholder, director and officer. The original employment of the defendants Harkins & Harkins by Murray, Prentice and Howland was in behalf of a syndicate of prospective purchasers of the tracts covered by the option, of which the plaintiff, through Smith, was a member; and Harkins & Harkins in the transactions in question were, by virtue of their employment, in privity with the plaintiff and under the fiduciary relation to it of attorneys to a client.

2. The option covered five tracts of land purporting to aggregate 288,600 acres; one tract containing 69,900 acres in Knott and Perry Counties; three tracts, containing an aggregate of 184,000 acres in Perry County; and one tract, containing 35,000 acres in Letcher County. As the three tracts in Perry County purported to contain an aggregate of 184,000 acres, or a fraction over 280 square miles, and as Perry County, as shown by the census of 1910 (according to a certificate submitted in behalf of the defendants Harkins & Harkins) contained only 335 square miles, it appears that, exclusive of the 69,000 acre tract laying partly in Perry County, Sears was offering to sell to Smith more than four-fifths of Perry County; a county which contained, according to this census, a population of 11,255 persons.

3. The S. G. Reid patent, issued in 1872, now in issue, being the 55,000 acre tract referred to in the option, purported to grant, by its outer boundaries, 68,800 acres in Perry County, less 13,800 acres of prior patented land included therein and deducted therefrom; that is, it purported to grant 55,000 acres, or almost 86 square miles, a little less than one-fourth of Perry County, according to the census of 1910. Its boundary line came within about a mile of Hazard, the county seat. It contained, in 1912, a population of several thousand people, was traversed by many public roads, contained many school houses, some of which were used as churches, and several school districts and voting precincts; and was in large part, an old settled country, with much cleared land, and many old buildings and with a large number of mining and timber corporations and individuals in possession of many and large portions, embracing apparently by far the greater part of its outer boundaries.

The proof shows that in fact, at the time of its issuance, at least 61,800 acres within its outer boundaries had been prevously granted under earlier and paramount patents, and that it actually conveyed title from the State to not more than six or seven thousand acres, which lay in scattered and detached portions. It was one of the series of similar blanket patents issued by Kentucky, from 1872 to 1874, which conveyed title to only a small portion of their outer boundaries; and it bore in Perry County the reputation of a "wild cat" patent conveying title to but little land. By reason of the comparatively small and scattered acreage to which it conveyed title, as well as the large number of later patents, covering about 60,000 acres, under which many adverse possessions were held, and the enormous expense of locating and settling the prior patents and the adverse possessions of squatters, it was, in spite of the large acreage value of those portions to which title could be established, of comparatively little value, as a whole, and worth nothing like the price of $178,500 at which Sears had given the option to Smith. Sears did not then even own this patent, but held an option on it himself at the price of $2,500; having obtained an option on this and other similar blanket patents from Coldwell, the purchaser at tax sales, for speculative purposes merely.

Sears was an habitual speculator in this class of specious and flimsy titles, was thoroughly familiar with the general situation, and unques-

tionably, in my opinion, knew the comparative worthlessness of the title which he proposed to sell.

Harkins & Harkins were thoroughly competent lawyers, familiar with Kentucky land titles and land law, and with the general nature of the blanket patents issued by Kentucky in the 1870's; the younger Harkins, though of less general experience than his father, having had special experience in the investigation of land titles in Perry County. I am constrained to conclude from all the surrounding circumstances that they both knew the general character of the Reid patent, and were fully aware that in all probability it only conveyed title to a small part of the 55,000 acres of paramount title which it purported to include, embracing a vastly larger acreage of prior patents than the 13,800 acres excluded on its face and conveying title to a small comparative acreage merely.

4. While the letters of Murray, Prentice & Howland were somewhat loosely worded, due apparently to their lack of familiarity with the abnormal system of land titles prevailing in Kentucky, it nevertheless sufficiently appears from the entire correspondence that Harkins & Harkins were employed to give an opinion, for the benefit of their clients, on the ultimate question whether, if they purchased from Sears, they would acquire "good title" to the land bought; and not merely whether they would acquire a valid tax title to the Reid patent, for whatever it might be worth, as a basis for subsequently acquiring a good title to the land itself by buying up the superior patents and valid possessory titles; and this, I am constrained to find, Harkins & Harkins thoroughly understood.

5. In the light of all the evidence and surrounding circumstances, I am likewise compelled, though reluctantly, to conclude and find from all the circumstances, that at some time before Harkins & Harkins gave their report on the title to the Reid patent, and probably prior to July 16th, they, at the instance of Sears, entered into a secret agreement with him that, for a money consideration to be paid to them by him, they would not disclose the real condition of the Reid title to their clients, but would give them an untrue, fraudulent and deceptive report as to the title, misleading and concealing its real condition, as a means of inducing the purchase of the Reid patent at the extravagant price at which Sears had given the option. I further find that, without making any real or substantial effort to ascertain the true condition of the title, especially as to the number and extent of the older and paramount patents—the most crucial matter affecting the validity of the patent—they gave to Murray, Prentice & Howland, for their clients, the written opinion, dated August 24, 1912. This report, "concerning the matter of the investigation of title to 55,000 acres of land situated in Perry County, Kentucky," after setting forth that the land in question purported to have been granted to S. G. Reid by patent dated June 12, 1872, for 68,800 acres, proceeded:

"From this patent there is excluded for prior claims, 13,800 acres, leaving the net number of acres, granted by said patent 55,000 acres. These exclusions are referred to in gross and are undefined and were made because of previously patented land within the exterior boundary of said patent. These

previously patented lands constituting the 13,800 acres were located principally along the streams and branches and were evidently made to include lands which were suited for agricultural purposes at the time they were made and did not extend very far on to the hillsides where the lands are chiefly valuable for coal deposits and timber."

After setting forth at length various mesne conveyances from and after Reid by which the property was acquired by the Kentucky Union Company, and the sale made for defaulting payment of taxes at which Coldwell became the purchaser, and an extended discussion of the proceedings under the tax sale and the Kentucky statutes and decisions relating to such sales, the report continued:

"It [the Reid patent] is younger than the Smith & Baum and De Groot patents, and to the extent of the conflict, the Smith & Baum and De Groot surveys will hold that part of the land covered by them. As to the older patents covering the land, it will be necessary to have the property actually surveyed and each of the patents older in date in this section of Perry County located before we can give an estimate as to the prior patented acreage.

"We feel safe in assuming, however, based upon experience with land titles throughout Eastern Kentucky and particularly in Perry County, that the 13,800 acres excluded from said patent would probably represent the correct number of acres of previously patented lands, for the reason that the surveyors making the survey had access to and were the custodians of the surveyors' books of the county and probably correctly estimated the acreage in the patents older than the Stephen G. Reid survey. However, they are susceptible of being made certain by compiling a list from the landoffice at Frankfort, Kentucky, and having them run out and located on the map within the exterior boundary lines given of the Stephen G. Reid survey.

"The foregoing report is based upon a personal inspection of the records and deeds and patents of the Perry County Court and the land office at Frankfort, Kentucky, and the records of the Circuit Court of the United States for the District of Kentucky at Louisville, which have been carefully considered by us, and attention is called that some of the deeds and mortgages herein referred to were not mentioned in the abstract of title furnished to us by you.

"Summarizing, we are of the opinion that at the time the land was surveyed under the S. G. Reid patent, there was contained within the exterior boundary thereof 68,800 acres, 13,800 acres of which was previously patented land, and therefore did not pass by the grant, but that there was within said patented boundary to S. G. Reid, 55,000 acres of vacant and unappropriated land. It is our opinion that the title passed from said Stephen G. Reid in the manner hereinbefore set out by the sundry mesne conveyances and was vested in the Kentucky Union Company at the time the same was assessed for taxation in the year 1905. * * * Under the laws of Kentucky as affecting tax sales now and as interpreted by the Court of Appeals, the presumption is indulged that the officers did their duty and it would be incumbent upon the claimant or owner of the property, in any endeavor which he might make to set the sale aside, to show that the proceedings were irregular. This the Kentucky Union Company did not attempt to do, and it is our opinion, in so far as the title of the Kentucky Union Company is concerned, that its title passed under said sale and vested in the purchaser, Sam Coldwell.

"Of course, under the sale and conveyance to Sam Coldwell, he took no greater title than the Kentucky Union Company had, and the question of adverse possession could not be determined from the record. It is a question of fact which may be proven in part by record and in part orally. * * *

"Should your clients elect to purchase this property, we would recommend they acquire the 13,800 acres of land, or if they are not able to acquire it in fee, then to acquire the coal, oil, gas and mineral rights in, on and underlying the same, with full and ample rights of way for the purpose of developing not only the 13,800 acres, but for the purpose of developing all the remainder of this outlying property. * * * Our idea for this recommen-

dation is to solidify and make into one ownership all of the land that is described within the exterior lines of the Stephen G. Reid patent, including the previously patented lands. It is not only valuable for the purpose of making it one body, and enlarging the acreage, but it gives access to the balance of the land included in the Stephen G. Reid patent to the extent of its outer boundary."

[2] Under all the circumstances, I am constrained to conclude, and do conclude and find, that the specific statement contained in this report, purporting to be based upon inspection of the records, that in their opinion at the time the land was surveyed under the Reid patent "there was within said patented boundary to S. G. Reid 55,000 acres of vacant and unappropriated land," was untrue, and that this was not their real opinion; and that the further statement that they felt safe in assuming, from their experience, that the 13,800 acres excluded from the Reid patent "would probably represent the correct number of acres of previously patented lands," was likewise untrue, and that this was not their real opinion. I further find that in spite of the incidental statements in the report that it would be necessary to survey each of the older patents in this section of the county before they could give an estimate as to the prior patented acreage and that the surveyor's estimate of the older patents was thus susceptible of being made certain, the report as a whole, by its circumstantial reference to the 13,800 acres of previously patented lands as located principally along the streams and branches, the specific reference to the Smith & Baum and De Groot patents, which alone were mentioned as older patents, the statement that from their experience they felt safe in assuming that the 13,800 acres excluded probably represented the correct acreage of previously patented lands, the specific statement of their opinion based upon a personal inspection of the records, that there were 55,000 acres of vacant and unappropriated land within the patented boundary, and the final reference to the advisability of acquiring "the 13,800 acres of land," or at least the mineral interest therein, was fraudulently intended to convey the impression to their clients that, in their opinion, there were approximately only 13,800 acres of prior patents excluded from the boundary, apparently in the Smith & Baum and De Groot patents; that while the exact extent of these prior patents could not be determined except by survey, the acreage given was in all probability correct, and there was approximately 55,000 acres of vacant and unappropriated lands within the boundary of the patent to which it conveyed good title; and that the impression thus intended to be conveyed was false, and did not represent their real opinion. A representation is however fraudulent if made with a fraudulent intent, even though there be a basis of truth underlying it, where its implications are false and made with an intent to deceive. Lee v. Lemert, 26 Kan. 111, 115 (Brewer, J., afterwards Mr. Justice Brewer).

I further find that this report was deliberately fraudulent in its failure to call the attention of their clients to the fact that they had not in fact examined the records for the purpose of ascertaining, even tentatively, the number or extent of the prior patents, or to call their attention to the real and substantial nature of the blanket patent to Reid, the

probable number and extent of the prior patents lying within its boundaries, and the real extent of the probable title thereby conveyed.

[3] I hence conclude that this report was fraudulent, both in the specific statements of opinion which it contained, as well as in the false inference intended to be thereby conveyed, and in the essential matters concealed and withheld, which the duty of counsel to clients required them to disclose.

6. I further find that the plaintiff, probably with the concurrent advice of Murray, Prentice & Howland, whose lack of experience in land titles of this character easily lead to their deception, relied upon this report as a statement from Harkins & Harkins, in effect, that the purchase of the Reid patent through the Coldwell tax title, would, in their opinion, convey title to approximately 55,000 acres of prior unpatented lands embraced within the boundary of the Reid patent, subject only to diminution by ascertaining the exact boundaries of the 13,800 acres of prior patents, and of the possessory titles that had been subsequently acquired by squatters; that in reliance upon the opinion expressed in this report and the inference drawn and intended to be drawn therefrom, the plaintiff, through Smith, purchased the Reid patent from Sears on September 9, 1912, taking a deed therefor to Smith dated September 6, 1912; and that at the time of the delivery of this deed the plaintiff, by certified check delivered to Sears by Harkins & Harkins, paid to him, as part of the purchase price, the sum of $95,500, and on or about the same date paid as part of said purchase price, the further sum of $4,500 to one O. D. Jackson in behalf of Sears, as a commission.

7. And I further find that on the same day on which the payment of $95,500 was made to Sears, he, secretly and surreptitiously, in fulfillment of his prior agreement with Harkins & Harkins, paid to them, in money drawn by him from the bank, the sum of $12,500, in consideration of the fraudulent opinion given by them in reference to title to the property and the aid thereby given by them in bringing about and inducing the purchase of the land from him; and that even if the younger Harkins at the time executed and delivered to Sears an option of purchase on 41,000 acres of land which he claimed under a tax title, of whose validity Sears then knew practically nothing, this was not the true consideration of such cash payment, but a mere pretense and sham to cover up the real nature of the transaction.

And Sears thereupon attempted, as expeditiously as practicable to cover up in the name of other persons that portion of the purchase price which he had himself retained.

[4] 8. Thereafter (a deed having in the meantime been executed by Smith and wife to the plaintiff), Sears, at the instance of the plaintiff, executed and delivered to the plaintiff a deed, dated October 9, 1912, whereby he conveyed the land in question directly to the plaintiff; this deed being intended by the parties as a substitute for the former deed to Smith. The plaintiff at the same time executed its promissory note to Sears for $78,750 as the balance of the purchase price, which, together with a mortgage from the plaintiff to Sears to secure the payment of the note, were delivered in escrow to await a determination

of the extent, if any, to which credit should be given on the note by reason of deduction in purchase price due to deficiency in acreage. I find, however, that at the time this new deed was executed and delivered and the note and mortgage executed and delivered in escrow, the plaintiff had not ascertained the fraud that had been practiced upon it; the investigation of the title which it had made in the meantime merely leading it to believe that there would be a comparatively slight deficiency in acreage by reason of an excess in the prior patented land over and above the 13,800 acres, against which it would be fully protected by credit on the note deposited in escrow. And I am therefore of opinion that the acceptance of this new deed and the execution of these papers in October did not constitute an affirmance by the plaintiff of its original purchase with knowledge of the fraud that had been perpetrated upon it, under the doctrine of McLean v. Clapp, 141 U. S. 429, 12 Sup. Ct. 29, 35 L. Ed. 804, and other cases, or deprive it of the right to rescind the transaction on account of fraud, when subsequently ascertained; for which purpose its bill was seasonably filed.

[5] I further find that the small portions of land inside of the Reid patent to which the plaintiff derived title under its purchase from Sears, are not, for the reasons already stated, worth the sum of $100,000.00 or substantially that amount; and that it has suffered great financial injury through the fraud practiced upon it, inducing it to pay this sum on the purchase price therefor. Furthermore where the false representation is as to quantity and the vendee obtains title to only a small portion of the purported quantity, the vendor being unable to convey title to a material portion constituting the principal inducement of the purchase, this itself is such injury as to entitle the purchaser to rescission. In such case he is necessarily injured by failing to receive for the consideration paid a material portion of the property which he expected to obtain for such consideration. See as to rescission in such case: 2 Black on Rescission, sec. 423, p. 144, and cases cited in note 143; and 6 Cyc. 341 and cases cited in note 77.

[6] 9. The fraud thus practiced upon the plaintiff whereby it was induced to purchase this Reid patent and to make a cash payment therefor largely exceeding the real value of the land, as well as causing it to obtain title to only a small portion of the land which it expected to receive in consideration for such payment is, in my opinion, such as to fully entitle it to maintain this bill for rescission of the purchase. The case presented is not that of an opinion fraudulently expressed by a prospective vendor as to the value of that which he proposes to sell, which is regarded as mere "trade talk," upon which the prospective purchaser is not entitled to rely, or of a purchase on the vendee's own independent investigation, without interference by the vendor, as in Southern Development Co. v. Silva, 125 U. S. 247, 256, 259, 8 Sup. Ct. 881, 31 L. Ed. 678, and other cases. An opinion expressed to a prospective purchaser by his attorney as to the validity of a title which he is about to purchase, which the attorney is bound to render honestly by virtue of his fiduciary relation, is not mere "trade talk," but is a representation of fact as to his real opinion upon which the client is entitled to rely; and if such opinion be falsely stated, at the instance

of the prospective seller and by collusion with him, it is, in my judgment, clearly a false statement of fact, to-wit, as to the opinion of the attorney and constitutes ground for rescission of the purchase thereby induced.

