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

WITH TABLE OF CASES IN WHICH REHEARINGS HAVE BEEN
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ARGUED AND DETERMINED

IN THE

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

In re AUTOMATIC TYPEWRITER & SERVICE CO.

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

No. 107.

1. **Bankruptcy ⇐=76(2)—Attaching creditor may join in petition without first releasing his attachment.**
   That a creditor has in good faith attached his debtor's property within four months does not disqualify him from presenting or joining in a petition to have the debtor adjudicated a bankrupt, although the attachment has not been formally released, but the court may require the attachment lien to be vacated before an adjudication is entered.
2. **Bankruptcy ⇐=65—Action by creditor not bar to involuntary proceedings.**
   The pendency of an action by the petitioning creditor on his claim against the alleged bankrupt, in which a counterclaim has been interposed, is not a bar to involuntary proceedings.
3. **Bankruptcy ⇐=65—Motive of creditor in filing petition immaterial.**
   The motive of a creditor in filing a petition in involuntary bankruptcy against his debtor is immaterial.

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the Automatic Typewriter & Service Company, alleged bankrupt. On petition by alleged bankrupt to revise orders denying a motion to dismiss the petition and granting a motion to dismiss certain defenses pleaded. Affirmed.

Petition to revise two orders made by the District Court for the Southern District of New York; the first denying a motion made by the alleged bankrupt to dismiss the involuntary petition in bankruptcy filed by the Hooven Automatic Typewriter Corporation, a creditor, and the second granting a motion to dismiss seven defenses set up in the answer filed by the alleged bankrupt as insufficient in law. The alleged bankrupt appeals.

Patterson, Eagle, Greenough & Day, of New York City (Carroll G. Walter, of New York City, of counsel), for petitioner.

David W. Kahn, of New York City, for respondent.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The Hooven Automatic Typewriter Corporation on May 21, 1920, as a petitioning creditor, filed an involuntary petition, praying that the Automatic Typewriter & Service Company be adjudicated a bankrupt. The alleged bankrupt filed an answer, in which it set up, among other things, seven affirmative defenses. To this no replication was filed, or ordered to be filed. The issues raised by the petition and answer were noticed for trial, when a notice was served that an application would be made to dismiss the petition at a term of the District Court. The petitioning creditor moved at the same time to dismiss the affirmative defenses on the ground that they were insufficient in law. The court below refused to dismiss the petition, and adjudged six of the seven defenses insufficient. A master was then appointed to take testimony. As a result, this present petition to revise was brought on by the alleged bankrupt. It is contended that the petition for adjudication, filed by the sole petitioning creditor, is insufficient in law upon the face thereof, because it does not plead any facts showing insolvency of the alleged bankrupt, and that such facts as are alleged in the answer show that the Hooven Automatic Typewriter Corporation is not a creditor, and it is claimed that said creditor is estopped from maintaining the petition, because it sued out an attachment against the property of the alleged bankrupt prior to the filing of the petition herein, and that this attachment was in force and effect at the time of filing its petition praying for the adjudication in bankruptcy. The contention is advanced that the facts set forth in the answer established that the Hooven Corporation has received and has not surrendered a preferential payment because of its levying the attachment, and therefore is disqualified and estopped from maintaining this petition.

Error is further alleged to have been committed because facts are alleged in the answer, which, it is claimed, show that the Hooven Corporation filed a petition in bad faith, for a sinister and ulterior purpose, and is equitably and legally barred from maintaining this petition. The petition pleads that the petitioner is a creditor for $50,000 for automatic typewriters sold and delivered to the alleged bankrupt, and for moneys paid out and expended for the latter's account from December 1, 1919, to February 28, 1920. The acts of bankruptcy are set forth as preferential transfers, and it is alleged that, since the same were made to prefer such creditors over its other creditors in the same class, property was conveyed, transferred, and concealed and removed with the intent to hinder, delay, and defraud its creditors. In the amended answer filed there is a denial of these allegations, and seven separate affirmative defenses are interposed. The court below dismissed six of the seven defenses, and this is now sought to be reviewed on this petition to revise.

We think the petition sufficiently sets forth that the petitioning creditor has a provable claim in excess of $500 and is not entitled to priority of payment within the meaning of section 64b of the Bankruptcy Act and the amendments thereof (Comp. St. § 9648), and, further, that

it has not received a preference within the meaning of the Bankruptcy Act. The claim is set forth as for typewriters sold and delivered to the alleged bankrupt, moneys laid out and expended for the account of the bankrupt, between the dates which are fixed, in excess of $50,000, and there is the further allegation that an unliquidated claim exists in favor of the petitioner against the bankrupt for breach of contract. The fifth paragraph of the petition sets forth that the alleged bankrupt is insolvent, and committed acts of bankruptcy by preferential payments and conveyances made to hinder, delay, and defraud the creditors. These allegations may have been more specific as to detail, but as set forth are sufficient.

In re Connecticut Brass & Mfg. Co. (D. C.) 257 Fed. 445, is referred to us as an authority supporting the contention of the petitioner that the petition here is insufficient in its allegations; but that case refers to the allegation of insolvency in a bill in equity for the appointment of receivers and not to a petition in bankruptcy. The form used by the draftsman of the petition here in question is that which has been used under the rule promulgated by the Supreme Court of the United States as General Orders in Bankruptcy, and is known as General Order 38 (89 Fed. xiv, 32 C. C. A. xxxvii). "It is the form which shall be observed and used with such alterations as may be necessary to suit the circumstances of any particular case." The plea of insolvency, as alleged by the petitioning creditor here, is in conformity with the form there adopted.

[1] The petitioning creditor instituted an action in equity prior to the filing of the petition praying for an adjudication in bankruptcy. It also caused to be issued a warrant of attachment against the property of the alleged bankrupt and procured a levy upon its property. A motion was made to vacate this attachment, which was granted; but a formal order giving effect to said decision was not entered, and the petitioner was permitted to make another application for another attachment. The warrant of attachment was therefore not formally vacated at the time of the filing of this petition, and the property of the alleged bankrupt was in the custody of the sheriff of the county of New York by virtue of said writ of attachment. A creditor, who in good faith obtains an attachment against a debtor's property within four months of the filing of a petition in bankruptcy, may join in the petition to have the debtor adjudicated an involuntary bankrupt. Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 80 C. C. A. 25; In re Hornstein (D. C.) 122 Fed. 266. And this, although the attachment has not been formally released. The court has the power to require the attachment lien to be released before an adjudication is entered. In re Stevens v. Nave-McCord, supra, Sanborn, J., writing for the court said:

"Such a preferred creditor may present or may join in a petition for an adjudication of bankruptcy. But he may not be counted for the petition unless he surrenders his preference before the adjudication."

If an adjudication be had here, the effect would be a dissolution of the attachment obtained, and therefore there would be no preference to

the petitioning creditor. It is thus obvious that the fact that an attachment was obtained here, and was not formally vacated by an order of the court at the time of the filing of the petition, did not give a preference, and did not incapacitate the petitioner from filing the petition. The advantage, if any were gained by the writ of attachment, cannot avail the petitioner in the bankruptcy court, and it therefore cannot defeat the right of a creditor having a provable claim of the requisite nature and amount to file a petition in involuntary bankruptcy.

We find nothing in the Bankruptcy Act itself which forbids a creditor filing a petition under similar circumstances. While the attachment obtained by the respondent remains unvacated of record, this respondent could not secure any advantage by that fact. When the order is entered vacating the attachment, it will be effective as of the date of decision of the court below vacating the same. This was a date before the bankruptcy. Furthermore, the preferred creditor who files a claim may surrender his preference at any time before the claim is allowed. This he need not do before the filing of the claim. We think the court below committed no error in refusing to dismiss the petition in bankruptcy because of this.

[2] As a defense, it is pleaded in the amended answer that the respondent instituted an action in the Supreme Court against the revising petitioner to recover $55,072.37 for goods sold and delivered and money expended, and that this action was removed from the state court to the federal court, where a counterclaim was interposed, and that at the time of the filing of the petition in bankruptcy this action was still pending. These proceedings were not a bar to instituting proceedings in bankruptcy, and we find no error below in dismissing this defense.

[3] The fourth defense pleads that the alleged bankrupt's involuntary petition in bankruptcy was not filed in good faith, but was filed vexatiously and maliciously, for the sinister, selfish, and ulterior purpose of defeating the claim of the cause of action set forth in the counterclaim of the revising petitioner. If it be proved by competent evidence that the bankrupt is insolvent, and committed acts of bankruptcy, and the other necessary jurisdictional facts are present, an adjudication in bankruptcy will follow therefrom, and what reasons or motives inspired or instigated the proceedings are of no importance, and will not defeat an adjudication. It is the right of action which is evidenced by facts alleged and proven that must prevail; whatever may be the motive, it will not support or defeat the cause of action. In re Binninger, Fed. Cas. No. 1,420; In re Duncan, Fed. Cas. No. 4,131. If there be any merit in the counterclaim interposed by the revising petition, this is a matter which can be determined upon the trial of the contested claim of insolvency, as may the contested claim of indebtedness, owing to the petitioning creditor from the revising petitioner.

The further defense, struck out as pleaded, was that, within four months of the filing of the involuntary petition, the revising petitioner paid to the respondent the sum of $15,000, which sum the respondent received and has not surrendered. This is not a plea that a preference

was secured by the respondent. We think the court below correctly struck out this defense. We find no error was committed in the determination below.

Both orders are affirmed.

In re WEINSTEIN.*

(District Court, S. D. New York. April 1, 1920.)

Searches and seizures ⟸5—Court held without jurisdiction to order return of papers.

A District Court is without jurisdiction in a summary proceeding to order the return of books and papers unlawfully seized from petitioner by officers of the United States, to be used in aid of deportation, or other administrative proceedings against him, over which the court has no regulatory power.

At Law. Rule issued on application of Gregory Weinstein against Francis G. Caffey, District Attorney, and others. On objections to jurisdiction of court. Objections sustained, and rule discharged.

This is a proceeding begun by rule issued out of the District Court, directing the United States Attorney for the Southern District of New York, John E. Hoover, Deputy Attorney General of the United States, Byron N. Uhl, Acting Commissioner of Immigration, Augustus N. Schell, Inspector of Immigration, and Charles K. Scully, Acting Chief of the Bureau of Investigation of the Department of Justice, to show cause before the District Court why they should not return to the petitioner certain books and papers described in the affidavits. It provided that service of a copy of the order on the United States Attorney should be sufficient. Service was effected on the United States Attorney, John E. Hoover, and Augustus N. Schell. On the return day, the District Attorney appeared specially, on behalf of all three respondents served, to object to the jurisdiction of the court over the application.

The affidavits on which the rule was granted show that the petitioner was taken in custody on January 5, 1920, by the agents of the Bureau of Investigation of the Department of Justice under a warrant of arrest; that he was taken to the office of the Department of Justice in New York City, and examined, and then to Ellis Island, where he was kept in close confinement, without being allowed any communication with persons outside. From this restraint he was released by order of this court on January 8, 1920. While in such custody, certain agents of the Department of Justice by threats and compulsion forced their way into his apartment without search warrant or other authority, and took possession of certain of his books, letters, and papers. On the 28th of February, 1920, at a hearing at Ellis Island (the character of which is not stated, but which was presumably to inquire as to his deportation), a letter so taken illegally from his possession was produced by the respondent Hoover and offered in evidence. This, with other of the documents seized, the petitioner alleges are in the possession or custody of the agents of the Department of Justice under the direction of the respondent Hoover, or in the custody of the Commissioner of Immigration, or his subordinates.

Charles Recht, of New York City, for the motion.

Francis G. Caffey, U. S. Atty., of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). For the purpose of this motion the allegations must be taken

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

*Order affirmed 271 Fed. 673.

as true. Therefore the seizure of the petitioner's papers was without warrant and in defiance of his most fundamental constitutional rights. The seizure must also be taken as directed by the Department of Justice and under the immediate control of a Deputy Attorney General. If papers so seized came into the possession of the District Attorney or other public officer for the purposes of a criminal prosecution, since 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, upon such a preliminary application they would have to be returned, and if the application were denied they would be incompetent evidence on the trial. Silverthorne Lumber Co. v. U. S., 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, decided January 26, 1920, went further, and held that the prosecuting officers might not make any use whatever of evidence so obtained. Neither case touches the question whether a summary proceeding will lie against a public officer acting in aid of an administrative inquiry over which the court has no regulatory jurisdiction.

That deportation proceedings are administrative is of course now well settled. Japanese Immigration Cases, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; U. S. v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. Such power as the District Court has is by habeas corpus, which reviews only the legality of the final restraint (U. S. v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917), and then only to see whether the discretionary powers granted have been honestly used, or exceeded (Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114). It is of course fundamental in English law that no official gains any immunity from ordinary legal process by virtue of his office. When he steps outside his powers he becomes subject to the usual remedies granted against any wrongdoer. Thus the officers here in question are subject to actions in trespass, quite as though the Deputy Attorney General had no official status. But this will not serve the petitioner; he wishes, not to invoke ordinary legal procedure, but to subject public officers to an extraordinary procedure from which wrongdoers are generally exempt. To do so I think he must either point to some express statutory right, or he must be able to show that the relief he asks is incidental to an inquiry, actually or prospectively, justiciable in the court to which he has recourse.

There is confessedly no express statutory authority, so the question resolves itself into this: Is the return of the papers an incident to the legal conduct of an inquiry justiciable in this court? Certainly it is not such in the first instance; on the contrary, the deportation proceeding is, as I have said, administrative. That it may eventually come within the jurisdiction of this court is true, but even then only to the extent of seeing whether the officials have only exercised powers granted by law. This court may not attempt any regulation of those proceedings while they last, unless perhaps it appears that the relator is not being restrained for purpose of deportation at all. It seems to me, therefore, that the sole warrant for similar applications in other cases is absent; i. e., this is not a part of the prosecution of an inquiry

over which the District Court has any jurisdiction, or indeed over which it may ever have jurisdiction.

So far as I can find, such applications have generally been treated as incidental to criminal prosecutions, either actually or prospectively, pending in the court to which they are made. This was true in U. S. v. McHie (D. C.) 194 Fed. 894; U. S. v. Friedberg (D. C.) 233 Fed. 313; U. S. v. Mills (C. C.) 185 Fed. 318; U. S. v. Maresca (D. C.) 266 Fed. 713; In re Chin K. Shue (D. C.) 199 Fed. 282. Judge Dodge had before him a seizure made by revenue officers preparatory apparently to forfeiture. It might be supposed that such an application would have been granted, but he held that, as the officers were not officers of the court within section 268 of the Judicial Code (Comp. St. § 1245), no summary jurisdiction existed. Such an application has been held to be in the stricter sense interlocutory. Coastwise, etc., Co. v. U. S., 259 Fed. 847, 170 C. C. A. 647. But, even if it were not, it is certainly in substance incidental to the larger inquiry in support of which the evidence was seized.

Of course the chief importance of the motion arises, not from the petitioner's desire to recover the property seized, but to lay what he conceives to be a necessary foundation for the objection on the deportation inquiry to the use of any documentary evidence so obtained. Since Adams v. N. Y., 192 U. S. 585, 24 Sup. Ct. 372, 48 L. Ed. 575, it has been the rule that in the midst of the trial of an indictment, and before a common jury, the question will not be tried out of the illegal seizure of documents which the prosecution offers in evidence. This distinction has been specifically recognized in Weeks v. U. S., 232 U. S. 383, 390, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and Silverthorne Lumber Co. v. U. S., supra, and indeed without it scarcely any prosecution could be successful. The contrary practice would involve two trials in one; the first, of the prosecuting authorities for their conduct in obtaining the evidence; the second, of the defendant upon the indictment. The least actual acquaintance with jury trials must satisfy any one of the necessity of the purely procedural distinction which these cases establish.

If, however, this petitioner has no power by preliminary application, either here or before the Department of Labor, to obtain a return of the documents wrongfully seized, and if the trial be before officials who can successfully separate the issues, and decide first on the legality of the seizure, and then upon the effect of the evidence, there seems to me no reason why any such procedural necessity should exist. The decision of the deportation authorities upon those questions could be reviewed upon habeas corpus to the same extent as their other decisions. Of course, this is not the place in which the question can be authoritatively decided, how an alien may successfully object to the admission of such evidence before the deporting tribunal. Unfortunately, I have not the power to insure the petitioner that this proceeding is unnecessary. Yet this inevitable uncertainty as to his rights is not an excuse for taking a first wrong step.

The rule to show cause is discharged.

In re DOROSKI.

(District Court, E. D. New York. January 4, 1921.)

Bankruptcy ⇐68—Exemption of farmer relates to time of commission of alleged act of bankruptcy.

Under Bankruptcy Act, § 46 (Comp. St. § 9588 [b]), an act committed by a person who was at the time engaged chiefly in farming cannot be charged as an act of bankruptcy and made the basis of involuntary proceedings.

In Bankruptcy. In the matter of Adam Doroski (or Dureski), alleged bankrupt. Involuntary petition dismissed.

Percy L. Housel, of Riverhead, N. Y., for petitioning creditors.
James T. Walsh, of Riverhead, N. Y., for alleged bankrupt.
Frank C. Barker, of Mattituck, N. Y., for Frank Kuleska.
Dudley Davis, of New York City, for McDermott Farm Supply & Produce Co.

CHATFIELD, District Judge. An involuntary petition in bankruptcy was filed on December 3, 1920, against Adam Doroski, who had for about one year occupied a farm in Suffolk county, in this district, under a two-year lease. During the year he had not only incurred debts and failed to pay the installment of rent, due October, 1920, but had mortgaged his implements and horses by a chattel mortgage to the McDermott Farm Supply & Produce Company, on August 18, 1920. On October 11, 1920, he gave a bill of sale of all the property to his wife, and on November 23, 1920, left his farm and went to New York, where he testifies that he walked around until night came and then went to an hotel. For some 9 or 10 days he spent his time during the day wandering around, and each night returned to the hotel, until December 5th, when he went back home and got in communication with his attorney. In the meantime his wife had been selling the farm property for cash or disposing of it to alleged creditors in payment of their debts, and had advertised a sale at auction of the balance.

It may be suspected that Doroski was awaiting his wife, and that, when she was delayed in arriving with the proceeds of the property, he returned home just in time to interpose an answer and to attend the hearing in the bankruptcy proceedings. The creditor who claims to have purchased the horses also appeared and answered the petition. Both he and Doroski claim that Doroski was a farmer and principally engaged in the tillage of the soil, and therefore not subject to adjudication as an involuntary bankrupt.

Section 4a (Comp. St. § 9588), provides that:

"Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

But subdivision (b) provides that:

"Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, * * * may be adjudged an involuntary bankrupt."

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

The intent of Congress to protect men engaged in agriculture, who might fall behind from the failure of crops for one or two seasons, has always been recognized as the basis for this provision in the statute. No question is raised in the present case as to the purpose of the law, but the facts compel a decision as to the time at which the status of the alleged bankrupt is to be determined.

A literal or direct reading of the section would lead to the conclusion that subdivision (b) spoke as of the time of adjudication, or as of the time when bankruptcy proceedings were instituted. But, as has been pointed out in many cases, either of these interpretations would allow a fraudulent bankrupt to escape by committing acts of bankruptcy and then changing his occupation, so as to put himself in the exempt class. This could not be allowed. Tiffany v. La Plume Condensed Milk Co. (D. C.) 141 Fed. 444 (citing cases from the English law and from the earlier United States statutes); In re C. Moench & Sons Co., 130 Fed. 685, 66 C. C. A. 37; In re Burgin (D. C.) 173 Fed. 726; In re Luckhardt (D. C.) 101 Fed. 807.

Those persons only may be adjudged bankrupts who, while insolvent, have committed acts of bankruptcy. In re Folkstad (D. C.) 199 Fed. 363. By analogy, the performance of those acts which in another person would be acts of bankruptcy may not be considered as such if performed by one exempt from adjudication. From this the converse of the preceding proposition has been held, viz. that a person in the exempt class, who commits acts of bankruptcy, cannot be thrown into bankruptcy because he has perforce ceased the occupation which gave him the exemption. Flickinger v. First Nat. Bank, 145 Fed. 162, 76 C. C. A. 132.

Indeed, it has been held in one case that a former bank cashier, absconding, could not be thrown into involuntary bankruptcy, because, among other activities, he had spent the most of his time prior to his flight in conducting a farm property. Harris v. Tapp (D. C.) 235 Fed. 918. But in all of these cases it has been held that the time from which the status of exemption was to be determined must be either the date of commission of an act of bankruptcy (In re Mackey [D. C.] 110 Fed. 355; In re Leland [D. C.] 185 Fed. 830; In re Disney [D. C.] 219 Fed. 294; Virginia-Carolina Chemical Co. v. Shelhorse, 228 Fed. 493, 143 C. C. A. 75), or the date at which the debts to which the act of bankruptcy relate were incurred (In re Crenshaw [D. C.] 156 Fed. 638; In re Burgin, supra).

In the case at bar the alleged bankrupt may have temporarily given up, due to his failures in the conduct of his farm and to recrimination by his wife. But all his debts had accrued and the alleged acts of bankruptcy had been committed prior to his disappearance, and while he certainly should be classed as a farmer and engaged in the tillage of the soil. But, more than this, it would appear that, no matter what his purpose may have been, he left his farm in the hands of an agent.

Under the circumstances, his bill of sale to his wife was little more than a power of attorney. The farm was being closed up and the assets turned into cash, either in fraud of his creditors and for his own benefit, or in fraud of his creditors for the benefit of his wife,

with his connivance. If, therefore, he would not be subject to involuntary bankruptcy, even if he had engaged in some other line of business, it must certainly be held that he could not be thrown into bankruptcy while a fugitive, or during the temporary cessation of his activities and before the expiration of the four-months period within which his exemption, based upon these particular acts of bankruptcy, would continue.

Immediately after the expiration of the four months, the same individual might be adjudicated a bankrupt for acts of bankruptcy committed while insolvent and after he had ceased the occupation of farming. In that proceeding the debts accruing during his farming operations might be proven in competition with debts accruing thereafter. A man like the alleged bankrupt in this case may have intended to defraud his creditors or to create preferences; but, so long as he continues to be a farmer, punishment cannot be meted out, nor his affairs administered, under the bankruptcy statute.

It is no objection to an apparently correct interpretation of an act of Congress to suggest that it does not include all possible cases where the operation of a similar statute might be useful. If two constructions were possible, one of which would prevent fraud and the other would allow a fraudulent debtor to escape, the one preventing the fraud would necessarily be chosen. But where one interpretation will cause difficulties in many cases, and the opposite interpretation will cause difficulty in few cases, including the one at bar, the words of the statute cannot be strained or distorted merely to fit the circumstances of this particular case.

It must be held that the alleged bankrupt was a farmer at the time the acts of bankruptcy were committed, and apparently was still a farmer, or at least had not taken up any other occupation, at the time the petition was filed. The court, therefore, had no jurisdiction in bankruptcy, and the petition must be dismissed.

THE NO. 14.

(District Court, E. D. New York. February 15, 1921.)

Maritime liens ⇐28—Repairs made on order of owner.

A repairer of a scow on order of a charterer, under a charter requiring return of the boat in good order and condition, ordinary wear and tear excepted, who by direction of a representative of the owner made additional repairs to parts injured or worn through ordinary wear and tear, and which were not within his contract with the charterer, *held* entitled to a lien therefor, under Act June 23, 1910 (Comp. St. §§ 7783–7787).

In Admiralty. Suit by Frank McWilliams, Incorporated, against the mud scow No. 14. Decree for libelant.

Macklin, Brown, Purdy & Van Wyck and William F. Purdy, all of New York City, for libelant.

Carter & Carter and Peter Carter, all of New York City, for claimant.

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

CHATFIELD, District Judge. The libelant undertook repairs upon the scow 14 for the charterer, the Great Lakes Dredging Company. These repairs necessitated putting the scow in dry dock in order to reset the corner irons and do certain work in connection with the doors to the pockets. The Great Lakes Dredging Company had the boat on the usual charter, requiring them to return it in good order and condition, ordinary wear and tear excepted. The repairs to be made were the results of injuries admittedly outside of ordinary wear and tear.

According to the testimony the libelant and the charterer went over the boat, specifying exactly those repairs which the charterer wished to have made upon the boat. During the course of the repairs the claimant sent his representative or runner to inspect the work, as apparently was customary on his part. According to the witnesses, the claimant, in his dealings with those who charter his boats, is not only exact and careful in requiring the making of repairs, but is insistent upon having the repairs made in workmanlike and permanent fashion, rather than to be content with temporary patching.

The libelant knew that the boat was under charter. The foreman of the libelant testified that the claimant was present at the interview when the items of repairs were agreed upon. But this is contradicted by the claimant, and it is impossible to find that the claimant was present. The libelant, as the work progressed, made additional repairs, admitted by all the witnesses to be within the clause "ordinary wear and tear," to some of the appliances and fittings of the pockets, and in the books of the libelant separate accounts of material and labor were kept for the work which had been ordered by the charterer, as distinguished from the work which came under ordinary wear and tear.

The superintendent of the libelant testifies specifically that the runner of the claimant ordered this "ordinary wear and tear" work to be done. The libelant, at the termination of the work sent two bills, each charged against the scow and the Great Lakes Dredging Company, the charterer, one bill for the work done under the contract with the charterer, and the other bill for the ordinary "wear and tear" repairs.

The representative of the Great Lakes Dredging Company objected to the bill for "wear and tear," and, as is shown by one of the exhibits, in August returned the bill to the libelant, which then made the bill out to the scow and to the claimant, as owner, and sent the bill to the owner, who has refused to pay the same. The claimant's runner is no longer in his employ and no effort has been made by the claimant to locate his whereabouts, or to produce him in court.

The libelant claims that the "ordinary wear and tear" repairs were ordered by the owner's representative, and that they are thus brought within the statute of June 23, 1910. 36 Stat. 604 (Comp. St. §§ 7783–7787). No question is raised that they are within the general subject-matter of this statute, but the claimant contends that the libelant cannot claim a lien therefor, in view of the libelant's knowledge that the boat was under charter, that the contract for repairs was made with the charterer, and that the libelant had reason to believe, or to know, and at any rate could easily have found out, that he, the claimant, had not ordered the repairs in question, and would not be responsible therefor.

It appears from the record that the claimant had previously notified the libelant, in the case of another boat, that he would not be responsible for any of the work done at the charterer's direction. It is apparent that the libelant knew of the charter, and that it cannot avoid any consequences of such knowledge. It could have no lien for work done or necessaries furnished on the orders of the charterer which were excluded by the terms of the charter. Act June 23, 1910, c. 373, § 3; The Hatteras, 255 Fed. 518, 166 C. C. A. 586; The South Coast, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386.

The libelant is not bound by the way in which the account was kept in its books, as the testimony shows that the bookkeepers, at the direction of the superintendent, kept the two jobs separate, and entered the name of the Great Lakes Dredging Company, as owner, without definite instructions, or without knowledge, as to any arrangement made for the making of the second repairs. In the same way the sending of a bill for the ordinary wear and tear repairs to the Great Lakes Dredging Company, of itself, is no proof that these repairs were not ordered by the claimant. But the testimony shows that the repairs for ordinary wear and tear were ordered by the representative of the owner, and, if so, the presumption arises that they were ordered on the credit of the vessel, and a lien was created, unless the presumption is rebutted. Act June 23, 1910, § 1.

The charterer was not bound to pay for them, and the owner would be liable in personam, if ordered by his representative, even though no lien existed; but that liability would be unenforceable in this suit.

On the testimony a valid lien is shown, and the libelant may have a decree.

DOAN et al. v. CONSOLIDATED-PROGRESSIVE OIL CORPORATION.

(District Court, D. Delaware. December 28, 1920.)

No. 404.

Courts ⇐308—In stockholders' suit, only those joining are "parties," within equity rule, and as affecting federal jurisdiction.

In a suit by stockholders against the corporation, on their own behalf and on behalf of other stockholders who may join, only such stockholders as join are "parties," within the meaning of equity rule 25 (198 Fed. xxv; 115 C. C. A. xxv), and the jurisdiction of a federal court is dependent wholly on the citizenship of the persons so suing, and not on the citizenship of other stockholders.

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

In Equity. Suit by William C. Doan and others against the Consolidated-Progressive Oil Corporation. On motion to dismiss bill. Motion denied.

H. D. Montgomery, of Pittsburgh, Pa., and S. D. Townsend, Jr., and James I. Boyce, both of Wilmington, Del., for complainants.

David J. Reinhardt, of Wilmington, Del., for defendant.

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

MORRIS, District Judge. The complainants, Doan, a citizen and resident of Ohio, and Englert, Dapper, and Koch, citizens and residents of Pennsylvania, stockholders of Consolidated-Progressive Oil Corporation, a Delaware corporation, filed their bill against that corporation "in their own behalf and in behalf of any and all other stockholders of said corporation who may wish to join or intervene therein and become parties thereto." The bill does not contain the names, citizenship, and residence of the "other stockholders" in whose behalf, also, the suit was instituted. For this omission the defendant, relying upon equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv) and the cases of State of Maine Lumber Co. v. Kingfield Co. (D. C.) 218 Fed. 902, and Whitaker v. Whitaker Iron Co. (D. C.) 238 Fed. 980, moves to dismiss the bill.

Are the stockholders in whose behalf the bill was filed, but who did not join in exhibiting the bill, *parties,* within the contemplation of equity rule 25; that being the eventual question raised by the motion. That rule deals only with the name, citizenship, and residence of those persons who are parties. It prescribes what shall be a sufficient description of the parties, but it does not specify who the parties to a cause are, or may be. The latter question is dealt with by rules 37 to 45, inclusive (198 Fed. xxviii, 115 C. C. A. xxviii). This suit seems to be in accord with equity rule 38, which, under the circumstances in it mentioned, authorizes one or more persons to sue for the whole. Foster's Fed. Prac. (6th Ed.) vol. 1, p. 703. Saving certain well-recognized exceptions in which one person may sue in the name of another, persons may not be joined as plaintiffs, but by their own act or with their knowledge and consent. Daniell's Ch. Pl. & Pr. (6th Am. Ed.) p. 190, note. It does not appear that the unnamed stockholders participated in, or had any knowledge of, the institution of this suit. It is a general rule in equity that "all persons having an interest in the subject of the action and in obtaining the relief demanded may join as plaintiffs"; but it is likewise true that only those who actually complain and join in exhibiting the bill are plaintiffs. Story's Eq. Pl. § 26. In class suits, in which one or more persons sue for all persons similarly situated, the members of the class in whose behalf a bill is filed, but who do not join in the complaint and in exhibiting the bill, are not parties plaintiff. Story's Eq. Pl. 125a.

Such is also the inevitable inference resulting from the decision and the language thereof in Stewart v. Dunham, 115 U. S. 61, 64, 5 Sup. Ct. 1163, 29 L. Ed. 329. Moreover, the Supreme Court there made it clear that, where persons sue in a representative capacity in a federal court, the jurisdiction of the court is dependent wholly upon the citizenship of the persons so suing, and not at all upon the citizenship of the other members of the class in whose behalf the suit is brought. When this case is read in connection with Ayres v. Wiswall, 112 U. S. 187, 5 Sup. Ct. 90, 28 L. Ed. 693, and New Jersey Central Railroad Co. v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949, which hold that all *parties* on one side of the controversy must be citizens of different states from those on the other, it becomes manifest that the members of a class in whose behalf a bill is filed, but who do not join in the complaint and in exhibiting the bill, are not considered by the Supreme

Court as parties to a suit. The facts in the cases of State of Maine Lumber Co. v. Kingfield Co. and Whitaker v. Whitaker Iron Co., supra, relied upon by the defendant, are not identical with the facts in the case at bar, and it may be that the difference in facts distinguishes those cases from the decisions of the Supreme Court above referred to. However that may be, the above-mentioned cases decided by the Supreme Court determine, in my opinion, the decision in this case, and make it necessary to deny the motion to dismiss.

An order in accordance with this opinion may be submitted.

UNITED STATES v. GARLAND.

(District Court, D. Delaware. February 17, 1921.)

No. 1.

Courts ⇐365—No recovery in excess of penalty of bond, where that is the law of state where bond is made.

In an action by the United States on the bond of a contractor for public work, given under Act Aug. 13, 1894 (Comp. St. § 6923), where by the law of the state where the contract and bond were made recovery in similar cases is limited to the penalty named in the bond, interest on such sum is not recoverable.

At Law. Action by the United States against Hugh A. Garland, receiver of the Pure Water Apparatus Company, and the American Surety Company of New York. Judgment for plaintiff.

James H. Hughes, Jr., U. S. Atty., of Wilmington, Del., for plaintiff.

S. D. Townsend, Jr., of Wilmington, Del., for defendant American Surety Co.

MORRIS, District Judge. Pure Water Apparatus Company, in June, 1913, entered into a contract with the United States for the installation of a distilling plant, of specified efficiency, at Ft. Caswell, North Carolina, and gave bond in the penal sum of $20,945, with American Surety Company of New York as surety, for the fulfillment of that contract. The plant was installed, but when completed was found to be wholly inefficient and useless. From time to time during the construction the government paid to the contractor sums of money which in the aggregate exceeded the penalty of the bond by more than the amount received by the government from salvaging the plant.

This is an action on the bond. Judgment by default was entered against the surety company at a prior term of this court. The plaintiff, acting under Revised Statutes, § 961 (U. S. Comp. St. § 1599), moved the court to render judgment in its favor for so much as is due according to equity. To establish the amount due, evidence, both oral and documentary, was presented by the plaintiff. The defendant was represented at the inquisition, but did not offer any evidence. That

the plaintiff is entitled to recover the full amount of the bond is, I think, under the evidence, not open to question.

The United States, however, seeks to recover, not only the penalty of the bond, but also damages in excess of the penalty for its detention, the measure of such damages to be the interest on the amount due from the time it should have been paid to the date of judgment. Whether in any case judgment in favor of the obligee in a penal bond may exceed the penalty has been the subject of "much contrariety of opinion," but, while considering the question of the amount of recovery upon a contractor's bond similar in substance and purpose to the one here under consideration, the Supreme Court in Illinois Surety Co. v. John Davis Co., 244 U. S. 376, 381, 37 Sup. Ct. 614, 617 (61 L. Ed. 1206), laid down a rule which, in my opinion, controls the decision in this case. It said:

"The contract and bond were made in Illinois and were to be performed there. Questions of liability for interest must therefore be determined by the law of that state."

United States v. U. S. Fidelity Co., 236 U. S. 512, 530, 35 Sup. Ct. 298, 59 L. Ed. 696, is, at least by inference, to the same effect.

The contract and bond of the Pure Water Apparatus Company were to be performed in the state of North Carolina. Apparently they were also made there. In any event, the record does not disclose that they were made elsewhere. The law of North Carolina, evidenced by New Home Sewing Mach. Co. v. Seago, 128 N. C. 158, 38 S. E. 805, and Bernhardt v. Dutton, 146 N. C. 206, 59 S. E. 651, is, as I understand those cases, that in an action upon a penal bond for condition broken no recovery in excess of the penalty may be had. Consequently I am of the opinion that in this case the recovery of the plaintiff against American Surety Company must be restricted to the amount of the penalty of the bond, to wit, $20,945.

Judgment accordingly, with costs.

THE NORSMAN.

(District Court, E. D. New York. January 13, 1921.)

1. **Assignments ⇐121—Right of assignee to maintain suit.**
   The assignee in good faith and for sufficient and valid reason of a claim for money due *held* entitled to maintain suit therefor.

2. **Maritime liens ⇐28—Supplies furnished to owner.**
   One furnishing gasoline to a motor boat on orders of the captain, pursuant to an established course of business, under which the bills had been paid periodically by the owner, *held* entitled to a maritime lien under Act June 23, 1910 (Comp. St. §§ 7783–7787).

In Admiralty. Suit by Robert L. Poling against the launch Norsman. Decree for libelant.

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

Henry W. Baird, of New York City (John A. Anderson, of Brooklyn, N. Y., of counsel), for libelant.

Peter Baumer, of New York City, for claimant.

CHATFIELD, District Judge. The libelant's brother and assignor, in the year 1917, maintained a pontoon with an oil and gasoline station at the foot of Fifty-Eighth street, Brooklyn, in New York Bay, and had for some time dealt with the owner of the gasoline launch Norsman, who paid his bills periodically at such times as was convenient, and approximately from month to month. The Norsman was generally operated by a captain employed by her owner and was rented or chartered for excursions of various sorts.

After the summer of 1917, the libelant's assignor was drafted and turned over his business to his brother, the libelant, who continued the business and brings this action. The libelant's assignor has now been mustered out and is again in charge of the business and was the principal witness upon the trial, but the claim has not been reassigned.

[1] The claimant raises several issues. He attacks the libelant's right to sue on the ground that he is not the real party in interest. The Trader (D. C.) 129 Fed. 462; Reppert v. Robinson, Fed. Cas. No. 11,703. The motive for making the assignment is so plain and the circumstances are so much beyond suspicion that there is no merit to this defense.

The claimant also questions the amount of the bill, on the ground that he had no knowledge of the details; but the slips made out at the time for the amount of gasoline and oil delivered support the libelant's claim and prove the total of the bill rendered to the claimant, which he repudiated and now opposes.

[2] His defense to the claim of maritime lien under the statute of June 23, 1910, chapter 373 (Comp. St. §§ 7783–7787), is based upon his testimony that he had difficulties with the captain of his boat; that prior to the obtaining of the supplies in question he had chartered the boat to another party, who had contracted to pay for such supplies and had personally given notice of this to the libelant's assignor. This is denied by the libelant's assignor. He thus contends that under the doctrine of The Hatteras, 255 Fed. 518, 166 C. C. A. 586, and The Valencia, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, he has rebutted the presumption which arises under the statute in question, and which, if not overcome, would create a lien against the boat. Act June 23, 1910, § 3 (Comp. St. § 7785). He testifies that he had this conversation around the middle of July, at a time when the new captain was on board the boat, but was so indisposed that a friend of the owner was running the engine.

The memorandum, however, of the hiring of the boat was not made until August 15th, and the testimony shows that money for the payment of these supplies was in the hands of another party, who went to Spain without paying the bills. Thereafter the owner of the boat repudiated the claim of lien for credit given to the boat and her captain. For each sale, beginning with July 15th, the day on which the conversation alleged would seem to have taken place, a slip was signed by the captain.

All the elements of a valid claim against the boat are shown, and the proof does not show to the court's satisfaction that the libelant's assignor was put on notice as to the charter of the boat. The South Coast, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386.

There seems to be no reason why the libelant should not be allowed to recover on the statutory lien against the vessel for $44.45.

NEKRITZ v. DUBERSTEIN et al.

(District Court, E. D. New York. January 5, 1921.)

Copyrights ⊂=53—Infringement by imitation of label.

Labels used by defendants on their product *held* so clearly imitations of the copyrighted label of complainant, with only colorable changes, as to entitle complainant to a preliminary injunction.

In Equity. Suit by Louis Nekritz, doing business as the Perfect Polish Company against Barnett Duberstein and John Cooper, doing business as the New York Stove Polish Company. On motion for preliminary injunction. Granted.

Theodora Hooker Doyle, of Brooklyn, N. Y., for plaintiff.

Samuel Jacobs, of New York City, for defendants.

CHATFIELD, District Judge. The plaintiff alleges infringement of copyright by one of his former employees through sales upon the market of a product known as the Cee-Dee liquid stove shine, and asks an injunction pendente lite. The complaint shows that the plaintiff is an alien residing in Brooklyn, while the defendants are also residents of Brooklyn, although their citizenship is not set forth. The plaintiff attempts to join the cause of action for unfair competition with that for infringement of copyright.

The defendants have now answered, and on the application for temporary injunction have submitted affidavits to contradict the statement of the plaintiff that the article of the defendants and the acts of them or their salesmen have actually misled, or that they tend to mislead, the public or interfere with the plaintiff's business. They also submit the labels used by them as an answer to the charges of infringement of copyright and unfair competition. The defendants' answer presents substantially a general denial of the plaintiff's allegations.

Defendants' idea as to the plaintiff's rights is shown by the charge that the plaintiff does not come into a court of equity with clean hands, because the plaintiff's label says that one application of his stove polish will last at least six months. Even though this be an exaggeration, it sounds rather remarkable in the mouth of parties who advertise at least twice upon their label that their stove shine gives an *everlasting* black luster. The labels are substantially identical in color, arrangement, and substance, both as to the printed matter and as to the picture. The defendants' label was evidently prepared

from the plaintiff's label, with slight changes to avoid the charge of copying; but these changes merely emphasize the imitation.

The differences from the copyrighted label are but colorable transpositions. The arrangement of stoves and water boiler is reversed, while the young woman, who in the plaintiff's copyright is wielding a paint brush upon the stove, is in the defendants' label holding the paint brush either just before or just after application to the stove. The gas range in each label has an unusual form of side shelf with open burners, but on the defendants' picture of the stove this shelf has been lowered, so that it is down between the two stoves and on a level with the coal stove hearth. The hot-water gas heater has been omitted from the defendants' design, but two pipes, both entering the bottom of the water boiler and presumably intended to represent connections with a water back on the coal stove are added. But more obvious than the matters of detail which might be distinguished by an observant person on close examination is the general resemblance in size and arrangement of printed matter and pictures and the color of the label itself.

Infringement of the copyright and unfair competition is so plainly evidenced that (the defendants having submitted to jurisdiction by their answer) upon the entire case such a palpable imitation should be restrained, unless and until the defendants can show, if they are able to do so, either the invalidity of the copyright or a valid defense against the charge of unfair competition.

Pending the outcome of the litigation an injunction will be granted.

THE ANGLER.

(District Court, E. D. New York. February 18, 1921.)

Salvage ⟸28—Rescue of drifting barge.

A salvage award of $150 made to a tug for the rescue and return to her tow of a barge, which had broken loose and was in danger of loss.

In Admiralty. Suit by the Flannery Towing Line, Incorporated, against the barge Angler. Decree for libelant.

Foley & Martin, of New York City (James A. Martin, of New York City, of counsel), for libelant.

Macklin, Brown, Purdy & Van Wyck, of New York City (W. F. Purdy, of New York City, of counsel), for claimant Dittmar.

CHATFIELD, District Judge. The services rendered by the Flannery were timely. The facts that she was called to the help of these boats by the Mahanoy, that the captain of the Angler left his boat because of the apparent danger, that one of the other boats in the tow received physical injury from contact with the chains of the dredge, which caused it to sink (even though placed in a slip by the Flannery after returning from rescuing the Angler), all indicate that the strength of the tide made the situation of the boats such that

salvage was necessary. After the Angler broke away and floated by itself up the river, her danger was lessened for a time and changed in character.

The Flannery was in no danger whatever and took no risk. After reaching the Angler, so as to put a line on board, her services were nothing more than that of a helper tug. She should be compensated for her good sense in taking the barge back to the Mahanoy's tow, rather than in putting it in to a pier, and compensation for that service should be estimated from the standpoint of the trouble or expense in sending another tug to get the boat.

I should think that a composite allowance for the aid rendered the Mahanoy in getting her barge back, the rescue of the barge before she caused any further damage, and the prevention of injury to the barge, including the expense of taking out or raising the cargo, would justify an ordinary amount of salvage award. I should think that $150 would be fair, and you may have a decree for that amount.

I should divide the charge, one-third to the cargo and two-thirds against the boat, and I should also divide the salvage service, two-thirds to the owner and one-third to the crew.

MORRELL v. LALONDE et al.

(District Court, D. Rhode Island. February 25, 1921.)

No. 1466.

Removal of causes ⇐50—No separable controversy with defendant whose liability is as insurer of codefendant.

In an action for personal injury against the person charged with negligence causing the injury and his insurer under Pub. Laws, R. I. 1915, c. 1268, § 9, providing that an insurer against liability for personal injury shall be directly liable to the injured party, and that such party may join the insured and insurer in an action, and the judgment shall bind both, there is no separable controversy between plaintiff and the insurer which will authorize removal of the cause by the latter as a citizen of another state, where plaintiff and the other defendant are citizens of the same state; the liability of the insurer being incidental to and dependent on that of the insured.

At Law. Action by Mary L. Morrell against Alphonse J. Lalonde and the United States Fidelity & Guaranty Company. On motion of defendant corporation to dismiss. Motion denied, and cause remanded to state court.

Curran & Hart, of Providence, R. I., for plaintiff.

Huddy, Emerson & Moulton, of Providence, R. I., for defendants.

BROWN, District Judge. This action at law was begun in the state court, and was removed to this court by the United States Fidelity & Guaranty Company, a corporation organized under the laws of the state of Maryland, on the ground that the cause of action against the United States Fidelity & Guaranty Company is a separable contro-

versy; the plaintiff and the defendant Lalonde being citizens of the same state. The company appears specially and moves that the action brought against it be dismissed.

The action was brought in the state court in accordance with section 9 of chapter 1268, Public Laws of Rhode Island, January Session, 1915, as follows:

"Sec. 9. Every policy hereafter written insuring against liability for personal injuries, other than payment of compensation under this act, shall contain provisions to the effect that the insurer shall be directly liable to the injured party, and, in the event of his death, to the party entitled to sue therefor, to pay him the amount of damages for which such insured is liable. Such injured party, or, in the event of his death, the party entitled to sue therefor, in his suit against the insured, may join the insurer as a defendant, in which case judgment shall bind either or both the insured and the insurer; or said injured party, or, in the event of his death, the party entitled to sue therefor, after having obtained judgment against the insured alone, may proceed on said judgment in a separate action against said insurer. Provided, however, that payment in whole or in part of such liability by either the insured or the insurer shall, to the extent thereof, be a bar to recovery against the other of the amount so paid; and provided, further, that in no case shall the insurer be liable for damages beyond the amount of the face of the policy."

This act has been considered by the Supreme Court of Rhode Island in Dillon v. Mark et al., 110 Atl. 611, in which it was held that section 9 was not restricted to workmen's compensation cases, but was for the protection of persons who sustain personal injuries for which those who are liable have insured themselves against liability. It was said:

"No distinction is made in the act between domestic and foreign insurance companies; both, if they choose to do business in this state, must conform to the law, and are only authorized to issue policies in accordance with the law and subject to the provisions thereof."

Accepting this construction of the statute by the Supreme Court of Rhode Island, the first question which presents itself is whether the record shows a separable controversy between the plaintiff and the defendant company; "a controversy which is wholly between citizens of different states, and which can be fully determined as between them."

It is urged that the cause of action against the defendant Lalonde sounds in tort, while the alleged cause of action against the defendant company sounds in contract. It is true that the defendant company is not charged as a tort-feasor, either joint or several; but it is charged with liability on two grounds: first, on the ground that the defendant Lalonde was guilty of negligence, to the plaintiff's damage; and, second, that under the statute, and the policy issued subject to its provisions, there is a statutory liability of the defendant to pay to the plaintiff, instead of to the insured.

The theory of the statute seems to be to subrogate the plaintiff, or person suffering personal injuries, to the rights of the insured defendant against the insurer. The statute expressly provides that the injured party may proceed in either of two ways: He may join the insurer as a defendant, or he may obtain judgment against the in-

sured alone, and proceed on said judgment in a separate action against the insurer. It is obvious that the insurance company cannot be held liable solely upon the ground that it has insured the defendant; it must further appear that the defendant in tort has become liable to the plaintiff in respect to a matter for which he is insured.

Looking at the alleged cause of action against the insurance company as a whole, it is evident that the liability of the insurance company to pay money to the plaintiff cannot be established, unless there is also established the liability of the tort defendant to pay damages to one who has suffered personal injuries.

The provision that in the suit against the insured the insurer may be joined, in which case judgment shall bind either or both the insured and the insurer, seems to be framed to enable the plaintiff in a single action to obtain a judgment as to the primary liability of the tort defendant that shall be binding upon both insured and insurer, and also to establish a statutory right to the insurance money. In cases where, under the provisions of the policy, the insurance company assumes the defense of the action against the tort defendant for its own protection, a judgment against the tort-feasor, on familiar principles, would bind both as to the primary question of the liability of the insured. In cases where the insurance company does not assume the defense, either in the exercise of a right given by the policy or upon being notified by the defendant to intervene in its own interest as indemnitor, the statute gives to the plaintiff a right to join the defendant, and makes it a condition of the right of the insurance company to do business in the state that the policy shall be subject to this statutory right of the plaintiff.

This is a statutory right of the plaintiff to be subrogated to the rights of the insured against the insurance company. Both parties to the insurance policy made their contract subject to the provisions of the statute of Rhode Island, which in effect requires that the insurer shall pay directly to him who was injured, instead of to him who has caused the injury. It thus provides against the possibility that the payment to the insured may not result in payment to the person injured, and gives to the person injured a right superior to that of the general creditors of the tort-feasor to the proceeds of the policy.

Similar questions of the relation of parties were considered in Merchants' Cotton Press & Storage Co. v. Insurance Co. of North America, 151 U. S. 368, 379, 381–383, 14 Sup. Ct. 367, 38 L. Ed. 195. It may be said, as is suggested by that case, that under the statute the insurance company occupies substantially the position of a garnishee, and that its indebtedness upon its policy may be reached and held subject to such final judgment as plaintiff might obtain against the insured tort-feasor, and that the insurance company has no separable controversy, in the sense of the Judiciary Act which entitles it to remove the cause from the state court to the United States court. Should the plaintiff fail to establish liability against the tort defendant, no controversy would remain as to the insurance company, as the plaintiff has no right of action against the insurance company, except as incidental to her litigation with the tort defendant.

The substance of the matter is that the liability of the insurance company to pay to the plaintiff must be worked out in favor of the plaintiff through the direct liability of the insured. I am unable to read the statute as permitting a direct suit against the insurance company alone, without joinder of the insured, until after judgment against the insured. If the statute seeks to convert an agreement to indemnify against liability of a certain person into a direct obligation to pay damages, it might result that the absence of the tort-feasor would deprive the insurance company of the ability to defend, and expose it to the danger of paying damages for which judgment could not be obtained against the insured. The statute may reasonably be regarded as designed to give to a plaintiff incidental relief against an indemnitor; to extend it farther would be to disregard the substantial rights of the insurer and the nature of its agreement with the insured. In Torrence v. Shedd, 144 U. S. 527, 530, 12 Sup. Ct. 726, 727 (36 L. Ed. 528), it was said:

"But in order to justify such removal, on the ground of a separate controversy between citizens of different States, there must, by the very terms of the statute, be a controversy 'which can be fully determined as between them'; and by the settled construction of this section the whole subject matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit. Hyde v. Ruble, 104 U. S. 407; Corbin v. Van Brunt, 105 U. S. 576; Fraser v. Jennison, 106 U. S. 191; Winchester v. Loud, 108 U. S. 130; Shainwald v. Lewis, 108 U. S. 158; Ayres v. Wiswall, 112 U. S. 187; Fidelity Ins. Co. v. Huntington, 117 U. S. 280; Graves v. Corbin, 132 U. S. 571; Brown v. Trousdale, 138 U. S. 389."

As the liability of the insurance company to the plaintiff must always be incidental to its liability to the tort-feasor, it is obvious that the controversy between the plaintiff and the insurance company as to its liability to pay directly to the plaintiff cannot be fully determined until there is also determined the primary controversy between the plaintiff and the insured.

I am of the opinion that it now appears that the removed suit does not really and substantially involve a suit or controversy properly within the jurisdiction of this court, and that, although no motion has been made to remand, it is the duty of this court to deny the action to dismiss, and to remand the case to the state court, with costs to the plaintiff.

A draft order may be presented accordingly.

In re EN SK SONG.

In re MASCARENAS.

(District Court, S. D. California, S. D. February 24, 1921.)

No. 324.

1. **Aliens ⇐61—Army service does not render Korean eligible for naturalization; "free white person;" "any alien."**
   The use of the term "any alien" in the several provisions of naturalization in Act June 29, 1906, § 4, subd. 7, as added by Act May 9, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352), is not intended to enlarge the right to naturalization, as restricted by Rev. St. § 2169 (Comp. St. § 4358), to "free white persons" and persons of African nativity or descent, except in the specific cases of native-born Filipinos and Porto Ricans therein mentioned, and a native Korean is not eligible for naturalization, even though he served in the army during the recent World War.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Any; White Person.]

2. **Aliens ⇐68—Filipino may not be naturalized until two years after declaration of intention.**
   A native-born Filipino, on application for naturalization under Act May 9, 1918, § 4, subd. 7 (Comp. St. § 4352), must present "the required declaration of intention," which must have been made not less than two years prior to his application.

In the matter of the petitions of En Sk Song and Simeon Ogbac Mascarenas for naturalization. Denied, without prejudice to renewal by Mascarenas.

Frederick K. Jones, of Los Angeles, Cal., Naturalization Examiner.
Applicants, in pro per.

BLEDSOE, District Judge. These two cases, though not similar in all their details, both involve a construction of the act of Congress of May 9, 1918, amending the Naturalization Law (40 Stat. 542), and therefore will be considered together.

In the Song case, the applicant is a native of Korea and subject of Japan, and an honorably discharged soldier from the United States Army, having served during the recent war. In the Mascarenas case, the applicant is a native-born Filipino over the age of 21 years, who has served 3 years in the United States Navy and is still in the service. He made his declaration of intention to become a citizen on November 16, 1920, and 3 days thereafter filed his application for naturalization. The question in the Song case is whether the petitioner, being a Korean, and therefore a member of the Mongolian race, is entitled to citizenship at all under our law, even though he may have served with credit in the Army during the recent war. The question in the Mascarenas case is whether the usual requirement of at least two years' lapse of time between the making of the declaration of intention and the petitioning for naturalization shall apply in the case of a Filipino serving in the United States Navy.

[1] By the act of Congress of June 29, 1906 (34 Stat. 596), a pronounced departure in the matter of the procedure to be followed in naturalizing aliens was ordained. The action then taken was intended to

provide "for a uniform rule for the naturalization of aliens throughout the United States." U. S. v. Morena, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359. It was concerned with matters of procedure almost entirely. The requirements of the Revised Statutes providing for at least 5 years' residence in the United States, and for the making of the declaration of intention at least 2 years prior to the application for final citizenship papers (section 2165, R. S.), were substantially reincorporated into the new provisions. Section 2169, R. S. (Comp. St. § 4358), originally limiting the privileges of naturalization to "free white persons," and later to persons of African nativity or descent in addition (see In re Singh [D. C.] 257 Fed. 209, 210), was left intact.

In 1918, Congress again amended the Naturalization Law; this time it was made easier and less burdensome for those coming to the defense of our flag in the then existing state of war to become citizens of our country. In that behalf, by the act of May 9, 1918 (40 Stat. 542), a number of subdivisions were added to section 4 of the act of June 29, 1906 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4352), supra. Therein it was provided, in substance, that certain classes of aliens might be naturalized under certain specified conditions as follows:

"(1) Any native-born Filipino of the age of twenty-one years and upwards, who has declared his intention to become a citizen of the United States and who has enlisted or may hereafter enlist in the United States Navy, * * * and who, after service of not less than three years, may be honorably discharged therefrom, * * * or

"(2) Any alien, or any Porto Rican not a citizen of the United States, of the age of twenty-one years and upwards, who has enlisted or entered or may hereafter enlist in or enter the armies of the United States, * * * or in the United States Navy or Marine Corps, * * * or who has served for three years on board of any vessel of the United States government, * * * may, on presentation of the required declaration of intention, petition for naturalization without proof of the required five years' residence within the United States if upon examination by the representative of the Bureau of Naturalization, in accordance with the requirements of this subdivision it is shown that such residence cannot be established.

"(3) Any alien serving in the military or naval service of the United States during the time this country is engaged in the present war may file his petition for naturalization without making the preliminary declaration of intention and without proof of the required five years' residence within the United States;

"(4) Any alien declarant who has served in the United States Army or Navy, or the Philippine Constabulary, and has been honorably discharged therefrom, and has been accepted for service in either the military or naval service of the United States on the condition that he becomes a citizen of the United States, may file his petition for naturalization upon proof of continuous residence within the United States for the three years immediately preceding his petition; * * *

"(4) And any alien, or any person owing permanent allegiance to the United States embraced within this subdivision, may file his petition for naturalization in the most convenient court without proof of residence within its jurisdiction, * * * provided he appears with his two witnesses before the appropriate representative of the Bureau of Naturalization and passes the preliminary examination," etc.

"(5) Any alien, who, at the time of the passage of this act, is in the Military service of the United States, who may not be within the jurisdiction of any court authorized to naturalize aliens, may file his petition for naturalization without appearing in person in the office of the clerk of the court and shall not be required to take the prescribed oath of allegiance in open court," etc.

The above are all contained in and constitute the essence of the detailed and somewhat complicated provisions of the "seventh" subdivision of section 1 of the above-mentioned act. Section 2 of the same act after providing for the express repeal of certain provisions of certain statutes contained the following language:

"That all acts or parts of acts inconsistent with or repugnant to the provisions of this act are hereby repealed; but nothing in this act shall repeal or in any way enlarge section 2169 of the Revised Statutes, except as specified in the seventh subdivision of this act and under the limitation therein defined."

The claim is insistently made that by the language of said subdivision 7, designated hereinabove as paragraph (3), Congress was intending to confer the privilege of naturalization upon "any alien," of whatsoever race, provided only he served in our Army or Navy during the time of the recent war; in other words, that as to all persons so serving, there was a complete repeal of the provisions of section 2169 limiting naturalization to "free white persons" and "persons of African descent."

Much earnest and persuasive argument is indulged in, so far as the question of mere policy is concerned, to the effect that any alien, irrespective of his race, who may have bared his breast to the bayonet of the enemy during the recent war in our defense is thereby entitled as a matter of right and of justice to the privilege of citizenship. With that question of policy, however, I feel that the courts are in no wise concerned. The argument made should be addressed to the Legislature of the land. It is our function merely to determine as best we may the classes of persons that under existing law are admissible to citizenship, and having determined that, to deny the privilege to all other classes.

Aside from the question of the general policy involved, the main force of the argument comes from the use of the phrase "any alien," etc., as indicated hereinabove, and the claim is made that by the use of that language Congress gave indubitable evidence of its intention to include every alien of whatsoever race within the privilege then being accorded. However, the same language, to wit, "any alien," possessing certain qualifications as to service in the military or naval forces, was used in the act of July 26, 1894 (28 Stat. p. 124). It was never, so far as I am advised, contended that such comprehensive language was in any wise a repeal by implication of the strict provision of section 2169, which had always controlled and limited by its very terms all applications for naturalization. So, also, the comprehensive phrase "any alien," as being entitled to the privileges of citizenship upon complying with certain required conditions precedent, has been repeatedly used by Congress from time to time. See paragraphs 5 and 6, § 2165; sections 2166, 2167, and 2168, R. S. It has never been held, however, either judicially or administratively, that such language was to be regarded as in any wise repealing the limitation placed upon the general right of naturalization expressed by the definite and limiting language of section 2169, supra. Repeals by implication are not favored, and I am persuaded that, if nothing more were contained in the law than the subdivision 7 of the act of May 9, 1918, the privilege of naturalization

would still have to be limited by the terms of section 2169. But Congress made assurance doubly sure, so to speak, by the provision above noted contained in section 2 of the act of May 9th, and thereby expressly recognized and insisted upon, as a national declaration of policy, the continued and controlling efficacy of section 2169, except in the instance referred to, and that instance, I am persuaded, is the privilege then for the first time accorded to native-born Filipinos.

Filipinos, of course, are members of the Malay or brown race. See Report of Immigration Commission, Senate Document 662, 61st Congress, Third Session. And under the terms of section 2169, except in the presence of the exception created by subdivision 7 of the act of May 9, 1918, they would have been denied citizenship. If Congress, in the enactment of subdivision 7, had intended to make it possible for aliens of every race to become citizens, merely through participation in the war in our Army or Navy, it would have been very easy for it to have said so. Furthermore, if such had been the general intention, to be gathered from the comprehensive language actually used in paragraph (3) above quoted, the detailed provisions respecting the Filipinos and the Porto Ricans would have been unnecessary. The mere incorporation of those detailed provisions, taken in connection with the careful language of the saving clause respecting section 2169, leads me to conclude that Congress was not intending, even as a recognition of loyal service performed during the war, to open wide the gates to citizens of every race and nationality who might have served under our flag. Moreover, a careful consideration of the wording of paragraph (3) of said subdivision 7, viewed by itself, makes it apparent that the purpose of Congress in that particular behalf was not to provide for the admission of aliens generally, who had served with us in the World War, but merely to provide that those of them who were otherwise eligible to admission might be admitted without being required to execute the usual preliminary declaration, and without completing the usual period of residence within the confines of the United States.

The applicant Song, being a native of Korea, and therefore of the Mongolian race (see Report of Immigration Commission, supra), is not a "free white person" (see In re Singh, supra), and therefore, not being eligible within the provisions of section 2169, must be denied citizenship.

[2] The contention of Mascarenas is that under the wording of the seventh subdivision of the act of May 9, 1918, he is entitled to file his petition for naturalization at any time after making his declaration of intention; i. e., he is not required to wait at least two years. Section 2165, R. S.; section 4, Act June 29, 1906.

This claim is in the teeth of the language of section 4 just cited, and is also contrary to the uniformity expected and to be sought in the naturalization law. U. S. v. Morena, supra. Furthermore, it seems to me to be in conflict with the express provisions of the subdivision relied upon, because, as hereinabove shown, the native-born Filipino, permitted to obtain citizenship, may petition therefor only "on presentation of the required declaration of intention." The required declaration of intention, I am constrained to hold, is the declaration specified in

subdivision 2 of section 4 of the act of June 29, 1906, above adverted to, which must be taken out not less than two years prior to the filing of the petition for naturalization.

The petition of Mascarenas, therefore, will be denied, without prejudice to its renewal when the required time shall have elapsed.

YATES v. SMITH et al.

(District Court, D. New Jersey. May 15, 1920.)

1. **Patents ⇐167(2)—Claims cannot be expanded by specification.**
   While the specification may be referred to for the purpose of better understanding the meaning of claims or of limiting them, it can never be made available to expand the claims.
2. **Patents ⇐73—Invention does not date from conception.**
   An invention does not date from the conception in the mind of the inventor, nor from unsuccessful experiments abandoned by him; but he must represent it in some physical form or impart his conception to another.
3. **Patents ⇐289—Suit for infringement brought within statutory limitations usually not dismissed for laches.**
   Only under very special circumstances should the court hold one chargeable with laches whose litigation was instituted within the statutory limitation, which in patent cases is six years.
4. **Patents ⇐289—Knowledge for 10 years of infringement bars suit.**
   A complainant *held* barred by laches from maintaining a suit for infringement, where both he and the patentee, his assignor, had knowledge of the claimed infringement ten years before the commencement of suit and that defendant was during such time building up a trade in the alleged infringing article and claiming the invalidity of complainant's patent.

In Equity. Suit by John W. Yates against Frank F. Smith and another. Decree for defendants.

Decree affirmed 271 Fed. 33.

Samuel E. Darby, of New York City, for plaintiff.

Stephen J. Cox, of New York City, for defendants.

DAVIS, District Judge. The plaintiff in the above-stated cause is seeking an injunction, together with an accounting of profits and damages, based upon alleged infringement of plaintiff's patent No. 897,449, issued on September 1, 1908, to Frederick Bogenberger, and by him assigned to the plaintiff.

The invention of the patent in suit relates to sash-pivot mechanism used in connection with pivoted fireproof metal windows that are designed to be swung about a pivot in opening and closing, as distinguished from windows that are raised and lowered to accomplish that purpose. The object of the patent as disclosed in the specifications is to provide a sash-pivoting mechanism, which is limited in its movement and which closes automatically when released, so as to cut off draft through the building, including means for adjusting the pivotal con-

nection of the sash, so that no manner of warping, expansion, or contraction will hold the sash in open position when it is desired to have it closed. The object of the patent also provides means whereby the limitation to the movement of the sash-pivoting mechanism may be rendered inoperative, so as to permit the window to be swung open to a greater degree for washing or any other purpose.

The patent has two claims, both of which the complainant alleges have been infringed. They are:

"1. A sash-pivoting device comprising a sash plate member secured to the frame of the sash, a supporting member adjustably secured to the stile of the frame, a pivot bolt secured to one of said members and having pivotal connection with the other member, a limiting stud on the supporting member, and a pawl carried by the sash-supporting member adapted to engage said stud to determine the movement of the sash.

"2. A sash-pivoting device comprising a sash plate secured to the frame of the sash, an arm adjustably secured to the stile of the frame, a pivot bolt secured to the arm and having pivotal connection with the plate, a limiting stud on the arm, and a pawl carried by the plate adapted to engage said stud to determine the movement of the sash."

The defendant denies infringement. In his brief he says:

"It will be noted that neither a gravity pawl or stop or an automatic pawl or stop is claimed, and that the improvement consisting of an arm or supporting member adjustably secured to the stile of the frame, and the limiting stud on the arm or supporting member is claimed in combination with the other old and well-known parts of the device. This, therefore, is the specific thing claimed by Bogenberger as his invention and monopoly, and by specifying it he disclaimed all other things set forth in the patent, and conceded them to be public property."

[1] It is true that Bogenberger does not specifically claim a gravity or automatic pawl or stop as does Smith in his "gravity latch piece." Does "a pawl carried by the plate adapted to engage said stud to determine the movement of the sash" mean a gravity pawl? The claims are the measure of the patentee's right to relief, and while the specification may be referred to for the purpose of limiting the claims, it can never be made available to expand them. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800. Though the context may not be referred to for the purpose of changing a claim and making it different from what it is, yet it may be referred to, and often is, for the purpose of better understanding the meaning of a claim. White v. Dunbar, 119 U. S. 47, 7 Sup. Ct. 72, 30 L. Ed. 303. In the specification the patentee said:

"The thumb piece (No. *19* on the pawl) is arranged so that the weighted end of the limiting pawl cannot be tilted past the center, because the thumb piece engages the sash when pressed back and when released it will drop by gravity upon the upper surface of the arm *6*."

The claims state that the pawl is "adapted to engage said stud to determine the movement of the sash." The claim does not specify in what way the pawl is "adapted to engage the stud to determine the movement," but the specification does show that "the flange, *14*, is provided * * * with a pivot pin, *16*, upon which is carried a limiting pawl, *17*, having a weighted outer end, *18*," and after being pressed

back, "when released it will drop by gravity upon the upper surface of the arm, *6*." The weighted outer end of the pawl, *18*, in Fig. 3 indicates that it drops by gravity upon the upper surface of the arm, *6*, and is thus adapted to engage the stud on the arm to determine the movement of the sash. In his brief, counsel for defendant says:

"Pawls may act by gravity, by spring pressure, by mechanical movement, or by hand."

There is nothing anywhere in the specification to indicate that the pawl in this case acts in any other way or by any other method than gravity, and the context, to which we may resort for better understanding the claim, forces the conclusion that this is a gravity acting pawl.

The construction and operation of the Bogenberger patent and the Smith patent, No. 970,656, issued September 20, 1910, are practically identical, except in one particular; the means for adjusting the sash in relation to the frame. In pointing out the identity of the Smith and Bogenberger devices, counsel for complainant says:

"The only difference between the structures in this respect being that the adjusting means in Smith is on the sash, whereas in the Bogenberger patent it is shown on the frame. The same result is accomplished however and in the same manner; that is, by making one member of the pivot mechanism adjustable with respect to the other member. It is contended that this slight difference is not sufficient to avoid infringement."

The complainant is entitled to invoke the law of mechanical equivalence and a mere change of location of the adjustable means from the frame to the sash would ordinarily not avoid infringement and would be of no consequence. The defendant, however, contends that the complainant is estopped from invoking that law by the limitation accepted by Bogenberger in the Patent Office. The file wrapper shows that claims originally filed as 1 and 2 were "rejected as not distinguishing from either Ryan or Patterson." The rejected claims are as follows:

"1. A sash-pivoting device comprising a sash plate, an arm mounted on the frame, means to pivot the plate to the arm, and means carried by the plate for limiting its movement.

"2. A sash-pivoting device comprising a sash plate secured to the frame of the sash, an arm secured to the stile of the frame, means to pivotally connect the plate to the arm, a limiting device upon the arm, and means carried by the plate to engage said limiting device for determining the movement of the sash."

The Patterson patent showed a pivot with an adjustment on the sash and not on the frame, and Bogenberger limited his structure to one having an adjustment on the frame in order to distinguish it from the Patterson patent. It is a question, therefore, whether or not the complainant is not bound by the apparent limitation. Shepard v. Carrigan, 116 U. S. 593, 6 Sup. Ct. 493, 29 L. Ed. 723; Roemer v. Peddie, 132 U. S. 313, 10 Sup. Ct. 98, 33 L. Ed. 382; Royer v. Coupe, 146 U. S. 524, 13 Sup. Ct. 166, 36 L. Ed. 1073. Bogenberger's intention thus to limit his claims seems to be disclosed in his first pivots.

The earliest date on which Bogenberger can lay claim to have had a definite conception of his invention, it seems to me, is June 28, 1907. On that day he wrote a letter to his attorney and said:

"I am again to-day inclosing you a sketch and description of another invention of mine. It is a little attachment to pivot for fireproof windows."