[7] 10. For present purposes, I assume, without determination, that the plaintiff, a foreign corporation, had, prior to the delivery of the deed to Smith, dated September 6th, as well as prior to the delivery to it of the deed dated October 16th, carried on business in the State of Kentucky, through the agency of Smith and otherwise, and that under the provisions of sec. 571 of the Kentucky Statutes, its failure to file in the office of the Secretary of State of Kentucky a statement giving the location of its office in the State and the name of its agent thereat, until October 16, 1912, would, under the Kentucky statute and decisions, render the contracts whereby it purchased the land in question unenforceable; and that no action would lie to enforce the same, at least in the courts of Kentucky, and perhaps in the Federal courts within the State. But however this may be, I am of opinion that these statutes do not deprive the plaintiff, as a foreign corporation, of the right to maintain, either in the courts of Kentucky or in the Federal courts therein, a bill to rescind these transactions for fraud, in which it does not seek to enforce any contract made in the carrying on of business in Kentucky, but on the contrary proceeds in derogation of such contracts and in the effort to set the same aside. This is not to affirm, but to disaffirm the transaction in question. See Central Transp. Co. v. Car Co., 139 U. S. 24, 60, 11 Sup. Ct. 478, 35 L. Ed. 55.

I find no precise authority in support of this conclusion; but think it is not only sound in principle but also finds strong support in the well settled rule that similar statutes in reference to the doing of business within a state by foreign corporations do not prevent such non complying foreign corporations from maintaining, even in the courts of the State, actions ex delicto. Delaware & A. Telegraph & Telephone Co. v. Pensauken Tp. (C. C.) 116 Fed. 910, 911; Louisville Property Co. v. Nashville, 114 Tenn. 213, 215, 84 S. W. 810; 19 Cyc. 1304, and cases cited in note 35. In Delaware & A. Telegraph & Telephone Co. v. Pensauken Tp. (C. C.) 116 Fed. 910, supra, the court said that the prohibition against a foreign corporation from transacting business "does not subject its property to wanton destruction." So an agent who has collected and retains property of his principal is, on grounds of public policy, estopped, when sued by his principal therefor, from relying upon the non compliance of his principal with the foreign corporation statutes of the State as a defense to such action. Insurance Co. v. Kennedy, 96 Tenn. 711, 716, 36 S. W. 709; Packet Co. v. Agnew, 132 Tenn. 265, 271, 177 S. W. 949, L. R. A. 1916A, 640. In like manner I am of opinion that one who has induced a foreign corporation by fraud to enter into a contract with it, is, on grounds of public policy, estopped, when sued by the foreign corporation for rescission of such contract, from relying upon its non compliance with the foreign corporation statute of the State as a defense to such action. Such statute does not subject it to being deprived of its property by fraud any more than by other tortious act. The instant case is in this respect clearly distinguishable from Fruin-

Colnon Cont. Co. v. Chatterson, 146 Ky. 504, 143 S. W. 6, 40 L. R. A. (N. S.) 857, in which the plaintiff affirmatively relied on the contract under which it was doing business in Kentucky, predicating its claim to a lien on the defendant's property on the work which it had done under such contract.

[8] And since the plaintiff is entitled to maintain the bill for rescission and to be granted relief predicated upon this theory, it is not deprived of such right by reason of non compliance with the statutes merely because it has prayed in its bill alternative relief looking on the reformation of the deed, which is not granted. The defense raised by the answers under sec. 571 of the Kentucky statutes accordingly cannot be sustained.

[9-12] 11. Upon rescission of the purchase, the plaintiff is likewise entitled to recover the amount paid by it to Sears as consideration on the purchase price of the land, consisting of the $95,500 paid directly to Sears and the $4,500 paid for Sears' account to Jackson. Wilson v. Ranch Co. (8th Circ.) 73 Fed. 994, 997, 20 C. C. A. 241; Lanier v. Hill, 25 Ala. 554, 559; Foster v. Gressett's Heirs, 29 Ala. 393, 397; McWilliams v. Jenkins, 72 Ala. 480, 487; Bibb v. Prather, 1 Bibb (Ky.) 313, 315, 2 Black on Rescission, § 694, p. 1569, and cases cited in note 87; 6 Cyc. 341. And since this payment was, in my opinion, induced by the joint fraud of all the defendants, the plaintiff is entitled to a decree for this amount against them all. Watts v. Mortgage Co. (5th Circ.) 60 Fed. 483, 486, 9 C. C. A. 98, affirming Lee v. Lemert, 26 Kan. 111 sup.; Milliken v. Frisbie, 89 Misc. Rep. 579, 153 N. Y. Supp. 751. And see Bigelow on Fraud, p. 246. The allowance of interest, in my opinion, is discretionary. See, by analogy, as to allowance of interest on the recovery of damages for torts, Lincoln v. Claflin, 7 Wall. 132, 139, 19 L. Ed. 106; Redfield v. Iron Co., 110 U. S. 174, 176, 3 Sup. Ct. 570, 28 L. Ed. 109; Arnold v. Horrigan (6th Circ.) 238 Fed. 39, 47, 151 C. C. A. 115; New York Trust Co. v. Detroit Ry. (6th Circ.) 251 Fed. 514, 523, 163 C. C. A. 508; and cases cited. In the exercise of this discretion, I am of opinion that interest should be allowed against the defendants from September 9, 1912, on the sums which they respectively received and of which they have had the benefit, that is, against Sears on the $83,000, which he received and personally retained, and against the defendants Harkins on the $12,500 which their firm received.

[13] 12. The plaintiff is also entitled upon rescission to a decree against all the defendants for the amount which it has naturally expended on account of the purchase, before the fraud was discovered (Wilson v. Ranch Co. [8th Circ.] 73 Fed. supra, at page 977, 20 C. C. A. 241), including money spent in care and preservation of the property (2 Black on Rescission, § 694, p. 1569) and in attempting to utilize the property before the fraud was discovered (Id. § 695, p. 1570), and the necessary expenses in subsequent examination of the title leading to the discovery of the fraud practiced upon it. Such recovery, however, cannot properly include either the amounts spent by it in investigating the property prior to the purchase or the expenses incident to this suit, such as the expenses of surveyors employed to exam-

ine the property preliminary to giving their testimony. The expense account, which has been exhibited by the plaintiff in its proof, is entirely too general to serve as the basis for a decree in this behalf, and includes many items, such as expense incurred prior to the purchase, which can form no part of its recovery. As it appears, however, that it has incurred substantial expense for which a recovery should be allowed, a reference will be had to a master to ascertain and report the amount of such expense for which the defendants are liable. Such report will be made upon the testimony already taken and such additional testimony as may be offered by the parties.

[14] 13. I further am of opinion that the plaintiff's right of action is not barred by sec. 2516 of the Kentucky Statutes providing that actions for "conspiracy" shall be commenced within one year, upon which the defendants Harkins rely in their answer. This, I am of opinion, relates only to the technical common law writ of conspiracy, which is of a very limited scope (8 Cyc. 645), and has no reference either to an action on the case in which conspiracy is charged, which does not change the cause of action alleged, but is merely important as it may affect the means and measure of redress (8 Cyc. 647), or to the substantive equitable action of rescission, brought for the purpose of rescinding a contract induced by fraud, in which as here, conspiracy is incidentally charged merely as a form of alleging the joint fraud and collusive action of the defendants.

[15] 14. The plaintiff is also entitled to a lien on the land in controversy to secure the payment of the money decrees rendered in its favor against the defendants, both for the purchase price paid and for the expenses which it may be entitled to recover, and decree of sale to enforce such lien. 2 Black on Rescission, § 694, p. 1564, and cases cited in note 87; 6 Cyc. 341, and cases cited note 78.

[16] 15. At the hearing before me, no exceptions were made or noted to any of the testimony; and none are referred to in the briefs. I have accordingly not ruled upon any exceptions therein contained. I note that in one instance, at least, it was agreed that exceptions noted at the taking of certain testimony should be considered by the court without specific exception thereafter. This, however, is not a proper way of bringing exceptions to the attention of the court; which cannot properly be required to go through a large record of this character and rule upon all the various exceptions noted when the testimony was taken; many of which were obviously of a purely tentative character and would not have been finally relied upon. Furthermore many, if not the majority, of these exceptions, are of a merely general character for supposed "incompetency," and specify no ground of objection which requires a ruling by the court. No ruling is hence made upon any of the exceptions appearing in the testimony.

16. A decree will accordingly be entered sustaining so much of the bill as relates to the rescission of the purchase of the Reid patent from the defendant Sears, and awarding the plaintiff a recovery against all the defendants for the $100,000 paid to and for Sears as part of the purchase price, with interest on portions thereof against the different defendants, as hereinabove provided; cancelling its note for $87,500,

the mortgage delivered in escrow and agreement; and also adjudging in favor of the plaintiff a lien on the land embraced in said Reid patent to secure the money decrees awarded to it in this cause. This decree will also provide for a reference to a master to ascertain and report the amount of expenses for which the defendants are liable, in accordance with this opinion; and will award against the defendants all costs of the cause heretofore accrued.

The decree of sale to enforce the lien will be reserved until the amount of the expenses for which the defendants are liable has been determined.

THE TICELINE.

THE JUNIOR.

THE AMELIA.

(District Court, E. D. New York. February 15, 1921.)

Salvage ⇐23—Shipping ⇐54—Charterer liable for breaking away of lighter and for salvage.

A subcharterer of a derrick lighter, which moored her at a dock from which she broke away during a storm of which warning had been given several hours before, suffering damage to herself and cargo, and doing damage to another vessel, *held* primarily liable for such damage and for salvage services rendered to her and her cargo.

In Admiralty. Suits by the Tice Towing Line, owner of the tug Ticeline, against the derrick lighter Junior; by the National Lead Company against the derrick lighter Junior and L. Boyer's Sons Company; by the L. Boyer's Sons Company, owner of the steam lighter Amelia, against 500 tons of oil cake, etc., and the National Lead Company; by the National Lead Company against the Junior; and by the L. Boyer's Sons Company against the National Lead Company and Charles A. McNeill and J. Lester Mack, trading as the McNeill Lighterage Company. Decree awarding salvage and damages primarily against the National Lead Company, subcharterer of the Junior.

Park & Mattison, of New York City (H. E. Mattison, of New York City, of counsel), for libelant Tice Towing Co.

Theodore L. Bailey, of New York City (Frank C. Welles, of New York City, of counsel), for National Lead Co.

Frederick W. Park, of New York City, for L. Boyer's Sons Co.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for McNeill Lighterage Co.

CHATFIELD, District Judge. On the 4th of February, 1920, with the wind coming from the northeast, but with a northwesterly storm threatened, of which notice had been given by the Weather Bureau for a whole day previous, with snowy conditions prevailing, and the night setting in with a temperature slightly below freezing, with the snow turning to rain and falling in the form of sleet, the wind increased and forced from her moorings the derrick lighter Junior, at the gas com-

pany dock, just southwest of the opening to the Navy Yard on the Brooklyn side of the East River. The barge Captain Sullivan, which had previously been lying outside of the Junior, was removed by her captain before the storm to a berth behind a projection of the dock. The Junior was under charter (with her captain) from the McNeill Lighterage Company to the National Lead Company, and had been, in turn, chartered by the McNeill Lighterage Company from her owner, L. Boyer's Sons Company. Each of these charters was in the usual form of oral charter; the terms being to pay for the service, to return the boat in good condition, ordinary wear and tear excepted, and to meet unusual expenses connected with the service of the boat, while the wages of the master and the use of the equipment going with the boat were furnished by the owner.

It appears that as the wind became stronger during the night, and as the tide began to run out in the neighborhood of 3 o'clock, the Junior broke from her moorings, apparently at one end, and was forced against the bulkhead in such a manner as to do considerable damage over a stretch more than the length of the boat. Then, all of her lines having broken, she started down the river, striking first a Tice Line tug which had been lying at the Gold Street pier while the master was telephoning the owner. The pilot in charge of the tug had his attention attracted by feeling the shock, and immediately saw the Junior moving away from the Ticeline and subsequently coming in contact with a carfloat at the next pier to the west. Within a short time thereafter, the captain having returned to the boat, the Ticeline started down the river in the darkness and storm, which by that time had turned to snow, after the Junior, which it overtook several hundred feet below the Brooklyn Bridge. The Ticeline ran up under the stern of the Junior, succeeded in getting a line aboard, and maneuvered her in to Pier 7, Brooklyn, where she remained long enough to satisfy the captain that the Junior was able to stay afloat, and that substantial help in the way of pumping would be needed to remove some 2½ feet of water which was already in her hold.

Shortly afterwards he telephoned his own office, and communication was sent to the National Lead Company, and by various messages information was also given to the McNeill Lighterage Company, whereupon the Atlantic, of the National Lead Company, and the Amelia, of L. Boyer's Sons Company, the owner of the Junior, proceeded to the Junior, and each undertook, as best it could, what appeared to be necessary. The Atlantic evidently reached the neighborhood of the Junior before the Amelia did; but, expecting at that time that the cargo might be dumped and the boat capsized, as the water was then over the port rail amidships and the boat was down at one corner, the Atlantic did not attempt to put a pump into the Junior until after the Amelia had come up on the other side and had put her pump into the boat. Subsequently both boats, with the same purpose in mind, but each ignoring the fact that the other was present, shoved the stern of the Junior across the slip, where she could rest more easily against the opposite pier. The Atlantic, meantime, had put her own pump into the Junior, and undoubtedly owing to the greater capacity of the pump was able to remove

more water than the Amelia. They succeeded in pumping out the boat to the point where the pumps sucked by 12 o'clock, and then the Atlantic left, leaving the Amelia standing by and pumping as occasion required, until the middle of the afternoon. Subsequently the Atlantic came back and looked the situation over, and the McNeill, of the McNeill Towing Company, also arrived and remained for a day and a half, seeing that the boat was kept afloat and pumping as needed.

Not only was there damage to the deck cargo, which consisted of $34,000 worth of oil cake, from water which rose over the deck, but some of the load appears to have been thrown overboard at some time during the voyage, and some damage was sustained by the rails of the Junior. It also appears that the Ticeline suffered the loss of a flagpole and a small break in its rail, at the time the Junior came into collision.

Under these circumstances the first claim is that of the Ticeline for salvage. It is stipulated that the value of the Junior, as damaged, was in the neighborhood of $5,500, and that the damage which she suffered had subtracted some $7,500 or more from her original value. It also appears that a substantial leak was discovered under water in the stern of the Junior, with respect to which temporary repairs were made at different times during the day, when the four tugs were standing by and pumping the boat out. The captain of the Atlantic testified that he had a conversation with the captain of the Junior, and some of the other witnesses have testified that the captain of the Junior was on board of the boat, although the captain of the McNeill has identified the man who was on board as another employé of the Boyer Company, and has testified that it was not the captain of the Junior.

Be that as it may, the captain of the Atlantic testified that the captain of the Junior told him that he was on his vessel at the Gas House dock and had jumped ashore in order to save his life. It further appears from the testimony that the captain of the Junior was located the following morning, both at the dock entrance of the Brooklyn Union Gas Company and in the neighborhood of the Captain Sullivan, where he had some communication with the gatekeeper and with the master of the Captain Sullivan, sufficient to indicate that he had been away and apparently did not know that his boat had gone adrift.

Whether it should be inferred, in the absence of any testimony from the captain of the Junior, that he left his vessel when she first began to pound the dock or break her lines, and remained away until morning, or whether he had left earlier the night before, there is nothing in the testimony to indicate that the captain of the Junior could have done anything to prevent the disaster or to rescue his boat any more expeditiously than was done by the salvors in the case, unless it should be held that it was his duty on the day previous to move his boat to another berth, or that it was his duty to stay on board constantly, and to be on watch, so as to summon assistance if danger was threatened.

It appears that the berth at the Gas Company dock was assigned by the National Lead Company. The McNeill Lighterage Company is evidently a copartnership, which obtained work from the National Lead Company, and which, in this case, made an independent contract to charter the Junior, and is thus by contract obligated to return the boat

and to look to the subcontractor for reimbursement, if unable to fulfill its contract.

We must therefore immediately pass on to the question of primary obligation on the part of the National Lead Company, both for the damages sustained and for fulfilling the obligation of the McNeill Lighterage Company, if the fault be placed for the accident upon the National Lead Company. As has been said, the berth was furnished by the National Lead Company; it had watchmen, who not only were looking out for its yard and the docks, but also had occasion to observe the boats; and the gas company also had watchmen, whose duty it was to take note of the situation. No obligation, of course, rested upon the gas company to protect or take charge of boats lying at its docks, as a matter of accommodation to the National Lead Company.

Conditions were such that a dangerous storm was to be anticipated. Apparently the lines put out by the captain of the Junior were in good condition, and were properly run, and the boat was safely berthed, so far as the captain could anticipate, unless he moved her from that situation. The wind, while blowing down the river, was not of such a nature as to make it negligence for the captain of the Junior to assume that his boat could lie safely moored to the dock, and, as master, he was not obliged to remain with the boat continuously, nor to do more than his contract called for when upon a voyage, or when docking the boat, or when watching her loading, or running her lines. Responsibility for the care of his master's property rested upon him as an employé of the Boyer Company; but general care of the boat at a wharf, the protection of this boat against impending storm, the safeguarding of the boat during hours when the captain was off duty, rested upon the National Lead Company, and it appears from the testimony that they had knowledge that the master was not upon the boat before any danger actually occurred.

Under all the circumstances I do not see that the captain of the barge was guilty of any negligence, and if the captain of the Atlantic is correct, that the captain of the Junior was upon his boat until he was compelled to go ashore in order to save his life, there would seem to be nothing which he could have done more than he did, and the issue comes down as to whether the National Lead Company should have, under the circumstances, had in mind the protection of the boats lying at its wharf, and done something to keep them from getting adrift.

I think, therefore, that the primary obligation for what occurred rests upon the National Lead Company, in the sense that they should be first called upon to answer for the damages resulting. Inasmuch, however, as the original contract was with the McNeill Lighterage Company, the decree must run against the McNeill Lighterage Company, which must answer in damage if the National Lead Company is not able to respond.

Now, as to the separate decrees in the separate actions, a number of situations are presented that must be differentiated. So far as the Ticeline is concerned, I think it is evident from the testimony, that, if the Junior had drifted much further in point of distance, or for any considerable length of time, she would have sunk, and the cargo would have been a total loss. Therefore the services of the Ticeline in rescuing her

and getting her to shore were of considerable value, and undoubtedly were salvage services. It also appears that the Ticeline has a cause of action for damages, which, while not separately pleaded, has been presented in connection with the cause of action for salvage, and I see no reason why the two decrees cannot be awarded in the one action. The Ticeline, therefore, should have a decree for its damages for the loss of its flagstaff and its broken rail. It should also recover for the salvage rendered, but the amount of the salvage must take into account the fact that the captain of the Ticeline mistook the condition of the Junior in assuming that it was not making water rapidly, that it was safe to leave it for some other vessel to come on telephone notification, and that the Ticeline performed very little service in the way of pumping out the water already accumulated. In fact, some of the damage to the cargo may have resulted from the fact that the Ticeline did nothing except tow the Junior to the wharf.

In the second action for salvage, the National Lead Company seeks to recover for the services rendered by its boat, the Atlantic, in saving the Junior from sinking. The Atlantic cannot claim any salvage in protecting the oil cakes, as they were the property of the National Lead Company, and as the Junior was actually being used by the National Lead Company in carrying these cakes. Nor can the National Lead Company recover for salvage of the vessel, if it was merely preventing further loss from its own fault. The services of the Atlantic were evidently, as has been said, more than half of that rendered to the Junior during the forenoon of February 5th.

The Amelia, belonging to the Boyer Company, has made the claim which is embodied in the third action, which is also a claim for salvage; but the owners of the Amelia, ignoring the fact that they were saving their boat for the National Lead Company, have contented themselves with filing a claim for salvage against the oil cakes. The amount of damage to the cargo, which the Amelia prevented by assisting the Atlantic in pumping, is measurable, but was attended with no risk, and does not rise much above an ordinary pumping service.

The McNeill Lighterage Company could not claim salvage, except as between itself and the National Lead Company; but its work must be taken into account in considering the total amount of help present and furnished, although its services, again, were nothing more than standing by and pumping, and do not rise to a high degree of salvage service.

Assuming that the cargo saved from partial or total loss was worth $34,000, that the boat, although sunk to the rails two or three times in the course of the operation, did not go to the bottom, and that the cost of raising it was saved, I think that a total award for the various salvage services of $2,500 would be commensurate. Of this I would allow in the Boyer action, for standing by all day and pumping, the amount asked in the libel, which is $218. The amount which might be claimed by the McNeill and by the Atlantic would certainly represent as much as $500, and the balance should be awarded to the Ticeline.

In the fourth action, in which the National Lead Company claims damages for the furnishing of an unseaworthy boat, in the sense that the servant, the owner of the boat, is alleged to have failed in the per-

formance of his duty, in which action we must separate carefully his relation as servant of the owner, and distinguish these from his duty as the agent or representative of the National Lead Company, it follows, from the fact that the National Lead Company was responsible for the accident, that the libel should be dismissed, but without costs.

In the fifth suit, in which the owner of the boat claims damages for the various items of loss, a decree will be entered directing the payment of the items of damage, including salvage, against the National Lead Company, and with the further provision that the decree shall be satisfied by the McNeill Lighterage Company under its charter, in case the decree is not satisfied by the National Lead Company, or in case execution does not accomplish payment of the claim.

The award for salvage of the boat in favor of the Ticeline, as has been previously stated, should run against the National Lead Company as a part of the damages, and, if not answered or collected from them, must run against the boat, which is thus a guarantor of the payment of this salvage claim. If collected from the boat, then, in turn, the owner of the boat will have the right to look to the McNeill Lighterage Company for reimbursement, and the decree may so provide.

The claim of the Boyer Company for salvage against the oil cakes has already been provided for, in that it can run only against the National Lead Company, and then, in turn, against the McNeill Lighterage Company, as evidently it cannot be satisfied by the owner out of his own property, the boat.

The decree for salvage of the Tice Towing Line will be awarded in the proportion of four-fifths for the oil cakes against the National Lead Company only, and one-fifth for the boat against the National Lead Company, and then against the McNeill Lighterage Company, in case payment is not obtained from the National Lead Company, and against the boat in case neither respond.

The decree in favor of the Tice Towing Line for damages will run against the National Lead Company and the McNeill Lighterage Company, and, if not collected, against the Junior.

Mr. Mattison: Will your honor indicate the proportion in which the owner and crew of the Ticeline will recover?

The Court: It should be ⅔ and ⅓.

THE ROMAN PRINCE.

(District Court, E. D. New York. February 8, 1921.)

1. **Collision ⇐122—Evidence to establish.**
   The doctrine of res ipsa loquitur cannot be invoked to establish that an injury to a vessel was caused by collision with another, and the liability inferred, unless there is evidence of some injury inflicted.

2. **Collision ⇐74—Evidence to establish.**
   Evidence, though directly in conflict, *held* sufficient to establish that a steamship, in passing out of a slip, came in contact with a barge lying outside another at a pier, and her liability for the sinking of the barge, which followed almost immediately afterward, in the absence of any other cause shown.

In Admiralty. Suit for collision by Philip J. Kenny, owner of the barge Crane, against the steamship Roman Prince. Decree for libelant.

Macklin, Brown, Purdy & Van Wyck and Wm. F. Purdy, all of New York City, for libelant.

Kirlin, Woolsey, Campbell, Hickox & Keating and Wm. H. McGrann, all of New York City, for claimant.

CHATFIELD, District Judge. For several days prior to the 19th of April, 1919, the barge Crane had been taking on a cargo of barley at various points in the slip on the south side of Pier 5 of the Bush Stores in Brooklyn. A number of barges were in the slip, when, around noon on that day, representatives of the Prince Line, which loaded its vessels upon the north side of Pier 4, moved some of these barges in order to allow the Roman Prince, which had been loaded to a 26-foot water line, to pass out of the slip to sea. The Prince had been berthed inshore of the steamships Carlow Castle and the Justin, and at the time a lighter was lying on the north side of the Justin. A harbor strike was in progress and no tugs could be procured, so the Prince, with the help of her own power and lines to piers or vessels on either side, started stern first out of the slip at approximately high water slack.

The slip is 275 feet wide. The Roman Prince is a steamer 420 feet long, with 54 feet beam. Her stern was first moved over toward the center of the slip, by hauling with the steamer's winch upon a line to Pier 4. A second line, running to Pier 5, was intended to hold the steamer from moving over, so as to strike the barges on the opposite side, and the steamer progressed by drawing in these lines with her winches until she reached a point near the entrance to the slip. The barges on the north side had been three or more deep, and some had been moved until no more than two abreast were left at any point on the southerly side of Pier 5. On the northerly side of Pier 4, the Justin and the barge alongside of her represented the widest obstruction to the slip. This would leave a clear space of approximately 115 feet through which the Prince could pass, with a clearance on each side of substantially 30 feet, if held to her true course. Apparently there was still some flood tide, although one of the claimant's witnesses testified that the tide was ebb, and at another time that it was flood.

The Prince, after reaching the outer end of the slip, continued backing while turning her stern to port upstream until she reached a position where she could, under her own engines, proceed down the Bay. The engines of the Prince were not used steadily until her stern had nearly reached the end of the slip, although one of the witnesses from the steamship testifies that these engines were worked back and forth at short intervals, as was necessary in getting her out of the slip. The lines to the north and south were cast off before the stern of the Prince emerged from the slip, and it is evident that, in order to allow the vessel to move astern under headway, they must have been run at a considerable angle from the perpendicular, if pulling or warping upon these lines was relied upon to give way to the ship. This would in turn allow considerable movement to either side, and the way of such an im-

mense vessel would have been very difficult to stop, unless the propeller was worked to start and stop her as occasion might be.

An Erie Railroad barge was moored off the outer end of Pier 4. Just inside of the end of Pier 4 on the south side was a Central Railroad barge, and the Crane was moored on the outer or southerly side of the Central Railroad barge. Ahead of the Central Railroad barge was a Lehigh Valley covered barge. One of the witnesses was in the door of this Lehigh Valley barge, while another was seated upon its roof. A third eyewitness was on the end of the pier, where he was waiting while a Shipping Board tug had gone to Pier 3 to dock the Tiger, a United States transport, which was accompanied by a boat with a band welcoming its arrival. Another witness was seated upon the top of the Erie barge, and these men all agree with the testimony of Mrs. Keenan, the wife of the captain of the Crane, that the stern of the Prince, as the vessel came out of the slip slightly on a diagonal toward Pier 4 on the north, struck the Crane a severe blow, at some point aft of amidships on the starboard side.

The Crane had been moored bow in. She was a barge 120 feet in length, with a side of some 12 or 13 feet, and was then loaded so as to draw 10 or 11 feet of water. The witnesses agree that the stern of the Prince then swung off toward the south, and that the Prince continued, as one of them expresses it, "scaling along" the Crane until the bluff of the bow of the Prince swung into the side of the Crane and continued either in contact or close to the starboard side of the Crane until the stern was passed.

The witnesses all agree that the Prince went clear of the outer mouth of the slip before turning stern upstream, and that Mrs. Keenan returned to her cabin, from which she in 5 or 10 minutes emerged and called for help, as her boat was then obviously sinking. The boat became entirely submerged within about 30 minutes after the Prince had passed out, and Mrs. Keenan was with difficulty helped on one of the other barges as the water rose on the Crane. The captain of the Crane had gone ashore for provisions, knew nothing of the occurrence, and was prevented by illness from being present at the trial. Within an hour after the Prince had gone out of the slip, the sinking of the Crane was reported to one of the officials on the dock of the Prince Line, by some one who evidently considered that the Prince Line was interested therein.

During the same afternoon a Merritt & Chapman wrecking boat reached the scene and prepared to remove the cargo of barley. A diver went down and examined the starboard side of the Crane from bow to stern. He could ascertain, by feeling, no injury until he reached the stern, where he found four or five of the end planks, some 3 feet from the bottom of the boat, forced out from the side a distance estimated by him as 5 or 6 inches.

That night another large steamer, the Wabash, came in the slip to load, necessitating the removal of the wrecking apparatus. According to the testimony the Wabash was unable to bring her stern close into the side of Pier 4, because of the wind or from being in contact with

some part of the Crane. The next day the Wabash was pulled ahead and brought alongside the pier, but later was pulled back at high tide and evidently rested, when loaded, upon the Crane as the tide fell. When fully loaded, the assistance of tugs was required to remove the Wabash, and the Crane, when put upon the dry dock, had her bow partly crushed in, her deckhouse, towing bitts, cleats, and upper parts broken down upon her deck, while a large number of her bottom planks were broken and pulled away, and one of her bilge logs was cracked near amidships. The owner of the Crane testifies that this cracked bilge log was on the starboard side of the vessel.

If the Crane was not lying exactly upon an even keel, her wearing strips may not have protected the bilge log if the boat was touched by the side of the Prince, which goes straight down to a much greater depth than the entire draft of the Crane. The sides of the Prince, when examined later, showed no dent or injury fixing any point of contact, and the old, scaly paint upon the Prince bore no marks of a blow or of scraping.

At the trial, examination of the photograph exhibits in evidence made it clear that the end planks of the Crane could not have been forced off by the side of the Prince or by her stem, unless she was listed somewhat to port, for the ends of these planks did not project beyond the side of the boat, and as a wearing strip along the side and around the stern was not injured, although only a couple of feet above the planks which were forced off.

The libelant then made the suggestion that the blade of the propeller of the Prince, which has a circumference of some 18 feet, or even the frame of the rudder, might have struck the stern of the Crane as the Prince was passing by. The Crane was so low in the water that the libelant contended that she could pass under the counter of the Prince far enough to come in contact with the propeller, or even the rudder blade.

But examination of the photographs and of the drawings of the Prince which have been supplied show that the curve of the Prince toward the stern post and her cutaway are not sufficient to allow the Crane to have reached a position where the propeller could have struck the end of the Crane, without placing the Prince at such an angle across the slip as to have brought her in contact with the boats on the southerly side. A number of witnesses who were located at points on the southerly side of the slip have testified that the Prince was at no time near the boats on their side and appeared to pass straight out from the slip, from the time when her stern began to pass the Crane.

No such position could have been assumed by the Prince without having been evident to all the witnesses in the neighborhood, and furthermore, if the Prince had been in such a position, Mrs. Keenan could not have gone outside her cabin and while standing upon the deck called (as she testifies that she did, in which she is corroborated by the other witnesses for the libelant) to an officer in uniform on the after deck of the Prince that the Prince had sunk her boat. These witnesses

corroborated Mrs. Keenan also in her testimony that the officer replied, "All right, lady; we didn't do you any harm."

If the Crane had been so far under the counter as to be able to reach the propeller, the side of the Prince would have been over against the deckhouse of the Crane, and directly over Mrs. Keenan's head. She could not have stood alongside her cabin, and when she called up to the officer she would have been thoroughly impressed with the position of the steamer. Further, the injuries to the Crane could not have been more than 6 or 7 feet under water, and the propeller blades would not describe an arc at that depth sufficient to enable them to reach the side of the Crane, if the boats were passing in any way side by side.

But more conclusive than this testimony as to possibilities is the testimony of Mrs. Keenan and of the witnesses, who all agree that the heavy blow which they saw, heard, and felt occurred when the side of the Prince near the stern struck the Crane amidships, and before the stern of the Prince reached where Mrs. Keenan was standing. It would appear that the blow inflicted by the bow of the Prince, even if that actually came in contact as the witnesses for the libelant testify, was not nearly so severe, and if an injury had been found by the diver at the point amidships of the starboard side of the Crane, where the first contact has been located by the witnesses, this would have been conclusive of the issue of fact in the case in favor of the libelant.

The claimant has produced 14 witnesses, including the pilot, who was on the after bridge of the Prince until she was straight in the slip, and had nearly reached the outer end of the slip when he left to go forward, her officers upon both bridges, her wireless operator, and another man who was sitting upon the port side of the deck watching the vessel pass out of the slip, and others of her crew who were employed in signaling to the engine room, etc., who all testify that the Prince passed the Crane without touching her, and with various amounts of open water (from 5 feet to 50) at all times between the vessels.

The claimant has also produced the man who handled the lines on Pier 4, and another man who carried the lines in a small skiff from point to point along the southerly side of Pier 4. Both of these men testify that they were upon the Crane as the Prince passed by. They also testify that they were talking to Mrs. Keenan at the time, and that the man from the small boat was in her cabin talking with her for several moments after the Prince passed out. This is denied by Mrs. Keenan and all the other witnesses for the libelant, who testify that these men were not upon the Crane at the time of the collision, and that the man with the small boat left and rowed away to where the Tiger was being docked before the stern of the Prince got out of the slip.

We have, therefore, a direct conflict in the recollections and testimony of the witnesses. The claimant contends that, if the Prince is not shown to have touched the Crane, a finding that the sinking of the Crane resulted from the movements of the Prince would be mere speculation. It is argued by the claimant that, even if the Crane sank at a

point of time in conjunction with the passing out of the Prince, the injury might have been received in some unexplained manner at another time, that some obstruction in the slip might have been present and forced by the Prince against the Crane under water, and that there would then be no proof of negligence on the part of the Prince or those responsible for her movements. They also argue that the sinking of the Crane at this time may have been pure coincidence.