On the back of this letter there is the purported description. The original letter and description were not found among the papers or in the files of the attorney. The purported carbon copies of the letter and description written on the reverse sides of a sheet of correspondence paper of the Consolidated Sheet Metal Works are all the documentary evidence that we have to establish the definite conception of the invention at that definite date. The defendant charges that the description was written at a later date and that the letter did not refer to it. It is not absolutely clear to me that his "little attachment to pivots for fireproof windows," referred to in the letter, was identically the device which is the subject of the application, filed April 16, 1908, for patent No. 897,449. Smith claims to have produced an automatic gravity stop in January, 1907. It appears that John C. McClure, a pattern maker, was engaged to make a pattern embodying this device and in McClure's daybook under date of January 15, 1907, there is a record made of four hours' work on the pattern.

On the following day, there is an entry for two hours' work on alterations suggested by Smith. This stop had a gravity acting pawl in the form of a hook and was placed upon the market and distributed shortly thereafter, March or April, 1907. A number of samples of that device mounted on sections of metal windows were sent, it is claimed, to various business firms and photographs of the completed device were sent to the trade generally. On or about April 5, 1907, Mr. Smith explained his automatic gravity stop to his attorney, Frederick F. Scheutz, Esq., who made entries in his record book of those facts at that time, and further Smith claims, though it is denied by Bogenberger, to have sent a sample of this automatic gravity stop to the Bogenbergers in March, 1907, and a sample of the improved form in August of that year, and in October following a catalogue from Smith, giving full detailed illustrations and descriptions of the original form.

The description of the original or hook form of automatic gravity stop in Smith's application of May 23, 1907, amounts to a reduction to practice. Automatic Weighing Machine Co. v. Pneumatic Scale Corp., 166 Fed. 288, 92 C. C. A. 206, and this is prior to the date of the invention by Bogenberger. But Smith did not plead this in anticipation of said patent, and the evidence concerning it may be received and considered only to show the state of the art and to aid in the proper construction of the patent in suit. Morton v. Llewellyn, 164 Fed. 693, 90 C. C. A. 514.

[2] The date of the invention of Bogenberger depends largely on memory. Shortly after the Consolidated Sheet Metal Works moved to 661 Hubbard street, Milwaukee, Bogenberger began experimenting, but the date of the moving alleged to be on or about January 1, 1907, depends upon memory; it not being shown by any records. The memory of Mr. Fred Bogenberger, the patentee and chief witness for complainant, as to the date of the invention, was found to be quite inaccurate when tested by records in other matters. It was, according to Bogen-

berger, in October, 1907, when a window containing a stop was completed and sent to the laboratory of the underwriters. This stop was unsatisfactory to the underwriters, who refused to approve it and returned it in January, 1908. In fact, the efforts of Bogenberger during 1907 seem to have been experimental, and it was not until 1908 that he made the pivot which subsequently went into use. An invention does not date from the conception in the mind of the inventor nor from unsuccessful experiments abandoned by the inventor. He must represent it in some physical form or impart his conception to another. Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521; Walker on Patents, § 70, 5th edition.

The plaintiff has the burden to bear and he should establish anticipation by some "concrete, visible, contemporaneous proofs, speaking for themselves," such as book entries, illustrations, purchases, bills, orders, and patterns. Emerson & Norris Co. v. Simpson Bros. Co., 202 Fed. 747, 121 C. C. A. 113; Delaski & Thropp Co. v. Fisk Rubber Co., 203 Fed. 986, 122 C. C. A. 286. This the plaintiff fails to do. We have practically nothing before June 28, 1907. Much of his testimony consists of impressions and guesses resulting from faulty or imperfect memory after the lapse of ten years. He has not borne the burden beyond a reasonable doubt.

The defendant says that the complainant ought not prevail in this suit because of laches—"most extraordinary and inexcusable delay on the part of Yates and his predecessors in interest." The validity of the defense of laches depends primarily upon the particular facts of the case in question. There are few general rules applicable to all cases. As Judge Sanborn, in the case of Ide v. Trorlicht, etc., Co., 115 Fed. 137, 148, 53 C. C. A. 341, 352, said:

"The doctrine of laches is an equitable principle, which is applied to promote, but never to defeat, justice. Under ordinary circumstances a suit in equity will not be stayed before, and will be stayed after, the time fixed by the analogous statute of limitations at law. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it."

[3] Almost innumerable conditions would determine this question, and only under very special circumstances should the court hold one guilty of laches whose litigation was instituted within the statutory limitation, which in patent cases is six years. Benthall Mach. Co. v. National Mach. Corp. (D. C.) 222 Fed. 918, 922. Whenever rights of third parties or the public intervene, or a defendant is allowed to put himself into a position from which he cannot extricate himself without great loss because of the silence and inactivity of the patentee with knowledge, he may not then assert his rights to their detriment.

[4] The parties in this suit were formerly associated in business. Smith employed Yates. In 1907 "they quarreled and severed their business relations." Whether or not they were unfriendly when they severed their relations or became so later, it is a fact that there seems

to have arisen a serious contention between them shortly after the separation. On January 28, 1909, Smith filed application for patent. On March 23, 1909, Yates filed application for patent and the Patent Office declared an interference between them. The patent No. 970,656 was finally issued to Smith as the inventor on September 20, 1910. "Yates then obtained a patent on a modified structure * * * and commenced to manufacture and sell the same." Judge Learned Hand held that the Yates devices infringed the Smith patent. (D. C.) 216 Fed. 361. Yates continued to infringe said patent and was adjudged in contempt of court for the violation of the injunction of the court and upon appeal of these proceedings, the Circuit Court of Appeals said:

"The record shows a persistent and disingenuous purpose on the part of the defendant to appropriate the invention of the complainant. It also shows an emphatic recognition of the value of the invention by the courts of this circuit." 244 Fed. 793, 795, 157 C. C. A. 241, 243.

The proofs establish that the Bogenbergers had knowledge of Smith's automatic gravity stop in 1907, probably as early as March of that year, and thereafter it was brought to their attention by catalogues, letters, blueprints, sample, personal call, and advertisement in which Smith's device was fully described. They admit knowledge in 1908. In 1913, Smith, through his attorney, notified the Bogenbergers that they were infringing his patent. They replied May 29, 1913, saying, inter alia:

"We are not infringing but believe that your client is guilty of the offense, which you are charging us with. However, we will submit this whole proposition to our attorney * * * and then you will hear from us immediately."

Smith's attorney replied, among other things, saying:

"Furthermore, Mr. Smith, informs us that, before you even made a stop of this character, you obtained samples of those made by him."

No reply to this letter was ever received, nor were the conclusions of the attorney ever conveyed to Smith in accordance with the statement contained in the letter of May 29, 1913. Smith continued to manufacture and sell his devices under his patent without interference, and with the apparent acquiescence of the Bogenbergers, until this suit was started in March, 1917, during which time Smith built up quite a large business all over the country. Between 1907 and 1917, the Bogenbergers were on friendly relations with Smith and purchased goods from him.

The complainant knew about the Bogenberger patent in 1913, if not before, for he was assisted by the Bogenbergers in certain phases of his litigation above referred to in that year. Yates, who later acquired the Bogenberger patent, though Bogenberger retains an interest therein, in that litigation set up that he was a licensee under the Bogenberger patent, and was operating thereunder, and was therefore not violating the injunction of the court and was not guilty of contempt.

These facts being established, are the complainant and his assignor guilty of such laches as to defeat the relief sought? No one case, be-

cause of the differences of fact, is an exact precedent for another. Yet a uniform principle pervades them all. The length of time during which a person neglects to assert his rights before they will be defeated on the ground of laches varies with the particular circumstances of each case, and is not, like the statute of limitations, subject to arbitrary rules. In order for duration of time to constitute laches, there must generally be: (1) Knowledge of the rights by the complainant or his assignors; (2) an opportunity to establish them in the proper forum; (3) by reason of the delay, the adverse party has good reason to believe that the alleged rights are worthless or have been abandoned; and (4) the relation of the defendant to those rights must have so changed that it would be inequitable to permit the complainant to assert them now. Galliher v. Cadwell, 145 U. S. 372, 12 Sup. Ct. 873, 36 L. Ed. 738. If the delay is harmless to the defendant, his relation to them remaining practically the same, he may not complain or take advantage of the delay. Delay may be excused, if due to the fact that the complainant did not know of the violation of his rights until long after it began, or that he was litigating a test case under his patent against another infringer during the time of the delay, or while litigation was in preparation. Walker on Patents (4th Ed.) § 596.

In the present case, the patentee and complainant knew of the Smith patent, and his contention that the Bogenberger patent was invalid, and that Smith was building up a large business based upon his device. The complainant cannot maintain that neither he nor the patentee had knowledge of their rights under the Bogenberger patent, nor that they did not have an opportunity to establish them in the proper forum, nor that they did not know that Smith claimed that the Bogenberger patent infringed his and that Smith was rapidly extending his business and putting himself in such position that it would be inequitable to permit the complainant to assert his rights now, whatever they may be. The complainant and the patentee, who has an interest in this litigation, are guilty of laches, and have thereby lost any right they might have had against the defendant. This point alone is dispositive of the case and justifies denial of the relief sought.

The bill will therefore be dismissed.

YATES v. SMITH et al.*

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

No. 2600.

Patents ⇐328—897,449, for sash pivoting device, not infringed.

The Bogenberger patent, No. 897,449, for a sash pivoting device, as limited by amendment of the claims in the Patent Office, *held* not infringed.

Appeal from the District Court of the United States for the District of New Jersey; J. Warren Davis, Judge.

Suit in equity by John W. Yates against Charles R. Smith, executor of Frank F. Smith, deceased, and another. Decree for defendants (271 Fed. 27), and complainant appeals. Affirmed.

Samuel Darby, of New York City (Walter A. Darby, of New York City, of counsel), for appellant.

Stephen J. Cox, of New York City, for appellees.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

BUFFINGTON, Circuit Judge. This case is the last of a protracted patent litigation between one Smith, a patentee, and Yates, his former business associate, wherein Smith's invention was finally sustained, infringement decreed and accounting ordered. See Smith v. Yates (D. C.) 216 Fed. 361, and 216 Fed. 359, 132 C. C. A. 503. During this litigation, no successful claim was made by Yates that Smith, in the prosecution and enjoyment of his business, was himself an infringer; but after the close of this litigation, and an attempt to reopen the controversy, Yates acquired from one Bogenberger a patent, No. 897,449, granted to the latter in 1908.

Though himself in the same general character of business as Smith, Bogenberger had never attempted to judicially enforce his patent against Smith. On Yates' acquiring this dormant patent, he brought this suit in the court below against Smith's representatives. On final hearing, that court, in an opinion rendered at 271 Fed. 27, dismissed the bill and thereupon Yates took this appeal.

The case concerns a mechanism actuating pivoted window sash, whereby, inter alia, such sash can be kept open at desired angles and their glass cleaned from inside a room. Reference to the opinion of the District Court, and to the prior litigation above referred to, will fully describe the art and prevent present repetition. On final hearing, the District Court dismissed Yates' bill on the ground of laches. Without discussing that particular ground of dismissal, upon which we express no present opinion, we rest our decision, affirming the decree below, on the simple and sufficient ground that infringement was not shown. In that regard, and without needlessly going into details, it suffices to say that in the two combination claims of Bogenberger's patent there is in one the element of "a supporting member adjustably secured to the stile of the frame," and in the other the element of "an arm adjustably secured to the stile of the frame." In Smith's device, the element of adjusting mechanism is located, not on the stile of the stationary window frame, as in Bogenberger's, but on the frame of the tilting window sash. Under ordinary circumstances, the question of whether this difference was a mere transposition of parts or a palpable mechanical change of location without difference in functional efficiency might possibly result in decreeing infringement. But an examination of the file wrapper of Bogenberger's application shows that the express location of the adjusting mechanism on the frame and the nonlocation of it on the sash fixed the claim boundary to which Bogenberger, under stress of patent rejection, was then limited, and thereby secured the claims here in suit.

The claims he originally made contained no location limitation. They were rejected by reference, inter alia, to the patent of Patterson, No. 128,651. Its subject-matter was a mirror swinging in a stationary frame, and the adjusting mechanism was located on the mirror. Under stress of this reference, and to avoid rejection, Bogenberger canceled, and substituted for his canceled claims, the present ones, which located the adjusting mechanism on the frame. We are not concerned with the question whether this action of the department was right (Vanmanen v. Leonard, 248 Fed. 939, 161 C. C. A. 57), or whether Bogenberger, by contesting, could justly have obtained a broader claim. The decisive thing is that, whatever contention to the contrary Bogenberger might have made, he did not make it, but himself became the actor, and tendered and accepted claims which restricted him to location limits, namely, on the frame of the window. Such being the condition of claim limitation and the consideration for which his patent issued, it follows that this location limit must be enforced, when he attempts on patent enforcement to expand his claims by emasculating such enforced limitation. For this court to adjudge otherwise would be for us to now in effect, and under the guise of mechanical equivalents, undo the action of the Patent Office and close to the public a field of manufacture which Bogenberger disclaimed, and which the Patent Office forced him to make as a condition of securing his claim.

We meet the measure of judicial duty by construing that contract as it was made, and it was made with claim limitations, which we now enforce by dismissing this bill, on the ground that the restricted claims have not been infringed.

THE BERKLEY.

TURLINGTON v. NEW YORK, P. & N. R. CO.

(District Court, E. D. Virginia. February 25, 1921.)

No. 2743.

1. Collision ⊂=95(7)—Steamship and tow; mutual faults.

A tug passing down Elizabeth river with a car float in tow, which by reason of meeting and passing a similar tow of the same owner, each using a hawser 600 feet long, in violation of the harbor rules and regulations established pursuant to Act May 28, 1908 (Comp. St. § 7969), unduly obstructed the channel, *held* primarily in fault for a collision between her tow and a steamship entering the channel from the side; and the steamship also *held* in fault for approaching and entering the channel from the anchorage grounds, where her view was obstructed, at such speed that she could not quickly control her movements.

2. Collision ⊂=6—Rules not permanently suspended by War Regulations.

War regulations cannot excuse violation of statutory rules and regulations governing the length of tows as applied to commercial operations more than a year after the signing of the armistice.

In Admiralty. Suit for collision by J. E. Turlington, master of the Steamship Berkley, against the New York, Philadelphia & Norfolk Railroad Company. Decree dividing damages.

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

Edward R. Baird, Jr., George M. Lanning, Baird, White & Lanning, all of Norfolk, Va., J. H. Turnure, of White Plains, N. Y., and Burlingham, Veeder, Masten & Fearey, of New York City, for libelant.

Thomas H. Willcox, Willcox, Cooke & Willcox, Braden Vandeventer, and Hughes, Vandeventer & Eggleston, all of Norfolk, Va., for respondent.

WADDILL, District Judge. The collision, the subject of this litigation, occurred in the channel of the Elizabeth river, Norfolk, Va., about opposite the Virginian Railway Piers, and in the immediate vicinity of buoy No. 8, at 6:45 o'clock on the morning of November 25, 1919, between the steamship Berkley, one of the line steamers of the Old Dominion Steamship Company, plying between Richmond and Norfolk, and car float No. 9, in tow of the tug Parksley, one of the line barges operated by the New York, Philadelphia & Norfolk Railroad Company, between Norfolk and Cape Charles, Va., en route to Cape Charles. Both vessels in collision were injured, the Berkley quite seriously, by her starboard quarter colliding with the starboard bow of the car float. The evidence, as respects the more material facts and circumstances bearing upon the collision, is less in dispute than usual, and the case turns almost entirely upon whether, at the time of the collision, the respondent's tows were unduly obstructing the navigable channel of the river, at and about the time of the collision, and whether the Berkley was being navigated with the degree of care and caution reasonably to be expected of her under the circumstances in which she was placed.

[1] The court's conclusion, upon full consideration of the testimony, is that both vessels were at fault for the collision. The Berkley claims that in coming across the flats from Newport News it was necessary to pass through the recently established anchorage grounds at that location, and which at the time were crowded with shipping that obstructed the view of her navigators of vessels passing up and down the Elizabeth river; that on the occasion in question, not only was her observation interfered with, but her view of the down-coming car float, with which she subsequently collided, was obscured by the presence of another car float of the respondent, then ascending the river, parallel with the down-going car float, in tow of another of respondent's tugs, the two tugs and tows occupying approximately 2,000 feet in length of the channel, and that the descending car float, after emerging from behind the up-going tug and tow, was not observed until it was too late to escape collision. The channel was undoubtedly obstructed by the unusual length of the tows, and that this condition contributed to the disaster there can be no serious question. Each tow was approximately 1,000 feet long, the hawsers each being from 90 to 95 fathoms, and the car floats were either in the act of passing, or had just passed each other, when the collision occurred.

By reason of the size and length of the tug and barge, considerable space was taken in the channel, and when to that was added the operation of the same in the crowded location in question, on approximately a 600-foot hawser, and further accentuated by one tow going in one

direction and the other in another, it resulted in the occupancy of virtually the entire channel for a distance of 2,000 feet. The hawsers to both tows were of unusual length, maintained in open violation, not only of the oft-repeated decisions of this court, affirmed by the Circuit Court of Appeals of this circuit, and by the Supreme Court of the United States, but in further violation of the Harbor Rules and Regulations, and the Regulation of the Secretary of the Treasury of December 7, 1908, prescribing the length of sea-going barges in inland waters (Comp. St. § 7969), which necessarily resulted in menace to other vessels using the harbor. The Harbor Rules (section 18) prescribe that "no tows exceeding 700 feet in length shall enter or depart from the harbor." The Jamestown (D. C.) 114 Fed. 593; The Georgetown (D. C.) 135 Fed. 854; The Hamilton (D. C.) 212 Fed. 1016; The Delmar (Wilkins' Adm'x v. N. Y., P. & N. R. R. Co.) 248 Fed. 826, key-note 1, affirmed 257 Fed. 42, 168 C. C. A. 254. These rules make obligatory the shortening of hawsers, and the necessity therefor was manifest in the particular locality, by reason of the crowded condition. Prudence and foresight would indicate the propriety of operating tows of reasonable length, and those violating the lawful requirements imposed upon them so to do are burdened with showing, not only that their acts of omission did not add to the happening of the accident, but could not have done so.

[2] Counsel suggest that the harbor rules were suspended as a result of certain legislation of the war period, referring particularly to the Regulation of the Secretary of Commerce of the 4th of June, 1917. This position, in the view of the court, is untenable, as certainly, for peaceful pursuits of the character involved here, the war should be considered as already ended, the collision having occurred more than a year after the signing of the armistice; and, in any event, the respondent should not avail itself of that position, for the reason that those navigating the respondent's tugs admit that they did not observe the regulations at any time, and, indeed, denied that they had ever been advised or informed of the existence of such rules, or that there was any limitation to the length of hawsers to be used by them.

While, in the judgment of the court, the length of the hawser in question entered into this accident, and of itself may have been the cause of the collision, still it cannot be said that the Berkley was free from fault in her navigation, which fault contributed to the accident. It is true that the view of the navigators of the Berkley was obstructed, and her course considerably impeded, in passing through and over the much frequented anchorage grounds, before entering the Elizabeth river; but knowing that she was suddenly to emerge through the anchored vessels into the channel, at approximately right angles to the channel, they should have exercised a higher degree of care and caution than they did in approaching and entering the channel, with a view of avoiding shipping passing up and down therein. They should not have taken the chance of altering her course to ascend the channel at the speed at which she came into it, but, on the contrary, should have slowed down earlier, so as to have been the better able to control her

movements. It was doubtless the length of the hawser—that is, the distance between the tug and car float—that misled them, in realizing how little room she had to navigate to the westward of the channel. They should not have taken this chance; she ought to have gone into the channel at such speed as without difficulty to have been able to control her movements against shipping crossing her course, ascending and descending the channel. This her navigators failed to do, and it resulted in part in bringing about the collision.

Sundry assignments of error were made by the vessels, one against the other, and much testimony adduced as to what each vessel did in its operation at and about the time of the collision, but, in the court's view, so far as the same bears upon the collision, it is immaterial and whatever error either vessel committed should be treated as error in extremis; the real cause being that one vessel was unduly obstructing the channel, and the other came into the channel at too great speed to avoid collision with the passing car float.

It follows, from what has been said, that a decree will be entered, dividing the damages between the vessels, on presentation.

METROPOLITAN TRUST CO. OF CITY OF NEW YORK v. RICHMOND PASSENGER & POWER CO. et al.

(District Court, E. D. Virginia. October 28, 1920.)

Equity ⇐114—Right to intervene barred by laches.

Leave to bondholders to file petitions of intervention to raise the question of diversion of assets by the mortgagor and other questions of administration of the property denied on the ground of laches, where application was not made until some 18 years after commencement of the suit in which their interests were represented by the trustee in the mortgage securing their bonds and more than 10 years after sale of the property had been made and confirmed.

In Equity. Suit by the Metropolitan Trust Company of the City of New York against the Richmond Passenger & Power Company and others. On application of the Bankers' Trust Company, executor, and others, for leave to file petitions of intervention. Application denied.

Mann & Tyler, of Norfolk, Va., William Hodges Mann & Son, of Petersburg, Va., and Charles C. Deming, of New York City, for petitioners.

Munford, Hunton, Williams & Anderson, of Richmond, Va., for defendants.

WADDILL, District Judge. This cause is now before the court, having been submitted some time since, upon objections of the Virginia Railway & Power Company, owners of the property heretofore acquired at the sale under foreclosure proceedings, in the several causes, consolidated and heard together, under the name of Bowling Green

Trust Co. v. Virginia Passenger & Power Co. to the filing in said causes, upon giving due notice thereof, of the petitions of Thomas C. O'Connor and others, and of the Bankers' Trust Company, executor, etc., duly presented to the court; the purpose and object of said petitions being to enable the petitioners to intervene in said cause, and contest the court's administration of the trust estate, and to trace certain alleged diversions of the trust property, claimed to have been diverted from the Richmond Passenger & Power Company to the Virginia Passenger & Power Company.

The conclusions of the court on the application to file said petitions, and the objections thereto, are as follows:

First. That said petitioners should not be allowed to file their petitions, and intervene in said cause and in said consolidated cause, because of the failure to assert their said several claims within a reasonable time after their rights accrued.

Second. The several petitioners are specially barred, by laches, from asserting the claims now interposed by them, because of their relation to and obvious knowledge of the pendency of this suit, and of the progress made in the same, which should have admonished them of their obligation to make known their intention to assert and prosecute their claims at an earlier date. The bill of the Metropolitan Trust Company, the trustee under the mortgage under which the bonds of the petitioners were secured, was filed on the 26th day of November, 1904. By said bill, the amendments thereto, and other pleadings filed in connection therewith, the questions now sought to be set up anew were fully and elaborately covered. The decree of reference under this and the other bills in the consolidated cause, and upon the pleadings, was entered on the 10th day of March, 1905.

After proceeding with the inquiries before the special master, for some two years, the Metropolitan Trust Company, trustee, on the 14th of March, 1907, presented its petition, and asked for further time within which to take testimony in support of its bill and the averments of its petition, setting forth other and further alleged diversions and causes of action. Over objection of counsel representing all the other interests generally, the master, on the 28th day of March, 1907, granted the request for time, which action the court, on the 4th day of May, 1907, approved to the extent of allowing 65 days' extension, and denied the right to file said petition, among other reasons, because of the delay in presenting the same. The cause was then, for some months, proceeded with before the master. On the 4th of June, 1909, the trustee under the mortgage declined to further prosecute said cause as trustee, leaving to the parties in interest, the right, if they saw proper, to take action in their own behalf. From that time, now more than 11 years, these petitioners have delayed presenting the petitions they now offer, and in the court's view they should not now be entertained.

Third. That, as well from the terms of the opinion of the Circuit Court of Appeals, to which this cause was heretofore taken by the petitioner Charles Hall Davis, as from the spirit of the decision, it was not the purpose and intention of that court to decide more than that

the case should remain upon the court docket, for the purpose of enabling the petitioner Davis to assert his claim, and to show the alleged diversion of assets, and his right of priority to payment of the amount due him as a preferred lienor, from the amounts realized, and not to enable persons generally, or others claiming to be similarly situated, to assert their claims.

Fourth. The effort of the petitioners to avoid the effect of their failure to assert their rights within a reasonable time seems largely based upon their averment that they were entitled to the benefit of the petition allowed by the court to be filed by Davis, and in which he averred that he sued for the benefit of himself, and others similarly situated, who would come in and share in the costs of the proceedings. They claim to be of that class. This position, under the facts of this case, is not well taken, in the judgment of the court. It is true that the petitioner Davis did in his petition state that the same was in behalf of himself and others similarly situated, who would come in and share in the cost of the proceedings. With the possible exception of this mere formal averment, nothing was heard, so far as this court is advised, of any attempt, effort, or purpose on the part of these petitioners, or any one of them, to assert their claims, along with that of the petitioner Davis. So far from doing so, the petitioner Davis endeavored to prosecute the suit in his own behalf in in forma pauperis proceedings, without suggestion or intimation that persons other than himself were interested in, sharing the expense of, or otherwise engaged in, the conduct of the litigation.

Fifth. The petitioner Davis filed his petition on the 12th day of March, 1910. The decree of sale was entered on the 24th of October, 1908, and the order confirming the sale on the 30th day of June, 1909. Thus some 18 months after the decree of sale, and nearly a year after the confirmation of sale in the foreclosure proceedings, he asserted his claim to 71 mortgage debenture bonds of $1,000 each, now of the aggregate amount of $129,175.62 as of the 31st day of December, 1919, and he was subsequently granted permission to contest the question of whether or not there had been a diversion of assets to the prejudice of the debenture bondholders. The master to whom the cause was referred has, on the Davis petition, recently reported that assets were diverted for a sum more than sufficient to pay his bonds.

To allow petitioners, who hold 168 of these debenture bonds, of the aggregate value now of $319,000, to assert their claims more than 10 years after the acquisition of the property by its present owners, in the foreclosure proceedings, and in effect to surcharge and contest the receiver's accounts, and assail the administration of the trust estate during the 5½ years the same was under the control of the court, and some 2 years previous thereto, to wit, from June 18, 1902, thus reaching back a period of 18 years, the alleged diversion as of the 31st of December, 1919, being averred to be $1,991,299.34, would seem grossly unfair and unjust, and almost inevitably result in working a serious wrong to the great body of the litigants interested in the administration of the trust estate, and especially to the present owners of the property. This, the court believes, should not be done,

and the Circuit Court of Appeals, in its action on the Davis petition, never for a moment contemplated such action.

An order denying the right of the petitioners to file the said several petitions will be entered on presentation.

THE HENRY LEE.

(District Court, E. D. New York. February 15, 1921.)

Collision ⇐71(3)—Tug entering slip not liable for collision with vessel lying at end of pier.

A tug which, when maneuvering to enter a crowded slip with a tow alongside, under the influence of an ebb tide, sagged against a vessel lying at the end of the pier with her bow over the line of the slip, *held* not liable for the injury caused to such vessel, in the absence of evidence that she was carelessly or recklessly navigated, and especially in view of New York City Charter, § 879, providing that vessels lying at the end of piers do so at their own risk of injury.

In Admiralty. Suit by William H. Anderson and others, copartners, against the steam tug Henry Lee. Decree for respondent.

Foley & Martin, of New York City, for libelants.

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

CHATFIELD, District Judge. On the afternoon of July 19, 1916, the steamer Theresa was moored at the end of Pier 7, East River, borough of Manhattan, with her bow upstream and projecting a short distance (admitted by the libelant to be at least 18 inches) over the line of the north side of the pier. The Theresa was previously a yacht, having a clipper bow, which had been cut down after the bowsprit had been removed, and given a perpendicular stem above the water line.

At this time the steam tug Henry Lee brought a hoister into the slip between Piers 7 and 8, intending to put this hoister on the southerly side of a steamer moored alongside of Pier 8. The slip was fairly well filled with lighters and it was necessary to maneuver the hoister in between the boats, particularly as a strong ebb tide made it difficult for the Lee to swing into the slip and work the hoister alongside of the steamer without going to the trouble of moving the various boats in the slip. The Lee succeeded in getting the hoister alongside the steamer, but either in passing into the slip, or in backing around in order to get out of the slip, was carried by the ebb tide against the bow of the Theresa, inflicting some damage.

The case was not tried until November 3, 1920, and the captains of the two boats were the only witnesses. Serious disagreement between them as to whether the Lee recklessly jammed into the slip, without regard for the Theresa, or whether she was unavoidably carried against the Theresa as she backed out, affected the recollection of each witness, and made it difficult to determine which story was the more credible. But, so far as the court can determine from the conflicting statements, it would appear that the Lee must have sagged

against the bow of the Theresa when burdened with the weight of the hoister alongside, or must have backed against the Theresa in maneuvering when getting the hoister into place, as the damage to the Theresa was sufficient to indicate a fairly severe blow.

We have therefore the situation where a tugboat in broad daylight, maneuvering to enter a slip, injures a boat projecting into the slip and moored at the end of the pier. The provision of the New York charter (Laws 1901, c. 466) considered in The Chauncey M. Depew, 139 Fed. 236, 71 C. C. A. 362, The Dean Richmond, 107 Fed. 1001, 47 C. C. A. 138, and The Allemania, 231 Fed. 942, 146 C. C. A. 138, has been held by the Court of Appeals of this Circuit, in The Daniel McAllister, 258 Fed. 549, 169 C. C. A. 489, not to be an excuse for careless or reckless navigation by a boat entering a slip, where the injury complained of was inflicted upon some other boat than the one lying at the end of the pier, and where the presence of this boat at the end of the pier was merely one of the circumstances under which the careless navigation was undertaken.

In the cases of The New York Central, No. 18, 257 Fed. 405, 168 C. C. A. 445, and Howell v. Delaware, L. & W. R. Co. (C. C. A.) 262 Fed. 119, it was held that the ordinance in question was but an expression of admiralty law, in that a boat projecting into or interfering with the entrance to a slip should be held liable for injuries to a vessel entering the slip and endeavoring, with careful navigation, to avoid the obstruction, if injury results from the presence of the obstruction. By similar reasoning, if the boat obstructing the slip receives the damage, it cannot under the ordinance or under admiralty law recover for any damage occasioned by its protruding into the slip.

The provision of the charter defines another proposition of law well recognized in admiralty, to the effect that a boat is expected to be able to withstand ordinary contacts and usage in traffic, and that it is not negligence for a boat entering a slip to come in ordinary contact with a boat lying at the end of the slip and around which the second vessel may be required to warp or work, unless the apparent danger is so great that it would be of itself negligence to make such a maneuver on the part of the vessel entering the slip.

In the case at bar either the Theresa was so weak in her new construction that she could not withstand the sagging down of the boat against her, when that boat was attempting to work around into the slip, or she was moored in such a position that she received a blow which would have been taken by the corner of the pier, if she had not projected into the slip. On either theory she cannot recover against the vessel entering the slip, unless this tug was so recklessly maneuvered as to indicate a willful collision and the infliction of a blow much stronger than the ordinary maneuvering around the corner of a dock in entering a slip.

The testimony in this case does not show, even though the captain of the Lee was impatient and disdainful of the Theresa's strength, that he was oblivious of her rights. He testified that he whistled to her to warn her of her danger as he was entering the slip. The captain of the Theresa paid no attention to this warning, and apparently

expected the Lee to keep out of the Theresa's way. The situation is somewhat like that of a person crossing a street between the regular street crossings. Another person, driving a vehicle, has no right to deliberately run down the person so crossing the street, on the theory that the person crossing the street has no rights to be respected. But the person crossing the street cannot complain if, under ordinary circumstances of traffic, drivers are unable, when using reasonable care, to avoid running them down.

The libelant has not satisfactorily shown willful and deliberate negligence on the part of the captain of the Lee, and on all the grounds above stated the libel must be dismissed.

ANDREW JERGENS CO. v. WOODBURY, Inc., et al.

(District Court, D. Delaware. October 15, 1920.)

No. 370.

1. **Equity ⇐180—That complainant does not come with clean hands need not be pleaded.**
   That a complainant does not come into court with clean hands is not a defense which must be pleaded.
2. **Trade-marks and trade-names ⇐68—Refusal to sell to customers of another not unfair competition.**
   A trader or manufacturer may, in the absence of an intent to create or maintain a monopoly, freely exercise his own discretion as to persons with whom he will deal, and may announce in advance the circumstances under which he will refuse to sell.

In Equity. Suit by the Andrew Jergens Company against Woodbury, Incorporated, and others. On motion for leave to file amended answer. Denied.

Keyes Winter, of New York City, and Thomas F. Bayard, of Wilmington, Del., for plaintiff.

Gustav Drews, of Brooklyn, N. Y., and J. P. Laffey, of Wilmington, Del., for defendants.

MORRIS, District Judge. The Andrew Jergens Company filed its bill of complaint, setting up exclusive right in it to use the name "Woodbury" or "Woodbury's" and the trade-mark (now registered), consisting of a reproduction of a neckless head, upon dermatological preparations and toilet articles, charges the defendant Wm. A. Woodbury Distributors, Inc., and others, with infringement of those rights, and prays for the usual relief.

The defendant Wm. A. Woodbury Distributors, Inc., now moves for permission to substitute by way of amendment a new answer for the answer heretofore filed. The plaintiff opposes the motion. The proposed new answer differs from the answer heretofore filed in two substantial particulars only. Both are by way of addition. The first is an affirmative averment, accompanied by allegations of the facts upon which this averment is based, that the plaintiff does not come

into court with clean hands. The second point of difference is that the answer now offered for filing sets up a counterclaim against the plaintiff. The grounds of plaintiff's opposition to the proposed amendment are: First, that the want of clean hands is not in reality a defense, and may be taken advantage of although not pleaded; and, second, that the counterclaim as set up is not valid in law.

[1] The first ground of opposition seems well taken. It is supported by Memphis Keeley Institute v. Leslie E. Keeley Co., 155 Fed. 964, 974, 84 C. C. A. 112, 16 L. R. A. (N. S.) 921, and Bell & Howell Co. v. Bliss (C. C. A.) 262 Fed. 131, 135. No case taking the contrary view has been cited. It follows that an amendment to the answer is not needed to enable the court to invoke the maxim in question should the facts so warrant.