[1] The claimant cites the cases of The Charles L. Jeffrey, 55 Fed. 685, 5 C. C. A. 246, The Ramleh (D. C.) 157 Fed. 769, and The Worthington and The Davis (D. C.) 19 Fed. 836, as authority for the proposition that the libelant must prove some fact from which negligence is to be imputed. An unexplained sinking of a vessel might be attributed to the presence of another vessel, where no competent cause can be found from the testimony, but no negligence would be ipso facto made out. The doctrine of res ipsa loquitur can be invoked in such a situation only in case it can be found from the testimony that some contact between or effect upon the vessels resulted from the navigation of the vessel charged with causing the injury. Liability can be based only upon negligence, either proven by direct evidence or by the nature of the act. Mere propinquity of the two vessels does not prove of itself the cause of injury, and certainly does not show negligence if no cause of injury can be found.

[2] But if it be found as a fact that the Prince, with her tremendous mass, was so navigated, either under the influence of her propeller or by pulling upon the lines with sufficient force to set the vessel in motion, and if she came in contact with the side of the Crane and the Crane thereafter sank, either from a broken bilge log and the forcing off of her bottom planks, or in some mysterious way from the forcing out of the end planks, then the claimant would be chargeable with negligence for undertaking such an operation without sufficient precautions, or using sufficient care to prevent the moving of the heavy mass of the Prince against the Crane. Damage would naturally and almost inevitably result if the boats were allowed to touch. This would not be one of the expectable, ordinary contacts incurred when moving in and out of the slip. If contact between the vessels be found as a fact, then the burden is thrown upon the claimant of presenting evidence sufficient to show that the injury was caused by something other than this contact, or that the contact in question could not have produced the injuries found.

There can be no question in this case that the injuries were present before the Wabash came into the slip. In the first place, the Crane sank, and sank rapidly. In the next place, the diver found the planks had been forced off from the end of the Crane before the Wabash arrived. Something must have produced these injuries, and if it be found as a fact that the Prince struck the Crane, this would be sufficient proof of negligence in the handling of the Prince to allow the owner of the Crane to recover for the injuries sustained prior to the arrival of the Wabash, in so far as these can be proven.

The court saw and heard the witnesses for the libelant, most of whom

were disinterested, and who testified so positively that the Prince did strike a severe blow against the side of the Crane that their testimony must outweigh the greater number of witnesses for the Prince, who either had some interest in the transaction or whose attention may have been diverted at the time. If they did not see the collision, their recollection, when drawn to the matter long afterward, as to whether the boats actually touched, and their estimate of the distance by which the boats were kept apart, is not persuasive. Their estimates of this distance are manifestly at fault, because they disagree widely, and yet the Prince, according to most of them, was much closer to the side of the Crane than the middle of the slip, where she intended to pass out.

It must therefore be held that some collision occurred, and that this was the result of negligence on the part of the Prince. The libelant may have a decree.

GULF, C. & S. F. RY. CO. et al. v. CITIES SERVICE CO. et al.

(District Court, D. Delaware. November 26, 1920.)

No. 1.

1. **Pleading ⇐364(1)—Irrelevant matter in common-law declaration.**
   A declaration *held* to contain superfluous, irrelevant, and immaterial matter, subject to a motion to strike out, under the common-law system of pleading in force in Delaware.
2. **Pleading ⇐310—Exhibit no part of common-law pleading.**
   An exhibit is no part of a pleading in an action at common law.
3. **Action ⇐2—"Cause of action" defined.**
   A "cause of action" consists of a fact, or a state of facts, to which the law, or principle of law, sought to be enforced against a person or thing, applies.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Cause of Action.]

At law. Action by the Gulf, Colorado & Santa Fé Railway Company and another against the Cities Service Company and another. On motion to strike out parts of declaration. Sustained.

John Biggs, of Wilmington, Del., for plaintiffs.
George N. Davis, of Wilmington, Del., for defendants.

MORRIS, District Judge. This is an action at law instituted by summons in case. A declaration, consisting of a single count 20 pages in length, has been filed. The defendant now moves for an order striking out certain parts thereof upon the ground that such parts are superfluous, irrelevant, and immaterial, and consist largely of matters of evidence and not of facts, as that word is understood in pleading.

[1] The common-law system of pleading as it existed in England at the time of the American Revolution is the system of pleading in use in Delaware to-day, with the exception of certain changes in detail, rather than in fundamentals, made by constitutional or statutory

provisions of the state. The changes in pleading in England effected by the pleading rules of Hilary Term, 1834, and by subsequent acts of Parliament, were not here adopted, nor has the system of code pleading in use in many of the states of the Union affected the common-law system of pleading in this state. The standard treatises upon common-law pleading may be looked to as furnishing the guide to a solution of questions with respect to pleading in the law courts of this state. Donahoe v. Star Pub. Co., 3 Pennewill (Del.) 545, 53 Atl. 1028; Woolley's Del. Prac. § 340. By virtue of section 914 of the Revised Statutes of the United States (Comp. St. § 1537) the system of pleading in force in the law courts of the state of Delaware is the system of pleading to be used on the law side of this court.

It may be helpful to consider the declaration in its relation to the general administration of justice, rather than to confine such consideration solely to the constituent and narrower field of pleading. Logically considered, and speaking generally, the trial of every case involves the drawing of a proper conclusion from the premises of a syllogism of which the major premise is a principle of law and the minor premise is a fact or combination of facts, or if the premises, or either of them, be uncertain, the trial involves the definite ascertainment of one or both premises, as the case may be, as well as the drawing of the conclusion therefrom when the premises are definitely ascertained. As our government is a government of laws, and not of men, and no power to enact or otherwise make laws has been conferred upon the courts, the major premise of the syllogism must be found in the body of the written or unwritten law. The duty of the court, aside from that of making findings of law or fact, or both, consist in drawing the conclusion from the premises of the syllogism, or, otherwise stated, in making a proper application of the principles of the law to facts found or admitted.

[3] Such facts, which constitute the minor premise of the syllogism, are, in a case properly pleaded, first found in the pleading required to state the cause of action. A cause of action consists of a fact, or a state of facts, to which the law, or principle of law, sought to be enforced against a person or thing, applies. In the common-law system of pleading the facts constituting the cause of action, the minor premise of the syllogism, must, in actions in case, be set up in the declaration. The declaration may not consist of conclusions of law, for it is the function of the court to draw conclusions of law from established facts. The duty of the parties to the action is to allege in the pleadings the facts constituting the cause of action or the defense, and to prove at the trial by proper evidence those not established by presumptions, by fiction of law, or by the admissions, express or implied, of the pleadings. Pleading conclusions of law assumes what must be proved. Such a course would evade a trial of the facts, upon which the conclusion must be based and upon which it depends for its soundness.

"But," says Brumbaugh in his work on Legal Reasoning and Briefing (page 69), "there is also a danger from the opposite extreme. To evade a world of abstractions, only to plunge into a labyrinth of details, is assuredly an equal

process of folly. The case has its roots in wide areas of circumstantial detail. Should these details be pleaded in full? Obviously not, for just as much uncertainty as to the points upon which the case turns will ensue from pleadings loaded down with a deluge of details as from the other extreme. Clearly, then, there is only one logical recourse, and that is a middle ground. * * * Plainly, therefore, the facts which must be alleged in order to raise a rule of law are the facts which are described as the 'ultimate facts,' for they are ultimate in the sense that they must be proved, while the chain of facts, or circle of facts, or botn, which constitute their penumbra, constitute the body of evidence by which such proof is to be made.".

At page 387 he adds:

"Thus, where the primary issue of law and the final issue, or issues of fact, are separated by intermediary links, the law provides that the pleadings allege expressly neither the one nor the other, but the *ultimate* facts, which in such a case are the issues next in order below the primary issue itself, holding that the issue above is a conclusion of law and the issues below are evidentiary."

There is much authority in support of the position above stated by Mr. Brumbaugh. In Dowman's Case, 9 Rep. 9, b, it is said that—

"Evidence shall never be pleaded, because it tends to prove matter in fact, and therefore the matter in fact shall be pleaded."

Both Mr. Chitty in his work on Pleading (volume 1, p. 225), and Mr. Stephen in his book upon the same subject (page *346), refer to this rule as one of great importance, yet so elementary and so well observed in practice as not to have become frequently the subject of illustration by decided cases. The remedy for flagrant violation of this rule is by motion to strike out the improper matter. Perry's Common Law Pleading, p. 413; Stephen on Pleading, p. *424.

In the brief submitted on behalf of the plaintiff it is said:

"In Chitty's Pleading, vol. 1, p. 376, it is stated that before the Hilary rules the pleader could frame the body or substance of the declaration in such order and language as he deemed preferable."

But in my copy of that work, being the fourteenth American edition from the sixth London edition, I do not find such an unqualified statement. In fact, I do not find at page 376 anything touching the matter. On the other hand, at pages 287, 288, I do find the following:

"After the *commencement* of the declaration, the *body* or statement of the *cause of action* follows in natural order, and which in every description of action consists of *three different points*, viz. the *right*, whether founded upon contract or tort independent of contract; the *injury* to such right; and the consequent *damages*. In stating such of these, all the requisites of certainty and other points before noticed must be observed.

"Keeping in view and subject to those *general requisites*, every pleader was, before the very recent pleading rules, at liberty to frame the body or substance of every declaration in such order and language as he might consider preferable. He was not, however, allowed vexatiously to insert any superfluous, impertinent, or extraneous matter, as, in an action on a mortgage deed, a long description of the mortgaged premises, or covenants, of which no breach was assigned, and if he did so, or inserted numerous counts substantially alike, the courts, in virtue of their general jurisdiction, might, on summons or motion, order the unnecessary matter to be struck out."

An analysis of the declaration is unnecessary, for unquestionably many pages thereof contain, not allegations of ultimate facts, but only statements of evidence, thereby producing uncertainty and confusion. Such a declaration is, in my opinion, a substantial violation of the rules of pleading just considered.

[2] In addition to the 20 pages of pleading above referred to, there are annexed to the declaration five exhibits, containing in the aggregate 50 pages. The defendant's motion to strike also embraces these exhibits. An exhibit is no part of a pleading in an action at common law. Where an action is founded upon a sealed instrument, such instrument should be pleaded by its tenor or according to its legal effect. State, Use of Herdman, v. Houston, 1 Har. (Del.) 230; Trustees New Castle Common v. Stevenson, 1 Houst. (Del.) 451. If the action is founded upon a contract or conveyance, which at common law is valid without deed or writing, the declaration need not count upon or take notice of the writing. In such cases the writing is regarded merely as evidence. Gould's Pleadings, c. 4, § 43. A writing simply referred to and annexed as an exhibit will be stricken out on motion as impertinent and irrelevant. Oh Chow v. Hallett, Fed. Cas. No. 10,469; Fitch v. Cornell, Fed. Cas. No. 4,834. While a Delaware statute (Rev. Code of 1915, § 4170) authorizes a copy of the instrument of writing upon which the action is brought to be filed with the declaration for certain purposes, this statute seems to have no application to the exhibits in question.

The filing of such a declaration as that in this case is explained only by the fact that it was drawn and prepared, not by a member of the bar of this district, familiar with common-law pleading, but as a statement of claim by a member of the bar of a state in which code pleading is in force. A strict enforcement of the rules of pleading would require an order striking out many parts of the declaration, but as the matter is now in charge of a member of the local bar learned in the principles of common-law pleading and skilled in their application, no order will be made within 10 days from the filing of this opinion, thus affording the plaintiff an opportunity to obtain leave to file and to file an amended declaration in keeping with the system of common-law pleading which prevails in this district.

NATIONAL INTEROCEAN CORPORATION et al. v. EMMONS COAL MINING CORPORATION et al.

(District Court, E. D. Pennsylvania. March 1, 1921.)

No. 156.

Admiralty ⇐41—Not essential that libelant be owner of cause of action.

A libel to recover freight earned under a contract of affreightment and damages for breach of the contract *held* sufficient, though libelant sued as agent for the agents of the owner of the vessel, where the libel disclosed the relations between the parties in interest and it further appeared that by the terms of the contract the freight was payable to libelant.

In Admiralty. Suit by the National Interocean Corporation and others, against the Emmons Coal Mining Corporation and others. On exceptions to amended libel and rule on respondents to answer. Exceptions overruled, with leave to respondents to answer.

White & Wetherill, of Philadelphia, Pa., for libelants.

Conlen, Brinton & Acker, of Philadelphia, Pa., for respondents.

DICKINSON, District Judge. The argument of these exceptions was practically a reargument of the whole question. We have so treated it, in deference to the very full brief submitted.

The libel in this case was originally filed in the name of National Interocean Corporation, for and by authority of Erhardt & Dekkers, agents for owners or chartered owners of steamship Augustin. The libel was amended by adding the names of the owners. It is to be observed, as the proceedings now stand, that the National Interocean Corporation is the party libelant, Erhardt & Dekkers are named as the parties for whom the libelant is the agent, and for and on whose behalf and by whose authority the libel is filed, and the owners are brought in merely by way of information as being the owners, of whom Erhardt & Dekkers are agents. In other words, the agent of the agent of the owners files the libel in its own name.

The basis of the cause of action is a contract of affreightment, and involved the services of the ship. If the proceeding were an action at law, governed by the principles of common-law procedure, it is perfectly clear that the action could not be maintained in the form in which it has been brought. Whenever a cause of action at law exists, it exists in some one or more, and the one or more in whom is the cause of action must assert it as plaintiff, and it can be asserted by no one else. Even at law, however, there are instances of exceptions to this general rule, as in del credere commission agencies and in contracts by agents for an undisclosed principal.

The exceptions to this libel are based upon the proposition that the common-law rule pertains in admiralty. The right sought to be enforced by this libel is the right to receive the moneys agreed to be paid for freight, so far as freight has been earned, and the right to recover damages for a breach of the contract of affreightment, so far as the freight was not earned because of the default of the other party to the contract. There would seem to be agreement upon the proposition that the right of action is in the owners of the steamship.

There is something to be said, however, with respect to this. The contract of affreightment is so drawn that there may be some question of whether the contract was to pay the freight to the National Interocean Corporation, to Erhardt & Dekkers, or to the owners of the ship. If in an action at law, counsel in bringing the action misjudged the party in whom was the legal right of action, and thereby named the wrong party as plaintiff, the action would fail. There would be no way at common law by which the consequences of such misjudgment of the proper legal plaintiff could be avoided by naming all of the possible plaintiffs, either in the alternative or jointly, and having judgment ren-

dered in favor of the one or more ultimately determined to be the ones entitled to recover. Proceedings in admiralty, however, so far partake of the nature of proceedings in equity that the importance which the common law attaches to formalities is ignored.

Equity does not concern itself with parties plaintiff and defendant, or who is properly one or the other, but concerns itself wholly with the proper parties to the cause. A chancellor does not in the first instance inquire in whom is the legal cause of action, but only inquires into the substantial fact of whether all who have an interest in the subject-matter are before the court. Essentially the same rule seems to be followed in admiralty. There are often practical benefits which flow from these differences in procedure. The present cause affords us an illustration. If there is any doubt of whether the legal right of action is in one or another, the doubt may be resolved by bringing every one who has an interest in the cause upon the record. All parties being thus before the court, it may be determined in whom is the right of recovery.

It is further permissible in admiralty proceedings for the agent of the real party in interest to file a libel, either in the name and on behalf of his principal or in his own name. Such a proceeding at law would be anomalous, but there is the highest authority for the statement that it is "settled" that a libel in the name of an agent, who has no other relations to the cause of action than such agency, may be brought.

The very capable proctor for the respondent in this case denies this; but, admitting it to be the settled rule in admiralty, the question presented by this record is whether such a libel may be filed, not by the agent of the one in whom is the right of action, but by the agent of that agent. The principle upon which the rulings made proceed seems to be that admiralty concerns itself only with the question of whether the libel is filed and recovery is thus sought with the authority and sanction of the real party in interest. We say this because it has been held that a cause may proceed to final decree, although the libel was filed in the name of the agent, and the authority of the principal was not given until after the action had been brought. We interpret this as meaning that, although the libel is filed in the name of an agent as libelant, recovery may be had for the cause of action set forth, notwithstanding the fact that the right of action is in another, provided that such principal, even as late as the trial, sanctions what has been done in his behalf.

The proctors for the respondent, without conceding this to be the law, contend that the principle applies only in cases in which the question has not been raised until at or after trial. The doctrine is invoked that in admiralty, as at law, a plaintiff must not only have, but must aver, a right to recover, and although it may be true that, if no question of the sufficiency of the averments be raised before trial, the plaintiff then may recover on his proofs, if the question of the sufficiency of the averment is raised, the libel cannot be sustained, unless a sufficient averment be present.

The averments of this libel are criticized, not merely because it is not averred in whom is the right of action, but also because the owners

of the ship are not made parties libelant. The criticism in its facts is well founded. For some reason there is a refusal to name the owners of the vessel as parties libelant, and a persistence in making the National Interocean Corporation the libelant. Why there should be this insistence upon the right of the National Interocean Corporation to thus figure as the libelant, when all procedural difficulties could be so easily removed, does not appear. It is the right, however, of proctors for the libelant to frame the libel in such way as is acceptable to them. This involves the consequence that the libel must stand or fall as they have framed it.

As the charter party may be read as a promise of the respondent to pay to the National Interocean Corporation the agreed freight, and as the parties in the libel are set forth as they are designated in the contract of affreightment, we read the libel as one setting up a cause of action founded upon this contract and belonging to the party libelant according to the designation given in the contract. We think the proceeding may be thus brought, although it may turn out to be that the owners of the ship are the legal, as well as beneficial, owners of the contract. A party to whom the promise was made may maintain an action, and under the rule in admiralty the agent of the real party in interest has a right of action in himself, and may maintain it for the benefit of the parties for whom he acts, upon proof that the action is brought by their authority or with their sanction.

Our conclusion is that the rule in admiralty is that the right of a party to maintain a libel depends upon the fact of whether he has a real interest or represents a real interest. The question of whether he has an interest of one kind or of the other is determined by the trial proofs. The averments of the libel that he has such interest are sufficient to carry the case to trial.

The proctor for the respondent is well within his rights in insisting that the foregoing statement of the admiralty rule is inaccurate. In deference to the request of counsel, we have re-examined all the cited cases, and herewith discuss them at a length which would not otherwise be justified.

The leading case upon the question is the case of Houseman v. Schooner, 40 U. S. (15 Pet.) 40, 10 L. Ed. 653. The comment of the court is that "the pleadings and proceedings are imperfect and irregular." The irregularities were so many that the decree was reversed, but the cause was remitted to the trial court, with instructions to enter a decree in favor of the libelant. The schooner in that case had been stranded. A part of the cargo belonged to J. & C. Lawton, and was shipped to them on their own account. Another part belonged to Porter, the shipper, who shipped them as his own but consigned them to the Lawton firm. Both these parts of the cargo were taken by the salvors. The libel was filed by O'Hara, "as agent for J. & C. Lawton, the consignees." It will thus be noticed that O'Hara had no interest of his own. His sole interest was as agent for the Lawton firm, who owned part of the cargo and were receiving agents for another part of the cargo, which belonged to Porter. The further fact appeared that

the power to act for the Lawton firm was given to the libelant after the libel was filed. Exactly how the question was first raised does not appear, but the points were made that the libelant could not maintain his libel, because the right of action was not in him, and that at least the libel could not be maintained for that part of the cargo which belonged to Porter. With respect to this part of the cargo the libel was filed by an agent of the agents of the owner. It was held, however, that the libelant could recover, and that subsequent authority to file the libel was ratification of what had been before done.

Lawrence v. Minturn, 58 U. S. (17 How.) 100, 15 L. Ed. 58, merely upholds the right of a consignee to sustain a libel in his own name.

The syllabus of McKinlay v. Morrish, 62 U. S. (21 How.) 343, 16 L. Ed. 100, states that a consignee may sue in his own name, or he may sue as agent, or he may sue in the name of his principal.

In The Thames, 81 U. S. (14 Wall.) 98, 20 L. Ed. 804, the mere nominal indorsee of a bill of lading, although not the owner of the cargo, was held to have the right to file a libel.

It was determined in The Vaughan, 81 U. S. (14 Wall.) 266, 20 L. Ed. 807, that the right of a consignee or the indorsee of a bill of lading to maintain a libel was no longer an open question.

The proctor for the respondent has sought to distinguish all of these cases, other than the Houseman Case, on the ground that they were all cases of either a consignee or indorsee of a bill of lading, each of whom is prima facie owner of the cargo, and hence entitled to maintain the action. The effort is further made to get away from the Houseman Case by the statement that it is unsupported by any of the latter rulings and may be considered as overruled by them. We are not in accord with this, however. All the cases recognize Houseman v. Schooner as authority and quote it as such.

Moreover, McKinlay v. Morrish in terms recognizes the right of any one to maintain an action in his own name as agent of the real owner. The libel, it is true, in that case, was by the consignees; but the discussion of the question by the court was such that the writer of the syllabus felt justified in extending the doctrine broadly to the right of an agent to sue in his own name as such. The final test, of course, is in whom was the right of property or right of possession where the cause of action concerns property. The judgment must be rendered in favor of the one who has this right of action, and can only be so rendered when he is a party to the proceedings; but he is in admiralty deemed to be a party to the proceedings, if they be brought by some one who is asserting such right of action on his behalf, whether the assertion be as agent or not.

In the instant case, we have, as has several times been stated, a contract of affreightment. To this contract there are two parties. In any action for a breach of such contract, one of these parties may be made libelant and the other respondent. Any one may file a libel as libelant upon an averment and subsequent showing of authority so to do from the real party in interest.

The exceptions are dismissed, with leave to respondent to answer

over within the time limited by the rules of court. If no answer be filed within 15 days, libelant may enter a decree pro confesso, in accordance with rule 8 of the rules of this court.

With respect to the second motion, this is in effect disposed of by the order already made. Rule 8 of the Admiralty Rules of this court prescribes the time within which an answer may be filed. The pendency of the exceptions justifies extending this time. In disposing of the exceptions, the court may preserve the right of the libelant to the benefits of a decree pro confesso, as we have done.

In re GARVAN, Alien Property Custodian.

In re HERMANOS' PROPERTY.

(District Court, E. D. New York. February 28, 1921.)

1. **War ⇐12—Proceeding to enforce delivery of property to Alien Property Custodian.**
   Under Trading with the Enemy Act, § 17 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½i), a District Court may proceed on the petition of the Alien Property Custodian to compel delivery of property alleged to belong to an alien enemy, and a formal bill in equity is not required.
2. **War ⇐12—Proceeding to enforce delivery of property to Alien Property Custodian.**
   Section 7c of the statute (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115½d[c]) makes mandatory delivery of property to the Alien Property Custodian on his demand and in a proceeding to enforce such demand his determination under authority delegated by the President, cannot be controverted.
3. **War ⇐12—Proceeding to enforce delivery of property to Alien Property Custodian.**
   So long as the Alien Property Custodian is exercising his powers under the authority of Congress, a court, in a proceeding to enforce his demand for delivery of property, cannot take into consideration the fact of the Armistice or that peace with Germany has been signed by other nations,

At Law. On petition of Francis P. Garvan, Alien Property Custodian, for delivery of property of Emmel Hermanos, Alien enemy, now in possession of George Gravenhorst and Fred W. Gravenhorst, partners doing business as Gravenhorst & Co. Delivery ordered.

Leroy W. Ross, U. S. Atty., and Charles J. Buchner, Asst. U. S. Atty., both of Brooklyn, N. Y., and Dean H. Stanley, Sp. Asst. Atty. Gen., for the United States.

Drew W. Hageman, of New York City, for respondent Gravenhorst & Co.

CHATFIELD, District Judge. This proceeding has been brought to compel the respondents, who are members of the firm of Gravenhorst & Co., to turn over certain property which has been demanded by the Alien Property Custodian as belonging to an enemy alien, under the statute of October 6, 1917 (40 Stat. 415, c. 106 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115½a–3115½j]), which is still in force.

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[1] The first question presented is as to the remedy sought, inasmuch as the proceeding has been by petition and order to show cause, rather than by a bill in equity. Under the language of the statute (section 17) giving the court ancillary powers and in effect directing that the court shall use its jurisdiction for such ancillary proceedings, the defendants would seem to have no reason under the statute to insist that what is in effect process in aid of a simple demand, be preceded by a bill of complaint rather than a petition which must set forth substantially the same allegations of fact.

The purpose of the section is to render expeditious and summary aid to the government, in order to circumvent the acts of those declared by the executive to be enemies of the government. Ordinary questions of fact cannot arise, and the general ideas, based upon constitutional rights of litigants to have a trial by jury where such trial was given by common law, or to have a bill in equity filed where the jurisdiction depends upon the general equitable powers of the court, should not prevent action by the court under the statute without the formality and loss of time incident upon the customary method of conducting litigation. Aliens have certain rights under the United States Constitution, and enemy aliens should be denied none of the constitutional rights which appertain to a human being in the United States, without respect to his political status. But beyond that Congress has full jurisdiction, and in this instance has spoken plainly.

[2] The next objection urged is that the determination or decision of the Alien Enemy Property Custodian should not be accepted as conferring jurisdiction and as an incontrovertible basis for the proceeding. Under this objection the respondents contend that they have the right to controvert the allegations of the petition. This is not borne out by the language of the statute, which in section 7 makes mandatory the delivery of such property as shall be ordered to be turned over by the President, and further this point has since the argument of this motion been determined by the decision of the Supreme Court of the United States in the cases of Central Union Trust Co. and others v. Garvan, Alien Property Custodian, 254 U. S. ——, 41 Sup. Ct. 214, 65 L. Ed. ——, decided January 24, 1921. It was there held that a wrong determination by the Alien Property Custodian must be combated or contested by a claim under section 9 of the statute, as immediate possession was the purpose of this legislation, and that the court proceeding was to be effective as a "taking with the strong hand."

A further contention under the second point of objection is that the Alien Property Custodian is alleged by the respondents in their answering affidavits to have received information and proof, prior to the making of his demand and order, to the effect that the defendants in this case were not dealing with an enemy or ally of an enemy, that the owners of said property could in no way be considered alien enemies, and that the original question had been based upon the fact that the goods had been shipped through commission agents upon the English alien enemy blacklist, whose names had been removed from the blacklist before the making of the order. But, like the previous ob-

jection, this claim cannot be urged, except after the seizure. The court cannot question the conclusion or good faith of the Alien Property Custodian, and cannot learn whether he is acting upon secret information in this particular proceeding. The only issues involved according to the decision of the Supreme Court are as to the identity of the property and the persons and the actual making of the demand by the Alien Property Custodian.

[3] A third contention under the second objection to this proceeding is that so much time has elapsed since the Armistice and the signing of the treaty by nations other than the United States, that the proceedings are unnecessary. But so long as jurisdiction exists for the President to designate the Alien Property Custodian to safeguard the interests of the United States under the authority of Congress, and so long as Congress suffers him to exercise this authority, there is no reason why the court should in a particular case conclude that its determination is superior to the powers of executive officials exercised by the authority of Congress. The war and jurisdiction under this statute have not been ended as provided in section 2. Change in risk or the lack of necessity for care because of the termination of hostilities does not affect questions of jurisdiction and methods of legal procedure under a statute still in force.

Under section 7a it is the duty of the Alien Property Custodian to strike "permanently or temporarily" the name from the list if the original facts showing "reasonable cause to believe" that any person is an enemy or the ally of an enemy are explained or cleared up. But the court, acting under section 17 to enforce the provisions of this act, cannot by rule, order, or decree review the determination of the President that "reasonable cause" still exists. When authority has been delegated by executive order or regulation to the Alien Property Custodian, the finding will not be gone into collaterally under a question as to the extent of the power which may be so designated.

The pleadings herein recite that the Alien Property Custodian has "determined and demanded." Question might arise whether the executive order should not be made in the name of the President. Orders similar to the present order were considered in the cases decided by the Supreme Court on January 24, 1921, and no objection found.

As in cases of internment under sections 4067, 4068, and 4070, Rev. St. (Comp. St. §§ 7615, 7616, 7618), the authority is that vested in the President and carried out under his discretion. The courts have no jurisdiction over the decisions or acts of those carrying out the presidential proclamations or orders. If a person acts outside the law and without any apparent authority, his power and right may be tested by the appropriate writ or proceeding. But unless, upon the face of the proceedings or the alleged facts, it appears that the proceeding is outside the authority given by Congress or the Constitution, no court can pass upon the correctness of the decision reached and any remedy must be under the statute conferring the power exercised.

If a deputy United States marshal should arbitrarily intern under the authority of the President a person who could show from the

record that no determination as to "reasonable belief" of hostile acts or intent had been made, the case might be outside the statute. But erroneous determination could not be reviewed under a claim to the courts that no jurisdiction existed.

Section 7e provides that—

"No person shall be held liable in any court for or in respect to anything done or omitted in pursuance of any order, rule, or regulation made by the President under the authority of this act."

Whether this would protect from suit a person acting arbitrarily or from bad motives. in a way which could not be considered "in pursuance of any rule or regulation," or whether the United States might be responsible, even if the individual were relieved of liability, are queries which give no support to the proposition that an alien can question by refusal to obey and by collateral attack an order expressly stated to be made upon a determination from facts, even though the alien may claim the ability to prove the official determination incorrect. Application for relief or remedy under the proviso of section 7a must be made to the Alien Property Custodian, or under section 9 by the filing of a claim. The safety of the government requires the upholding of the authority conveyed.

THE NETTIE MOORE.

(District Court, D. Maryland. February 18, 1921.)

1. **Shipping ⟸209(1)—Filing answer, asking limitation of liability, makes respondent party for all purposes.**
   Where the charterer of a barge in which he had undertaken to carry a cargo for libelant voluntarily filed an answer, claiming limitation of liability, and a cross-libel in a suit in rem for damage to the cargo, his dismissal without leave of his cross-libel did not have the effect of withdrawing his appearance as a respondent for all purposes of the suit.
2. **Shipping ⟸208—Charterer of barge held not entitled to limitation of liability.**
   The charterer of a barge, which was old and worth not to exceed $550, who contracted to carry a cargo worth $70,000 from New York to Baltimore, and personally signed the bills of lading and superintended its loading into the barge, *held* not entitled to a limitation of liability for damage to the cargo, resulting from the unseaworthiness of the barge for such service and the improper loading and covering of the cargo.
3. **Evidence ⟸355(7)—Ex parte survey found among papers of deceased surveyor not admissible in evidence.**
   A writing found among the papers of a deceased surveyor, purporting to be a survey of a vessel made at the request of one only of the parties to a suit, *held* not admissible in evidence.

In Admiralty. Suit by Abraham R. Looban, trading as the Merchants' Bag & Cover Company against the barge Nettie Moore and A. J. Snyder, trading as the New York, New England & Pennsylvania Lighterage Company. Decree for libelant.

George Forbes and Jacob J. H. Mitnick & Son, all of Baltimore, Md., for libelant.

George T. Mister, of Baltimore, Md., and Peter Baumer, of New York City, for respondents.

ROSE, District Judge. [1] Libelant had imported from the Far East some 250 bales of burlaps at a cost approximating $70,000. They were delivered in New York, and he had immediate and urgent need of them in Baltimore. As at the moment a railroad embargo prevented their shipment by rail, he arranged with respondent for their transportation on the barge Nettie Moore, an old Erie Canal boat of a deadweight capacity of about 350 tons.

The respondent had for many years been engaged in the barge and lighterage business, using for that purpose boats owned, or, as in the case of the Nettie Moore, chartered, by him. The craft in question was, so far as the cargo was concerned, an open boat, for throughout most of its length its only deck was a walkway about 2 feet wide on each side. Respondent undertook to load the cargo. He supplied no dunnage for it. In order to protect the burlaps, he hired six much-used tarpaulins for 50 cents a day apiece, as the boat was without hatch covers.

When the Nettie Moore reached Baltimore it was found that many of the bales of burlaps had been damaged by water. Libelant proceeded in rem against the barge. Up to that time he had had no opportunity to ascertain the extent of the injury done. To be on the safe side, he claimed $25,000. One Ellwood, who was both master and owner of the Nettie Moore, appeared as claimant. He objected to stipulating for the amount the libelant was seeking to recover, because the barge was worth at the most but an insignificant fraction of such sum. It was thereupon agreed that the barge and her freight of $1,450, paid in advance, were of the aggregate value of $2,000. Subsequently respondent filed a pleading in the case, which he described as an answer and cross-libel. He denied that the burlaps had been damaged on the barge, but, if they had been, he claimed for himself the benefit of the limited liability statutes. He asserted that the libelant, by demanding a grossly excessive stipulation, had unnecessarily detained the boat, in consequence of which he had not only been deprived of its use for a number of days, but had suffered special damage, as he lost thereby a profitable charter, and he asked for a decree against libelant for the amount of these losses. Subsequently the libelant filed an amended libel, in which, after reciting that respondent had appeared, claimed the benefit of the limited liability acts, and sought recovery upon his cross-libel, asked that he might be made a party respondent, and to that end that summons be served upon his proctor of record.

Two weeks later respondent filed an order in the clerk's office, dismissing his cross-libel without prejudice. As his answer, claim under the limited liability act, and cross-libel formed an integral part of the same papers, this order was in effect to amend the composite pleading by striking out so much of it as constituted a cross-libel. To

amend, leave of the court is required, and that was neither asked for nor given, nor would it have been a proper case in which to have permitted such an amendment. The respondent had of his own motion brought himself into the litigation, not only by seeking recovery against the libelant, but by praying the court to limit his personal liability. He was under no compulsion to do so, as the decree in the case as it stood would necessarily have been limited to the amount of the stipulation, which it was agreed was the value of the barge and her freight. The seeking and obtaining by libelant of the subsequent order to make him a party was unnecessary. It amounted to nothing more than a formal assent by the libelant to his coming into the case. Striking out the cross-libel would not withdraw the petition to limit the liability. The court would remain under obligation to pass upon that issue. The questions raised by the cross-libel are so intimately and even inseparably connected with those involved in the original libel that they should be here determined.