[2] As a counterclaim the defendant states certain facts to show that it is entitled to use the word "Woodbury" or "Woodbury's," together with the "neckless head," on certain toilet articles and preparations, and charges:

"That plaintiff * * * has threatened to and did refuse to deal with, or to sell its products, the products of plaintiff, to dealers, * * * and the like, who dealt with defendant, and did otherwise intimidate dealers, * * * and the like, into declining to deal with defendant. * * *"

The defendant relies on Schonwald v. Ragains, 32 Okl. 223, 122 Pac. 203, 39 L. R. A. (N. S.) 854, and Standard Oil Co. v. Doyle, 118 Ky. 662, 82 S. W. 271, 111 Am. St. Rep. 331, in support of its contention that the acts of the plaintiff so charged entitle the defendant to relief. But, as I understand those cases, the decision in the former is based upon the malicious interference by the defendant with the contracts of the plaintiff, and the latter case rests upon a threat to ruin a customer of another should the customer continue his dealings with that other. The wrongs for which relief was there given are not the wrongs forming the basis of defendants' counterclaim. The charge made in the proposed answer, as I view it, falls within the principle laid down in Federal Trade Commission v. Gratz, 253 U. S. 421, 40 Sup. Ct. 572, 64 L. Ed. 993, and United States v. Colgate & Co., 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443, to the effect that a trader or manufacturer may, in the absence of an intent to create or maintain a monopoly, freely exercise his own discretion as to parties with whom he will deal, and that he may announce in advance the circumstances under which he will refuse to sell. I think these cases, rather than Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, and Hitchman Coal & Coke Co. v. Mitchell, 245 U. S. 229, 38 Sup. Ct. 65, 62 L. Ed. 260, L. R. A. 1918C, 497, Ann. Cas. 1918B, 461, also cited by the defendant, furnish the rule by which the sufficiency of the counterclaim must be measured.

The defendant likewise charges:

"That plaintiff * * * has threatened to and did refuse to deal with * * * trade journal publishers, * * * who dealt with defendant, and did otherwise intimidate * * * trade journal publishers * * * into declining to deal with defendant. * * *"

This charge is too vague, indefinite, and uncertain to show a cause of action in the defendant against the plaintiff. It may mean no more than that the plaintiff declined to advertise in trade journals carrying the advertisements of the defendant. If so, in the absence of further facts, I fail to see, under the reasoning of Federal Trade Commission v. Gratz and United States v. Colgate & Co., how the defendant may justly complain.

In view of the foregoing conclusions, I am of the opinion that leave to file the proposed amended answer would not be in furtherance of justice and should be denied.

An order in conformity herewith may be submitted.

THE THEODORE SMITH.

(District Court, E. D. New York. February 11, 1921.)

Towage ⇐11(10)—Tug not negligent in mooring tow outside other boats.

A tug, which moored a lighter outside of six other boats lying at a bulkhead, *held* not liable for damage caused when a cleat on one of the inner boats gave way and allowed the line of boats to swing downstream with the ebb tide and come into collision with other boats moored below, where the weather was calm and there was no indication that the fastenings of the other boats were not sufficient.

In Admiralty. Suit by William W. Aldrich against the steam tug Theodore Smith; the Messick Towing & Transportation Company, claimant. Decree for respondent.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for libelant.

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

CHATFIELD, District Judge. On the 7th day of November, 1919, at about 1 p. m., the tug Theodore Smith landed the lighter McAllister Bros. No. 35 outside of six boats made fast to a bulkhead on the Jersey side of the river in the basin or slip south of the Ninth Street Pier. The McAllister was almost directly up the river from the barge William F. Monk, which was the center of three boats lying abreast on the north side of the coal dock, which is the next pier down the river. The tide was running ebb, and the Smith, having observed that the six barges appeared properly moored and that there was no sign of approaching danger or bad weather, left the barges. Shortly thereafter a cleat started on the upper corner of one of the inside barges, the boats swung down the river, striking the Poland, the outside barge of the three below, squeezing the Monk against the inside barges, and inflicting damage for which this action is brought.

The libelant contends that the tug was responsible for putting a boat at the outside of a flotilla and thus throwing additional strain upon the lines of the inside boat, without either running lines over the decks of the other boats to the bulkhead, or without seeing that the fastenings of the inside boats were adequate. This accident happened within 30

minutes after the time the tug left the barge, and the conditions of wind and tide were not such as to indicate that the addition of one barge would of itself cause such a strain upon the lines that they might reasonably have been expected to break.

If the McAllister had been there for a considerable time, and her master could properly be held negligent for failing to observe the circumstances and the condition of the fastenings of the inside boats, responsibility for the accident would rest upon the McAllister, if that negligence was the proximate cause of breaking away. Bradley v. Sullivan, 209 Fed. 833, 126 C. C. A. 557; The Ganoga, 257 Fed. 720, 169 C. C. A. 8. See, also, McWilliams v. Philadelphia & R. Ry. Co., 203 Fed. 859, 122 C. C. A. 84.

It was held in The Rambler (D. C.) 87 Fed. 784, that a tug was responsible for damage expectable at the time of mooring a barge; and in Rice v. Erie Railroad Co., 272 Fed. 130 (So. Dist. N. Y., Nov. 3, 1920), a Pennsylvania tug towing the Kingston was held responsible for failure to see that proper lines were run when the Kingston was left alongside of an Erie barge lying outside of two tiers of boats at the Bush Docks in Brooklyn. The ground of imposing liability upon the Pennsylvania Railroad was not only that it owned the tug placing the barge in this position, but it also had the barge under charter and was responsible for the lines put out by that boat. The relevancy of the case to the present situation is that the court says:

"It does not seem fair to impose upon a moored boat the obligation of strengthening and perhaps putting out additional lines so as to take care of all comers. If such obligation once be admitted, it may well be that boats may be required to carry lines far in excess of those reasonably necessary to safely moor and care for themselves"—citing Pope v. Seckworth (D. C.) 47 Fed. 830; The Atlas (D. C.) 115 Fed. 856.

In the Rice Case, supra, responsibility of the owners of the tug was not distinguished from their responsibility as charterers of the barge, and a great change in the weather made it evident that the situation was not viewed from the standpoint of the tug's responsibility for mooring the barges under conditions where no danger would be apprehended.

It does not follow, from cases like Doherty v. Pennsylvania Railroad Co. (D. C.) 261 Fed. 529, affirmed December 15, 1920 (C. C. A.) 269 Fed. 959, that a tug, having boats in tow and mooring them under apparently safe conditions, is thereby rendered responsible for what may happen under a change of conditions, unless the barges are shown to remain by contract under the care and in the custody of the owners of the tug, and that conditions arose from which they should have apprehended danger, but which they neglected to guard against.

In the present case considerable dispute arose on the trial as to events at the time when the drifting boat struck the Poland, and hard feelings were then engendered, which affected the judgment of the men upon the boats. But there seems to be no issue of fact presented affecting this issue, and upon the entire case the libel against the Smith should be dismissed.

DE LISI v. BOOTH & CO. et al.

(District Court, E. D. New York. February 16, 1921.)

Release ⇐57(1)—On settlement for personal injuries valid.

A release signed by libelant on receipt of a lump sum in settlement of a claim for personal injuries, after payments made to him under the State Workmen's Compensation Law had ceased, because of the decision of the Supreme Court that such law was not applicable to such cases, *held* to have been executed with full understanding of the situation and to bar a suit for further compensation.

In Admiralty. Suit by Frank De Lisi against Booth & Co. and the Booth Steamship Company, Limited. Dismissed.

Thomas O'Rourke Gallagher, of New York City, for libelant.

Haight, Sandford, Smith & Griffin, of New York City, for respondent Booth S. S. Co.

Benjamin C. Loder, of New York City, for respondent Booth & Co.

CHATFIELD, District Judge. The pleadings raise the defense, which has been heard as a preliminary matter, that the libelant, with knowledge, accepted a settlement of his claim, and executed, with understanding of the consequences and of the contents of the release, a release and satisfaction on payment of $1,550.

It has been unnecessary at this preliminary hearing to go into the merits of the libelant's cause of action; but the pleadings indicate that liability in admiralty was contested and that the respondent has evidence showing that it was without fault. It would also appear from the pleadings that the libelant's injuries were severe, and that his incapacity is such that settlement of the claim was advisable, even though the respondent had what would be a good defense on the merits, if it could be substantiated.

The whole matter has been obscured and confused by the situation arising from the decision of the so-called Jensen Case (So. Pac. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900) in the month of May, 1917. At that time the libelant had been receiving compensation for nearly two years. There was a possibility—in fact, a probability—that legislation by Congress would obviate or nullify the effects of the Jensen decision. Compensation under the state law would thus be (as it was in fact) re-established, and a release entered into because of the Jensen decision would then properly be disregarded, if the lapse in jurisdiction were wiped out by a further act of Congress. It was not foreseen at the time that, if Congress did legislate, its jurisdiction to so legislate would be denied by the Supreme Court of the United States, as was done in the case of Knickerbocker Ice Co. v. Stewart (decided May 17, 1920) 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834.

Under these circumstances, the whole situation is plain, particularly in view of the apparent fact that when compensation payments ceas-

ed the libelant was strongly in need of money. It would appear from his testimony and that of Mr. Denitti that De Lisi understood that, if the Compensation Law continued in effect or was restored to effect, he might get further compensation. He understood that, if he was to get no further payments by way of compensation, the respondents would pay him but $1,550 in a lump sum, and he understood, apparently, that he must set himself up in business, or go to Italy, or do something, if the effect of the Jensen decision were not removed.

In view of all this, and the testimony that he brought his own interpreter (even though the interpreter did not apparently, in detail, seek to make difficult his acceptance of the settlement, but rather encouraged it), in view of the fact that the release was interpreted to him, and in view of the fact that liability was contested, it does not seem to me that the libelant was defrauded, or that he entered into the signing of the release under such a plain failure to understand the situation that he can repudiate the release and the settlement which he made.

It is impossible to consider that he anticipated a second decision in his favor, if legislation restored compensation. If he was hoping that compensation would still be granted, and that the settlement would be only temporary, it is impossible to find that he did not know what he was doing, even though the result works extreme hardship on the libelant.

I feel that, upon the evidence showing the circumstance of signing that release, as well as upon the face of the paper itself, and the rule of law that the person bound by the release cannot vary the effect of the written instrument, except by making out a plain case of fraud or deception in learning what he was signing, I must hold that the settlement of the case was binding, and dismiss the libel.

You may have an exception, and I will extend the terms 60 days after the entry of judgment.

LEVY et al. v. EQUITABLE TRUST CO. OF NEW YORK et al.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1921.)

No. 5763.

1. **Corporations ⟸209—Intervention by stockholders on ground of fraudulent failure to defend held barred by laches.**
Stockholders in a railroad company, which by its act of incorporation had assumed the obligation of its predecessor to guarantee the bonds of another railroad company, are barred by their laches from asking leave to intervene in a suit to sell the railroad property and present the defense of fraud in that agreement to a judgment based thereon in another district, where it appeared that court proceedings against the two railroad companies on the guaranteed bonds had been pending for five years.

2. **Railroads ⟸141—Interlocking directorates of noncompeting lines not fraudulent.**
The fact that railroad companies, which were noncompeting, but were connecting lines, had interlocking directorates, is not fraudulent.

3. **Judgment ⟸701—Against corporation concludes stockholders' defenses not fraudulently suppressed.**
A judgment against a corporation is conclusive against its stockholders, who were represented by it, unless it was obtained by fraudulent collusion between the creditor and the officers or directors of the corporation to suppress defenses which the corporation might have asserted.

4. **Corporations ⟸211(6)—Intervening petition by stockholders to prevent sale under judgment must raise serious question of fraudulent failure to defend suit against corporation.**
A petition by stockholders to intervene and prevent the sale of corporate property in satisfaction of a judgment claimed to have been obtained by fraud in not defending the suit against the corporation, though it need not make a showing of fraud as fully and definitely as at the trial of intervention, must disclose enough fraud to challenge the serious attention of the court.

5. **Corporations ⟸212—Stockholders held not to have shown fraudulent failure to defend suit against corporation, so as to entitle them to intervene.**
Where it appeared that the defense of an action against a corporation on its guaranty of the bonds of another was conducted by able independent counsel not connected with either corporation, and that every possible defense was presented in the trial court and on appeal to the Circuit Court of Appeals, except the claimed defense of fraudulent collusion in the guaranty, stockholders have failed to make a sufficient showing to entitle them to intervene and defend on the ground that the judgment of the corporation was procured by fraudulent collusion.

Appeal from the District Court of the United States for the District of Colorado; Walter H. Sanborn and Robert E. Lewis, Judges.

Suit by the Equitable Trust Company of New York, as substituted plaintiff, against the Denver & Rio Grande Railroad Company, in which a receiver was appointed for the defendant company. Petition by Jefferson M. Levy and others, stockholders of the defendant company, for leave to intervene and have the receiver's sale postponed

until the stockholders could present a defense to the judgment on which the order for sale was based was denied (269 Fed. 987), and petitioners appeal. Affirmed.

John Lee Webster, of Omaha, Neb. (Arthur M. Wickwire, Louis Marshall, and Daniel W. Blumenthal, all of New York City, on the brief), for appellants.

George Welwood Murray and John F. Bowie, both of New York City (Franklin W. M. Cutcheon and William Roberts, both of New York City, on the brief), for appellee Equitable Trust Co. of New York.

Before HOOK, Circuit Judge, and COTTERAL and JOHNSON, District Judges.

HOOK, Circuit Judge. This is an appeal by some individual stockholders of the Denver & Rio Grande Railroad Company and a protective committee of like stockholders from an order of the United States District Court for the District of Colorado denying them leave to intervene in the suit of the Equitable Trust Company of New York pending in that court. A decree had been entered in the suit for the sale of the equity of the Denver Company in its railroad properties and the sale was about to be made. The decree was based on a money judgment in the court below for $36,515,038.68, obtained January 7, 1918, by the Trust Company against the Denver Company, which in turn was upon a prior judgment in the United States District Court for the Southern District of New York, upon which a credit had been applied by the sale of property.

The object of the intervention sought by the petitioning stockholders was the postponement of the sale in Colorado to enable them to investigate and develop a defense against the New York judgment and a fraudulent omission to assert it there. As the court in New York had jurisdiction of the parties and of the subject-matter of the litigation, and the judgment against the Denver Company had become final, and judgment on that judgment had also been rendered in Colorado, it was incumbent on the petitioning stockholders to show that they acted seasonably in view of the circumstances, that their corporation had a good defense to the demand of the Trust Company, and that through fraud the defense was not presented in New York.

Upon a hearing of the petition and proofs the court below held that the petitioners either knew or should have known, long before the New York judgment was rendered, of the transactions upon which it was founded and of the defenses that might be urged, and that their inactivity amounted to such neglect or laches as precluded them from asserting, at this time, a defense not made by their corporation, the defendant in the cause. Passing this objection, the court below further held that the petitioners failed to show the probable existence of a sufficient defense that might have been, but was not, set up in the New York case, or fraud on the part of counsel who had charge for the Denver Company in that court. The petition to intervene was therefore denied. A sale of the railroad properties of the Denver Company not previously sold under proceedings in other courts was then had;

but, pending this appeal from the denial of the intervention, action on the motion for confirmation of the sale was deferred by the court below.

The present case is the culmination of events that began in 1905 and is the direct outgrowth of various judicial proceedings first in the Ninth Circuit, then in the Second Circuit, and finally in the United States District Court for Colorado, from which the appeal to this court comes. In both the Ninth and the Second Circuits they reached the Circuit Courts of Appeals. An unsuccessful effort was also made to obtain a review by the Supreme Court of the judgment in the Second Circuit. What has occurred makes a long history, but only so much of it will be set forth here as is needful to disclose the situation when the stockholders asked to intervene in Colorado on November 1, 1920. It appears in greater detail in 231 Fed. 478; 145 C. C. A. 457, 231 Fed. 571; 233 Fed. 335; 236 Fed. 814; 244 Fed. 485; 162 C. C. A. 397, 250 Fed. 327; 246 U. S. 672, 38 Sup. Ct. 423, 62 L. Ed. 932.

Prior to 1905 the Western Pacific Railway Company, a corporation organized under the laws of California, had acquired a right of way from Salt Lake City to San Francisco and had constructed a small amount of track. The Denver & Rio Grande Railroad Company, a Colorado corporation, and the Rio Grande Western Railway Company, a corporation of Colorado and Utah (then practically, but not legally, a single company, with a single system of railroads), greatly desired the completion of the Western Pacific, so that they would have an outlet to the Pacific Coast. Reasons for this are recited in the above-reported cases, and are also referred to in the opinion of the Supreme Court in United States v. Union Pacific R. Co., 226 U. S. 61, 33 Sup. Ct. 53, 57 L. Ed. 124. Briefly, as stated, they were to avoid being bottled up by the combinations, effected and threatened, of other large transcontinental systems to the north and south of them, and competing with them and their Eastern connections for the same through traffic. The building of the railroad from Salt Lake City, where it connected with the Rio Grande Western, to San Francisco, required a large amount of money, and that in turn required the issue and sale of Western Pacific securities that would appeal to the purchasing public; and so it was arranged that the Denver and the Rio Grande Companies should back the Western Pacific project with their own credit.

The transaction took the following form: The Western Pacific completed the issue, previously authorized, of $50,000,000 of its first mortgage 5 per cent. bonds due September 1, 1933. On June 23, 1905, it executed to a trust company, as trustee for the bondholders, its first mortgage on its railroad then and thereafter constructed. On the same day it executed, with others, three contracts, known as A, B, and C. In this case we are mainly concerned with contract B, in which the Denver & Rio Grande and the Rio Grande Western were parties of the first part, the Western Pacific the party of the second part, and the trust company, as trustee, the party of the third part. It may be observed here that this contract was included in the mortgage of the Western Pacific to the trust company as a pledged or mortgaged

item along with the railroad properties; also that the mortgage and the three contracts, A, B, and C, were parts of one and the same comprehensive transaction. In 1908 the Denver & Rio Grande and the Rio Grande Western were consolidated in the name of the former under the laws of Colorado and Utah; the consolidated company expressly assuming the obligations of its constituents under contract B. For convenience the constituent and consolidated companies will be generally referred to as the "Denver," except where necessary to distinguish them. The trust company, as trustee in the mortgage of the Western Pacific and third party in contract B, was succeeded in title and trust by the Equitable Trust Company of New York, a party to the cause here, and they will be referred to as the "Trust Company."

To return to contract B: Reduced to its lowest terms, material on this appeal, the contract provided: (a) That the Denver should have certain defined traffic and trackage rights in respect of the railroads of the Western Pacific; (b) that the Denver should generally keep the Western Pacific going financially, and, specifically, should pay to the Trust Company for the bondholders all interest on the Western Pacific first mortgage bonds, not actually paid by the Western Pacific, until all the bonds were fully paid principal and interest; (c) that the contract should run with the railroads of the Denver and the Western Pacific into whosesoever hands they might come, and that its provisions and the performance of them should be deemed a part of the consideration of any contract, of whatever form or nature, and of any transaction by which any person or corporation might acquire or attempt to acquire the railroads or either of them; (d) that if, upon default in any of the terms of the Western Pacific mortgage a right of foreclosure should accrue to the Trust Company, it might terminate the contract, and all provisions giving the Denver the right to the use and possession of the railroad of the Western Pacific, excepting provisions that the Denver should pay interest on the bonds as above.

The Denver paid interest on the Western Pacific bonds until, finding that its own solvency was seriously threatened, it defaulted in the semiannual installment due March 1, 1915. Its failure to pay at that time was according to a prior declaration that it would pay no more. March 2, 1915, the Trust Company brought suit in the Northern district of California to foreclose the mortgage. Receivers were appointed, and they took possession of the Western Pacific Railroad. While the suit was pending, further default was made as to the interest due September 1, 1915, and on December 18, 1915, the Trust Company declared the principal of the bonds due. On May 26, 1915, the Trust Company filed an ancillary bill in the Southern district of New York and the court there appointed as receivers of the Western Pacific property in its jurisdiction the same persons who had been appointed in California. On the following day, May 27, 1915, the Trust Company filed in the court in New York a suit against both the Denver and the Western Pacific, setting up the mortgage and contract B, and asking for a construction of the latter in respect of the obligations of the Denver under its terms, the determination of the amount due on the Western Pacific bonds after the foreclosure in California, a receiver of the

Denver, and the subjection of its property to its ascertained liability under the contract.

On February 21, 1916, the court in California enjoined the Trust Company, then before it as complainant in the mortgage foreclosure suit, from prosecuting the suit against the Denver in New York. It held that the mortgage and the three contracts were parts of one transaction, and that the rights of the Trust Company were not independent, but were so qualified by the reciprocal covenants between it and the railroad companies and between the railroad companies themselves that the foreclosure suit of which it had jurisdiction involved the rights of the Trust Company under contract B; also that this applied as well to contract A to which the Trust Company was likewise a party and to contract C to which the Missouri Pacific Railway Company (the Eastern connection of the Denver) was a party. The court in California thereupon ordered that the Denver and the Missouri Pacific be made parties to the foreclosure suit there. 231 Fed. 478. On appeal by the Trust Company (and writ of prohibition) the Ninth Circuit Court of Appeals on March 29, 1916, reversed the order of the District Court. It held that the covenant of the Denver to pay the Trust Company the interest on the Western Pacific bonds was independent and severable from the other covenants in the contracts, and was not involved in the foreclosure suit, nor judiciable there, except at the instance of the Trust Company with personal jurisdiction of the Denver. 145 C. C. A. 457, 231 Fed. 571.

The suit for foreclosure of the Western Pacific mortgage then proceeded in the court in California without involving the rights and liabilities under contract B. A decree was rendered May 27, 1916, for the full amount of the Western Pacific bonds with interest and for foreclosure. The court, in determining the terms of sale, fixed the minimum or upset price at $18,000,000. This amount was upon a consideration of the then earning capacity of the railroad and the value of the unproductive properties. 233 Fed. 335. The properties, including contract B, were bid in at the upset price by representatives of the holders of about 95 per cent. of the Western Pacific bonds and conveyed to a new company organized by them. In December, 1916, the bondholders' new company filed in the foreclosure suit a written election not to assume or adopt contract B, and stating that it did not as purchaser of the railroad claim "the right to assert, enforce, and enjoy any right formerly in the property of the Pacific Company (old Western Pacific) in said contract B."

On June 14, 1917, the District Court for the Southern District of New York in the suit pending there rendered a decree in favor of the Trust Company against the Denver for $38,270,343.17. This was the deficiency after the California foreclosure plus interest. In reaching that conclusion the court in New York held, May 17, 1917, that the liability of the Denver under contract B in respect of the interest on the Western Pacific bonds was unconditional, that it survived the foreclosure of the mortgage in California and the disavowal of contract B by the bondholders' new company, that the Trust Company had a right to declare the principal of the Western Pacific bonds due under the

terms of the mortgage, that the making of contract B was within the statutory powers of the Denver and not ultra vires, that the undertakings of the Denver to the Trust Company under contract B were independent of and severable from the other stipulations in that and the other contracts and the mortgage, that the action of the Trust Company in securing the fixing of the minimum upset price and the purchase by the bondholders for such price at the foreclosure sale of the Western Pacific Railroad in California did not release the Denver from further liability to the Trust Company, and that its then liability according to actuarial rules was at least equal to the unsatisfied principal of the bonds and accrued interest. 244 Fed. 485. We have recited these principal items of the court's decision to indicate the defenses that were made by the Denver. The Denver appealed from the decree to the Circuit Court of Appeals for the Second Circuit. On execution certain Liberty bonds of the Denver were sold and the proceeds, $3,003,562.52, were applied on the decree.

On December 27, 1917, the Trust Company brought an action on the decree just mentioned in a state court of New York with attachment of assets of the Denver in that jurisdiction. It obtained judgment there on March 13, 1918, and moneys, stocks, and bonds taken on execution resulted in credits aggregating $5,632,064.28. Shortly afterwards the Trust Company obtained another judgment on the New York decree in a state court of Cook county, Ill., and moneys of the Denver taken on attachment produced a further credit of $967,301.37. On January 3, 1918, on the appeal by the Denver from the decree of the District Court for the Southern District of New York to the Circuit Court of Appeals for the Second Circuit, the cause was remanded, with direction to transfer it from the equity side to the law side of that court, and as so transferred the decree or judgment was affirmed. 250 Fed. 327, 162 C. C. A. 397. As already observed, the effort of the Denver to obtain a review by the Supreme Court failed April 15, 1918. 246 U. S. 672, 38 Sup. Ct. 423, 62 L. Ed. 932.

On August 23, 1917, prior to the proceedings in the state courts, the Trust Company brought an action in the court below, the United States District Court for Colorado, on the decree of the federal court in New York and on January 17, 1918, obtained judgment against the Denver for $36,515,038.68, the amount of the New York decree and interest, less proceeds there of the sale of the Liberty bonds. On January 17, 1918, a creditor of the Denver brought a suit in equity in the court below for the administration of its assets and the appointment of a receiver. The Trust Company intervened on January 25, 1918, and receivers of the Denver were appointed. On December 22, 1919, the Trust Company was substituted as plaintiff in the cause. The railroad was in the possession of and was operated by the Director General of Railroads during the period of federal control. By a decree in the equity cause, dated September 25, 1920, the court below found the amount due on the New York decree of June 14, 1917, also that the balance due on the judgment rendered by it January 7, 1918, on the New York decree after charging the Trust Company with all moneys received through proceedings in other courts and otherwise, was $36,-

192,655.78, and that the Denver was insolvent. The decree directed the sale by a master of all the Denver railroads and properties not theretofore disposed of (except a claim against the United States arising from federal control) subject to the lien of the mortgages. The decree was filed October 1, 1920, and the master advertised a sale for November 20, 1920.

[1] After all the above had occurred with such publicity as usually attends important matters of that kind, the petitioning stockholders asked the court below to stay further proceedings to enable them to investigate and assert a defense of fraud to the New York judgment not made by their corporation; and the essential elements of the fraud they assert consist of matters of long standing, not secret or concealed at the time, but of public notoriety or report, part in recitals in the records of their railroad company kept as required by law, of which they were bound to take notice, and part of known corporate history shown in financial and statistical publications in current and common use. The very corporate structure of the consolidated Denver, in which the petitioners hold their stock, discloses (1908) an express assumption of the obligations of contract B which they now assail. They knew or should have known that the litigation in California and New York against the Western Pacific (1915–1916) might affect seriously their interests in the Denver. But, whether so or not, the suit of the Trust Company against the Denver in the Southern district of New York (1915–1917) was at once a warning of what might follow. The Trust Company sought in that suit the subjection of the property of the Denver to its liability under contract B and so stated in its initial pleading. The case was pending in that court for two years before final judgment was rendered, and the Denver corporation was allowed to defend it without action or participation upon the record by the stockholders.

These and many other proceedings and transactions within the five years prior to their petition to intervene, of which they knew or could have known, and therefore must in law have known, constitute an obstacle to the relief now sought which the court below had no power to remove. Leavenworth Commissioners v. Railway, 134 U. S. 688, 10 Sup. Ct. 708, 33 L. Ed. 1064; Foster v. Railroad, 146 U. S. 88, 13 Sup. Ct. 28, 36 L. Ed. 899. It may be that the inactivity of the petitioners was due to a belief that in some way an adjustment would be made preserving from extinction their equity in their railroad. That is usually done when the interests involved are so great that there is practically no protection against a strict insistence upon contractual obligations, especially in times of temporary depression; but whether it should be followed or not is a question of broad policy, solely for the creditor, not for the court. The court below was judicially required to recognize the judgment that had been obtained in New York and to grant the process demanded. With that its province ended. This is not a proceeding in which the aid of a court of equity has been invoked to facilitate the reorganization of a railroad and an adjustment of its acknowledged obligations in which it might as a condition temper the demands of creditors to time and circumstance and prevent injustice

and oppression. It is essentially an insistence upon the enforcement of a judgment by the process provided by law.

[2] We agree with the court below that, aside from delay of petitioners constituting a clear case of laches, they presented no probability of a meritorious defense of fraud to the demand of the Trust Company. Reliance is placed on Central Trust Co. v. Wheeling & Lake Erie (D. C.) 211 Fed. 515, a foreclosure case in which at the instance of a receiver certain traffic and trackage contracts, having points of resemblance to those here, were involved. The case is not in point; moreover, when it reached the Sixth Circuit Court of Appeals, the decision there was not upon the ground relied on here. Baker v. Central Trust Co., 148 C. C. A. 511, 235 Fed. 17. Emphasis is put upon the existence of interlocking directorates in the Western Pacific, the Denver, and the Missouri Pacific which in combination with other railroads eastward were, it is said, designed to further an ambitious plan for a transcontinental system from Baltimore to San Francisco. But interlocking directorates of railroads, noncompeting actually or potentially, but in the direct line of continuous transportation, are not fraudulent per se or presumptively fraudulent. Many of the large railroad systems of this country grew in that way and are so composed to-day.

With statutory authority the extension of an established railroad system in the name of another corporation organized or acquired for the purpose, with use of the financial credit of the former, and its retention of control of the directory of the new enterprise, is a very common thing in the history of American railroads. Legitimate financial considerations are often the reason, and sometimes legislation itself. It may be said generally that, where the consolidation of connecting, noncompeting railroads is not contrary to public policy, a community of interest in them, with representation accordingly in their directorates, is neither fraudulent per se nor presumptively fraudulent. Of course as long as they maintain their several corporate organizations, contracts between them, when attacked in the courts, will be scrutinized in the light of the common control. But in the case at bar the Western Pacific was essentially an enterprise of the Denver, not very different in the last analysis, had it been with legislative authority directly financed and constructed in the name of and by the Denver itself. That a venture proves ill advised or unfortunate is one thing; that it is fraudulent is quite another.

[3, 4] There is still another obstacle to the granting of the petition. According to familiar principles of law the judgment against the Denver in New York concluded its stockholders as to every defense that was or might have been urged against it, unless those in charge of the case for that company collusively or fraudulently omitted a valid and sufficient defense. That is the legal effect of the judgment against the Denver corporation, and the petitioning stockholders have no independent standing to contest it or to try the case anew except in the circumstance stated—extraneous fraud at the trial in New York. While it was not necessary that petitioners make such a showing as fully and definitely as at the trial of the intervention had one been al-

lowed, yet it was incumbent upon them to disclose enough to challenge the serious attention of the court below.

[5] As regards the condition above mentioned they failed wholly and completely. On the contrary, it appears that the case for the Denver in the court in New York and on appeal to the Circuit Court of Appeals was in charge of independent counsel of great ability and reputation, not affected by the influences alleged to have controlled the prior corporate actions of the Denver. The reported opinions of those courts show that almost every conceivable defense to the demand of the Trust Company was urged, other than that now asserted by the petitioners, the proof as to which we have already considered. There was hardly a suggestion at the hearing below that the counsel was not able and faithful. We have recited the principal features of the opinion of one of those courts. The most interesting question raised, if not the most substantial one, was that of the power of the Denver under the statutes of Colorado and Utah to contract as it did, in view of the construction given to contract B and the disavowal of the contract by the bondholders who bought in the Western Pacific at the foreclosure in California and for whom the Trust Company stands. In other words it was whether, since the state statutes, one expressly and the other impliedly, required a consideration for such engagements as the Denver undertook on behalf of the Western Pacific, the promises of the former to the Trust Company were wholly independent of the other stipulations in that and the associated instruments in which, it was contended, the considerations and their continuous noncommutable character resided. Upon full consideration the question was decided against the Denver and is concluded by the judgment. Finally, it may be observed that a previous committee of stockholders of the Denver was formed in 1917, and continued until about the time the present one came into being in October 1920; but what, if anything, it did in connection with the litigation does not appear.

The order denying the petition to intervene is affirmed.

OHIO VALLEY PULLEY WORKS, Inc., v. ONEIDA STEEL PULLEY CO.

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

No. 96.

1. Principal and agent ⇐29—Agent not entitled to renewal of contract.

A contract gave plaintiff exclusive agency for sale of goods made by defendant in certain territory for a specified term, and provided that it should be renewed for an additional five years, if the net sales "shall have amounted to the sum of $50,000 for the year 1915, and shall have increased 10 per cent. each year for the two years following, and thereafter shall have showed 5 per cent. net increase annually during the life of the contract." It further provided that, in the event of a general depression in business, "the said second party shall not be required to make the yearly increase in sales as provided herein during the period in which said depression occurred." *Held*, that the latter provision did not apply

to sales during 1915, and that net sales of $50,000 during that year were an essential requirement to the right of plaintiff to a renewal of the contract.

2. Contracts ⊂=169—Not subject to construction by extrinsic circumstances, where language is plain.

The conditions and circumstances surrounding the making of a written contract may be considered, to determine the intention of the parties, where the contract is ambiguous; but, where its language is clear, the parties are bound by its terms.

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

Action at law by the Ohio Valley Pulley Works, Incorporated, against the Oneida Steel Pulley Company. Judgment for defendant, and plaintiff brings error. Affirmed.

H. Duane Bruce, of Syracuse, N. Y., and Worthington, Cochran, Browning & Reed, of Maysville, Ky., for plaintiff in error.

Stewart F. Hancock, of Syracuse, N. Y., and Zane, Morse & Marshall, of Chicago, Ill., for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The plaintiff in error sued in this action for breach of contract. After an amended complaint was served, a demurrer was interposed, and upon that demurrer a motion for judgment was then made. Judgment was directed for the defendant. A writ of error was then sued out and the case is here, upon assignment of errors, on the claim that the court below erred in holding that the plaintiff in error was not entitled to recover for the breach of contract sued on, and this for the reason that the complaint did not state sufficient facts to constitute a cause of action.

The plaintiff in error is a corporation organized under the laws of the state of Kentucky, and the defendant in error is a corporation organized under the laws of the state of New York. The action is to recover $100,000 damages for the breach of the contract which is made a part of the complaint. It is the claim of the plaintiff in error, through its complaint: That it was engaged in the business of the manufacture and sale of transmission machinery known as wood split pulleys. That it had a selling organization throughout the United States, and a large trade therein, and enjoyed a business reputation of value in the marketing and selling of transmission machinery. That the defendant in error was engaged in manufacturing and selling steel pulleys and other transmission machinery, and that negotiations were entered into in the year 1913 between the parties, to the end that the plaintiff in error should become the defendant in error's sole and exclusive selling agent in certain territory throughout the West and South for the steel pulleys and transmission materials manufactured by the defendant in error; and on the 15th of December, 1913, the written contract sued on was entered into. Under the terms of this contract, the defendant in error agreed to appoint and employ the plaintiff in error, during a stated period, the exclusive agent for the

sale of the steel pulleys and other transmission materials manufactured by the defendant in error in the territory specified in the contract, and in consideration of the agreements and promises contained in the contract, during the year 1912, the defendant in error had sold, in the territory covered by the contract, steel pulleys and transmission materials manufactured by it to the approximate amount of $16,417.54, and in the year 1913 sold the same articles in the same territory amounting to $27,991.67. The amount of the sales were known to both parties at the time of the execution of the contract, December 15, 1913, and that the contract was entered into for the purpose of enabling the defendant in error to avail itself of the plaintiff in error's agencies and connections and business reputation in the territory specified in the contract, with a view of an increase in the business therein. That, pursuant to the terms of the written contract, the plaintiff in error entered upon the performance thereof, to the best of its ability marketed the products of the defendant in error within the territory, and expended considerable time and labor and money in the effort. That subsequent to the execution of the contract on December 15, 1913, changes were made in the agreement, and on account of said changes it was deemed advisable by the plaintiff in error and defendant in error to execute a new contract, which should supersede the contract of December 15, 1913; and the parties did, on the 9th of November, 1914, contract in writing. This contract is made a part of the complaint. It bears the date of May 7, 1914, but it is alleged that it was not in fact executed on that day.