[2] Upon the merits it appears that the barge, by bills of lading signed by the respondent personally, acknowledged that the burlaps were, when received by it, in apparent good order and condition. When delivered in Baltimore, many of the bales were visibly in bad shape. It was up to the barge to explain what had happened to them. No explanation has been given or attempted. Nothing has been told of any perils of the sea encountered in the voyage through the various kills, canals, rivers, and bays traversed on its not too tempestuous route from New York to Baltimore. It follows as a matter of course that the barge at all events is liable. But as, upon any possible standard of computation, the damage done greatly exceeds the value of that craft, the question of the most practical importance is whether the respondent is entitled to limit his liability, and that depends upon whether the barge was seaworthy for the work it undertook to do, for the respondent was not only its charterer, but, as already stated, he had signed bills of lading himself, and was the individual who actually inspected it before he sailed. He was himself, and not through others, directly responsible for sending it forth in the condition in which it went.

[3] Libelant offered in evidence a writing found among the papers of the late Capt. Sanford of this city. It purports to be a survey of the barge, made at the instance of the libelant so soon as the burlaps were unloaded. Capt. Sanford was one of the best-known marine surveyors of this port, a thoroughly competent and reliable man. His testimony, if living, would be illuminating, and if in accord with what is stated in the paper offered in evidence would probably prove decisive. It so happens, however, that his survey was altogether an ex parte affair. No notice that he was to be asked to make it was given by the libelant to the master of the barge or to its owner, and no request to participate in it was ever made. Capt. Sanford was called into the matter after the dispute had arisen. I do not feel that any of the rules of law as to the declarations or entries made by deceased persons will justify the admission of his survey. I am persuaded, however, by the other testimony, that the barge was unseaworthy for the purpose

of transporting burlaps, and that the respondent was himself personally, and not through the oversight of any one else, negligent in fitting her for the voyage. As already stated, the goods were damaged on the trip from New York, and yet there is no suggestion that the barge met with any accident, whether due to the neglect of her master, the only person on board of her, or to any other cause. The injury to her cargo must therefore have resulted from some defect in her or in her fittings. The evidence leaves little room for question that the tarpaulins used to cover the cargo were old, worn, and insufficient to protect from the rain a cargo so susceptible to water damage as burlaps. Their defects alone sufficed to explain what happened, although a leaky hull and failure to use proper dunnage may have borne their part.

This barge, rather a roomy one, capable of carrying upwards of 300 tons, was bought in 1918 for $2,000, and that, too, at the very peak of the war prices for anything which would float. It was two years older at the time it undertook to carry burlaps of the value of $70,000, and was worth according to the agreement of the parties not more than $550. To undertake to carry such a cargo in such a craft was a reckless taking of chances with another's property. It remains to determine what damage was done.

Libelant claims upwards of $14,000, and offers evidence to show that he suffered to this extent. In the nature of things there must be a great deal of uncertainty as to all such calculations. Libelant is entitled to recover the difference between what the goods were worth in the condition in which they were when put upon the barge and their value in the state in which they were delivered by it. Ordinarily that may be measured by the difference in market prices between them in their sound and in their damaged condition. Even when so simplified, there remains in this case many doubtful factors. I shall not attempt to enumerate, much less to discuss, them. It will be sufficient to say that libelant has proved that he has been damaged to the extent of $9,000. Perhaps he lost more, but the evidence he has been able to offer does not satisfy me that he has.

A decree against the stipulators for $2,000, and for the balance of $7,000, with costs, against the respondent, may be sumitted for signature.

EAGLESON v. PACIFIC TIMBER CO. et al.

(District Court, D. Delaware. December 3, 1920.)

No. 394.

1. Corporations ⇐573(1)—Reorganization plan must be fair to all stockholders.

A transfer of the assets of a corporation to a new corporation, as a part of a reorganization plan by which the stockholders of the old company are to have an interest in the new one, will be set aside as fraudulent, unless all stockholders of the same class are allowed to participate on equally favorable terms.

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

2. Corporations ⇐573(1)—Reorganization fraudulent in law.

A plan of reorganization adopted by a corporation *held* fraudulent, where holders of common stock who owned no preferred stock were permitted to exchange their stock, share for share, for that of the new company, but those who also owned preferred stock were required, as a condition to such exchange, to exchange their preferred stock for that of the new company, paying in cash a sum equal to its par value, or in effect to buy an equal number of shares of the new preferred stock.

In Equity. Suit by John Eagleson, individually and as executor of the last will and testament of James Bell, deceased, against the Pacific Timber Company and the West Coast Timber Company. Decree for complainant.

Robert H. Richards, and James I. Boyce, both of Wilmington, Del., for plaintiff.

William S. Hilles, of Wilmington, Del., and J. B. Colahan, 3rd, of Philadelphia, Pa., for defendants.

MORRIS, District Judge. The only question of moment necessary to be decided in this suit, the purpose of which is to set aside the sale by the Pacific Timber Company, a Delaware corporation, one of the defendants, of all its assets to the other defendant, West Coast Timber Company, is whether the plan of reorganization of the first-named company which involved such sale was fair or fraudulent as to the minority stockholders of the Pacific Company, of whom the plaintiff is one. The question arises on final hearing of the cause.

The Pacific Company was organized in 1907, with an authorized capitalization of $3,000,000. Its shares of stock, both preferred and common, have a par value of $100 each. By express provision of the charter the holders of the preferred stock became entitled, upon liquidation or dissolution of the corporation, to be paid the amount paid upon their shares before the payment of any amount to the holders of the common stock. About 3,780 shares of preferred stock are outstanding, each of which was paid for in cash at par. The Pacific Company, in keeping with the purpose of its organization, became the owner of timber lands and timber leases in Mexico. Warfare in that country stopped development of those properties in 1911, and has since then not only prevented further development and operations, but has resulted in the destruction of improvements theretofore made for the cutting and sale of the timber. The company is now insolvent; but, should order be restored in Mexico, it is conceded that its assets would probably be very valuable. A plan of reorganization was in March, 1920, submitted to and approved at a stockholders' meeting. It provided for the organization of a new company, having shares of stock, both common and preferred, with a par value of $10 each; the transfer of all the assets from the old company to the new company; the exchange, share for share, of common stock in the old company for common stock in the new; the exchange, share for share, of the preferred stock upon the payment of $10 (being the par value thereof) for each share of the preferred stock so acquired in the new company, such

exchange to be subject, however, to a condition which is stated in the defendants' brief thus:

"One who held both preferred and common stock could not exchange his common stock in the old company for that of the new, receiving the latter without the payment of any money therefor, unless and until he had surrendered his preferred stock and had paid for the preferred stock in the new company so issued to him."

The authorized number of shares of preferred stock of the new company exceeded the number of outstanding shares of the preferred stock of the old company. The evidence warrants the inference that the shares of preferred stock in the new company would be sold generally to any one at par. The plan also contemplated the issuance of capital stock or certificates of indebtedness of the new company for a large part of the indebtedness of the old company.

The plaintiff and other minority stockholders, including the interveners, opposed the proposed plan when it was presented at the meeting of stockholders, and they have at all times since been consistent in their opposition. The West Coast Timber Company was organized. An instrument of writing purporting to transfer the assets of the Pacific Company to the West Coast Company pursuant to corporate authority was made on or about the 30th day of March of the present year. The bill of complaint was filed on July 7th. The transfer of the assets must, under the circumstances, be considered as a step in the reorganization of the Pacific Company, and not merely as a sale of its assets. Fletcher, Cyc. Corp. § 4866.

[1] An examination of numerous cases bearing upon the question under consideration has led me to the conclusion that where the reorganization of a corporation, effected in part by a sale of its assets to a new corporation, leaves an interest in the stockholders of the old company, or provides for the acquisition by them of an interest in the new company, the right so to participate in such interest must be equally favorable to all stockholders of the same class, and that a denial of such equality of opportunity is a legal fraud upon the stockholders thus discriminated against, entitling them, in the absence of countervailing equities, to a decree setting aside the sale. Jones v. Missouri-Edison Electric Co., 144 Fed. 765, 778, 75 C. C. A. 631; Tanner v. Lindell R. Co., 180 Mo. 25, 79 S. W. 155, 103 Am. St. Rep. 534; Ervin v. Oregon Ry. & Nav. Co. (C. C.) 27 Fed. 625; MacArthur v. Port of Havanna Docks Co. (D. C.) 247 Fed. 984, 988; Cutting v. Railroad Co., 35 Misc. Rep. 616, 72 N. Y. Supp. 27; Sparrow v. Bement & Sons, 142 Mich. 441, 105 N. W. 881, 10 L. R. A. (N. S.) 725; Fletcher, Cyc. Corp. § 4866. Pomeroy's Eq. Juris. (4th Ed.) § 405.

[2] The reorganization plan of the Pacific Company was not equally favorable to all stockholders of the same class. Furthermore, it denied to the holders of the preferred stock, entitled to priority in payment over the common stock upon dissolution or liquidation of the company, rights which it conferred upon the holders of the common stock. In fact, the effect of the reorganization plan was the complete forfeiture

of the preferred stock; for, while it purported to confer rights of participation upon that stock, it in truth denied it all rights, except to buy preferred stock in the new company at par—a privilege (if such it may be called) that was open to the public in general. But, apart from the forfeiture of the preferred stock, the several holders of the common stock were, among themselves, denied equal rights of participation in the new company. The terms upon which they were permitted to participate were dependent upon whether or not the holder of common stock also held preferred stock. As the holders of more than half of the common stock of the Pacific Company had none or practically no preferred stock, while many persons, including the plaintiff and the interveners, held substantially equal amounts of preferred and common stock, it is manifest that the plan of reorganization was for the benefit of the majority, to the detriment of the minority, and consequently unfair and fraudulent.

The sale of the assets must therefore be set aside, unless the defendants' contention that the action of the plaintiff in delaying the institution of this suit until July 7th amounted to laches can be sustained. In my opinion this contention is not well founded.

A decree in accordance with this opinion may be submitted.

THE MAVISBROOK.

THE CAROLINIAN.

(District Court, D. Maryland. March 1, 1921.)

Admiralty ⇐43—Vessel not exempt from suit because operated by government at time of collision.

The fact that a vessel was under requisition and being operated by the United States at the time of a collision *held* not to exempt her from a suit in rem for the collision after her return to the owner.

In Admiralty. Suit by F. E. Richards, as liquidator of the Steamship Tregenna Company, Limited, owner of the steamship Mavisbrook, against the steamship Carolinian. On exceptions to libel. Overruled.

Haight, Sandford, Smith & Griffin, of New York City, and Brown, Marshall, Brune & Parker, of Baltimore, Md., for libelants.

Robert R. Carman, U. S. Atty., of Baltimore, Md., for respondent.

ROSE, District Judge. This is a collision case. The government has excepted to the libel on the ground that, at the time the collision took place, the Carolinian was under requisition by the government of the United States, upon the bare-boat charter basis, and was actually being then used as an army transport, being manned by an army crew, furnished by the War Department.

Subsequent to the collision, and before the arrest, the requisition and charter were terminated, and she was returned to her owner, in whose possession she was when arrested. The government says

that the only way in which a ship can become responsible in rem for a tort is through the fault of some one, whose relation to her is such that she is answerable for his shortcomings, and that neither the government nor its property can ordinarily be held liable for wrong done by its servants or agents.

It further contended that at the time of the collision the Carolinian was not employed as a merchant vessel, and therefore the libelant cannot rely upon section 9 of the act of 1916 (Comp. St. 8146e). At the time she was seized by the marshal she was solely employed as a merchant vessel, and at that time she was not immune from ordinary process upon a libel in rem against her. The Lake Monroe, 250 U. S. 246, 39 Sup. Ct. 460, 63 L. Ed. 962.

Nevertheless it is now urged that no liability in rem ever attaches to a ship for anything she does while in public service and in possession of the government. What Chief Justice Waite *said* while on Circuit in The Fidelity, 8 Fed. Cas. 1189, No. 4,758, fully sustains this contention. But the Supreme Court, in Workman v. New York City, 179 U. S. 552, 21 Sup. Ct. 212, 45 L. Ed. 314, explained that what was *decided* in that case was merely the application of the exception to the mode of execution of a judgment or decree against a municipal corporation, and then went on to say that in the admiralty law, the existence of that exception in all cases had been denied, citing a case from this district. Oyster Police Steamers of Md., 31 Fed. 763. It expressly declined to pass upon which of the conflicting conclusions on this point was the correct one. The Siren, 7 Wall. 163, 19 L. Ed. 129, was cited, and the English cases analyzed, and it was then declared that the English law, in harmony with the maritime law of this country, held that the fact that the wrong had been committed by a public vessel of the crown afforded no ground for contending that no liability arose because of the public nature of the ship, although it may be, in consequence of a want of jurisdiction over the sovereign, redress cannot be given. It said that the public nature of the service upon which the vessel was engaged at the time of the commission of a maritime tort affords no immunity from liability in a court of admiralty, when the court has jurisdiction. In The Siren, supra, the libel was in rem.

The language of the Supreme Court is so clear that it does not seem that it is open to two constructions, and such clearly was the opinion of the judges who sat in The Florence H. (D. C.) 248 Fed. 1012, The Gloria (D. C.) 267 Fed. 929, Samuelson v. The F. J. Luckenbach (D. C.) 267 Fed. 931, and The City of Philadelphia (D. C.) 263 Fed. 234.

It may be said in this case that the Carolinian itself has been released in accordance with the provisions of section 4 of the Act of March 9, 1920 (41 Stat. 526), and the only question remaining open is whether any liability was incurred for the tort committed while she was in the government service, and, if so, for how much?

It follows, from what has been said, that the government's exceptions will be overruled.

THOMSON et al. v. PEARSONS.

(Court of Appeals of District of Columbia. Submitted January 14, 1921. Decided February 7, 1921.)

No. 1387.

Patents ⇐113(7)—Decision of three Office tribunals that party could make claims is followed, unless palpably wrong.

Where the three tribunals of the Patent Office concurred in holding that the senior party was entitled to make the claims corresponding to the counts, the Commissioner's decision will be affirmed, unless such conclusion was palpably wrong.

Appeal from the Commissioner of Patents.

Interference proceeding between John Stewart Thomson and another and George T. Pearsons. From a decision of the Commissioner of Patents, awarding priority to Pearsons, Thomson and another appeal. Affirmed.

Seward Davis, of New York City, for appellants.

Joseph D. Sullivan, of Washington, D. C., for appellee.

SMYTH, Chief Justice. This interference involves an automatic fire extinguisher, and, in the language of the Commissioner, the only point involved is whether Pearsons can make the claims corresponding to the counts. The three tribunals of the Patent Office held that he could. We see no reason for disturbing their conclusion. It is not palpably wrong, and therefore, under repeated decisions of this court (Greenawalt v. Dwight, 49 App. D. C. 82, 258 Fed. 982; Hopkins v. Riegger, 49 App. D. C. 188, 262 Fed. 642; Kennicott v. Caps, 49 App. D. C. 187, 262 Fed. 641; Maremont v. Olson, 49 App. D. C. 369, 265 Fed. 1009), we affirm the Commissioner's decision.

Affirmed.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat in the hearing and determination of this appeal in the place of Mr. Justice ROBB.

LAUGHLIN v. BURRY.

(Court of Appeals of District of Columbia. Submitted November 15, 1920. Decided February 7, 1921.)

No. 1353.

1. **Patents ⇐91(4)—Evidence held to show junior party to interference disclosed invention to senior party.**

In an interference proceeding in the Patent Office, involving an invention relating to side bearings for railroad cars, evidence *held* to show that the junior party disclosed the invention to the senior party in connection with negotiations with the senior party's employer and subsequent assignee.

2. **Patents ⇐90(7)—Party to interference proceeding disclosing generic claims of issue held entitled thereto and not limited to specific form.**

Where the junior party to an interference proceeding involving side bearings for railroad cars had disclosed to the senior party an embodi-

ment of the generic claims of the issue, he was entitled to the broad generic claims, and not limited to any specific form or arrangement.

3. **Patents ⊂=93—One conceiving invention and employing another to work out details entitled to the result.**
Where one conceives an invention and employs another to work out the details of the general conception, the result belongs to the employer.

4. **Patents ⊂=211(3)—Inventor, by obtaining license from patentee, not estopped to assert rights.**
Where a party to an interference proceeding, before the corporation of which he was president obtained a license to manufacture the device covered by the other party's patent, had taken steps to apply for a patent, the license did not estop him from claiming the invention, but was justifiable for the protection of his interests.

5. **Patents ⊂=113(7)—Concurrent decisions in favor of same party not conclusive, when not concurring on facts or conclusions.**
The rule that the court will hesitate to disturb concurrent decisions of the Patent Office did not apply, where they did not agree on the facts, or the conclusions to be drawn therefrom, though all awarded priority to the same party.

6. **Patents ⊂=91(1)—Delay in applying for patent until after grant to another held to create no unfavorable presumption.**
The delay of an inventor in applying for a patent until four months after the issue of the patent to another claimant of the invention created no presumption in favor of the patentee, where the delay was due to an informal arrangement with the patentee's employer for joint ownership, and as soon as it became apparent that the employer would not carry out the agreement he took steps to protect his rights and applied for a patent.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding in the Patent Office between Elmyr A. Laughlin, junior party, and Vincent J. Burry, senior party. From a decision in favor of the senior party, the junior party appeals. Reversed.

Joshua R. H. Potts and Brayton G. Richards, both of Chicago, Ill., for appellant.

R. D. Totten, of Pittsburgh, Pa., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from the decision of the Commissioner of Patents awarding priority of invention to appellee, Burry, for an invention relating to side bearings for railway cars. The issue is in seven counts, of which the following are illustrative:

"1. A bearing device comprising upper and lower housings or bearing plates vertically movable the one with relation to the other and having plain bearing faces, a plurality of rollers interposed between said plates and means on said plates and said rollers to maintain the rollers constantly spaced at the same distance apart and constantly centered with respect to the application of the load."

"7. In a bearing device, the combination with upper and lower bearing plates vertically movable the one with relation to the other and having plain bearing faces forming runways and each having a slot arranged in a vertical plane, a pair of bearing rollers interposed between said bearing plates, said rollers being provided at the end with one or more lugs adapted to engage said slots, said slots being so formed as not to interfere with the rotation of said rollers, but to guide the same to centered position beneath the point of application of the load at all times, and also to maintain the rollers in substantially centered position when the car is tilted and the rollers are out of engagement with one or the other of said upper and lower bearing members."

The invention is described in the opinion of the Examiners in Chief as follows:

"The invention relates to side bearings for railway cars and consists essentially in the provision of rollers having plain bearing faces, located between housing parts on the under side of the car body and upper side of the track, respectively, the rollers being provided with laterally extending trunnions which engage raceways in side extensions of the housing. The raceways are designed to cooperate with the trunnions to permit the lifting of the car body, as in rounding a curve, while at the same time maintaining the rollers properly spaced apart and centered with respect to the load."

[1] The case turns largely upon the question of originality. Appellant, Laughlin, in November, 1914, was president of the Joliet Railway Supply Company of Chicago. He was 35 years old, and had been engaged for 16 years in the manufacture and sale of railway supplies. He has obtained six patents on side bearings which have been in general use. Laughlin conceived the idea of inventing a car mounting in which the load would be carried on side bearings. This he termed the side bearing truck, as distinguished from a side bearing which only bears the load in emergencies. Laughlin took up the matter of the invention with one Turner, superintendent of motive power for the Pittsburgh & Lake Erie Railroad Company, with headquarters at Pittsburgh. Turner appears here as the assignee of the Burry patent. Laughlin and Turner were on intimate business terms, growing out of the use of Laughlin's bearings by the Pittsburgh & Lake Erie Railroad.

Upon the invitation of Laughlin, Turner made a trip to Laughlin's home at Oregon, Ill., where the details of the present invention were discussed and an oral agreement entered into between Laughlin and Turner that they would share equally in the invention. It was then that Turner suggested to Laughlin that he had a young man by the name of Burry working under him as chief draftsman in the mechanical department of the Pittsburgh & Lake Erie Railroad, who could render valuable assistance in working out the details of the invention. As a result of this suggestion, Burry went to Chicago, and Laughlin laid before him his plans for developing the invention. Burry returned to Pittsburgh with Laughlin's drawings and certain models which Laughlin had prepared. Later, when Burry reached a point where he needed further assistance, he made a trip to Laughlin's home, where he spent several days with Laughlin in working upon the details of the invention. Burry returned to Pittsburgh, where bearings were constructed and placed upon the cars of the Pittsburgh & Lake Erie Railroad Company and tested out, which test demonstrated the complete success of the invention. Burry made application for a patent February 17, 1916, and a patent was issued thereon July 18, 1916.

When Laughlin began pressing Turner for a written contract setting forth their agreement as joint owners of the invention, his suspicions were first aroused that Turner was planning to appropriate the invention to his own benefit. It was then that he made application for the patent, which resulted in the present interference. The evidence in the case is somewhat complicated, but depends largely upon a long series of correspondence between Laughlin, Turner, and Burry, which overwhelmingly establishes the contract between Turner and Laughlin

and the fact that Burry was called in merely as an employee to help work out the details of the invention.

That Laughlin disclosed the invention to Burry at the meeting in Chicago, we think, is clear. Blueprint Exhibit 6, which Laughlin gave to Burry, disclosed all the elements of the issue, except that the lower surfaces of the rockers are shown to have teeth, where as the issue calls for plain surfaces, both above and below. However, model rockers (Laughlin's Exhibits 1, 2 and 3), which Burry admits were explained to him in connection with Exhibit 6, show a plain surface at the top, the teeth at the bottom being removable, which would suggest the use of a smooth surface. This strongly corroborates Laughlin's testimony that they were so constructed in order that they could be tested both ways, and his testimony is to the effect that they were so tested. It is also significant that these rockers were provided with lugs or trunnions to co-operate with the side guides to prevent displacement.

Laughlin also testified that the use of the smooth surface was discussed at his meeting with Burry. While Burry denies this, it is inconceivable that Laughlin should have explained to Burry the rockers with removable teeth in connection with Exhibit 6, and made no reference to their use without the teeth. That this feature was discussed by them, as Laughlin testifies, is emphasized by the fact that Burry returned to Pittsburgh and immediately set about to work out the details of the invention with plain surface bearings. It is also significant that Burry, in his preliminary statement, alleges that he conceived the invention in issue the first week in January, 1916, or a little over a week after the Chicago meeting, although admitting under oath that he had never invented anything before or since. All the circumstances corroborate Laughlin and refute Burry. It must also be remembered that, the relation of employer and employee having been established, the burden shifts heavily upon Burry. Gedge v. Cromwell, 19 App. D. C. 192; Miller v. Kelly, 18 App. D. C. 163.

[2] It is true that Laughlin's original conception, as disclosed by Burry, showed a slightly different arrangement of the side trunnions from that disclosed by Burry in his application for patent. But the issues broadly cover:

"Means on said plates and said rollers to maintain the rollers constantly spaced at the same distance apart and constantly centered with respect to the application of the load."

It is clear that Laughlin disclosed to Burry an embodiment of the generic claims of the issue. He is not, therefore, limited to any specific form or arrangement, but is entitled to the broad generic claims.

[3] It is well settled that, where one conceives an invention and employs another to work out the details of the general conception, the result belongs to the employer. Milton v. Kingsley, 7 App. D. C. 531, 537; Miller v. Kelly, 18 App. D. C. 163, 170; Gedge v. Cromwell, 19 App. D. C. 192, 198; Gallagher v. Hastings, 21 App. D. C. 88, 99; Flather v. Weber, 21 App. D. C. 179; Kreag v. Geen, 28 App. D. C. 437. In the Kreag Case, the court announced the rule as follows:

"The relation of employer and employee once established, the law is well settled that when one conceives the principle or plan of an invention, and employs another to perfect the details and realize his conception, though the

latter may make valuable improvements therein, such improved result belongs to the employer."

[4] Much is attempted to be made of a license to manufacture the Burry bearing granted to Laughlin, Clark & Co. on November 23, 1916. Laughlin was president of this corporation, and it is claimed that, in the light of this transaction, he is estopped from claiming the invention. It is not clear how the contract between Turner and Burry and this corporation can estop Laughlin from contesting Burry's right to the patent, especially in the light of the facts disclosed by the record. Laughlin filed his application four days after this contract was made. We may assume that the application had been in the hands of his attorneys at least since his discovery of Turner's duplicity, which date is fixed by a letter sent by Laughlin to Turner October 5, 1916, in which he states:

"'Your favor of the 3d forwarded to me here, and I thank you for your frankness. I evidently have misunderstood the situation. It was always my understanding that whatever was developed in the way of a truck, from my suggestions to you and Mr. Burry, and whatever I developed from your suggestions, was to be 'joint property,' as between you and me. You have my written word to this effect."

Laughlin had already taken steps to protect his rights, and the contract thereafter entered into by the corporation in which he was interested could not be taken as an admission that he had no claim to the invention. This court, in Winslow v. Austin, 14 App. D. C. 137, 143, considering the effect of an assignment of an interest in the Winslow patent to Austin, said:

"On this state of the case, the Board of Examiners in chief, on appeal to them, and the Commissioner of Patents, on appeal to him, appear to have had no difficulty in reaching the conclusion that Austin had fully made out his claim to priority of invention, and he was accordingly awarded such priority. The conclusion of the Examiner of Interferences was in favor of Winslow, but his conclusion was largely based upon the prima facie effect secured to Winslow by his position of senior party upon the record, and upon the fact of the assignment taken by Austin from Licht & Keeney of interest in the Winslow patent. And there is unquestionably considerable force in this latter fact. But this fact, we think, ought not to be taken as an admission on the part of Austin that he in reality and truth had no claim to the invention involved in the present issue, and that the sole and exclusive right as inventor was in Winslow. As very properly said by the Examiners in Chief, he may have obtained the assignment as an easy way to quiet a contest, or in order to combine in himself all adverse claims to the contested invention."

It will be observed that, even if Laughlin had personally accepted a license under the Burry patent, it would only bring him squarely within the Winslow Case. But the license was granted to a corporation in which Laughlin was interested, and the negotiations, as shown by the record, were carried on entirely by Clark, its vice president. However, as in the Austin Case, any interest that Laughlin may have acquired through this transaction was justifiable, inasmuch as he had the right to protect his interests by acquiring use of the patent to any extent that he might desire.

[5] This is not a case where the court will hesitate to disturb the concurrent decisions of the Patent Office, since no two of them agree

either upon the facts or the conclusions to be drawn therefrom. The Examiner of Interferences found that the distinguishing feature of the issue consists of "bearing-plates vertically movable, the one with relation to the other, and having plain bearing surfaces"; that Burry was not in the employ of Laughlin; that, when Burry visited Laughlin, the disclosures made by Laughlin all showed bearing surfaces with teeth; and that Laughlin's knowledge of Burry's license arrangement with Laughlin, Clark & Co. estopped him from claiming the invention.

The Board of Examiners in Chief held that Burry was in the employ of Laughlin; that Laughlin disclosed to Burry vertically movable bearing plates, both with and without plain bearing surfaces; that Laughlin was not estopped by the license to Laughlin, Clark & Co., but that the distinguishing feature of the invention resided in the specific arrangement of the side trunnions and raceways as shown by Burry; and that, on this point alone, Burry was entitled to prevail.

The Commissioner held that Laughlin disclosed nothing to Burry that did not belong to the prior art, hence it was immaterial whether Burry was in Laughlin's employ or not, and that Laughlin's actions, after he discovered Burry had applied for a patent, were inconsistent with the claim of the existence of a fiduciary relation between them.

[6] The delay of Laughlin in applying for a patent after Burry's patent was issued creates no presumption in Burry's favor or against Laughlin, since the correspondence discloses clearly that Laughlin was relying upon Turner to enter into a formal contract in pursuance of the oral agreement originally made between them, and, as soon as it became apparent to Laughlin that Turner would not carry out his agreement, he took steps to protect his rights through an application for patent. In any event, his application was made four months after the issue of the Burry patent, and this, considering the negotiations he was carrying on with Turner, cannot be held to be an unreasonable delay. It was Laughlin's reliance upon his agreement with Turner and his fiduciary relation with Burry that lulled him into inactivity during the period when Burry was securing his patent. As soon as Laughlin discovered the scope of Burry's patent, he at once insisted upon his rights, both under his agreement with Turner, and by taking steps to assert his claims in the Patent Office. The conspiracy of Turner and Burry to repudiate their contract and to appropriate to themselves the whole benefit to be derived from this valuable invention, cannot be employed by them to the disadvantage of their victim.

The improvement involved, in view of the prior art, is a narrow one, and consists, in our opinion, of a combination of the features specified, only in conjunction with plain bearing surfaces. This is emphasized from the rejection of the Burry application until he limited his claim to plain bearing surfaces. The conclusion, therefore, is irresistible that the distinguishing feature of the issue consists in the vertically movable bearing plates with plain bearing surfaces; that this was broadly disclosed to Burry at his first meeting with Laughlin, and that whatever Burry did was merely ancillary in specifically carrying into effect the generic disclosure of his employer.

The decision of the Commissioner of Patents is reversed.

Reversed.

SCHWARTZ v. BROWNLOW et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided February 7, 1921.)

No. 3450.

1. **District of Columbia ⇐19—Ordinance restricting business buildings held in conflict with zoning act.**
   The ordinance of the Commissioners of District of Columbia restricting the erection of business buildings in residence blocks, even if authorized by Act June 14, 1878, empowering them to make building regulations, was in direct conflict with Act March 1, 1920, creating a zoning commission, to adopt regulations specifying, among other things, the purposes for which buildings and premises in the several areas might be used, and repealing all laws in conflict therewith.
2. **District of Columbia ⇐19—Commissioners' authority to enforce regulations of zoning commission does not authorize ordinance restricting business buildings.**
   Zoning Act, § 10, authorizing the Commissioners of the District to enforce the act and the regulations of the zoning commission, and providing that nothing therein shall limit the authority of the Commissioners to make municipal regulations not inconsistent therewith, does not authorize the Commissioners to adopt an ordinance restricting the erection of business buildings in certain blocks.
3. **District of Columbia ⇐19—Building regulation repealed by Zoning Act before time for commission to act.**
   The Zoning Act, which repealed inconsistent acts in præsenti, operated immediately to deprive the Commissioners of the District of jurisdiction to enact building regulations in conflict with the jurisdiction conferred upon the zoning commission, so that such regulation was invalid, though the six months' period within which the zoning commission was required to act had not expired at the time of adoption of the Commissioners' regulation.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by Mollie Schwartz against Louis Brownlow and others. From a judgment refusing the writ, petitioner appeals. Reversed and remanded, with directions to issue the writ.

W. G. Gardiner, of Washington, D. C., for appellant.

F. H. Stephens, P. H. Marshall, and R. L. Williams, all of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This appeal is from a judgment of the Supreme Court of the District of Columbia refusing a writ of mandamus to compel the Commissioners and building inspector of the District to issue a permit for the erection of a drug store on a lot situated in a residence block in the city of Washington.

The application for the permit was filed with the inspector on May 26, 1920, and approved by the plumbing inspector and structurally approved by the building inspector. The permit, however, was refused because of an ordinance adopted by the Commissioners three days before, which provided as follows:

"On a residence street where there is no property on the same block occupied and used for business purposes, no permit for the establishment or con-

duct of a business of any character, retail or wholesale, shall be granted until there shall be filed the written consents of the owners of three-fourths of the property within two hundred feet of the site of the proposed establishment."

[1] The Commissioners base their authority for adopting this regulation upon the act of Congress of June 14, 1878 (20 Stat. 131), which is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the Commissioners of the District of Columbia be, and they hereby are, authorized and directed to make * * * such building regulations for the said District as they may deem advisable."

The act then provides that the rules and regulations so made shall have the same force and effect as if enacted by Congress.

Whether the adoption of the ordinance in question was a constitutional exercise of police power by the Commissioners need not be considered, since their action is in direct conflict with the act of Congress of March 1, 1920 (41 Stat. 500), creating a zoning commission, which, among other things, provides:

"Within six months after the passage of this act, and after public notice and hearing as hereinafter provided, the said commission shall divide the District of Columbia into certain districts, to be known, respectively, as height, area, and use districts, and shall adopt regulations specifying the height and area of buildings thereafter to be erected or altered therein and the purposes for which buildings and premises therein may be used."

The act provides for notice and hearings before the adoption of such regulations, and further provides that—

"All laws in conflict with the provisions of this act are hereby repealed."

[2] Nor is the power of the Commissioners to make regulations affecting the use of property strengthened by section 10 of the Zoning Act, which provides:

"That the Commissioners of the District of Columbia shall enforce the provisions of this act and the orders and regulations adopted by said zoning commission under the authority thereof, and nothing herein contained shall be construed to limit the authority of the Commissioners of the District of Columbia to make municipal regulations as heretofore: Provided, that such regulations are not inconsistent with the provisions of this law and the orders and regulations made thereunder."

While the Commissioners are given power to enforce regulations adopted by the zoning commission, they are expressly prohibited from making regulations inconsistent with the act or the regulations made by the zoning commission thereunder. The legislative power conferred by the act is in the zoning commission, and not in the Commissioners of the District of Columbia.