The complaint further alleges that the terms were agreed upon by the representatives of the parties in the state of Kentucky on a day in October, 1914, and forwarded to the defendant in error in the state of New York, whereupon it was duly executed and subscribed on the 9th of November, 1914. It is alleged: That, when formally executed on November 9, 1914, the plaintiff in error had sold under the previous contract of December 15, 1913, in the territory specified, steel pulleys and transmission materials to the amount of approximately $35,000. The amount of these sales were known to both plaintiff and defendant in error at the time of the agreement of the terms of May 7, 1914. That the terms of this superseding contract appointed and employed the plaintiff in error, during the period mentioned therein, its sole and exclusive agent for the sale, in the territory specified in the contract, of steel pulleys and other transmission materials manufactured by the defendant in error. Payment was to be made for its services as such agent pursuant to the commissions specified in the contract as set forth therein.

It is further alleged that the terms of the contract should continue for and during the period from the date of the contract of May 7, 1914, to December 31, 1918, and also thereafter for a period of five additional years, provided the net sales made by the plaintiff in error as such agent amounted to $50,000 for the second year of the original term of said contract, to wit, the calendar year 1915, and increased 10 per cent. each of the years 1916 and 1917, and increased thereafter at the rate of 5 per cent. each year, but provided, further, that such

requirement and condition as to the amount of said increases in the sale as aforesaid be suspended and inoperative during any period of general business depression. It is further alleged that the amount of the sales made by the plaintiff in error for the year 1914 was $37,450.47, for the year 1915 $26,094.63, and for the year 1916 $57,433.71, to which should be added the sum of $14,835.38, which last-named amount was the aggregate of sales made by the defendant in error in the states of Arizona, Utah, and Colorado, upon which the plaintiff in error received no commission, but which was required to be included in ascertaining the total volume of business done by the plaintiff in error in accordance with a subsequent agreement made and entered into by the plaintiff and defendant in error in writing on March 27, 1916, a copy of which is made part of the complaint. The amount of the sales made by the plaintiff in error was $27,979.33 from January 1, 1916, to March 31, 1916.

It is alleged: That during the year 1915, and at the time of the agreement as to the terms of the contract of May 7, 1914, there was a general business depression. That because of such general business depression the plaintiff in error, in accordance with the terms of the contract, was not required to make sales of defendant in error's goods thereunder in the amount of $50,000 in the year 1915, in order to be entitled to have said contract continued in force during the original term thereof, or in order to effect an extension thereof for a period of five years from December 31, 1918, and further that the failure to make sales in said amount during said period was due to such depression. It is further alleged that the amount of sales made by it under the contract during 1916, increased more than 10 per cent. and further it is alleged that in March, 1917, the Dodge Steel Pulley Company, a corporation, acquired control of the defendant in error by the purchase of its capital stock and induced the defendant in error to refuse to carry out its contract with the plaintiff in error, or permit the plaintiff in error to continue to act as its selling agent as provided by its contract, and on March 28, 1917, an agreement was entered into between the plaintiff in error and defendant in error and the Dodge Steel Pulley Company, whereby it was agreed that, in consideration of an abrogation of its aforesaid contract dated May 7, 1914, for a period of time between April 1, 1917, and December 31, 1918, the defendant in error and the other corporate parties to said agreement pay to this plaintiff in error a commission of 6 per cent. upon all sales of steel pulleys and bushings made in the territory described in the aforesaid contract dated May 7, 1914, and the amendments and additions thereto. A copy of this contract is referred to and made a part of the complaint, but it is alleged that it was expressly stipulated in this agreement of March 28, 1917, that the same would not prejudice, abrogate, change, or affect the rights of the plaintiff in error under the contract with the defendant in error.

It is further alleged that between the 1st of April, 1917, and the 31st of December, 1917, and the 1st of January, 1918, and the 31st of December, 1918, the amounts of sales made in the territory covered by the agency of the plaintiff in error under its contract with the de-

fendant in error, were for said periods of time, respectively, $65,033.67, and $104,288.33. It is then pleaded that the plaintiff in error was excused from any default in the selling of the requisite amount of merchandise by the defendant in error's waiver, when it entered into the contract of March 28, 1917, with the Dodge Company. The allegation, is further, that the conditions and events specified and agreed to in the contract between the plaintiff and defendant in error, as conditions precedent to the right of the plaintiff in error to five additional years of agency from December 31, 1918, did occur and happen, and that according to the terms of the contract the plaintiff in error's employment as an agency was extended and continued by virtue of the agreement between the parties for five years beginning December 31, 1918. Due performance of the conditions and provisions of the contract on the part of the plaintiff in error is pleaded, and a breach of the contract is alleged in the refusal of the defendant in error to permit the plaintiff in error to sell the goods of the defendant in error for the term of five years beginning December 31, 1918, and as a result thereof damages are demanded in the sum of $100,000.

[1] By the demurrer these facts are deemed to have been admitted. The first ground of demurrer applies to the amount of sales made by the plaintiff in error in the year 1915. The contention of the defendant in error is that the facts as pleaded in the complaint do not set forth a cause of action. The chief reliance is placed upon the allegations of the complaint, which set forth the volume of sales made by the plaintiff in error during the periods here before referred to. A question of construction of the terms of the contract is involved. Among other things, the contract provides:

"This contract shall remain in full force and effect until December 31, 1918, and shall be renewed at the expiration of this period for an additional five (5) years, provided that the net sales made by the party of the second part shall have at the end of the second year (December 31, 1915) amounted to the sum of $50,000 for the year 1915, and shall have increased ten (10) per cent. each year for the two years following (1916 and 1917), and thereafter shall have showed five (5) per cent. net increase annually during the life of the contract. * * *

"It is further agreed that, in the event of a general depression in business, should such a condition prevail, the said second party shall not be required to make the yearly increase in sales as provided herein during the period in which the said depression occurred."

By the complaint it appears that in the year 1915 the sales were $26,094.63, and not $50,000. The defendant in error contends that the meaning of the contract is that, unless $50,000 worth of sales were made in 1915, the plaintiff in error has not won its right to an extension of five years, and that therefore this action, which is brought for an alleged breach in failing to extend the contract for five years, cannot be maintained. The first excuse pleaded for nonperformance is the general business depression, and the plaintiff in error inquires: Does the provision relative to the effect of general business depression apply to the business done in the year 1915? It alleged that the sales in 1915 were $26,094.63, and further that, because of general business depression in the year 1915, the plaintiff in error's failure to sell the

stipulated amount of $50,000 was due to such business depression. It claims, therefore, that the failure to sell the stipulated amount was excused by reason of the provisions above quoted.

Defendant in error's contention is that the obligation to sell $50,000 of its product in 1915 was absolute, and that the business depression clause of the contract was not applicable to such year, but to subsequent years, and applied only, as referred to in the contract, to a yearly increase, which must be maintained in order to carry out the terms of the contract on the part of the plaintiff in error. The argument is advanced that the contract must be construed as a whole, and when this is done it is meant that a minimum business of $50,000 in 1915 was intended to be a provision for a yearly increase, as was the percentage of increase required for the years 1916, 1917, and 1918. The contract does not require any fixed amount of sales for the year 1914, and it is further argued that there was no requirement of any amount of business for 1914, but, whatever may have been the business in 1914, it must be $50,000 for the year 1915. This view is said to be obtainable, if the circumstances surrounding the parties at the time of the execution of both the original contract and the subsequent agreement of May 7, 1914, be viewed, and we are prevailed upon to consider the circumstances surrounding the execution of the agreement, and it is argued, if we do this, we are led to the conclusions so strongly urged by the plaintiff in error.

[2] But there are well-fixed limitations which must guide us in construing the terms and obligations of the contract. Courts, in the construction of contracts, look to the language employed. The parties chose their words to express their intentions, and it is assumed that they do so in view of all the surrounding circumstances in which they are involved at the time of the execution of the contract. If the language be clear, it is conclusive. There can be no construction, where there is nothing to construe. This is the law of contracts. United States v. Hartwell, 6 Wall. 385, 18 L. Ed. 830. It is only where the contract is ambiguous that parol evidence is proper to explain its meaning. When parol evidence is admitted, it is to show what was meant by the particular phrase used in the contract, and thus to resolve the ambiguity and to show the real intention of the parties. Where the contract itself refers to previous conversations, the parol evidence of prior negotiations is held to be admissible for the purpose of ascertaining the intentions. Hamilton Coal Co. v. N. Y. & Phila. Coal & Coke Co., 160 Fed. 75, 87 C. C. A. 231. The court (Eighth Circuit), in Kilby Mfg. Co. v. Hinchman-Renton Fireproofing Co., 132 Fed. 957, 66 C. C. A. 67, said:

"* * * Where, in the application of a contract to its subject-matter, an ambiguity or uncertainty arises which cannot be removed by an examination of the agreement alone, parol evidence of the circumstances under which it was made, and of statements made in the negotiations which preceded it, may be admitted to resolve the ambiguity, and to prove the real intention of the parties."

If there is uncertainty or ambiguity as to the meaning of words used in the writing itself, where it is based upon or refers to a con-

versation, evidence of a parol character is admissible, not to vary the terms of the contract, but to explain the sense in which the language and writing is used. Such surrounding or attending circumstances may competently be admitted for the purpose of placing before the court the same situation and giving it the same advantage for construing the instrument as was possessed by the parties to the contract when they executed it. Permitting such evidence does not contradict or vary the terms of the writing, but is admitted for the purpose of enlightening the court, so as to enable it to more fully understand the language employed. Wolff v. Wells Fargo Co., 115 Fed. 32, 52 C. C. A. 626. And where technical words are used in a writing, parol evidence is admissible to show their meaning, and, if it thereby appears that the words used may have different application, parol evidence is admissible to prove what the parties said at the time of the execution of the writing for the purpose of showing the sense in which they used the words. And where the contract is capable of two interpretations, and a doubt exists as to its true meaning, it is proper to admit evidence of previous negotiations and surrounding facts relative to the subject-matter of the contract in order to reach a true understanding of the parties at the time the contract was entered into Western Union Tel. Co. v. Amer. Bell Tel. (C. C.) 105 Fed. 687. Such permission to offer parol evidence is solely for the purpose of aiding in the true construction of the written instrument, and not for the purpose of adding to or taking from any of its provisions—the latter never being permissible. Northern Assur. Co. v. Grand View Building Asso., 183 U. S. 308, 22 Sup. Ct. 133, 46 L. Ed. 213; Cameron Mill & El. Co. v. Orthwein, 120 Fed. 463, 56 C. C. A. 613. But the rule of construction, however, always prevails that the intention of the parties is to be adduced from the language employed by them and the terms of the contract when unambiguous, are conclusive. Words cannot and should not be read into a contract, which import an intent wholly unexpressed when the contract was executed.

We think that the parties clearly expressed themselves and there is no ambiguity in the terms of the contract here under consideration. It is admitted by the amended pleadings that the sales of 1915 were but $26,094.63, when they should have been $50,000. We think the parties intended that, no matter what the volume of business carried on in 1914, it was incumbent upon the plaintiff in error to reach a minimum of $50,000 in 1915, and then to continue percentages of increase as expressed in the contract, in order to win the extension of five years from December 31, 1918. We think that the clause as to excusable noncompliance because of business depression had no application to the year 1915, and since there is no valid excuse pleaded for nonperformance in 1915, upon the face of the complaint, the plaintiff in error had not lived up to the terms of the contract and is not entitled to the five-year extension. When the parties made the contract on May 7, 1914, although it was not actually signed until November 9, 1914, the conditions of business prevailing in 1914 they are charged with notice of. We find no technical terms employed in the language of the paragraphs we are asked to construe; and we be-

lieve that, if we enforce the construction argued for by the plaintiff in error, we would write into the contract conditions which the parties did not have in mind at the time of its execution.

The plaintiff in error further urges that it was excused from performance of the required volume of business or sales made in 1917 and 1918, and this for the reason that it is said, by reason of the contract of March 28, 1917, the necessity of making the sales required for 1917 and 1918 was excused. Since we have concluded that the first ground of demurrer is good, we may disregard this claim. But the plaintiff in error urges that it was prevented from making the increase in the number of sales required under the contract of May 7, 1914, for or during the years 1917 and 1918, solely because the defendant in error waived the same by the contract of March 28, 1917. It appears that the Dodge Steel Pulley Company acquired control of the defendant in error, and, it is pleaded, induced the defendant in error to refuse to carry out its contract with the plaintiff in error or to permit the plaintiff in error to continue to act as its sole agent as provided for in the contract of May 7, 1914, but did, in the agreement of March 28, 1917, enter into a contract with the plaintiff and defendant in error, and other allied corporations of the Dodge Steel Pulley Company, whereby it was agreed that plaintiff in error be permitted to continue under the terms of the contracts of 1917 and 1918, and that the failure to make the increased sales for said years was expressly waived by the terms of the contract. The contract of March 28th provided:

"This agreement shall not in any way prejudice, abrogate, change, alter, or affect any of the rights of the parties hereto under the aforesaid contract of May 7, 1914, for or during the five (5) years succeeding December 31, 1918."

And further it provided:

"It being the intention of the parties * * * to leave the rights of all parties under the aforesaid contract of May 7, 1914, unchanged, except during the time hereinbefore mentioned as provided for herein, and this agreement shall not be deemed to be in any way a recognition by the parties of the first and second part that the party of the third part has any right to continue said contract of May 7, 1914, beyond December 31, 1918, nor a waiver of the party of the third part to continue said contract beyond the said 31st day of December, 1918."

It is apparent from the language of this contract that neither party intended to waive any obligation to be performed by the parties thereto. There is no express waiver which will aid the plaintiff in error. The contract did abrogate, from April 1, 1917, to December 31, 1918, the right of the plaintiff in error to sell, and the plaintiff in error was thus left with no power to sell during that period, and hence the plaintiff in error could not make sales for 1917 and 1918 of sufficient amount to perform the terms of the contract of May 7, 1914; but we do not think the contract in any wise excused the obligation, on the part of the plaintiff in error, to make the sales for the year 1915, and the subsequent increases in order to win the extension of five years provided for in the contract of May 7, 1914. The subsequent contract, while

abrogating the right of sale during 1917 and 1918, leaves the rights of the parties under the contract of May 17, 1914, as written and fixed in that contract. We therefore find no error in the ruling of the court below.

The judgment below is affirmed.

BUYER v. GUILLAN et al.

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 154.

Monopolies ⇐12(2)—Combination in "restraint of interstate commerce."

An agreement between members of labor unions, comprising longshoremen and others concerned with the handling of merchandise shipped by water at the port of New York, that they would not handle any merchandise transported or operated on in any way by any individual, firm, or corporation refusing to recognize the unions, pursuant to which employés of a steamship company, who were members of such unions, refused to check, weigh, or load merchandise offered by complainant for interstate shipment, on the ground that it was brought to the pier by a transfer company which employed both union and nonunion men, and the steamship company refused to receive the shipment because its employés would not handle it, though the transfer company offered to load it, *held* to constitute an unlawful combination in restraint of interstate commerce, in violation of the Sherman Anti-Trust Act (Comp. St. §§ 8820–8823, 8827–8830), and to entitle complainant to an injunction in a suit in a District Court, brought under Judicial Code, § 24 (23), Comp. St. § 991 (23).

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Combination in Restraint of Trade.]

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

Suit in equity by Samuel Buyer, doing business as Samuel Buyer & Co., against William S. Guillan, the Old Dominion Transportation Company, and others. From an order vacating a restraining order and denying a motion for preliminary injunction, complainant appeals. Reversed.

Walter Gordon Merritt, of New York City (Austin, McLanahan & Merritt, of New York City, of counsel), for appellant.

Gilbert & Gilbert, of New York City, for appellees Carney and others.

Mann Trice, of New York City (James F. O'Neill, of New York City, of counsel), for appellees Quinn and others.

Loomis, Barrett & Jones, of New York City (H. L. Loomis and Stephen A. D. Jones, both of New York City, of counsel), for appellees Guillan and others.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Judge Augustus N. Hand, vacating a restraining order granted by Judge John C. Knox, and denying a motion for a preliminary injunction in a

suit arising under section 24 (23) of the Judicial Code (Comp. St. § 991 [23]). The plaintiff is engaged in the business of manufacturing and selling elastic garters and notion specialties, having his principal office and salesroom in New York City and a factory at Norfolk, Va., and another at Norwich, Conn.

The defendant Old Dominion Transportation Company is a common carrier, and the only common carrier by water between New York City and Norfolk, Va. The defendant Guillan is the company's general agent in New York City. The defendant Ettenger is chief clerk of the New York office, and the defendant John E. Ryan a checker. The other defendants are labor unions connected with the shipping of goods by water from this port, and are organized into voluntary unincorporated associations as follows:

The International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers has local unions throughout the United States, among which is the Drivers' & Chauffeurs' Local Union No. 807, engaged in driving horse or motor trucks in New York City and vicinity. District Council 16 of the Brotherhood is composed of delegates from various local unions located in New York City and vicinity, including the Local Union 807.

The International Longshoremen's Association is composed of workmen engaged in checking, handling, weighing, loading, and unloading merchandise and coaling vessels, and in operating lighters, tugs, and steamships, in different ports of the United States, and is subdivided into local unions, among which are the following operating in New York City and vicinity: Commercial Checkers' Union, Local 874, engaged in checking merchandise for transportation by water; Local Union 791, consisting of members engaged in general longshore work; Scalesmen's Union Local 935, engaged in weighing merchandise for transportation by water; Local Union 947, engaged in the same business; Steamship Pier Office Employees, Local 1017, engaged in handling merchandise for transportation by water; Local Union 895, engaged in general longshore work; Local Union 856, engaged in the same work.

The District Council of New York and vicinity of the International Longshoremen's Association is composed of delegates from the various local unions located in New York and vicinity.

Finally, the Transportation Trades Council of the Port of New York and vicinity is composed of delegates from all the local unions of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers and of the International Longshoremen's Association. Officers or business agents of each one of the foregoing unincorporated associations have been named as parties defendant individually and as representing the respective associations and their members.

The plaintiff's bill and affidavits allege that the Old Dominion Transportation Company and Guillan, induced and coerced by the associations defendant, have refused to receive and transport the plaintiff's goods, in violation of their duty as common carriers, and that they have entered into a combination with the associations defendant in violation of acts of Congress, among others the Sherman Law, to prevent

the handling or transportation of the plaintiff's merchandise, or of any merchandise handled or operated on by nonunion men, or which is offered for transportation by any transfer company or individual teamster not employing union men exclusively.

July 8, 1920, the plaintiff delivered to the Citizens' Trucking Company, Incorporated, which employs both union and nonunion men, a shipment of raw materials to be used in his factory at Norfolk, Va. The Trucking Company brought the goods to the pier of the Transportation Company and tendered them, together with bills of lading for shipment; but the company's checker refused to check them on the ground that the truck was a scab truck and he had been instructed by the delegate of his union not to check them. The defendant Guillan was then called upon, and he tried to get two other checkers to check the goods; but they refused for the same reason. Thereupon the truckmen offered to unload, weigh, and check the goods themselves; but Guillan refused, on the ground that he was unfamiliar with the details and his employees would not attend to them. July 12 the same shipment was again tendered to the Old Dominion Transportation Company and refused for the same reasons.

Exactly the same thing took place with a shipment by the International Cork Company, of Brooklyn, to Suffolk, Va., via Norfolk, the company's checkers refusing to check the freight; one of the checkers telling the defendant Guillan that he would like to check the goods, but if he did so he would be fined $50 by his union. The checker was the defendant John E. Ryan.

There are also submitted by the plaintiff a number of affidavits, made in April and May, 1920, of officers and business agents of the Transportation Trades Council and of various of the local organizations, including Local Unions 807, 874, and 791, in the case of Burgess Co., Inc., v. Frederick Stewart et al., in which these deponents allege that the local unions have voluntarily agreed to follow the advice of the Transportation Trades Council, in pursuance of which they will not handle any nonunion merchandise transported or operated on in any way by any firm, individual, or corporation that refuses to recognize the unions, and this not for the purpose of injuring such persons, but for their own benefit, to establish the policy that all water front business shall be done exclusively by union men.

The affidavit and answer of the defendant Guillan is to the effect that he did not refuse to receive the plaintiff's shipment, but, on the contrary, desired to transport it, ordered the company's dock employees to receive, handle, and check it, which they refused to do, and that neither he nor the Old Dominion Transportation Company has ever combined with the unions to refuse to handle nonunion merchandise or the merchandise delivered by nonunion teamsters.

The answer of the Old Dominion Transportation Company is to the effect that the company was and is willing and anxious to receive and transport the plaintiff's merchandise, but that its employees refused to handle the same because it was brought on a nonunion truck; that if the company had discharged these employees its whole business would have been tied up, to the great injury of the public.

The answer of B. F. Ettenger is that he is chief clerk of the company's office, and has nothing to do with receiving, loading, checking, or weighing freight; that he is not a member of any labor union, and never combined with any one to injure the plaintiff's business, or to induce the Old Dominion Transportation Company to refuse to receive or carry his goods.

The answer of the defendant Carney, individually and as president of the United Weighers' Association, Local 974, of the International Longshoremen's Association and its members, denies that he or they have entered into any combination to injure the plaintiff or his business, or have coerced the Transportation Company to refuse to accept and transport the plaintiff's merchandise, referred to in the complaint, in interstate commerce.

The answer of John D. Welch, individually and as president of Local Union 895 of the International Longshoremen's Association and its members, is to the same effect, but admits that the Old Dominion Transportation Company does employ some of its members. The answer of Peter Hussey, individually and as secretary of Local Union 895 of the International Longshoremen's Association and its members, is to the same effect. The answer of John Quinn, as secretary and treasurer of Local Union 874 of the International Longshoremen's Association and its members, is to the same effect.

The affidavits of Martin Lacey, as representative of District Council 16 of the International Brotherhood of Teamsters, Chauffeurs, Stablemen, and Helpers and its members, of John F. Quinn, as representative of Truck Drivers' and Chauffeurs' Local Union 807, and of W. F. Kehoe, representative of the Transportation Trades Council of the Port of New York, are to the effect that neither they individually nor the bodies they represent had any part in the refusal of the Old Dominion Transportation Company to receive the plaintiff's freight as alleged in the complaint.

While it is true that the injunction asked for is of a mandatory nature, rarely granted on affidavits, the question is really one of law, and we believe that it will be to the interest of the public, and with the approval of the parties, with the exception of the Old Dominion Transportation Company, to dispose of the question now.

It will be seen that the representatives of the unions admit the existence of an agreement that their members will not handle the plaintiff's interstate shipments unless he sends them to the Old Dominion Transportation Company by some transfer agency operated entirely by union men, and the Old Dominion Transportation Company admits that it will not transport his shipments until its employees consent to handle them. For this reason it may be regarded as a party to the combination. It is also plain that the plaintiff has sustained, and is sustaining, and will sustain in the future, special and irreparable damage as the result of this combination, for which he has no adequate remedy at law, because of the difficulty of ascertaining the damage in case of each shipment refused and of the necessity of bringing a multiplicity of suits.

The whole case of the defendants and the conclusions of the learned judge of the court below are based upon the law of the state of New York as laid down in Bossert v. Dhuy, 221 N. Y. 342, 117 N. E. 582, Ann. Cas. 1918D, 661, to the effect that a combination of individuals whose primary intent is the protection of their own interests, as, for instance, to establish complete unionization of the longshore work of the water front of the port of New York, not accompanied by violence or intimidation, and not to gratify malice, is lawful, even if it does injure others.

In Duplex Printing Press Co. v. Deering, 252 Fed. 722, 164 C. C. A. 562, we followed this view, and also held that such combinations did not violate the Sherman Law (Comp. St. §§ 8820–8823, 8827–8830). We construed section 20 of the Clayton Act (Comp. St. § 1243) as legalizing a secondary boycott so far as it consists in refusing to deal with any one who deals with an employer whose employees are on strike. But this decision has been lately reversed by the Supreme Court, holding that, if the combination was in violation of an act of Congress, it is of minor consequence whether either kind of boycott (primary or secondary) is lawful or unlawful at common law or under the statutes of particular states; that section 6 of the Clayton Act (section 8835f), providing that labor organizations shall not be held illegal combinations in restraint of trade under the anti-trust laws, contemplates only such organizations as lawfully carry out their legitimate objects; that section 20, prohibiting United States courts and judges from issuing injunctions, applies only to disputes between employers and employees.

The combination in this case being in restraint of interstate commerce, and no controversy between employer and employees being involved, the order is reversed, and the court below directed to issue a preliminary injunction in accordance with this opinion.

THE BINGHAMTON (three cases).

THE SAGUA.

(Circuit Court of Appeals, Second Circuit. January 19, 1921.)

No. 109.

1. **Collision ⟸38, 76—Burdened vessel in fault.**
One of two crossing vessels *held* solely in fault for a collision at sea, where, although the burdened vessel, she continued her course and speed until collision, and gave no signal of her intention to cross ahead until too late for the other vessel to avoid the collision. The privileged vessel *held* not in fault for keeping her course and speed until one minute before collision, where until that time the other vessel could have avoided the collision by porting, and had given no indication that she would fail in her duty.

2. **Collision ⟸38—Duty of privileged vessel to keep her course and speed.**
Under article 21 of the International Rules, it is the duty of the privileged of two crossing vessels to keep her course and speed until a depar-

ture from the rule is necessary to avoid immediate danger, and the fact that subsequent events show that her sooner stopping and backing would have avoided collision does not prove negligence.

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

Suits in admiralty for collision by the Czarnikow-Rionda Company, by the Sibiria Steamship Corporation and another, and by the Warner Sugar Refining Company against the steamship Binghamton, the Binghamton Steamship Company, Incorporated, claimant, and by said claimant and others against the steamship Sagua, claimed by the Sibiria Steamship Corporation. Decree holding both vessels in fault, and both claimants appeal. Modified, by discharging the Binghamton from all liability.

Certiorari denied, 254 U. S. ——, 41 Sup. Ct. 377, 65 L. Ed. ——.

Appeals by claimants of both steamships from decrees in admiralty holding both the Sagua and Binghamton at fault for a collision which resulted in injuries to both vessels and loss of much cargo on the Sagua. On the night of March 18–19, 1917, the Binghamton, light, was proceeding from Boston to Norfolk, steering southwest; at the same time the Sagua, laden with a cargo of sugar, was on a voyage from Cuba to New York, steering for some time before collision N. 8° E. Both steamers were making about 10 knots, and both expecting to pass close to the Barnegat gas buoy. Neither had any difficulty in seeing this buoy; the night being clear, or "pretty good" for seeing lights. The wind was fresh, perhaps a "moderate gale," from the northwest, and the sea rough—rather "choppy."

The engineers on both vessels noted the shock of collision at 2:25 a. m. The Sagua probably made this notation more accurately, because her engineer felt the shock without any previous warning of danger or any suggestion of coming difficulty. Down to the moment of collision the Sagua's engines were at "full ahead," while those of the Binghamton were ordered "full astern" at 2:24 and were going astern at collision. Consequently the engineer of the Binghamton only estimated the moment of contact at about a minute after the order astern. Certainly at collision the Binghamton was still forging strongly ahead, and she struck the Sagua abaft amidships on the starboard side, and almost at right angles, with sufficient power to cut in about 15 feet.

The District Court held the Sagua liable because, being the burdened vessel, she failed to keep out of the Binghamton's way, and similarly held the Binghamton because (1) "she stubbornly held her course into collision," and (2) the watch officer, seeing that the Sagua was approaching in defiance of rule, left the pilot house and called the captain, who instantly came out, saw collision to be probably inevitable, and ordered the engines full astern. The captain's bed was about 17 feet from the wheel in the pilot house; his room being separated from the pilot house by a bathroom only. The estimated time required to bring him out was 10 or 12 seconds. He was called from the bathroom door.

From decrees according to the above findings, both claimants appealed.

Barry, Wainwright, Thacher & Symmers, of New York City, and Blodgett, Jones, Burnham & Bingham, of Boston, Mass. (Edward E. Blodgett, of Boston, Mass., and James K. Symmers, of New York City, of counsel), for the Binghamton.

George Whitefield Betts, Jr., and Robert McLeod Jackson, both of New York City, for the Sagua.

J. M. Richardson Lyeth, of New York City, for Czarnikow-Rionda Co.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for Warner Sugar Refining Co.

Hunt, Hill & Betts, of New York City, for Sibiria S. S. Corporation.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] Several matters discussed at bar were passed on in the trial court in a way satisfactory to us. Thus we hold with the court below that the Binghamton down to the moment of collision was pursuing a substantially steady course; she did not change her course in the manner contended for by the Sagua's watch officer.

Again, the Binghamton's colored lights plainly complied with the law, for they were seen much further than the statutory distance. Nor were these lights obscured in any manner contributing to collision. This is sufficiently proven by the fact that the Sagua saw the Binghamton's running lights in plenty of time to keep out of her way.

Finally, it is unnecessary to discuss the fault of the Sagua further than was done below. Everything that that vessel did grew out of the singular belief of her second officer (who was in command when the Binghamton's lights came in view) that in the neighborhood of Barnegat buoy he had the right of way, because he was bound for New York.

The debatable part of this appeal lies within a narrow compass. The Binghamton was the privileged vessel; she watched the Sagua, and saw that that vessel was steadily getting closer on her port bow. The Sagua was the burdened vessel, and ought to have seen, but did not, that she was as steadily closing in on the Binghamton, which was plainly on a crossing course and on the Sagua's starboard bow.

The first and only sound signal from the Sagua to the Binghamton was one of two whistles blown about a minute before collision. As the Sagua was then going at full speed, and so continued into collision, she must have been at the moment of giving this signal about 1,000 feet from the place of contact.

The watch officer of the Binghamton had gone to call his captain long enough before the Sagua blew these two whistles so that the captain came into the pilot house and blew a succession of sharp blasts on his own whistle, which (as we find) were coincident with the Sagua's two whistles, and prevented those on the Binghamton from hearing the same. Contemporaneously with blowing these sharp blasts the Binghamton reversed her engines full speed. This was at least a minute before collision, and when the Binghamton was also about 1,000 feet from the point of contact. These are the facts, as we find them, raising the question of law whether the privileged Binghamton held her course and speed too long.

[2] The statement or wording of the rule can no longer be questioned in this court. It is the duty of the privileged vessel to keep "on her course until a departure is necessary to avoid immediate danger," and the rule as to speed is the same as that regarding the course. Yang-Tsze Ass'n, etc., v. Furness, 215 Fed. 859, 861, 132 C. C. A. 201, certiorari dismissed 242 U. S. 430, 37 Sup. Ct. 141, 61 L. Ed. 409.

The fact that subsequent events show that stopping and backing on the part of the privileged vessel would have avoided collision does not prove negligence. The Musconetcong, 255 Fed. 675, 677, 167 C. C. A. 5.

This is no more than the rule of The Delaware, 161 U. S. 4, 16 Sup. Ct. 516, 40 L. Ed. 771, enforced in this court in The Chicago, 125 Fed. 712, 60 C. C. A. 480. It may be pointed out that the Chicago, like the Sagua, blew a two-whistle signal when to do it was almost criminal. This signal was not heard by the City of Augusta (like the Binghamton), but nevertheless it was at that moment that the City of Augusta reversed her engines. It was in such a case (so singularly like the one at bar) that (quoting from the Delaware) we held that the privileged—

"steamer will not be held in fault for maintaining her course and speed, so long as it is possible for the other to avoid her by porting, at least in the absence of some distinct indication that she is about to fail in her duty."

In the same opinion we sufficiently differentiated the Supreme Court decisions relied upon or referred to by the Sagua, viz.: The New York, 175 U. S. 187, 20 Sup. Ct. 67, 44 L. Ed. 126, and The Albert Dumois, 177 U. S. 240, 20 Sup. Ct. 595, 44 L. Ed. 751. See also The Cygnus, 142 Fed. 85, 73 C. C. A. 309.

Thus the question must always become one of fact, and as has been pointed out (The Haida [D. C.] 191 Fed. 623, affirmed 196 Fed. 1005, 115 C. C. A. 376):

"It must always be a close question when the time comes at which the burdened vessel can by no possibility do her duty, and that time is doubly hard for the privileged vessel to find, for she has no right to change her course and speed until then."

The present case comes down to two questions: (1) Should the Binghamton have stopped and reversed her engines before the Sagua blew two whistles? (2) Was the reversing of the Binghamton delayed by the act of her second officer in going for the captain?

The Sagua was a quick-steering vessel, and under the wind and weather conditions of that night she would go over to her own starboard hand with great rapidity. If she had done this at the very moment that the two whistles were blown, we think she would have succeeded in clearing the Binghamton, if the latter vessel had maintained her course and speed. If this be true, then, under the cases already cited any change of course or diminution of speed by the Binghamton would have been a fault, and she cannot be condemned for abstaining from a fault.

We find it shown by a fair preponderance of evidence that the Sagua could have obeyed the rule until she blew those two whistles. But, further, the Sagua is affected by that other rule established by the same cases, viz. when her own fault is so gross and so plainly shown as it is here, it is incumbent upon her to prove affirmatively and conclusively the fault of the other vessel.

The decrees appealed from are modified, by discharging the Binghamton from all liability, with costs in both courts.

CHARLES T. WILT CO. et al. v. WILLIAM BAL CO.

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

No. 83.

1. Patents ⟸328—880,058, for trunk, not infringed.
The Wilt patent, No. 880,058, for improvement in trunks of wardrobe type, *held* not infringed.
2. Patents ⟸246—Combination not infringed, where elements are omitted.
A patentee, who describes and claims a combination, cannot be heard to say that some of the elements described are nonessential, for the purpose of establishing infringement by one who omits such elements and does not, therefore, use the combination.
3. Patents ⟸328—1,000,654, for improvements in suspension fixtures for trunks, void for lack of invention.
The Wilt patent, No. 1,000,654, for improvements in suspension fixtures devised for trunks, *held* void for lack of invention.

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

Suit by the Charles T. Wilt Company and Elmer E. Wilt against the William Bal Company for infringement of patents Nos. 880,058 and 1,000,654. Decree for defendant, and complainants appeal. Affirmed.

Taylor E. Brown, of Chicago, Ill. (Ralph L. Scott, of New York City, on the brief), for appellants.

Charles Neave and Stephen H. Philbin, both of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The patents for which this suit for infringement is brought are No. 880,058, for a certain new and useful improvement in trunks, and No. 1,000,654, for improvements in suspension fixture devices for trunks.

In the first patent, claims 3 and 10 are involved, and are as follows:

"3. The combination, with a receiving compartment, of a fixed, horizontal rail therein, an extension rail, a hinge directly connecting the latter rail with the fixed rail, and a hanger sustaining carriage, movable on said rails; the rails and hinge being arranged to constitute a continuous way for the carriage to permit it to be moved from one rail to the other."

"10. The combination, with a receiving compartment, of a fixed horizontal rail therein, an extension rail connected therewith and adapted to be folded into the compartment, perpendicular to the fixed rail, when not in use, a hanger sustaining carriage, supported by and movable on said fixed and extension rails, and a supporting standard hinged to the outer end of said extension rail and constructed to be folded inside the compartment parallel with the extension rail."

In the second patent, claim 1 is involved, and reads as follows:

"1. A trunk or compartment, having a rigid upper end and being open at the front, said upper end being higher along its longitudinal median line than at either side thereof, and a suspension device within said upper end and arranged beneath said longitudinal median line thereof."

It was held below that there was no infringement of any of the claims sued on, and the bill was dismissed.

It is conceded by the appellants that the invention is for an improvement in wardrobe trunks which is of a minor character. Therefore the invention, if any, is a narrow one. The patent in suit relates to a type of trunks which stand on end and are opened by lateral or sidewise movement of two parts, or sections, which are hinged together vertically. It is commonly known as a wardrobe trunk, having sliding drawers or trays for personal clothing in one of the swinging trunk sections. The other, usually a compartment without such sliding trays or drawers, is provided with clothes hangers, upon which garments may be suspended. Such trunks are used by traveling salesmen extensively to carry models or sample clothing without folding, and the wardrobe trunk is used as a convenient personal trunk.

It is claimed that the patentee was the first in the art to have provided the compartment of a wardrobe trunk with a cheap, strong, easily operable, and simple arrangement, which comprised a horizontally fixed rail in the upper part of the compartment, an extension rail hinged directly to the fixed rail, and so arranged as to constitute a continuous way, when the hinged extension is in prolongation of the fixed rail, whereby a carriage, to which the clothes hanger is attached, could move along both rails.

The improvement in patent No. 1,000,654, is claimed to be an improvement over the first patent in suit. It is claimed to involve a trunk which cannot be stood on its upper end, and in which a suspension device is located in the clothes compartment, so arranged as to minimize the space in the compartment, and thus provide desirable features. It is a construction having an open front compartment with a rigid gabled top end wall, with a suspension device arranged beneath the ridge of the gabled end wall. The alleged invention is not limited to the specific form of the upper end of the trunk, but is claimed to be of a broad and basic character. The idea of the invention seems to have been to add to the wardrobe trunk, with its fixed rail and its extension rail, a hanger sustaining carriage, movable on said rails, so arranged that this carriage can run on wheels whose track is inside the tubular fixed and extension rails, and the extension rail can telescope inside of the fixed rail, when the trunk is closed. The patent describes it as follows:

"An apparel support embodying our invention embraces, in general terms, a fixed rail *C* located within the top of the compartment *B* of the trunk, and extending from front to rear thereof, and designed to support a suitable carriage designated as a whole by C^1, which carries a plurality of hangers C^2, and an extension rail *D*, that is adapted to be extended horizontally from the fixed rail to support the carriage and hangers, as indicated in dotted lines in Fig. 3, and so constructed that when not in use, it may be contained wholly within the compartment *B* as indicated in Fig. 1." Page 2, lines 5–18.

"Certain features of the construction, involved in the fixed supporting rail and its extension and the carriage for the garment hangers, embody portions of our invention." Page 2, line 41.

This carriage is described as follows:

"The carriage herein shown comprises an elongated loop c^4, which is swung from the lower ends of the hanging brackets c^3, and on the lower member of

which are suspended the hangers c^2. The bearings for said carriage within the tubular, slotted rails consist of axles c^5 mounted in transverse openings in the hanging brackets c^3, and provided at their ends with wheels c^6 c^6 engaging the interior surface of the tube. Preferably the wheels c^6 are made of vulcanized fiber or like nonresonant material, whereby movement of the carriage inwardly and outwardly on the rail produces no objectionable noise. The said wheels are beveled on their peripheries to correspond to the cylindric inner surface of the tube, as shown in Fig. 4, thereby providing ample bearing between said wheels and the tubular rail." Page 2, lines 81–100.

[1] Examining the two claims in the suit, 3 and 10, there is no substantial difference between them. There is this additional, in claim 10, the element of a supporting standard; but this does not affect the situation indicated in claim 3 of the appellee's structure. Assuming invention is what Wilt got up, we do not think the appellee infringes. There is no hanger suspending carriage in the appellee's trunk, and the appellants' carriage is not used by the appellee. The carriage for the garment hangers is absent in the appellee's trunk. The appellee does not employ the tubular slot rails, and does not employ the moveable carriage of the claims, but takes the ordinary familiar clothes hanger and hooks it over the rails. There is, therefore, no carriage. And in order to make the appellee's structure come within claims 3 and 10 of the appellants' device, it is necessary to find a hanger sustaining carriage.

[2] The patent, if valid, is for a combination, and, unless the combination is infringed, there is no infringement. Rowell v. Lindsay, 113 U. S. 97, 5 Sup. Ct. 507, 28 L. Ed. 906; Black Diamond Co. v. Excelsior Co., 156 U. S. 611, 15 Sup. Ct. 482, 39 L. Ed. 553. We are but adopting the language which the inventor chose to use in describing his invention. He is bound by the phraseology employed. It cannot now be added to or subtracted from. A defendant cannot be held to be an infringer of a combination claim, when he omits some of the elements of the combination; for, when he does so, he no longer uses the combination. It is no answer to insist that all of the elements are not essential, and that the combination operates as well without them. The patentee may describe his combination as he will; but, having done so, his rights must be protected, as must the rights of the public which are involved, in construing the claim by the language employed and no other.

[3] As to the later patent, it is apparent that the prior art anticipated all that is claimed by the patentee in claim 1. The detail of this patent is that the upper end of the trunk is of gable form, top wall raised, comprising oblique members. The inventor refers to his patent as "improvements in suspension fixtures devised for trunks."

It is claimed that one feature of the invention is the upper end of the trunk, the gabled form of top wall, comprising oblique members which meet to form a peak, and the advantages are said by the inventor to be that the trunk cannot be set up on its upper peaked end, thus avoiding the liability of clothing falling down and being wadded in the top of the inverted trunk, and preventing the hangers slipping off their supporting carriage in case the trunk is inverted. An additional advantage is the saving of weight and material, and providing a strong

and durable top wall construction. The hanger suspending carriage is the same as claimed in the prior patent in suit. Claim 1, as above quoted, refers to the gabled upper end and a suspension device beneath the ridge of the gable. If read without reference to the drawings and specifications, claim 1 would refer to any wardrobe trunk whose top is higher along its center line than it is at the sides.

This record discloses that there is nothing original in constructing a trunk that cannot be placed upside down. The article and pictures taken from the Ladies' Home Journal (article of February 19th) illustrate this. It also appears from the patent to Steiger, No. 791,226, where a trunk is shown with the conical block, which projects from the walls and serves to prevent the trunk being stood vertical on that end or in an upside down position. There is contained in that patent a claim of a suspension device arranged beneath the center line of the rounded top, but the suspension device is not found placed above the rectangular portion of the trunk. And in the patent to Yaeger, No. 479,485, a round top and the suspension devices underneath it, placed within the rounded portion and the concave space at the top, is thus utilized. In the Gilmore patent, No. 852,554, the clothes hanger is placed within the rounded top portion of the trunk when the trunk is closed, and, when the trunk is opened, the rack is tilted forward and downward, and the clothes may be moved outside. The claims of that patent provide for a suspension device within said upper end and arranged beneath said longitudinal median line thereof.

An examination of the prior art satisfies us that the only change which the appellants have made was to change the rounded form of the top of the wardrobe trunk to a gabled form. In doing this, we think the inventor has utilized that common knowledge which is all within the capacity of any mechanic, and that what he has accomplished does not rise to the dignity of invention.

The decree is affirmed.

INTERSTATE COAL CO. v. LOG MOUNTAIN COAL CO., Inc.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1921.)

No. 3463.

Brokers ⇐56(3)—Entitled to commission on sales direct to customer procured by him.

Defendant, as a broker, under authority from plaintiff, made a contract to furnish a customer with a stated number of cars per day of coal produced by plaintiff, until further notice, and during performance of such contract, with plaintiff's knowledge, was negotiating with the customer for a contract for a fixed term and delivery of an additional quantity, when plaintiff itself made such contract direct with the customer on the same terms and at the same price. *Held*, that defendant was entitled to its agreed commission on the coal delivered under such contract.

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

In Error to the District Court of the United States for the Eastern Division of the Southern District of Ohio; John E. Sater, Judge.

Action by the Log Mountain Coal Company, Incorporated, against the Interstate Coal Company. Judgment for plaintiff, and defendant brings error. Reversed conditionally.

C. E. Blanchard, of Columbus, Ohio, for plaintiff in error.

Herbert Jackson, of Cincinnati, Ohio (Wilson & Rector, of Columbus, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The Log Mountain Company (hereafter called plaintiff) was an operator, mining coal in Kentucky; the Interstate Company (hereafter called defendant) was a coal broker, or wholesaler, selling from Columbus, Ohio. An arrangement was made by which the defendant was to handle Log Mountain Company coal upon a fixed commission per ton. The defendant took orders, which were forwarded to the plaintiff, and shipped by it, sometimes directly to the consumer, sometimes to the defendant. The selling price was collected by the defendant company, and, less commissions, was remitted monthly to the plaintiff. The latter charged all the shipments on its books to the defendant. At a time when there was a considerable balance accrued from the defendant, a controversy arose as to the plaintiff's right to sell directly to the defendant's customers, and the defendant refused to pay this balance. The plaintiff brought this suit, alleging that the defendant was a del credere factor, and thus personally liable. The defendant answered, admitting the indebtedness (except for a set-off allowed to it in the judgment below), but alleging that it had accrued as between vendor and purchaser, and claiming that there had been a contract whereby it had the sole right to buy and sell this coal for certain territory, that the plaintiff had broken this contract, and that damages had arisen to defendant more than sufficient to exhaust plaintiff's demand. It therefore asked judgment against the plaintiff for the balance.

A jury was waived, and the court found the facts and law specifically. The conclusions were that the relation between the parties was that of principal and agent, and not vendor and purchaser; that the alleged contract for exclusive territory did not exist; and that, therefore, the plaintiff should have judgment for the amount claimed, less a small cross-item allowed. The defendant below brings error, and says that the facts found lead to the conclusion, as one of law, that the relation was that of vendor and purchaser, and insists, also, that defendant's main cross-damages sufficiently appear.

There was no written contract. The true relations of the parties depend, largely, on inferences to be drawn from the course of business. Certain things point very strongly to the conclusion that the coal was sold by the plaintiff to defendant, and we think some of the stated findings of fact supporting the contrary result are really findings of law, and so cannot be accepted as indisputable. The case, on this issue, is—at best for the plaintiff—a very close one, as is emphasized

by the fact that the trial judge reached and announced one conclusion, but, before completing the findings, became satisfied that the weight of inference was the other way. We do not find it necessary to decide this issue. The only judgment asked or rendered was a money judgment. The defendant confessed that it owed the money and had no defense, except its counterclaim and its contention that the petition was drawn upon an erroneous theory. We think no legal prejudice inheres in the judgment against defendant, because its admitted liability may have been for another reason than the one alleged. The only suggestion of harm is that the judgment fixes upon defendant a wrongful conversion of plaintiff's money. If this could, in any case, be so prejudicial as to require reversal, it is not here, because of the result which we later reach upon the counterclaim.

The trial court's conclusion of fact that there was no contract for exclusive territory is supported by substantial evidence; the burden was on defendant to establish this claim, and its evidence is plainly not compelling.

One of the customers found by defendant was located in Detroit, and was a large user of coal. It was supplied by defendant with some of plaintiff's coal for test. The test proved satisfactory, and it thereupon made a contract with defendant that it would take five cars of this coal per day, continuously, "until further notice." The negotiations between this customer and defendant contemplated (with plaintiff's knowledge and approval) the making of a binding contract for a year, and for a larger quantity per day. At this stage the Detroit customer, learning where the coal came from, went directly to plaintiff and made a binding contract for shipments during the remainder of the year (about eight months), to December 31st, at the same price which the customer was paying the defendant. The plaintiff thereby saved the commission which it had agreed to pay defendant upon its sales. In considering this counterclaim, defendant must now be considered a broker; plaintiff cannot be heard to deny that status. As a broker, it was entitled to its commission on the sales which it made, or which were made by its principal, to the customer which it had procured. Dotson v. Milliken, 209 U. S. 237, 243, 28 Sup. Ct. 489, 52 L. Ed. 768; Cleveland-Cliffs Co. v. Gamble, 201 Fed. 329, 119 C. C. A. 567; Robinson v. Parham (C. C. A. 6) 257 Fed. 544, 545, 168 C. C. A. 527; Mechem on Agency, §§ 2431, 2435; R. C. L. tit. Brokers, §§ 49, 58. If plaintiff obtained the order by some such change in contemplated terms or conditions as to indicate that the defendant might not have made the sale which plaintiff did make, the burden was on plaintiff to show this fact, and it was not shown. When the principal accepts a customer procured by the broker, he must pay commissions, even though the accepted terms were somewhat variant from those given to the broker. R. C. L. tit. Brokers, § 52, note 12.

Cases like Holton v. Job (C. C. A. 6) 204 Fed. 947, 123 C. C. A. 269, depend upon a special contract that the commission is payable only when the broker carries it through to the end; they do not reach the typical relationship and the contract which the law implies therefrom. While it is true that the contract which defendant had made with

the customer continued at the latter's will, yet it was in full force, and was being daily carried out, when plaintiff stepped in and took over for itself both the existing sales and their planned expansion and continuation. This is a sufficient tie to attach defendant's rights to those sales which were made under the contract which plaintiff entered into with the customer while the broker's contract was still in force (see cases cited above); but the commissions do not reach to sales made by plaintiff to the same customer after the expiration of such contract. Such further sales under these findings must be considered as pursuant to a new contract made between plaintiff and the customer after defendant's agency had ceased. The defendant's counterclaim, therefore, should have been allowed as to the sales made to this customer up to December 31, 1917.

Since the refusal of the defendant to make payment upon the account was upon the express ground that plaintiff had interfered with this Detroit sale and was depriving defendant of its rightful profits, there could be no wrongful conversion of plaintiff's money merely by this refusal, and it does not appear that any demand for the sum rightly due was ever made.

The plaintiff claims it was justified in dropping defendant, because plaintiff had been deceived in two particulars: First, as to defendant's solvency; and, second, as to the existence of the Detroit contract. Neither of these grounds is alleged in the reply to the counterclaim; but, aside from that, insolvent agents are often permitted to collect the principal's money, and there is no finding that there was any material misrepresentation in this respect. Defendant did represent to plaintiff that the contract with the Detroit customer was closed for a definite time and amount, while, in fact, the negotiations were not closed, and if plaintiff had relied upon this, and damages had resulted, defendant might have been liable, or the misrepresentation might have supported the termination of further relations with defendant, if there had been a continuing contract between them; but we do not see how it justified plaintiff in refusing to pay commissions arising under the facts here existing.

The record does not indicate the amount of commissions to which we think the findings show defendant entitled, since the amount of sales shown by the record to have been made to the Detroit customer includes an unknown sum for sales after December 31st. If, within 30 days, the parties can agree upon the sum which should be remitted from the judgment on this account, and file in this court certified copies showing that such remittitur has been made in the court below, the judgment, as so modified, will be affirmed, but with costs against the defendant in error. In the absence of such showing, the judgment will be reversed, with costs, and the case will be remanded for new trial.

COVINGTON COTTON OIL CO. v. BICKMORE NITRATING COTTON CO., Inc.

(Circuit Court of Appeals, Fifth Circuit. February 23, 1921.)

No. 3485.

1. **Pleading ⇐388—Difference between pleading and proof as to extent of false representation not variance.**
That an answer alleged a false representation by a plaintiff corporation that it had a paid-in capital of $5,000, while the proof was that it represented its paid-in capital as $10,000, *held* not a material variance; the gist of the defense being the false representation.

2. **Sales ⇐53(3)—Right of rescission question for jury.**
The right of a defendant to rescind a contract for the sale to defendant of 500 bales of cotton linters for future delivery, on the ground of false representations by plaintiff that it was a corporation with a stated amount of paid-in capital, *held* a question for the jury, where there was evidence that such representations were made, and that at the time of contract plaintiff was not yet organized, and tending to show that, when defendant gave notice of rescission, plaintiff had little, if any, capital paid in.

In Error to the District Court of the United States for the Northern District of Georgia; Wm. T. Newman, Judge.

Action by the Bickmore Nitrating Cotton Company, Incorporated, against the Covington Cotton Oil Company. Judgment for plaintiff, and defendant brings error. Reversed.

E. Marvin Underwood and John T. Dennis, both of Atlanta, Ga. (Hewlett & Dennis and Alonzo Field, all of Atlanta, Ga., on the brief), for plaintiff in error.

A. G. Powell and Marion Smith, both of Atlanta, Ga. (Little, Powell, Smith & Goldstein, of Atlanta, Ga., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Defendant in error was plaintiff below, and brought suit to recover damages for breach of a contract for the sale and future delivery to it by defendant of 500 bales of cotton seed linters. Defendant admitted the execution of the contract, and that plaintiff had lost profits in the amount claimed as damages, but set up in its answer the affirmative defense that it was induced to enter into the contract by false and fraudulent representations of plaintiff's financial responsibility. Descending to particulars, the answer alleged that the business manager of the plaintiff company represented that it was, at the time of the contract, a corporation fully organized, and with paid-in capital stock of $5,000; that this false and fraudulent statement was made with the intention to deceive defendant, and was believed to be true and relied upon; and that, upon discovery of its falsity, defendant elected to, and did, rescind the contract. The evidence introduced to sustain the answer was, substantially, that defendant before entering into the contract required the broker who procured it to ascertain the

financial standing of the plaintiff company; that, upon making inquiry as directed, the broker was informed by its manager that the plaintiff company was at that time fully organized, and had a paid-in capital stock of at least $5,000; that the contract, which was dated June 26, 1916, was executed on behalf of plaintiff by its manager before the 1st day of July following; that during the month of July, 1916, the manager of plaintiff company admitted to the president of defendant company that none of the capital stock of the former company had even up to that time been paid in, but stated that it would be before the dates arrived for delivery of the goods. At the trial the broker was uncertain whether plaintiff's manager stated that the amount of the paid-in capital stock was $5,000 or $10,000. but defendant's president testified that this amount was reported by the broker to be $10,000. There was much conflict between the evidence for defendant and that for plaintiff on the issues raised by the answer.

The evidence of plaintiff tended to show that the organization meeting of the plaintiff company was held July 1, 1916, and that prior thereto $500 of its capital stock had been paid in. It was admitted, however, that at the time of the interview between the representatives of the two companies there had not been paid in to the plaintiff corporation in excess of $500 on account of capital stock. August 3, 1916, defendant wrote the plaintiff a letter which contained the following statements:

"On July 31st, I requested that your Mr. H. C. Bickmore come to my office, as I wished to get some further information in regard to the financial standing of your corporation, and during the conversation Mr. Bickmore stated that the Bickmore Nitrating Cotton Company was incorporated under the laws of New York, with an authorized capital of $5,000, of which not a dollar had been paid in, and that the corporation was doing business without having effected an organization under your charter, but that they expected to pay the amount in before the opening of next season. This statement, of course, was a great surprise to us, as our contract with you had been based entirely on information secured by L. S. Smith from you; otherwise, we would not have executed the contract. As we have been misled in believing that your company had a paid-in capital stock of $10,000, as represented by your Mr. Bickmore to Messrs. L. S. Smith and W. D. Hall, we beg to advise that we here and now rescind the contract as made by us, and refuse to have any further connections with it in any shape or form."

Defendant's president testified that the linters did not advance in price until the following October, and that he resold them at the same price as that fixed in the contract. At the close of the evidence the court directed a verdict for the plaintiff.

[1] The assignments of error are based upon the contention that defendant's evidence was sufficient to require the submission of the case to the jury. In support of the trial court's direction of a verdict, plaintiff claims there was a variance, in that the false representations alleged fixed the amount of the capital stock paid in at $5,000; whereas, it is said, defendant's evidence tended to show that this amount was represented to be $10,000. The representation was false, according to defendant's evidence, whether it was that the capital stock paid in consisted of the smaller or greater amount, because there was evidence

tending to show that no capital stock had been paid in. The letter clearly shows that the defendant elected to rescind because of the alleged falsity of a material representation by the plaintiff as to the amount of its capital stock paid in. If the defendant had the right to rescind because of a representation alleged and proved, the letter none the less showed an exercise of that right, although it may have inaccurately stated, as to amount only, what the representation was. Besides, the statement of the amount of stock paid in was not the only material thing claimed to be false in the representations, and it was not incumbent upon defendant to prove the falsity of all the material representations made, but proof of any one of them was sufficient. The corporation was only in process of organization at the date of the contract. Its organization meeting had not then been held, according to all the evidence. It is admitted by plaintiff that only $500 of its capital stock had been paid in at the time of organization, and also that no more than that had been paid in at the time of the interview between the representatives of the two companies. We are of opinion, therefore, that there was no variance.

[2] To sustain the judgment, plaintiff also takes the position that the suit could not be defended by proof that no capital stock, or a less amount than $10,000, had been paid in, because defendant in its letter assigned as a reason for rescinding the contract the representation that plaintiff's capital stock had been paid in to the amount of $10,000. The rule of law, that one may not rescind a contract upon one ground and then defend upon a different one, is recognized as being well established. However, the letter does not appear to lay as much stress upon the amount of the capital stock as it does upon the circumstances that there was no capital stock paid in, no corporation organized, and no financial responsibility behind plaintiff's obligations. It could not be well argued that defendant was seeking to save itself from a losing bargain, because, as already stated, there was testimony, that the price of linters had not then advanced, and that they were sold to others at the same price as that specified in the contract with plaintiff.

We are of opinion that the rights of the parties depend, not upon questions of law, but upon questions of fact, and inasmuch as there is a conflict in the evidence upon material facts, the case is peculiarly one to be settled by the verdict of a jury.

The judgment is reversed, and the cause remanded for a new trial.

THE NEW LONDON.

THE EGERTON.

(Circuit Court of Appeals, Second Circuit. February 4, 1921.)

Nos. 125, 126.

Collision ⊂=83—Mutual faults of meeting steam vessels.

A freight steamer and a meeting tug, with a tow, both *held* in fault for a collision in Long Island Sound in a dense fog, for failing to stop on hearing the fog signals of the other ahead, as required by article 16 of the Inland Rules (Comp. St. § 7889), and the tug also for failing to maintain a proper lookout or to sooner hear the fog signals of the steamer.

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

Suit in admiralty for collision by the Egerton Towing Company against the steamer New London; the Central Vermont Transportation Company, claimant, with cross-libel against the steam tug Egerton. Decree against the New London alone, and her claimant appeals. Modified, to hold both vessels at fault.

For opinion below, see 253 Fed. 842.

Appeal by Central Vermont Transportation Company from decrees in admiralty entered in the District Court for the Eastern District of New York, holding appellant's steamer New London solely at fault for a collision between that steamer and the steam tug Egerton. The New London is a freight steamer with a possible speed of about 16 miles an hour. On the evening before this collision she left New London, Conn., on her regular trip to New York. On her usual and expected course she would pass Execution Rock and light on her starboard hand at a distance of about an eighth of a mile.

Before reaching Execution the fog was so thick that the lighthouse could not be seen, and the fog horn thereat was not heard. Yet the steamer's log states that "when about one-half mile east of Execution Rock light, Thursday morning, September 9 [1915], about 7 a. m., was in collision with towboat Egerton, towing three light scows going east." The Egerton was bound from Newtown Creek to Hempstead, and had the three sand scows on a hawser of about 10 fathoms. Her course was from the Gangway Rock buoy to Sands Point buoy, a path which would keep her well out of the way of vessels bound in for New York from the Sound and approaching Throggs Neck. The tug passed the latter buoy close aboard, and when somewhat to the eastward thereof was struck on her starboard side by the New London. Both vessels were damaged, and each filed a libel. The District Court exonerated the Egerton, and this appeal followed.

Haight, Sandford, Smith & Griffin, of New York City (Henry M. Hewitt, 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 HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). In our judgment the apostles present no material disputed question of fact. There is controversy as to the hour and place of collision, but it is uncontradicted that the accident happened in a very dense fog, that

both vessels had been in the fog for some time before they came together, and that both were in waters known to be frequented by vessels such as the two before us.

Consequently it makes no difference whether collision occurred at 7:30 a. m., or a half hour or more earlier, or whether the New London was (as she plainly was) considerably off her course when she struck the Egerton. For neither the time of contact nor the place of collision affected the rules of navigation applicable to both tug and steamer. Both alike were bound to observe the duty of maintaining a vigilant lookout, and to obey article 16 of the Inland Rules (Comp. St. § 7889).

The New London, by her own account, heard the fog whistles of the Egerton forward of her own beam after she had been in fog for well over a half an hour. It may be admitted that on hearing the Egerton's whistles she at once stopped her engines, but it is plain that she came in view of the tug and then into collision at such speed as rendered her unable to stop within the distance other vessels could be seen. Thus she violated one of the oldest rules of steam navigation, often announced and lately restated by us in The Manchioneal, 243 Fed. 805, 156 C. C. A. 313. We therefore agree with the lower court in its finding as to the New London.

The Egerton, by her own testimony, had stopped her engines not long before collision so as to insure safety from another steamer (said to be the Sagamore). That vessel passed close aboard, and thereupon the tug proceeded under "one slow bell," although at least her pilot then heard, or almost immediately heard, the fog signals of the New London. When the steamer appeared through the fog collision was probably inevitable, and then the Egerton "gave a jingle to see if [her captain] could throw her astern." Collision occurred almost immediately.

Under the circumstances it was a violation of rule 16 not to stop the Egerton's engines on hearing the New London's fog whistles forward of her beam. The rule contains "an imperative requirement." The Suffolk, 258 Fed., 219, 169 C. C. A. 287. It has been urged that this error did not contribute to the collision, and that when the fault of the New London is glaring the court should not be astute to discover minor error on the part of the tug. Both arguments rest upon well-settled rules of decision; but it is always equally true that where a violation of rule is proven the burden is upon the violator to show that disobedience did not contribute. The No. 25 (C. C. A.) 266 Fed. 331. It is to say the least doubtful whether that burden has been borne by the Egerton in respect of the fault just discussed.

But in two other respects the tug is in our judgment plainly at fault. There is no reason to doubt that the New London approached blowing proper fog signals, and they were not timely heard by the Egerton. Considering that her own signals were heard, that she had heard the whistles of the vessel referred to as the Sagamore, no excuse can be received for this failure in vigilance. Again, the Egerton was without any proper lookout. It is said that there was a deckhand forward; but he was undoubtedly aft of one of the engineers who was idling in the

bow. Wherever he was, he did nothing, and was not in his place, which is the bow, as pointed out in The Manchioneal, supra.

It is not only impossible to say that the absence of a vigilant lookout did not contribute to this collision, but it is in our judgment plain that it did so contribute. It makes no difference that the Egerton, at and for some time before collision, was moving very slowly; a lookout must be maintained even when a vessel is stopped, as we held in The Plainfield, 205 Fed. 730, 124 C. C. A. 24, a case which in its material aspects is not unlike the present.

The decree below is modified, so as to hold both vessels at fault, and appellants are granted the costs of this court.

DIRECTOR GENERAL OF RAILROADS v. LEWIS E. SANDS CO., Inc.

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 82.

Carriers ⇐85—Held not required in notice under bill of lading to "order notify" to advise consignee of right of inspection.

Under a bill of lading for a carload shipment to order of consignor with notice to consignee the carrier *held* not required in such notice to advise the consignee of a right of inspection given by the bill of lading.

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

Action at law by the Lewis E. Sands Company, Incorporated, against the Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed.

Cravath & Henderson, of New York City, and Warren Tubbs, of Buffalo, N. Y., for plaintiff in error.

Ramsdale & Church, of Albion, N. Y. (S. T. Church, of Albion, N. Y., of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Sands & Co., Incorporated, of Waverly, N. Y., sold a carload of beans to Thomas & Co., of Frederick, Md., to be delivered at Adamstown, Md., "notify Adamstown Canning Co., at Adamstown, state of Maryland." February 18, 1918, they shipped the same at Waverly in Lehigh Valley car 85836 via Baltimore & Ohio Railroad Company, receiving a bill of lading to their own order allowing inspection of the beans and requiring surrender of the bill of lading to the railroad company upon delivery.

On the same day they drew a draft on Thomas & Co., the purchasers, for the price $12,201.75 to the order of the First National Bank of Sayre, Pa., which stated "Car No. Lehigh Valley 85836," and deposited this draft with the bill of lading in the bank. At the same time they sent an invoice to Thomas & Co. by mail, which stated the character and weight of the commodity and that the beans could be inspected on

arrival. The bank at Sayre forwarded the draft and bill of lading to the Central Trust Company of Frederick, Md. In the regular course of business Thomas & Co. would pay the amount of the draft to the Trust Company, receiving the bill of lading and upon delivery of it to the Baltimore & Ohio Railroad Company at Adamstown would receive the beans.

The car was destroyed by fire March 16 at 2:30 a. m. when on a siding at Adamstown, used jointly by the Railroad Company and the Canning Company before any delivery was made. The bill of lading contains the following clause:

"* * * For loss, damage, or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

After the fire the plaintiff took up the draft and bill of lading from the Central Trust Company, presented their claim for loss of the beans to the Railroad Company, which having been rejected, they brought this suit.

The question contested was whether under the bill of lading the Railroad Company was liable as insurer or as warehouseman and that depended on whether notice of arrival was given to the Canning Company more than 48 hours before the fire. Upon this point there was testimony pro and con, which the trial judge fairly submitted to the jury, which found a verdict for the plaintiff.

We think there was error in answer to the following requests:

The court affirmed the request of the plaintiff:

"That such notice as would start the 48 hours running must be a notice that will enable the consignee or person to be notified to identify the particular car to which the notice applies, so that they may know the consignor, consignee, and person to be notified, and whether there is a right of inspection."

It is the duty of a railroad carrier to notify the consignee of arrival of his goods, and in case of a bill of lading to order of the shipper, or to order of a consignee not at destination, it is usual to provide for notice of arrival to some other person representing the owner. Such other person has been presumably informed by the holder of the bill of lading of the character of the shipment, the name of the consignee, etc.

All that is required of the Railroad Company is to give notice. What is due notice depends upon circumstances. Notice to one in a small town may well differ from notice to a person in a large city. Oral notice may sometimes be sufficient and at others written notice. It seems to us to be exacting too much of a railroad company to require it to state, in addition to the fact of arrival of the goods, such a provision in a bill of lading as that inspection is allowed.

So, the defendant having requested the court to charge:

"That, if they find from the evidence that the Canning Company had actual knowledge on March 13th of the arrival of the car of beans on the joint siding, it was not necessary that notice should be formally given,"

the plaintiff's attorney requested that this instruction must be taken

"in connection with what your honor previously charged, that such notice must specify the car, so as to be able to determine the consignor, consignee, and person to be notified, and whether there is a right of inspection."

The court so charged. It is impossible for us to say whether the jury found for the plaintiff on the ground that notice of arrival was not given 48 hours before the fire, or upon the ground that, so given, it was not due notice, because not including a statement of the right of inspection.

We need not consider whether the Railroad Company should have given with the notice of arrival the number of the car, name of consignor, etc., because it plainly appears from the record that the Canning Company had notice of these facts.

The judgment is reversed.

SIMKINS v. SIMKINS et al.

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

No. 3642.

1. **Courts ⇐405(1)—Review of Canal Zone court exercised by appeal or writ of error.**
   The jurisdiction of the Circuit Court of Appeals to review final judgments and decrees of the District Court of the Canal Zone, conferred by Panama Canal Act, § 9 (Comp. St. § 10045), which is to be exercised by the same procedure as in reviewing final judgments of District Courts of the United States, is to be exercised by writs of error or appeal within the time fixed therefor by Comp. St. § 1228a.

2. **Certiorari ⇐5(1)—Prohibition ⇐3(2)—Refusal of appeal does not authorize issuance.**
   The suggestion that an order of the District Court of the Canal Zone complained of prevented petitioner from taking an appeal does not entitle him to certiorari or prohibition, since a judge of Circuit Court of Appeals would have allowed an appeal, if application had therefor been duly made under Judicial Code, § 132 (Comp. St. § 1124).

3. **Certiorari ⇐16—Prohibition ⇐3(2)—Does not issue to review decree not yet final.**
   The fact that decree of the District Court of the Canal Zone which is complained of was not yet final, so that no appeal would lie therefrom, does not entitle a party to have it reviewed by certiorari or prohibition, since the jurisdiction of the Circuit Court of Appeals to review the decrees of that court is restricted to final decrees, and it is not vested with power to superintend or control the action before the final decree is rendered.

Petition for Writs of Certiorari and Prohibition to the District Court of the Canal Zone; John W. Hanan, Judge.

Petition by Arthur Brooks Simkins against Cordelia Luikart Simkins and another for writs of certiorari and prohibition to the District Court of Canal Zone. Petition dismissed.

Charles B. Howry, of Washington, D. C., for petitioner.

Before WALKER, BRYAN, and KING, Circuit Judges.

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

WALKER, Circuit Judge. The petitioner seeks a revision by this court of action taken by the District Court of the Canal Zone in a suit brought against him in that court by Cordelia Luikart Simkins, and to that end prays in the alternative that writs of certiorari or prohibition be issued, for the annulment of action taken by the District Court of the Canal Zone, and for a decree directing and commanding the judge of that court to dismiss the above-mentioned proceeding therein.