[3] While the six months' period within which the zoning commission was required to act had not expired at the time of the adoption of the present regulation, the repealing clause of the zoning act was in præsenti and operated immediately to deprive the Commissioners of the District of jurisdiction to enact building regulations in conflict with the jurisdiction conferred upon the zoning commission.

The regulation in question attempts to regulate the use to which

petitioner could put her building, which is the chief jurisdiction conferred upon the zoning commission.

The judgment is reversed, with costs, and the cause is remanded, with directions to issue the writ as prayed for in the petition.

Reversed and remanded.

EDWARDS v. BROWNLOW et al.

(Court of Appeals of District of Columbia. Submitted December 6, 1920. Decided February 7, 1921.)

No. 3453.

Appeal from the Supreme Court of the District of Columbia.

Mandamus by W. Walton Edwards against Louis Brownlow and others. From a judgment refusing the writ, petitioner appeals. Reversed and remanded, with directions to issue the writ.

W. W. Edwards, of Washington, D. C., for appellant.

F. H. Stephens and R. L. Williams, both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This is a companion appeal to No. 3450, this day decided. The application was for a permit to erect a building to be used as a delicatessen, and was refused upon the same ground as in the Schwartz Case, —— App. D. C. ——, 270 Fed. 1019.

For the reasons therein stated, the judgment is reversed, with costs, and the cause is remanded, with directions to issue the writ as prayed for in the petition.

Reversed and remanded.

AUNT JEMIMA MILLS CO. v. BLAIR MILLING CO.

(Court of Appeals of District of Columbia. Submitted January 10, 1921. Decided February 7, 1921.)

No. 1356.

1. **Trade-marks and trade-names ⇐43—Picture of negro held to infringe bust picture of negress.**

The owner of the well-known trade-mark for Aunt Jemima's pancake flour, consisting of a bust picture of a smiling negress with a handkerchief wrapped about her head and shoulders, can oppose an application for registration of a mark for similar goods, consisting of the word "Sambo," with the representation of a negro having a white cap and wearing a long apron, since, even though the products were called for by the name, the similarity of the pictures might deceive purchasers.

2. **Trade-marks and trade-names ⇐43—Adoption of similar mark implies intention to take advantage of reputation.**

Where a new manufacturer adopts as his trade-mark a representation similar to that of an existing well-known trade-mark of a manufacturer of the same class of goods in the same vicinity, the only inference possible is that of gaining advantage from the wide reputation of the established manufacturer.

3. **Trade-marks and trade-names ⇐44—Doubts resolved in favor of opposer.**

In determining an opposition to registration of a trade-mark, doubts will be resolved in favor of the opposer.

Smyth, Chief Justice, dissenting.

Appeal from the Commissioner of Patents.

Application by the Blair Milling Company for registration of a trade-mark, opposed by the Aunt Jemima Mills Company. From a decision of the Commissioner of Patents, dismissing the notice of opposition, the opposer appeals. Reversed.

Francis M. Phelps, of Washington, D. C., and E. S. Rogers, of Chicago, Ill., for appellant.

Hervey S. Knight, of Washington, D. C., Arthur C. Brown, of Kansas City, Mo., and James W. Orr, of Atchison, Kan., for appellee.

VAN ORSDEL, Associate Justice. Appellant company, a Delaware corporation, with its place of business at St. Joseph, Mo., filed its opposition to the registration of a trade-mark by appellee company, a Kansas corporation, doing business at Atchison, Kan., 23 miles from St. Joseph.

Appellant's device is the well-known "Aunt Jemima" trade-mark for self-rising buckwheat flour. It consists of the words "Aunt Jemima's," having underneath the bust picture of a full-faced smiling negress, with a handkerchief wrapped about her head and shoulders. This mark has been used by appellant company and its predecessor in business at St. Joseph, Mo., on pancake flour since 1889, and on buckwheat flour since 1904. Appellee's mark consists of the word "Sambo," having underneath the representation of a full-faced, clean-shaven, smiling negro, having a white cap on his head and wearing a long apron, bearing in one hand a plate of smoking cakes, and in the other hand a cake turner. This mark has been used by appellee company at Atchison, Kan., on pancake flour since 1913, and on pancake buckwheat flour since August 7, 1916.

The opposition is based upon the similarity of the marks and the likelihood of confusion in trade, when the marks are applied to goods of the same descriptive properties.

From an order dismissing the notice of opposition, this appeal was taken.

[1] The goods on which the marks are used are the same, and we think the marks are deceptively similar. It is urged that the goods would be distinguished as "Sambo" and "Aunt Jemima's" brands, but we doubt this conclusion. The Aunt Jemima flour has become so widely known that a glance at the picture would satisfy the average purchaser. In other words, while the goods are known by the name, the picture is the distinguishing feature by which the goods are visually identified.

In determining the question of possible confusion and resulting damage, it is proper to consider the manner in which appellee's mark may be used. Cartons were produced at bar as exhibits, on which the lower part of the figure of the negro cook was so covered with printed matter that to the casual observer only the shoulders and head were plainly visible. Should registration be granted, the printed matter could be extended until only a bust picture remained, and nothing would prevent the registrant from using whatever coloring it desired in setting

forth the mark, so long as the style of dress and the features of the negro were retained.

We think our opinion in the case of Wayne County Preserving Co. v. Burt Olney Canning Co., 32 App. D. C. 279, is controlling here. There, as here, the marks were used on the same kind of goods. There, as here, the parties were located in neighboring towns, and there, as here, one was a bust picture and the other a full-length figure. The mark of the appellant company in that case consisted of a bust portrait of Gen. Wayne in colonial military uniform, while the mark of appellee company consisted of a full length figure of a colonial military officer designated by the words "Col. Willett."

Considering the similarity of the marks, the court said:

"These marks, when appearing on the canned goods of the respective parties, exposed to the public on the shelves of the retailer, are so similar as to be likely to cause confusion; and where, as in this case, there is no evidence on that subject, except the marks themselves, it is the duty of the court to protect the prior registrant and user from the probability of any such occurrence. It is strangely coincident that appellee, engaged in the same business as appellant, and located in the adjoining county to where appellant has used his mark for many years, should select a mark so similar. The property right in trade-marks is a valuable one, and is entitled to protection from those who would profit by its imitation, and the courts should resolve the doubt, if any exists, in favor of the prior registrant."

[2] So here the adoption of the mark before us by appellee company, situated only 23 miles from where appellant company has for years been manufacturing and widely distributing its goods bearing the Aunt Jemima mark, will admit of but one inference—that of gaining advantage from the wide reputation established by appellant in the goods bearing its mark.

[3] While the case is a close one, the court will adhere to its rule and resolve the doubt in favor of the opposer. As was said by Mr. Chief Justice Smyth, in William Waltke & Co. v. Geo. H. Schafer & Co., 263 Fed. 650, 49 App. D. C. 254:

"The case is not free from difficulty, but where there is doubt the courts resolve it against the newcomer. Lambert Pharmacal Co. v. Mentho-Listine Chemical Co., 47 App. D. C. 197. The reason for this is, as has been said by this court more than once, that the field from which a person may select a trade-mark is practically unlimited, and hence there is no excuse for his impinging upon, or even closely approaching, the mark of his business rival. O. & W. Thum Co. v. Dickinson, 46 App. D. C. 306; Florence Mfg. Co. v. J. E. Dowd & Co., 178 Fed. 75, 101 C. C. A. 565. Where he does so he is open to the suspicion that his purpose is to appropriate to himself some of the good will of his competitor."

The decision of the Commissioner of Patents is reversed.

Reversed.

SMYTH, Chief Justice, dissents.

Mr. Justice HITZ, of the Supreme Court of the District of Columbia, sat with the court in the hearing and determination of this appeal, in the place of Mr. Justice ROBB.

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⇐113(7) (D.C.) Concurrent finding of Office tribunals not reversed, unless manifestly wrong.—Ball v. Barnhurst, 693.

⇐113(7) (D.C.) Concurrent findings by three Office tribunals sustained, unless manifestly wrong.—Massey v. Ridge, 879.
⇐113(7) (D.C.) Decision of three Office tribunals that party could make claims is followed, unless palpably wrong.—Thomson v. Pearsons, 1013.
⇐113(7) (D.C.) Concurrent decisions in favor of same party not conclusive, when not concurring on facts or conclusions.—Laughlin v. Burry, 1013.

V. REQUISITES AND VALIDITY OF LETTERS PATENT.

⇐129 (U.S.C.C.A.N.Y.) Licensee may not refer to prior art to show invalidity.—Pressed Steel Car Co. v. Union Pac. R. Co., 518.

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⇐138(1) (D.C.) Determination whether delay in seeking reissue was excusable is within Commissioner's discretion.—In re Hoiland, 704.
⇐144 (D.C.) Determination whether delay in seeking reissue was excusable is within Commissioner's discretion and will not be disturbed.—In re Hoiland, 704.

IX. CONSTRUCTION AND OPERATION OF LETTERS PATENT.

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⇐157(1) (U.S.C.C.A.Ill.) Product patent may be considered in considering scope of process patent.—Bestwall Mfg. Co. v. U. S. Gypsum Co., 542.
⇐157(1) (U.S.D.C.Mass.) "Patent" is contract between government and inventor.—I. T. S. Rubber Co. v. Essex Rubber Co., 593.
Patents should be construed as other contracts.—Id.

(B) Limitation of Claims.

⇐165 (U.S.D.C.Mass.) Patent is limited by language used.—I. T. S. Rubber Co. v. Essex Rubber Co., 593.
⇐168(2) (U.S.D.C.Mass.) Fact that claim was amended after defendant began manufacturing is to be considered.—United Shoe Machinery Co. v. L. Q. White Shoe Co., 650.
⇐178 (U.S.D.C.Mass.) Invention of doubtful utility *held* not pioneer, entitled to broad equivalents.—United Shoe Machinery Co. v. L. Q. White Shoe Co., 650.
⇐178 (U.S.D.C.Mo.) Claims for straight arch covers hipped arch.—Laclede Christy Clay Products Co. v. City of St. Louis, 338.

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⇐183 (U.S.D.C.Conn.) Intermediate assignor of invention could not dispute the assignee's title, because first assignor was an infant.—New Departure Mfg. Co. v. Rockwell-Drake Corporation, 219.

(B) Assignments and Other Transfers.

⇐193 (U.S.D.C.Ill.) Patentee may assign rights against particular infringer.—Nye Tool & Machine Works v. Crown Die & Tool Co., 587.

(C) Licenses and Contracts.

⇐211(1) (U.S.C.C.A.N.Y.) Recitals in license that licensee would not evade patent *held* contractual.—Pressed Steel Car Co. v. Union Pac. R. Co., 518.
Agreement by licensee not to evade patent does not support recovery, in absence of infringement.—Id.
⇐211(3) (U.S.C.C.A.N.Y.) Licensee may refer to prior art to show noninfringement.—Pressed Steel Car Co. v. Union Pac. R. Co., 518.
⇐211(3) (D.C.) Inventor, by obtaining license from patentee, not estopped to assert rights.—Laughlin v. Burry, 1013.
⇐212(1) (U.S.C.C.A.N.Y.) Licensee *held* liable for royalty on freight cars constructed for it by another licensee.—Pressed Steel Car Co. v. Union Pac. R. Co., 518.
⇐218(1) (U.S.D.C.R.I.) Use of part of plant, though an infringement, *held* not to require payment of process royalties.—Jobbins v. Kendall Mfg. Co., 671.
⇐218(3) (U.S.C.C.A.N.Y.) Licenses *held* not to change general rule that royalty ceases on termination of patent.—Pressed Steel Car Co. v. Union Pac. R. Co., 518.

XII. INFRINGEMENT.

(A) What Constitutes Infringement.

⇐237 (U.S.D.C.Mo.) Parts performing same function *held* equivalents, though differing in shape and method of support.—Laclede Christy Clay Products Co. v. City of St. Louis, 338.
⇐244 (U.S.C.C.A.Cal.) Changing order of steps does not avoid infringement.—Los Angeles Lime Co. v. Nye, 155.

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⇐286 (U.S.D.C.Ill.) Assignee may sue.—Nye Tool & Machine Works v. Crown Die & Tool Co., 587.
⇐288 (U.S.D.C.Mass.) Nonresident defendant must have place of business, and commit infringement, within district, to give court jurisdiction.—I. T. S. Rubber Co. v. Essex Rubber Co., 593.
⇐305 (U.S.C.C.A.Ill.) Infringer not enjoined from paying royalties to foreign company.—Zenith Carburetor Co. v. Stromberg Motor Devices Co., 421.
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Payment of dividends by infringer restrained pending accounting.—Id.
⇐313 (U.S.D.C.Ill.) Suit for infringement dismissed.—Nye Tool & Machine Works v. Crown Die & Tool Co., 587.
⇐313 (U.S.D.C.Mass.) Where validity was admitted and infringement denied, case may be disposed of on motion to dismiss.—I. T. S. Rubber Co. v. Essex Rubber Co., 593.
Where earlier proceedings in Patent Office immaterial, case may be disposed of on motion to dismiss.—Id.
⇐314 (U.S.D.C.Mo.) Infringement is question of fact.—Laclede Christy Clay Products Co. v. City of St. Louis, 338.
⇐319(1) (U.S.C.C.A.Wis.) Profits which would have been made on sales prevented by

infringement recoverable as damages.—Filer & Stowell Co. v. Diamond Iron Works, 489.

Profits which would have been made on sales of repair parts *held* recoverable as damages.—Id.

⇐327 (U.S.D.C.Mass.) Decisions in patent cases by courts in other districts are not binding.—I. T. S. Rubber Co. v. Essex Rubber Co., 593.

Defendant not concluded, because it might have had question litigated.—Id.

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51,165. Wall receptacles in bathrooms, held void, 270 F. 97.

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873,680. Spraying apparatus, held void, 270 F. 677.
933,011. Woven cotton belting, held void, 270 F. 224.
986,455. Furnace arch, claims 1 to 3, held anticipated; also, held infringed, if valid, 270 F. 338.
1,021,476. Wheel hub, held not anticipated, valid, and infringed, 270 F. 775.
1,029,328. Process of making plaster board held to disclose invention, and infringed, 270 F. 542.
1,034,746. Plaster board, held to disclose invention, and infringed, 270 F. 542.
1,067,814. Vacuum tank for engines, held not infringed, 270 F. 449.
1,104,589. Gear grinding machine, held valid and infringed, 270 F. 934.
1,132,273. Vacuum tank for engines, claims 1 and 3, held to involve no invention; claim 13, held not infringed, if valid; claims 9 and 14, held valid and infringed, 270 F. 449.
1,134,457. Vacuum tank for engines, claims 1, 2, 4 and 5, held to involve no invention; claim 4, held not infringed if valid, 270 F. 449.
1,143,740. Machine for setting blind eyelets in shoes, held valid and not infringed when restricted, 270 F. 650.
1,143,741. Process of setting blind eyelets in shoes, held invalid, as covering only the function of a machine, 270 F. 650.
1,155,532. Trimming mechanism for shaft grinding machine, held valid and infringed, 270 F. 934.
1,167,742. Noiseless gear, held void, 270 F. 632.
1,167,743. Noiseless gear, held void, 270 F. 632.
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⇐4(1) (U.S.C.C.A.Ohio) Lives in being not limited to beneficiaries.—Dahlgren v. Pierce, 507.

⇐4(21) (U.S.C.C.A.Ohio) Income of trust not a perpetuity may be shared by child or person unborn at testator's death.—Dahlgren v. Pierce, 507.

Statute restricting devises of realty does not apply to bequests of income therefrom.—Id.

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⇐72 (U.S.D.C.Wash.) Relief demanded determined from prayer.—U. S. v. Sloan Shipyards Corporation, 613.

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⇐310 (U.S.D.C.Del.) Exhibit no part of common-law pleading.—Gulf, C. & S. F. Ry. Co. v. Cities Service Co., 994.

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⇐364(1) (U.S.D.C.Del.) Irrelevant matter in common-law declaration.—Gulf, C. & S. F. Ry. Co. v. Cities Service Co., 994.

⇐369(6) (U.S.D.C.N.Y.) Motion to require election *held* to authorize dismissal of insufficient counts.—Rankin Gilmour & Co. v. Newton, 332.

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⇐48(4) (U.S.C.C.A.Colo.) Indictment for fraud need not allege organization of partnership, whose name defendant appropriated.—Savage v. U. S., 14.

Particulars of scheme to defraud need not be alleged with same certainty as mailing letter.—Id.

⇐49 (U.S.C.C.A.Colo.) Evidence *held* to show corporate transactions were for defendant's scheme.—Savage v. U. S., 14.

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⇐101(2) (U.S.C.C.A.N.Y.) Messenger who arranged for shipping libelant's property regarded as libelant's agent.—Hugetz v. Compania Trasatlantica, 90.

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