Accompanying the petition, which was filed on December 14, 1920, was a certified copy of pleadings, process, motions, orders, decrees, etc., in the suit mentioned, including a decree filed March 16, 1920, as of February 16, 1920, which finally adjudged in favor of the plaintiff in that suit rights asserted by her therein, including claims for more than $1,000. No writ of error or appeal has been sued out to obtain a review by this court of any action taken by the District Court of the Canal Zone in the above-mentioned suit or proceeding. The petition is now before this court on the petitioner's application for an order requiring those named as respondents to show cause why the relief sought should not be granted.

[1] The jurisdiction of this court with reference to action taken by the District Court of the Canal Zone was conferred by the following provision of section 9 of the Panama Canal Act of August 24, 1912 (37 Stat. 565; U. S. Comp. St. § 10045):

"The Circuit Court of Appeals of the Fifth Circuit of the United States shall have jurisdiction to review, revise, modify, reverse, or affirm the final judgments and decrees of the District Court of the Canal Zone and to render such judgments as in the opinion of the said appellate court should have been rendered by the trial court in all actions and proceedings in which the Constitution, or any statute, treaty, title, right, or privilege of the United States, is involved and a right thereunder denied, and in cases in which the value in controversy exceeds one thousand dollars to be ascertained by the oath of either party, or by other competent evidence, and also in criminal causes wherein the offense charged is punishable as a felony. And such appellate jurisdiction, subject to the right of review or appeal to the Supreme Court of the United States as in other cases authorized by law, may be exercised by said Circuit Court of Appeals in the same manner, under the same regulations, and by the same procedure as nearly as practicable as is done in reviewing the final judgments and decrees of the District Courts of the United States."

The subjects of the appellate jurisdiction conferred by the above set out statute are "final judgments and decrees of the District Court of the Canal Zone," and that jurisdiction may be exercised by this court "in the same manner, under the same regulations, and by the same procedure as is done in reviewing the final judgments and decrees of the District Courts of the United States." The jurisdiction conferred is brought into play by writ of error or appeal. Panama R. Co. v. Beckford, 231 Fed. 436, 145 C. C. A. 430. Neither of these remedies has been resorted to, and the time for doing so has expired, if the judgment or decree complained of was final. U. S. Comp. Stat. par. 1228a.

[2] In behalf of the petitioner it was suggested that by an order which is complained of he was prevented from taking an appeal.

That suggestion does not indicate the existence of a valid excuse for the failure to seek a review by the appropriate method, as a judge of this court could have allowed an appeal, if application therefor had been duly made. Judicial Code, § 132 (Comp. St. § 1124).

[3] Another suggestion is that the decree complained of is lacking in finality. If no final judgment or decree has been rendered in the case, the proceedings in it are not now subject to be reviewed by this court, whose jurisdiction is limited as indicated by the plain terms of the statute. This court has not been vested with power to superintend or control action of the District Court of the Canal Zone in a case or proceeding in which no final judgment or decree has been rendered.

The conclusion is that the petitioner is not entitled to the relief sought or any part of it. It follows that the petition should be dismissed. It is so ordered.

Petition dismissed.

CUMBERLAND TELEPHONE & TELEGRAPH CO., Inc., v. LAWRENCE et ux.

(Circuit Court of Appeals, Fifth Circuit. February 22, 1921.)

No. 3597.

1. **Telegraphs and telephones ⊜15(3)—Injury from obstruction of street actionable.**
   A telephone company, constructing its line along a street, under Acts La. 1880, No. 124, is without right to so place guy wires as to create an obstruction dangerous to one lawfully using the street.
2. **Municipal corporations ⊜703(1)—Crossing street between established crossings not unlawful use.**
   Crossing a street at a place other than a regular crossing is not an unlawful use of the street.
3. **Telegraphs and telephones ⊜26¾, New, vol. 7A Key-No. Series—Company under federal control liable for injury from obstruction of street.**
   A telephone company, which so placed a guy wire in a street as to create a dangerous obstruction, *held* not relieved from liability for an injury caused thereby, because its line was being operated at the time by the government.

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

Action at law by John H. Lawrence and wife against the Cumberland Telephone & Telegraph Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

J. C. Henriques, of New Orleans, La., for plaintiff in error.

C. T. Starkey, of New Orleans, La. (Alfred E. Billings and Charles T. Starkey, both of New Orleans, La., on the brief), for defendants in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was an action by the defendants in error against the plaintiff in error, Cumberland Telephone & Telegraph

Company (herein called the defendant), to recover damages caused by the death of George Dewey Lawrence, which was attributed to wrongful conduct of the defendant in so placing on a sidewalk in a public street in the city of Gretna, La., a galvanized guy wire of neutral tint, difficult to be seen by day, and not visible at night, with which the deceased's person came in violent contact on the night of September 29, 1918, when he jumped across a gutter in crossing from one side of the street to the other, near the middle of a block, at a point near where the guy wire was fastened at the ground about 30 feet from the pole, near the top of which the other end of the guy wire was fastened. The guy wire was erected in the manner stated by the defendant prior to May, 1913. The fact that at the time the deceased was hurt as above stated the defendant's telephone and telegraph system was, and had been since August 1, 1918, in the possession and control of the Postmaster General, in pursuance of the President's proclamation issued under the power conferred by a joint resolution of Congress (40 Stat. 904), was set up as a defense. The court ruled against that defense by refusing a request that a verdict in favor of the defendant be directed.

[1, 2] The right of defendant to construct its line along the street did not include the right thereby to obstruct the ordinary use of the street. Acts La. 1880, No. 124. The defendant was without right so to place its guy wire as to create an obstruction dangerous, especially at night, to one making a lawful use of the street. Wilson v. Telephone & Telegraph Co., 41 La. Ann. 1041, 6 South. 781; Nesson v. City of New Orleans, 134 La. 455, 64 South. 286, 51 L. R. A. (N. S.) 324. The deceased's use of the street was not rendered unlawful by the circumstance that he crossed it at a place other than the regular crossing. Weber v. Union Development Co., 118 La. 77, 42 South. 652, 12 Ann. Cas. 1012.

[3] The liability of the creator of a nuisance for the reasonably to be expected consequences of it does not cease to exist as a result of the property or structure constituting it passing from his possession or control. He remains liable because he was the author of the original wrong. Plumer v. Harper, 3 N. H. 88, 14 Am. Dec. 333; East Jersey Water Co. v. Bigelow, 60 N. J. Law, 201, 205, 38 Atl. 631; Hyde Park Thomson-Houston Light Co. v. Porter, 167 Ill. 276, 47 N. E. 206; Crommelin v. Coxe & Co., 30 Ala. 318, 329, 68 Am. Dec. 120; Philadelphia & R. R. Co. v. Smith, 64 Fed. 679, 12 C. C. A. 384, 27 L. R. A. 131, 20 R. C. L. 292. Whether the original wrongdoer's successor in possession and control was liable is a question which is not presented for decision. The defendant was not, on the abovementioned ground, entitled to have a verdict in its favor directed.

Other questions raised in behalf of the defendant are not considered to be such as to call for a discussion of them. The issues were properly submitted to the jury.

No reversible error being shown, the judgment is affirmed.

BRYAN, Circuit Judge, did not take part in the decision of this case.

CHIPMAN v. WEST UNITED VERDE COPPER CO. et al.

(District Court, D. Delaware. April 20, 1920.)

No. 383.

Courts ⇐308—Diversity of citizenship must exist as to all parties on one side and all parties on the other.

A federal court is without jurisdiction of a suit on the ground of diversity of citizenship, unless it appears from the record that such diversity exists between all the parties on one side and all the parties on the other.

In Equity. Suit by Russell H. Chipman against the West United Verde Copper Company and others. On motion to dismiss bill. Sustained.

J. Frank Ball and James Saulsbury, both of Wilmington, Del., for plaintiff.

John R. Nicholson, of Wilmington, Del., for defendants.

MORRIS, District Judge. Russell H. Chipman, a citizen of the state of New York, filed his bill of complaint against the West United Verde Copper Company, a Delaware corporation. Subsequently the complainant by amendment to the bill added several individuals as parties defendant. The defendant corporation moves for the dismissal of the bill on the ground that it now appears that one or more of the individual parties defendant are citizens of the same state of which the complainant is a citizen; the sole ground of jurisdiction alleged in the bill being diversity of citizenship.

Section 24 of the federal Judicial Code (section 991, U. S. Comp. Stat.) provides:

"The district courts shall have original jurisdiction as follows: * * * First. Of all suits of a civil nature, at common law or in equity, * * * where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of three thousand dollars, and * * * is between citizens of different states. * * *"

The Supreme Court, in Mexican Central Railway v. Pinkney, 149 U. S. 194, 200, 13 Sup. Ct. 859, 862 (37 L. Ed. 699), said:

"The rule is that, to give the Circuit Courts of the United States jurisdiction on the ground of the diverse citizenship of the parties, the facts showing the requisite diverse citizenship must appear in such papers as properly constitute the record of the case."

It is well settled that the required diversity of citizenship does not exist unless all the parties on one side of the controversy are of diverse citizenship to those on the other. Raphael v. Trask, 194 U. S. 272, 276, 277, 24 Sup. Ct. 647, 48 L. Ed. 973; Strawbridge et al. v. Curtiss et al., 3 Cranch, 267, 2 L. Ed. 435; Coal Company v. Blatchford, 11 Wall. 172, 20 L. Ed. 179. Section 51 of the Judicial Code (section 1033, U. S. Comp. Stat.) is not now involved. The record in this case as it now stands shows that one or more of the defendants are citizens of the same state as the plaintiff, and consequently that this court is

without jurisdiction over the controversy. The bill of complaint must be dismissed unless the plaintiff shall, within a time to be fixed by the order, by appropriate proceedings vest the court with jurisdiction.

In view of the foregoing conclusion, it becomes unnecessary now to consider the second ground of the motion to dismiss.

An order in conformity herewith may be prepared and submitted.

FARBER v. FORMAN & LERNER, Inc.

(District Court, E. D. New York. January 5, 1921.)

Patents ⊂=328—52,985, for design for fern dish, held not so obviously valid as to authorize preliminary injunction.

Preliminary injunction against infringement of the Farber design patent, No. 52,985, for a design for a fern dish, denied on an answer denying that patentee was the originator of the design.

In Equity. Suit by Simon W. Farber against Forman & Lerner, Incorporated. On motion for preliminary injunction. Denied.

Mock & Blum, of New York City, for plaintiff.

Eugene Eble, of New York City, for defendant.

CHATFIELD, District Judge. Application for temporary injunction pending trial of action for infringement of design patent. The defendant is a corporation organized by former employees of the plaintiff. The particular design with which the suit is concerned is one for a fern dish or casserole holder, consisting of a round strip of plated metal with handles and feet. The decoration is imparted to the circular body of the dish by two rows of perforated designs, each consisting of a spherical triangle inclosing three separate leaves of which the center leaf is inclosed in a spatulate outline or frame.

The defendant's design is very close. Its dish is slightly deeper. The handles are attached a little further from the rim, the two rows of design are reversed in position, and each spherical triangle contains three figures, of which but one is a leaf. The other two inserted figures, which in the plaintiff's design bear the outline of the ribs of a leaf, in the defendant's design are plain, but are so small in size and of such shape that careful examination is necessary to show the difference.

On the whole, the designs are so close that the court would have no doubt in granting a temporary injunction upon the presumptive validity of the design patent, No. 52,985, dated February 11, 1919, except for the issue raised by an attack upon the claim of invention by the plaintiff as set forth in his design patent.

The defendant alleges, and seeks to show by affidavit, that the plaintiff obtained this design in Europe, and brought back a sample with him some two or more years before filing his application for patent on March 4, 1918. It appears that proof as to the plaintiff's claim of invention must be obtained either from Europe or by production of the original

model referred to by both the plaintiff and the defendant, in order that its origin and disclosures may be examined.

The issue thus raised is sufficient to make it advisable to withhold temporary injunction until the trial of the action, which can be reached within a reasonable time.

Motion for temporary injunction denied.

LAZARUS et al. v. NEW YORK CENT. R. R.

(District Court, S. D. New York. February 4, 1921. On Rehearing, March 29, 1921.)

1. **Carriers ⇐36—Liability to shipper for loss governed by uniform bill of lading.**
   Where a railroad carrier receives an interstate shipment without issuing any bill of lading or making a contract with the shipper its liability is governed by the terms of a uniform bill of lading published and filed with the Interstate Commerce Commission.

2. **Carriers ⇐160—Period of federal control excluded in determining limitations; "periods of limitation."**
   Transportation Act Feb. 28, 1920, § 206f, providing that "the period of federal control shall not be computed as a part of the periods of limitation in actions against carriers * * * for causes of action arising prior to federal control," *held* to apply to an action by a shipper for loss of goods, where the limitation was fixed, not by contract between the parties, but in the absence of such contract by the terms of the uniform bill of lading published and filed by the carrier with its schedules, although the period of limitation had expired and action had been commenced before the passage of the act.

3. **Constitutional law ⇐171—Statute removing bar of limitations constitutional.**
   Transportation Act Feb. 28, 1920, § 206f, providing that "the period of federal control shall not be computed as a part of the periods of limitation in actions against carriers * * * for causes of action arising prior to federal control," *held* constitutional as applied to a cause of action by a shipper against the carrier as to which the period of limitation had expired before passage of the act, where such limitation was not fixed by contract, but by the carrier in its published and filed schedules as permitted by Interstate Commerce Act, § 20, as amended (Comp. St. § 8604a).

At Law. Action by Samuel O. Lazarus and others against the New York Central Railroad. On motion by plaintiff for directed verdict. Motion granted.

This is an action at law brought against the final carrier for the loss of parts of two shipments of tin, laden at Singapore and consigned to the British consul at New York, "Notify Lewis Lazarus & Sons" (the plaintiffs). The shipment was made on the 12th day of May, 1917, on the steamship Luise Nielsen at Singapore, and reached Seattle, the port of delivery, on June 16, 1917. Two through bills of lading were issued by the ship's agents at Singapore, which contained no exceptions or conditions relevant to this controversy ex-

cept the following: "A delivery from the ship's tackles at the anchorage from the port of transhipment of the goods and merchandise in this bill of lading according to the terms thereof to the connecting line to be carried subject to the terms and conditions of its bill of lading shall absolve the steamship company of all claims of whatever description." Upon delivery of the tin to the rail carrier at Seattle no bill of lading was issued at that place. Eventually the intermediate rail carriers delivered the tin to the defendant for transport to New York and the defendant also gave no bill of lading. The two shipments reached New York on August 13 and 17, 1917, and within a day or two thereafter a shortage was discovered in each shipment, presumably due to some theft in the New York freight yards, although no proof appears.

The defendant, in accordance with the Interstate Commerce Act (Comp. St. § 8563 et seq.), before receiving the shipment, had published and filed a uniform bill of lading with the Interstate Commerce Commission, one of the provisions of which was as follows: "Suits for loss, damage or delay shall be instituted only within two years and one day after delivery of the property, or in case of failure to make delivery, then within two years and one day after a reasonable time for delivery has elapsed." After the discovery of the shortages the parties negotiated over a long period of time as to liability, and the plaintiffs commenced no action until the 29th day of September, 1919, more than two years and one day after the loss had been discovered.

The rate at which the tin was carried corresponded with the rate provided in the Transcontinental Freight Bureau east-bound import tariffs. These tariffs and classifications had been published and filed by the defendant with the Interstate Commerce Commission and were in effect at the time. By paying a higher rate, the shippers could have freed themselves from the terms and conditions of the uniform bill of lading. They are not, however, shown to have had notice of the conditions in the uniform bill of lading or of the option to be free from the same by paying a higher rate.

Three points were raised: First, whether, in the absence of any contract between the carrier and the shipper the conditions of the uniform bill of lading applied at all; second, whether, if they did, section 206 (f) of the Transportation Act of February 28, 1920, c. 91, 41 Stat. 462, extended the period of limitation contained in the clause quoted from the uniform bill of lading; third, whether two years and one day after a reasonable time for delivery had in fact elapsed before September 29, 1919.

The plaintiff also raised the question of an estoppel to assert the defense, arising from the negotiations between the parties before the suit was brought.

Laurence A. Sullivan, of New York City, for plaintiff.
William Mann, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). I find it necessary to decide only two out of the three questions raised in this case: (a) May the carrier take advantage of the provisions of its bill of lading, as filed, without showing that the shipper had accepted it, or even that the carrier had issued any bill at all? (b) Does section 206 (f) of the Federal Transportation Act extend the time, fixed by the bill of lading as filed, within which action may be brought?

[1] Before the Cummins Amendment (Comp. St. §§ 8592, 8604a) it was settled that, when the carrier published and filed its regulations and schedules in accordance with section 1, subdivision 4, of the Interstate Commerce Act (Comp. St. § 8563), and conformed with the pertinent regulations of the Interstate Commerce Commission, it was not necessary to incorporate a limitation of liability into a passenger ticket or to prove any contract with the passenger, in order

to take advantage of the limitation of liability contained in the schedules. Boston & Maine R. R. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. And it was also settled that it was not necessary to issue any bill of lading at all in the case of goods. Atchison, etc., Ry. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901. In the second case it is true that a bill of lading was issued containing the limitation relied upon, but that was after the shipment (a horse) had started on its way, and the case was treated as depending only upon the original oral contract of carriage. While all limitation of liability has since been made illegal by the Cummins Amendment, that does not affect the applicability of the doctrine there established in respect of such limitations as still remain open to the carrier, of which the period within which suits may be brought is one. Regardless of the terms of the receipt or bill of lading delivered, and regardless even of the fact that none at all is given, the regulations governing the relations of the shipper and the carrier are to be found in the schedules published and filed with the Interstate Commerce Commission, subject to its approval or disapproval within the jurisdiction given it by statute. Therefore, when the defendant received the tin at Chicago or Buffalo, it was not necessary to go through the empty form of issuing a new bill of lading, which indeed it would not have delivered to any one, if it had, nor was the equally futile formality necessary at Seattle when the first domestic carrier received it from the ship.

[2] The next question is open on authority and must be settled on principle. It turns upon the effect to be given to section 206 (f) of the Transportation Act of 1920, which went into effect more than two years after the loss occurred and some months after the action had been commenced. It is divisible into two parts: First, whether the section covers this case in its meaning; second, whether it is valid, when applied to defenses already completed, established by the lapse of time. The section is as follows:

> Sec. 206: "(f). The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers * * * for causes of action arising prior to federal control."

The defendant argues that the phrase "periods of limitation" must refer only to limitation by statute, and cannot include a limitation such as this derived from the bill of lading filed with the Commission. In corroboration of that construction it appeals to section 206 (a), which reads in part as follows:

> "Such actions [actions arising out of federal control], suits, or proceedings may, within the periods of limitation now prescribed by state or federal statutes, but not later than two years from the date of the passage of this act, be brought," etc.

There is good reason for interpreting the phrase "periods of limitation" in the same way in each subsection, and I accept the defendant's argument pro tanto. But I believe that, at least in the absence of a

contract with the shipper, the period fixed by the bill of lading is a "period of limitation prescribed by * * * federal statutes." Section 20 of the Interstate Commerce Act (Comp. St. § 8604a) forbids a carrier by "rule, contract, regulation or otherwise" to make a limitation of less than two years, and in so doing it may truly be said to prescribe that period as a minimum. It is true that it gives the carrier the right to establish a longer period, if it chooses, which it has not here chosen to do, except to the extent of one day, and it may be where there is a valid contract between the carrier and the shipper for a period longer, even by so short a time as one day, that it would be improper to speak of the limitation as "prescribed by" the statute. However, in the case at bar there was no such contract, as the defendant concedes, and to avail itself of any limitation whatever it must resort to the statute, section 1, subdivision 4, which gives binding effect to its schedules when published and filed, as required by the Commission.

Assuming, then, that section 20 does not "prescribe" the period, because of the addition of one day, yet it remains true that it is not by contract, but by legislative permission, that any period at all is fixed, and the issue turns upon the merely verbal question whether though in substance fixed by the right granted the carrier by statute, the period is "prescribed by * * * federal statutes." I think that the language should be referred rather to the substance of the situation than to its form. The clause was apt to cover all those limitations which got force from positive law rather than from contract, and if the defendant relies upon the statute to limit the period, it must not blow hot and cold, by denying the application of all relevant amendments. To be sure, section 206 (a) might have read "periods of limitation, prescribed or derived from state or federal statutes"; but that would have been a blind and clumsy phrase, and there can, I believe, be little doubt that the intent went to all limitations forced upon the shipper without his consent. Furthermore, the Transportation Act went into effect February 28, 1920, more than two years after the President had seized the railroads. Actions for personal injuries not infrequently have a period of limitation of only three years or less, and actions on contracts of carriage are generally limited to two years under section twenty. Unless section 206 (f) has the effect of extending the period of limitations already expired, it will have a very small operation at all, and will probably fail to include the great majority of those cases which were pending on December 28, 1917. It seems to me, therefore, judged merely as matter of intent, that section 206 (f) tolled the limitation.

[3] The remaining question is of the constitutionality of the section so construed. If the defendant depended upon a contract between itself and the shipper, I should have great doubts of the validity of such a statute, but as I have already said, it does not. The question is merely whether, when the period has been completed within which by force of statute the shipper may begin suit, a second statute may restore that remedy which the first took away. Upon that question it

seems to me that Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483, is conclusive, and I need discuss it no further. The case does not involve the acquisition of property rights by prescription, but of taking away and later restoring a remedy for a chose in action. Whatever the theoretical basis for any such distinction, it is too well settled to be open now to any question.

Verdict directed for the plaintiff on both causes of action.

On Rehearing.

If the tin had a market value, or a value which could be ascertained by any "recognized standard," Demotte v. Whybrow, 263 Fed. 366, rules this case. I recall no evidence on that point, but I shall assume that this was the fact, unless the defendant disputes it and wishes to insist upon the production of proof by the plaintiff. In such case, if the defendant will move for a new trial on that issue within 10 days, I will grant it, and the plaintiff must produce evidence. Otherwise, the verdict will be directed for interest, as well as principal, from the date of the loss; i. e., the arrival of the cars in New York.

MARU NAV. CO. v. SOCIETA COMMERCIALE ITALIANA DI NAVIGATION.

(District Court, D. Maryland. February 28, 1921. Supplemental Opinion, March 21, 1921.)

1. **International law ⟸10—Vessel under requisition by foreign nation not exempt from attachment.**
   A vessel *held* not immune from foreign attachment in a suit in personam against the owner, because she was at the time under requisition by and in the actual possession of the Italian government.

2. **Salvage ⟸23—Owner liable in personam for salvage services.**
   The owner of a stranded vessel, who retained and used her after she was released, *held* liable in personam for salvage services rendered in effecting such release on request of her master.

3. **Salvage ⟸18—That vessels were in company does not defeat claim by one for salvage of the other.**
   That two vessels sailed for a distance in company during danger from submarines, because one was armed while the other was not, but without further agreement, *held* not to defeat a claim of the unarmed vessel for salvage services rendered to the other when stranded.

4. **Salvage ⟸36—Payments to master and crew not bar to suit.**
   Payments made by the owners of a vessel to which a salvage service had been rendered to the master of the vessel rendering the service, to be divided between master and crew, which payments were not reported to the owner, nor intended to be, the purpose being to prevent any claim for salvage, *held* not to bar suit for salvage by the owner.

5. Salvage ⇐30—Award for releasing stranded vessel.

An award of $34,000, made to a steamship for service rendered in pulling off a stranded vessel, with freight for the voyage, $320,000, which was released without injury after 39 hours; the vessels being in no particular danger, except from submarines, the danger from which was serious.

In Admiralty. Suit by the Maru Navigation Company against the Societa Commerciale Italiana di Navigation. Decree for libelant.

John Henry Skeen, of Baltimore, Md., and Loomis, Barrett & Jones, of New York City, for libelant.

Whitelock, Deming & Kemp, of Baltimore, Md., and Barry Wainwright, Thacher & Symmers, of New York City, for respondent.

ROSE, District Judge. [1] The instant proceedings were instituted in August, 1918, by the filing of a libel against the respondent, in personam, with a clause of foreign attachment, under which the steamship Armando was arrested. Both the Italian consul and the ambassador of Italy made separate, but substantially identical, suggestions to the court that the Armando was immune, because it was at the time under requisition to the government of Italy, and in the actual possession of that government. As neither of these suggestions came through our State Department, I declined to consider them as evidence upon the question of fact involved, and for that view may now be cited the recent decision of the Supreme Court. In re Muir, Master of the Gleneden, 254 U. S. ——, 41 Sup. Ct. 185, 65 L. Ed. ——.

When the ship was attached, I was out of the district, and an immediate hearing upon its validity could not readily be had. It was of vital importance that the sailing of the ship should not be postponed, and accordingly respondent arranged that the ship should be stipulated for. All parties, with the approval of the court, agreed that the filing of the stipulation should not in any wise waive her claim for immunity, and that, if the latter was sustained, the stipulation was to be thereby vacated.

From the oral and documentary evidence submitted, it appears that at the time of her arrest the relation of the Italian government to the ship was substantially that sustained by the same government to the Attualita. 238 Fed. 909, 152 C. C. A. 43. The fact that the Armando had an Italian army officer on board, whose usual duties were those of a supercargo, but who could take actual command of her in certain contingencies, which did not happen, is a distinction which does not appear to me to amount to a legal difference. It is true that here the ship was not arrested for its own fault, as the Attualita was, and that in consequence some of the reasons of policy which made the Circuit Court of Appeals for this circuit there hesitate to sustain the claim of immunity, which would have freed her from responsibility for her own wrongs, do not exist here; but after all what was decided there was that the interests which the Italian government had in her were

not of such a character as to make her immune to the processes of our courts. What has since been said by the Supreme Court (In re Muir, supra) leaves the authority of The Attualita, supra, as yet unshaken. It follows that the Armando was properly attached, and that the merits of the case raised by the libel must be passed upon.

Early in June, 1917, two steamships, one the St. Charles, an American, and the other, the Tea, an Italian, were at Gibraltar. Both were bound for Genoa. The Tea was much the larger of the two, and carried one gun. The St. Charles was unarmed. For that reason the naval authorities directed them to cross the Mediterranean in company.

During the first part of their trip they kept in Spanish territorial waters as much as possible, in the hope of thereby minimizing the danger of submarine attack. About quarter of 5 on the morning of June 10th the Tea, when about a mile off shore, went aground, and was unable to extricate herself. The St. Charles was at the moment about a half mile astern, and came promptly up. The Tea sent an officer on board her to ask for help. Arrangements to give it were at once made. The St. Charles put out an anchor. A hawser was gotten from one ship to the other; but, as the St. Charles was about to begin pulling upon it, she found herself aground, carried there, as is suggested, by a local current, of the existence of which her navigators were unaware. It was some three hours before she got herself off.

About 1:30 a hawser was again made fast to the vessels, but it parted in about 15 minutes after strain was put upon it. It took all hands on the St. Charles some time to get their ship ready to try again. This time the line was so arranged as to make it in effect four. It was carried through the bitts on the St. Charles, and then to its mainmast. It was about a quarter of 6 in the afternoon before all these arrangements were completed, and then for an hour and three-quarters the St. Charles pulled as hard as she could. At half past 7 the approach of darkness made it prudent to suspend. The next morning work began again, but at quarter of 9 the St. Charles pulled out her bitts and did some damage to the deck planking, to which they were attached. The line was then secured to her mainmast, and the effort to free the Tea was resumed.

During the day, a Spanish sailing vessel of about 300 tons anchored close to the two ships, in a position in which there would be danger, both to herself and the Tea, if the latter should come suddenly off. She was asked to change her anchorage, but she would not, or at all events did not. The Tea finally began to move, at first slowly, and then much more rapidly, about 7:25 on the afternoon of the 11th, a little less than 39 hours after she took ground. A collision between her and the Spaniard was imminent, and was avoided by the exercise of quick judgment and skillful seamanship of the St. Charles, at the cost, it is suggested rather than proved, of some little permanent damage to her windlass or its connections, and there is some claim that

the engines upon the St. Charles suffered somewhat from the strain of the prolonged pulling.

The two steamships then resumed their voyage to Genoa, at which port they arrived on Saturday, the 16th of June, without further incident. On the 18th, the agents of the Tea gave the master of the St. Charles 35,400 liras, the equivalent at the then rate of exchange, of $5,000 in our money. In the letter inclosing this sum, the master of the St. Charles was asked to distribute it among his officers and crew for the services rendered the Tea. The signature of the master and his second officer at the foot of the letter acknowledged receipt of this sum.

The master of the St. Charles said he turned the $5,000 over to a committee of his officer and crew for distribution. He testified that, without suggestion from him, this committee awarded him, as nearly as he can recall, some $1,600 of it. The first officer admits that he received $500. Some of the seamen, who have been examined as witnesses, got $100 each. Precisely how the remaining $2,800 was disbursed he does not exactly remember. The captain says he understood that everybody on board, except the men in the steward's department shared in it. The steward's company were ignored because, according to the master, they had no hand in the salvage service, a proposition to which it is perhaps unnecessary to say they do not agree. There is reason to believe that there were other omissions.

Apparently on the same day on which this $5,000 was given by the agents of the Tea, they handed the master of the St. Charles an additional $8,000, and presented him with a handsome gold watch, marked "To Capt. Charles Lyman, for his brave and friendly assistance to S/S Tea, Genoa, 18—6—17." While they had the receipt of both the master and second officer for the $5,000, they took from the former an acknowledgment for the entire $13,000, expressed to be "in full settlement of the services rendered to their S/S Tea off the Spanish coast, and slight damage suffered by my steamer." In point of fact, no part of the $13,000 was used in repairing the damage done. The agents of the Tea sent men on board the St. Charles to do the needed work, and paid them themselves. The master of the St. Charles never gave either her owners or the ship's company any of this $8,000, nor did he tell any of them of it. He sent $7,000 of it home to his wife in this country, and, significantly enough, gave the remaining $1,000 to the master of the Tea. He says the latter payment was in pursuance of an agreement he had made when the Tea was aground. Just why he entered into any such arrangement he does not explain. There is high authority that skill and gallantry of a naval officer, displayed at or after an attack upon his ship, may deserve the highest decoration it is possible to give, despite the fact that his ship was lost; but, so far as I am aware, a merchant captain has never before been supposed by any one to be entitled to a substantial pecuniary reward for letting his ship get aground and having somebody else pull it off.

The owners of the St. Charles heard nothing of these matters until, upon the return of their ship to this country, some of her crew complained that they had not received a share of the $5,000. Further investigation followed, as well in the United States as in Italy. The first replies of the Genoa agents of the owners of the Tea to the inquiries made on behalf of the St. Charles were, to say the least, reserved and incomplete. While efforts to ascertain the true facts were going on, the Tea made a couple of trips to the United States, and finally in the Mediterranean fell a victim of an enemy submarine.

There seems to be little, if any, reason to doubt that the agents of the owners of the Tea, very possibly at the interested suggestion of her master, made up their minds to get rid of any possible salvage claim, by making it to the advantage of the master and other persons on board the St. Charles to say little or nothing about the matter. Perhaps they at first supposed that $5,000 would suffice. If so, the master of the St. Charles was of another mind, and speedily convinced them that it would be well to pay the extra $8,000. In spite of the wording of the receipt they took from him, it is not likely there was much expectation that any wind of it would come to the owners of the St. Charles. The fact that $5,000 of it had been given to the officers and crew of the St. Charles indicated strongly that the agents of the Tea were not really making the payment to the master as such, in settlement of a salvage service. If that had been their purpose, they would not have themselves assumed to apportion the amount between the St. Charles and her company. That was something with which they would have nothing to do whatever.

The receipt, as already mentioned, was in another respect incorrect. According to it, the repairs to the St. Charles were to be paid for out of the $13,000. It is clear that neither the agents of the Tea nor the master of the St. Charles ever intended that this should be done. The facts being as they are, the respondents nevertheless contend (1) that for such a salvage service, if it be one, recovery can be had in a proceeding in rem only, and that this is especially true, now that the thing saved has perished. (2) That the relation of the two ships was such that the St. Charles was bound to do what she did, and is not entitled to any reward for doing it. (3) That the master of the St. Charles had authority to settle the salvage claim, and did so. These contentions will be considered in the order in which they have been stated.

[2] Is the owner of the Tea liable in personam? In England the question is settled adversely to the contention of the respondent. The Cargo ex Port Victor, L. R. [1901] Probate, 243. That case has been expressly cited with apparent approval by the Supreme Court in U. S. v. Cornell Steamboat Co., 202 U. S. 184, 26 Sup. Ct. 648, 50 L. Ed. 987. The liability has been here often enforced, sometimes without objection or comment, nor has it been denied in any case with which I am familiar when the services were rendered at the request of the owner or his agent, or where the saved thing came afterwards into the beneficial possession of the owner, or when he obtained and

retained some profitable interest in it, or when he threw obstacles in the way of the salvors asserting their rights in rem. Any one of these conditions has been more than once held or assumed to be sufficient to sustain a libel in personam. Bergher v. General Petroleum Co. (D. C.) 242 Fed. 967, Baxter v. Heilner (D. C.) 38 Fed. 668; Brevoor v. The Fair American, 4 Fed. Cas. 71, Fed. Cas. No. 1,847; Hudson v. Whitmire (D. C.) 77 Fed. 846. The fact that the salved ship was sunk after it had, subsequent to the salvage service, made two voyages across the Atlantic, for the profit of its owner, does not affect the right of the salvors to demand compensation.

Reliance is placed by the respondent on The Carl Schurz, 5 Fed. Cas. 84, No. 2,414. There Judge Hammond said:

"A salvor, in the view of the maritime law, has an interest in the property; it is called a lien, but it never goes in the absence of a contract expressly made, upon the idea of a debt due by the owner to the salvor for services rendered as at common law, but upon the principle that the service creates a property in the thing saved. He is to all intents and purposes a joint owner, and if the property is lost he must bear his share like other joint owners."

As applied to the facts then before the court, this language is both apt and accurate. There the saved ship was raised by the salvors in a damaged condition, and 10 or 15 days later, while still unrepaired, was arrested at their instance, and sold by the marshal. The value received at this sale, less the expense, was obviously all that was saved for the owner, and was necessarily the basis of any estimate of what the salvage services were worth to him. Judge Hammond had not in mind a case in which, as the result of the action of the owner, the salvor was unable to assert his lien in rem until after the loss of the ship, which, in the meanwhile, had been gainfully employed in its owner s business.

[3] Was the St. Charles entitled to salvage? No one may claim a salvage reward for doing what he is legally bound to do, and for which he is actually or constructively compensated in other ways. At times there has been a custom for ships trading in particular parts of the world to sail in company for mutual protection, under an agreement that they would assist each other without becoming entitled to any compensation for so doing. The Zephyr, 2 Hagg. Adm. 43; The Harriet, 1 W. Rob. 439. But, in such cases, that there is such an intent must be proved as a matter of fact. No evidence of its existence is here forthcoming.

[4] Did the payments to the master of the St. Charles settle its salvage claim? The advocates have learnedly discussed under what circumstances the master of a ship has authority to adjust its claims for salvage. The Inchmaree, L. R. [1899] Probate, 111, distinctly holds that a shipmaster has no implied authority to bind his owner or his crew by an agreement as to salvage compensation for services already rendered. The persuasive force of the reasoning in that case is but little impaired by what Judge Longyear said 24 years earlier in The Senator, 21 Fed. Cas. 1077, No. 12,664. That was simply a towage case, in which the master had certified to the reasonableness of the

tug's bill. The general rule unquestionably is that the master, as to services to be rendered and when immediate decision is necessary, may on his own behalf, and as agent by necessity for his owner and crew, agree as to the terms upon which the aid will be given, and that such contract is binding; but after the work is done, and there is time to consult the other parties, he may not bargain their rights away, nor, for that matter, may any one or two of the three without the assent of the others. Bergher v. General Petroleum Co. (D. C.) 242 Fed. 967.

In this case, however, all discussion of the master's power to bind his owner and his crew is beside the mark. His right, when it exists at all, depends upon the belief of the persons with whom he is dealing that he is, to the best of his judgment and ability, looking after the interests of those for whom he assumes to speak. If those who are contracting with him know that he is not in good faith trying to protect those for whom he assumed to be agent, they cannot rely on any arrangement he may make for them. Leathem v. The Roanoke (D. C.) 50 Fed. 574, may do as well as any other case as an authority for the doctrine applicable to all contracts on land or sea. In the instant case, there is no room to suppose that the agents of the Tea could have believed that the master of the St. Charles was seeking to protect his owner.

[5] The only remaining question is as to the amount to which the St. Charles is entitled. The Tea and her freight for the voyage may be taken as worth not less than $320,000. Had she been an entirely free ship, her value would have been much greater. When aground, she was in no particular danger from the elements, unless a severe and prolonged storm came on, which event at that season of the year was not probable. The submarine danger was serious. The commander of one of the undersea boats might or might not have respected the neutrality of Spanish waters; but, if he learned that the steamers were aground, it would have been the easiest thing in the world to lay in wait for them outside the three-mile limit. The risk run by the St. Charles in staying by the Tea was a good deal more serious than she would have incurred had she sailed alone to Genoa. The work she did was not great, but it entailed the possible risk of serious stranding. Her salvage operations seem to have been carried on with skill and energy. No other help was presently available or at hand. The fact that the St. Charles was sailing in company with the Tea is a circumstance to be taken in account as a moderating feature in any allowance that may be made. The Trelawney, 4 Red. 223; The Collier, L. R. 1 Arm. Ecc. 83.

On the other hand, the extremity of the peril, and the amount of the award, which might reasonably be allowed for the services rendered, was better known and could be more accurately measured at the time by the saved ship than it can be now and here. In the hope of escaping such an award as a court would make, the Tea was then willing to make an irregular payment of $13,000, taking the chance of losing some part

of it if the owners of the St. Charles ever found out the real facts and instituted proceedings. Men do not take such chances, unless they expect to profit largely by success.

I think that an award of $34,000 for the salvage service would be just. Of this, three-fourths should go to the owner, and this amount the respondent should pay without deduction. The one-fourth, or $8,500, remaining should go to the master and crew. Ordinarily I should allow the master, who took the responsibility of deciding that the salvage service should be rendered, an extra allowance, say of $850. I shall allow the first officer, whose services were of unusual value in this case, $500. This leaves $7,150 to be apportioned among the master and crew in the ratio of their respective wages.

But the master has already been paid by the respondent all to which he is entitled, and far more. Certain members of the crew have received out of the first $5,000 paid by the respondent certain sums, and they are not entitled to collect them again. The respondent may therefore deduct from the amount of the $34,000 the captain's share as above set forth, and the moneys already received by each of several members of the crew, to an extent not exceeding the amount to which such member will be entitled, according to the method of apportionment herein provided. In short, the amount which the respondent should have paid to the master and to each member of the crew is to be determined in the manner herein stated. The master and some members of the crew have received something from the respondent already. The respondent will be entitled to credit, against the sum any individual may be entitled to demand, whatever sum said individual has already received from it.

Under all the circumstances of this case, I think the awards should bear interest from November 1, 1917, and the respondent should pay the costs.

Supplemental Opinion.

The respondent has suggested that, in addition to all else it conceives to be wrong in the aforegoing opinion, the allowance of interest from November 1, 1917, is error. Except when, as in Great Lakes Towing Co. v. St. Joseph-Chicago S. S. Co., 253 Fed. 635, 165 C. C. A. 261, the salvage award is based upon contract, it is seldom liquidated until the decree is entered, and respondent claims that interest may not be allowed upon unliquidated damages.

At law that is true in some jurisdictions, although not in all. Stephens v. Phœnix Bridge Co., 139 Fed. 248, 71 C. C. A. 374. But in admiralty and in equity, the rule is usually more elastic. The Ada (D. C.) 239 Fed. 372. More than 30 years ago the Supreme Court, in a collision case, said that the allowance of interest was within the discretion of the trial court. The Maggie J. Smith, 123 U. S. 349, 8 Sup. Ct. 159, 31 L. Ed. 175.

It is true that it appears that, according to the original practice of the English Admiralty, interest was not allowed in salvage cases. Jones Bros., 3 Asp. M. C. 478. But the Circuit Court of Appeals for

the Fifth Circuit held that in this country, in the sound judicial discretion of the court, it may properly be given. Texas Co. v. Texas & Gulf S. S. Co. (C. C. A.) 263 Fed. 868. There appears to be no American authority to the contrary.

All that was decided is this circuit in The Haxby v. Merritts' Wrecking Organization, 83 Fed. 720, 28 C. C. A. 33, was that the trial court may not modify a mandate of the Circuit Court of Appeals. Ordinarily there is room for real and wide difference of opinion as to what the service is worth, and there is usually little 'cause why interest should be allowed, but there is nothing inflexible about the rule. Its application will be controlled by circumstances.

In this case, the respondent endeavored to keep from the libelant knowledge that any service has been rendered. The last hearing in open court was on the 22d of December, 1919. The amount of the salvage which would be decreed, if any properly could be, was then announced from the bench, and it was also said that interest would be allowed from November 1, 1917, a date 4½ months after the Tea was pulled off the strand, a time ample for an ascertainment of the amount of salvage justly due, had it not been for the peculiar practices of the respondent. No formal opinion was then filed, and no formal decree was entered, because it was obviously expedient to await the decision of the Supreme Court in Re Muir, supra. Often the allowance of full legal interest will be a hardship on whoever is to pay it, for money may be worth much less to him, but in the last 4 years that has been very seldom true. It is more than probable that, even with the added interest, the respondent is better off, and the libelants in worse case, than they would have been, had the payment been made within a reasonable time after the work was done.

In view of all the circumstances, I see no reason to modify the conclusion heretofore announced.

NORTHPORT SMELTING & REFINING CO. v. LONE PINE-SURPRISE CONSOL. MINES CO.

(District Court, E. D. Washington, N. D. November 3, 1920.)

No. 3255.

1. Mines and minerals ⊂=31(2)—End and side lines of lode claims determined by course of discovery vein.

The end and side lines of a lode mining claim are not necessarily those so designated by the locator; but the "end lines" are those which are crosswise of the general course of the discovery vein on the surface, although they may have been located as the side lines.

[Ed. Note.—For other definitions, see Words and Phrases, End Line.]

2. Mines and minerals ⊂=31(2)—End lines of lode claim, for all extralateral purposes, fixed by course of discovery vein.

Although Rev. St. § 2322 (Comp. St. § 4618), gives the locator of a lode claim the right to all the veins which apex within its surface, the end lines of the claim, which fix extralateral rights in all such claims, are determined by the course of the discovery vein.

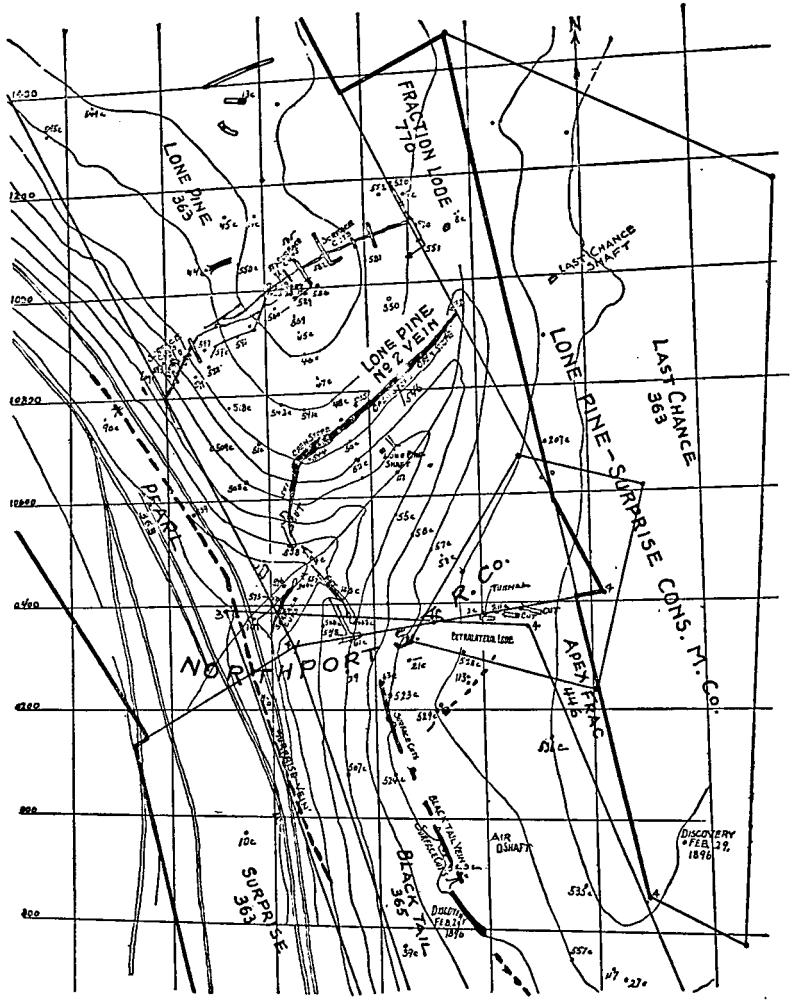
In Equity. Suit by the Northport Smelting & Refining Company against the Lone Pine-Surprise Consolidated Mines Company. Decree for defendant.

John P. Gray, of Cœur d'Alene, Idaho, and John H. Wourms, of Wallace, Idaho, for plaintiff.

William E. Colby, of San Francisco, Cal., and Fred S. Duggan, of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is a suit to quiet title, for an injunction, and for an accounting. The property involved is the segment of a vein or lode, bearing gold and silver, within the surface boundaries of the Last Chance lode mining claim in the Republic mining district. It appears from the bill of complaint that on the 28th day of February, 1896, the predecessor in interest of the plaintiff discovered a vein or lode bearing gold and silver and other valuable minerals and metals on vacant, unoccupied public land of the United States, in what is now Ferry county, in this state; that on the same day they located the Lone Pine quartz lode mining claim, by posting the usual notice at the point of discovery, and sunk a discovery shaft on the lode, disclosing a vein of quartz ore with one well-defined wall; that they immediately marked the location on the ground as required by law, and thereafter continued in the open, notorious, and uninterrupted possession thereof; that they made application for patent in 1897, final proof and payment February 8, 1898, and received a patent under date of March 2, 1899; that on the 19th day of July, 1916, the plaintiff succeeded to the right and title of the original locators, by mesne conveyances, and is now the owner of the claim, and of all veins, lodes, or ledges having their apices therein throughout their entire depth; that subsequent to the 29th day of February, 1896, the predecessors in interest of the defendant located the Last Chance lode mining claim, lying east of the Lone Pine claim, and received a patent therefor under date of March 2, 1899; that within the Lone Pine claim is a vein or lode of quartz bearing gold and silver and other valuable minerals and metals, known as the Blacktail vein; that the top or apex of the Blacktail vein crosses the southerly end line of the Lone Pine claim, and extends in a northerly and easterly direction through the claim, passing out of the east side line at a point 618 feet north of the southeast corner; that the course of the vein is easterly on its downward course, and the plaintiff is the owner of the vein throughout its entire depth between planes, drawn downward vertically, from the south end line and the point where the vein crosses the east side line; that the defendant claims an estate or interest therein, and through secret underground works has extracted ore therefrom to the value of $100,000.

The answer puts in issue the right and title of the plaintiff. The following rough sketch will illustrate, in a general way, the location of the different claims, and the course or strike of the different veins found therein:



The plaintiff contends that the vein designated on the plat as Lone Pine No. 2 is an extension or continuation of the Blacktail vein; that the Blacktail vein enters the south end line of the Lone Pine claim, and passes out through the easterly side line; that the downward course or dip of the vein is in an easterly direction; and that the plaintiff is therefore the owner of the vein or segment in dispute throughout its entire depth. The defendant, on the other hand, contends: First, that the discovery vein crosses both side lines of the Lone Pine claim; that the side lines, therefore, become the end lines, and that the end lines thus established remain the end lines for all purposes, and determine

the question of extralateral rights on all veins found within the surface boundaries; second, that Lone Pine vein No. 2 is not an extension or continuation of the Blacktail vein, and does not pass or cross beyond the south end line of the claim; third, conceding that the Blacktail vein crosses both the south end line and the east side line, the plaintiff is nevertheless attempting to pursue the vein on its course or strike, and not on its downward course or dip.

[1] It is well settled that the end lines fix the limits beyond which the locator may not go in the appropriation of any vein or veins along their course or strike, but within the meaning of this rule the end lines are not always those fixed or adopted by the locator. As said by the Supreme Court in Del Monte Mining Co. v. Last Chance Mining Co., 171 U. S. 55, 89, 18 Sup. Ct. 895, 908 (43 L. Ed. 72):

"Our conclusions may be summed up in these propositions: First, the location as made on the surface by the locator determines the extent of rights below the surface. Second, the end lines, as he marks them on the surface, with the single exception hereinafter noticed, place the limits beyond which he may not go in the appropriation of any vein or veins along their course or strike. Third, every vein 'the top or apex of which lies inside of such surface lines extended downward vertically' becomes his by virtue of his location, and he may pursue it to any depth beyond his vertical side lines, although in so doing he enters beneath the surface of some other proprietor. Fourth, the only exception to the rule that the end lines of the location as the locator places them establish the limits beyond which he may not go in the appropriation of a vein on its course or strike is where it is developed that in fact the location has been placed, not along, but across, the course of the vein. In such case the law declares that those which the locator called his side lines are his end lines, and those which he called end lines are in fact side lines, and this upon the proposition that it was the intent of Congress to give to the locator only so many feet of the length of the vein, that length to be bounded by the lines which the locator has established of his location."

Or, as said by Mr. Justice Miller, in his charge to the jury in Stevens v. Williams, 1 McCrary, 480, 490, Fed. Cas. No. 13,413:

"The plaintiff is not bound to lay his side lines perfectly parallel with the course or strike of the lode so as to cover it exactly. His location may be made one way or the other, and it may be so run that he crosses it the other way. In such event his end lines become his side lines, and he can only pursue it to his side lines vertically extended, as though they were his end lines; but if he happens to strike out diagonally as far as his side lines include the apex, so far he can pursue it laterally."

And in Walrath v. Champion Mining Co., 171 U. S. 293, 307, 18 Sup. Ct. 909, 915 (43 L. Ed. 170), after quoting the language of Mr. Justice Field in Iron Silver Mining Co. v. Elgin Mining Co., 118 U. S. 196, 198, 6 Sup. Ct. 1177 (30 L. Ed. 98), the court said:

"The court, however, did not mean that the end lines, called such by the locator, were the true end lines, but those which 'are crosswise of the general course of the vein on the surface.'"

It is equally well settled that end lines, once established, cannot thereafter be changed, or, as said by the Circuit Court of Appeals for this circuit in St. Louis Min. & Mill Co. v. Montana Min. Co., 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725:

"As to the first contention, it is a well-settled proposition that a mining claim can have but two end lines, and that, end lines having been once established, they become the end lines for all veins found within the surface boundaries."

[2] It was conceded at the trial, or at all events there is no controversy over the fact, that the strike of the discovery vein on the Lone Pine claim is substantially parallel to the end lines of the claim, and that the discovery vein passes out through and beyond both side lines. Under these facts, had the present controversy arisen under the act of 1866 (14 Stat. 251), extralateral rights would unquestionably be limited by the side lines, and not by the end lines, for under that act the grant was limited to the discovery vein or lode and was likewise limited by the surface boundaries. As said in Walrath v. Champion Mining Co. (C. C.) 63 Fed. 552, 556:

"The locators were only required to designate the lode in their notice of location. The lode was the principal thing. The surface ground was a mere incident thereto, for the convenient working thereof."

The act of 1872 (17 Stat. 91), carried into the Revised Statutes as section 2322 (Comp. St. § 4618), made certain changes in the act of 1866, and extended the grant to the exclusive right of possession and enjoyment in the locator of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of the surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of the surface location. But did this change in the law work any change in the existing rule as to end lines and side lines, or as to the mode or manner of their ascertainment? It would seem not. Thus, in Walrath v. Champion Mining Co. (C. C.) 63 Fed. 552, Judge Hawley said:

"The act of 1872, in granting all other veins that were within the surface lines of previous locations, did not create any new lines for such other veins, nor invest the court with any authority to make new end lines for such other veins; and it is apparent from an examination of the statute that the court has no power to make a new location for every vein that may be found within the surface lines of the location, and thereby enlarge the rights of the original locators. When the end lines of a mining location are once fixed, they bound the extralateral rights to all the lodes that are thereafter found within the surface lines of the location."

The decree in this case was modified in one unimportant particular by the Circuit Court of Appeals (72 Fed. 978, 19 C. C. A. 323), and affirmed by the Supreme Court of the United States (171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170), under the same title. This language of Judge Hawley was quoted with approval by Judge Gilbert in Montana Mining Co. v. St. Louis Min. & Mill Co., 102 Fed. 430, 42 C. C. A. 415. In that case the court said:

"It is earnestly contended that the complaint does not state a cause of action, for the reason that it appears therefrom that the vein which the defendant in error claims the right to pursue under the surface so conveyed to the plaintiff in error is not the discovery vein, and that there is no allegation that the discovery vein runs in any particular direction, or that its strike would intersect the end lines, or that it runs lengthwise of the claim, rather

than across, or that it dips in any given direction, and that for want of these allegations the complaint wholly fails to show a right in the defendant in error to pursue beyond its vertical side lines the vein from which the ores in controversy were taken."

The learned judge did not question the correctness of the proposition that extralateral rights on all veins within the surface boundaries are controlled by the course or strike of the discovery vein, but proceeded to show that the complaint contained the further distinct allegation that the defendant in error was the owner of the vein from which the ores in controversy were extracted, and therefore stated a cause of action and was sufficient to support the judgment.

In the leading case of Mining Co. v. Tarbet, 98 U. S. 463, 25 L. Ed. 253, after a reference to the act of 1866, Mr. Justice Bradley said:

"The act of 1872 (17 Stat. 91) is more explicit in its terms; but the intent is undoubtedly the same, as it respects end lines and side lines, and the right to follow the dip outside of the latter. We think that the intent of both statutes is that mining locations on lodes or veins shall be made thereon lengthwise, in the general direction of such veins or lodes on the surface of the earth where they are discoverable; that the end lines are to cross the lode and extend perpendicularly downwards, and to be continued in their own direction either way horizontally; and that the right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex on or near the surface. It was not the intent of the law to allow a person to make his location crosswise of a vein so that the side lines shall cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. That would subvert the whole system sought to be established by the law. If he does locate his claim in that way, his rights must be subordinated to the rights of those who have properly located on the lode. Their right to follow the dip outside of their side lines cannot be interfered with by him. His right to the lode only extends to so much of the lode as his claim covers. If he has located crosswise of the lode, and his claim is only 100 feet wide, that 100 feet is all he has a right to. This we consider to be the law as to locations on lodes or veins.

"The location of the plaintiff in error is thus laid across the Titus lode, that is to say, across the course of its apex at or near the surface; and the side lines of the location are really the end lines of the claim, considering the direction or course of the lode at the surface."

In Walrath v. Champion Mining Co., 171 U. S. 293, 18 Sup. Ct. 909, 43 L. Ed. 170, the Supreme Court said:

"Appellant's right upon the Contact vein is given by this statute. What limits this right extralaterally? The statute says vertical planes drawn downward through the end lines of the location. What end lines? Those of and as determined by the original location and lode, the Circuit Court of Appeals decided. Those determined by the direction of the newly discovered lodes, regardless whether they were originally intended as end lines or side lines, the appellant, as we have seen, contends. The Court of Appeals was right. Against the contention of the appellant the letter and spirit of the statute oppose, and against it the decisions of this court also oppose.

"The language of the statute is that the 'outside parts' of the veins or lodes 'shall be confined to such portions thereof as lie between vertical planes drawn downwards * * * through the end lines of their locations. * * *'"

Counsel for plaintiff call attention to the fact that there was in that case but one original vein and that the claim was located under the act of 1866. True, the claim was located under the act of 1866; but it is

equally true that the court was construing the act of 1872, for, after quoting section 3 of that act (Comp. St. § 4618), the court said:

"Appellant's right upon the Contact vein is given by this statute."

Furthermore, in an earlier part of the same opinion, the court quoted with approval the language of Mr. Justice Bradley in the Tarbet Case, to the effect that the intent of the two acts with reference to end lines and side lines is one and the same. In the same opinion the court makes use of the following language, upon which the plaintiff apparently places much reliance:

"These propositions we affirm, with the addition that the end lines of the original veins shall be the end lines of all the veins found within the surface boundaries."

It is argued that the court here had reference to original veins within the surface boundaries of a single claim, but this argument seems rather tenuous and far-fetched. If all veins within the surface boundaries had in fact the same end lines or side lines, or paralleled each other, no question could arise as to extralateral rights, because such rights would be the same, whether one or another vein was controlling. If, on the other hand, one vein crossed the side lines and another the end lines, as is the claim here, the statement would seem meaningless and contradictory, because the original veins could have no common side lines or end lines. The statement, however, follows the quotation of the summary of Mr. Justice Brewer in the Del Monte Case, and, inasmuch as the learned judge there referred throughout to a single vein or lode, I am of opinion that the statement was added for the purpose of making clear the proposition that extralateral rights on all veins are controlled by the same set of end lines.

The terms "principal," "original," "primary," "secondary," "accidental," and "incidental" have all been employed at different times to describe the different veins found within the same surface boundaries, but their meaning is not entirely clear in all cases. They may refer to the relative importance or value of the different veins, or to their relations to each other; they may refer to the time of discovery; or they may well be used to distinguish between the discovery vein and other veins within the same surface boundaries, and beyond question they are most frequently used in this latter sense. Thus, in an earlier part of the opinion in the Walrath Case, the Supreme Court refers to "the original location or lode," and in a later part to the strike or dip of "the original vein." In the first instance, the court seems without doubt to refer to the discovery vein because it speaks of "the original location or lode," and there is nothing in the context to indicate that the word was used in any different sense in other parts of the same opinion.

But the chief reliance of the plaintiff is the decision of the District Court in Clark-Montana R. Co. v. Butte & Superior Copper Co., 233 Fed. 547. It appears from the map or plat found in the opinion in that case that the Jersey Blue vein crosses the west end line of the Blackrock claim, and that the Rainbow, or discovery, vein crosses both side lines of the same claim. The court held that extralateral rights were

controlled by the course or strike of the Jersey Blue vein, rather than by the course or strike of the discovery vein, merely saying:

"Neither the Jersey Blue nor the Rainbow is a secondary vein. Both are primary. The Jersey Blue overlaps the Rainbow. Extralateral rights based on it extend east beyond where the like rights based on the Rainbow begin. Indeed, taking the course of the Jersey Blue, where fixed by plaintiff south of the Rainbow, it is probable it crosses the Blackrock south side line east of the Elm Orlu east end line. That the Rainbow crosses both side lines is not controlling. There can be but one set of end lines, and, if the located end lines fix extralateral rights upon one vein, as they do upon the Jersey Blue, they fix them upon all veins."

Ordinarily, I would feel constrained to defer to the superior knowledge and experience of the learned judge who wrote that opinion, in matters of this kind; but, if the question here involved was at all decisive of the rights of the parties in that case, I confess I cannot understand why it should receive such scant consideration at the hands of the court in a well-considered opinion, or why the question was not even referred to by either of the appellate courts to which the case was carried. 248 Fed. 609, 160 C. C. A. 509, 249 U. S. 12, 39 Sup. Ct. 231, 63 L. Ed. 447, where the title of the case is reversed. The decision itself is out of harmony with the language of the courts in the many extralateral right cases decided during the last half century. In all of these cases it seems to have been taken for granted, if not decided, that the principal effect of the act of 1872 was to extend the grant, so as to include all veins or lodes having their top or apex within the surface boundaries, but with the same end lines, the same side lines, and the same extralateral rights as properly appertain to the discovery vein, which forms the basis of the location and patent.

Counsel for plaintiff concede that the course or strike of other veins have no controlling effect, unless their presence was known at the time of location; but the testimony in this case amply demonstrates the danger of making valuable property rights dependent upon what was known or unknown a quarter of a century ago. Furthermore, there was no known vein extending lengthwise of the Lone Pine claim at the time of location, or even at the time of patent. There was nothing on the surface to indicate that the Blacktail vein extended that far to the north, and while vein No. 2 was, perhaps, known at the time of discovery, and was certainly known very soon thereafter, yet that vein, so far as then known, extended crosswise of the claim, and there was not even a suspicion until years afterwards that it turned abruptly to the south, almost at right angles, and crossed the south end line, if, indeed, that fact can be said to be established at this time. If the contention of the plaintiff is correct, the discovery vein on the Lone Pine claim has no extralateral rights. It could not be pursued along the strike or course of the vein beyond the east side line, nor could it be pursued beyond the end lines proper. Yet, had the discovery vein dipped and extended beyond the north end line of the claim, I fail to see how the right of the owner of the claim to pursue the vein on its downward course or dip beyond the end line could be defeated, except by some person showing a prior right. If this is true, why should side

lines or end lines now depend upon the fortuitous circumstance that it has recently been discovered that vein No. 2 in fact crosses the south end line. The locators of the Last Chance claim knew that the discovery vein on the Lone Pine crossed the side lines, and they had a right to assume, therefore, that no extralateral rights would ever be asserted in that direction.

These views seem in entire harmony with all law writers on the subject. Thus, in discussing the different classes of veins within the same surface boundaries, Judge Lindley says:

"One thing seems quite certain: The law, as at present construed, may compel the inquiry, where two veins are found to exist within a claim, as to which one was discovered first—that is, which vein was the basis of the location—and there exists to this extent a distinction between the two classes of veins." Lindley on Mines (3d Ed.) § 594.

Commenting on this statement in the Harvard Law Review, Mr. Henry Arnold says:

"In other words, where two veins are found to apex within the surface territory of one location, no distinction is to be drawn between them, but both are to be treated as of equal dignity—unless a question arises as to some point concerning, or dependent on, the drawing or character of the boundaries of the location, in which event, but in which event only, inquiry as to which is the discovery vein (that is, as to which vein served as the basis of location) becomes of moment." 22 Harvard Law Review, 278.

"Extralateral rights on secondary (incidental) veins—that is, on veins other than the discovery (original or principal) vein—are determined with reference to those lines, which for the discovery (original or principal) vein's extralateral rights are the end lines of the claim." Costigan on Mining Law, p. 440.

"There can be but one set of end lines for all the veins covered by the patent, and where departure from one or both side lines renders it material, only the discovery vein can be used to determine what are the planes of the end lines." Morrison's Mining Rights (15th Ed.) p. 215.

The doctrine of extralateral rights has been the subject of more or less criticism in the past. All the authorities agree that side lines and end lines do not depend on the mere act of the locator, and if it is now held that they do not depend on the course or strike of the discovery vein, another element of uncertainty is introduced, and the administration of the mining laws will become still more vexatious and difficult.

If I am correct in these conclusions, the plaintiff can assert no extralateral rights beyond the east side line of the Lone Pine claim, and it becomes unnecessary to discuss or consider the debatable questions whether a connection between vein No. 2 and the Blacktail vein has been established with the degree of certainty required by law, or whether the plaintiff is seeking to follow or pursue the vein on its course or strike, rather than its downward course or dip. I reach this conclusion with the less hesitation because it leaves both parties in the full possession and enjoyment of all rights claimed by them and their predecessors in interest for more than 20 years after the location of their respective claims.

For the reason stated, the bill of complaint should be dismissed; and it is so ordered. Let a decree be entered accordingly.

COALMONT MOSHANNON COAL CO. v. MATTHEW ADDY STEAMSHIP & COMMERCE CORPORATION, Inc., et al.

(District Court, E. D. Virginia. January 1, 1921.)

Removal of causes ⇐26—Suit between nonresidents of district is removable only with plaintiff's consent.

Under Jun. Code, § 29 (Comp. St. § 1011), authorizing removal to the District Court for the proper district of suits which could have been originally brought in the United States District Court, a suit in which both plaintiff and defendant were nonresidents of the state in which the suit was brought and of the district cannot be removed to United States District Court by the defendant without the consent of the plaintiff.

At Law. Action by the Coalmont Moshannon Coal Company against the Matthew Addy Steamship & Commerce Corporation, Incorporated, and others, begun in the state court, and removed by the named defendant to the United States District Court. On motion to remand to the state court. Motion granted.

Swink & Fentress, of Norfolk, Va., for plaintiff.

Cramer & Schmuck, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for defendant petitioner for removal.

WADDILL, District Judge. The above-named plaintiff duly instituted its attachment proceeding under a recent statute of the state of Virginia (Code, 1919, § 6383) in the circuit court of Norfolk city, and caused to be sued out of said court certain attachments against property alleged to belong to the principal defendant, in the hands of the codefendants, the railroads and coal exchanges, which attachments were properly served as required by the laws of the state of Virginia. Both the plaintiff and the principal defendant are nonresident corporations of the state of Virginia, the plaintiff having its principal office in the city of Philadelphia, and the principal defendant its principal office in the city of New York. Upon service of the attachment as aforesaid, the principal defendant, by appropriate proceeding, filed in the state court its petition praying the removal of the proceeding into the United States District Court for the Eastern District of Virginia, and the same was by the state court removed into this court. Thereupon the plaintiff appeared specially in this court, and moved to remand the case to the state court, from whence it had been removed, the grounds alleged therefor being especially that, inasmuch as both the plaintiff and principal defendant were nonresidents of the Eastern District of Virginia, assuming the case to be one which might have been originally brought in the federal court, the same could not be so removed, save with the consent of the plaintiff, which consent the plaintiff declined to give, and, on the contrary, asserted its right to have the proceeding remain in the state court.

Sections 24, 28, 29, and 51 of the Judicial Code, 36 Stat. L. 1087 (Comp. St. §§ 991, 1010, 1011, 1033), regulate and control the jurisdiction of the United States District Courts in suits like the one at bar. Sections 24 and 51 deal with original jurisdiction. The former

defines the character of suits, and the latter indicate the districts in which they may be brought. Section 28 authorizes removal to the District Court "for the proper district" of suits brought in the state court, and which could have originally been brought in the United States District Court. Section 29 provides for the removal of such suits "into the District Court to be held in the district in which such suit is pending."

Much confusion has arisen in the interpretation of the removal statutes, especially in construing that part of the act which in effect limits the right of removal to such cases as might have been originally brought in the federal court; the beclouding of the question arising chiefly from confounding venue with jurisdiction, venue being something which can be waived by the parties, whereas jurisdiction cannot be. In an ordinary civil action instituted in a circuit court to recover judgment on a claim like the one in suit, it is conceded that the federal court of the district would have jurisdiction of such case, if instituted in a federal court, upon the defendant appearing therein, and hence that the same was a suit of which that court would have had original jurisdiction, such as is contemplated by the removal statutes, upon the removal being timely and appropriately asked for. But the plaintiff insists that, while this is true of such a case if brought within the district of the plaintiff's residence, still, where brought, as here, in a district in which neither the plaintiff nor the defendant resides, the defendant's right of removal is limited, and cannot be had without the plaintiff's assent thereto. This is the sole question to be determined in this case. If the plaintiff is right in its contention, its motion to remand should be granted; otherwise, the same should be overruled.

In Hughes, Fed. Pro. (2d Ed.) c. 15, § 115, p. 321, the author says:

"As to suits brought in a state court in a district where neither plaintiff nor defendant resided, the earlier decisions preponderated in favor of the doctrine that the defendant could remove such a case, on the theory that the defendant alone was interested in the place of suit; but later cases have established the doctrine that such a case is not removable by defendant without the consent or waiver of the question by plaintiff"

—and cites in support of his position In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264; In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1164; Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392; Puget Sound Sheet Metal Works v. Great Northern R. R. (D. C.) 195 Fed. 350. Other and more recent decisions apparently take the same view as those cited, of which the following may be referred to: Doherty v. Smith (D. C.) 233 Fed. 132; Pendar v. Empire Gas & Fuel Co. (D. C.) 260 Fed. 669; Isaac Kubie Co. v. Lehigh Valley R. R. Co. (D. C.) 261 Fed. 806; Kansas Gas & Electric Co. v. Wichita Natural Gas Co. (C. C. A. 8th Cir.) 266 Fed. 614; Ex parte Park Square Automobile Co., 244 U. S. 412, 37 Sup. Ct. 732, 61 L. Ed. 1368. See, also, Hall v. Great Northern R. R. Co. (D. C.) 197 Fed. 488, and Jackson v. Kenefick (D. C.) 233 Fed. 130. The last two cases, while dealing with the general subject, involve also the

right of an alien to remove. Also George v. Tennessee Coal & Iron Co. (C. C.) 184 Fed. 951, a decision of Judge Newman, of Georgia, which involved a removal in an attachment case.

These decisions generally sustain the plaintiff's right to remand, and while, covering the same period as these, there have been several cases taking the contrary view, citation of them will not be made, further than to refer to the case of Louisville & Nashville R. R. v. Western Union Telegraph Co. (D. C.) 218 Fed. 91, an opinion of Judge Cochran, of Kentucky, which contains an exceedingly able and forceful discussion of the subject, the reasoning of which is hard to successfully answer. Much confusion of thought on the question has arisen since and apparently as a result of the decision in In re Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, where the Supreme Court held that a suit instituted in a state court between a nonresident plaintiff and a nonresident defendant could not be removed into the federal court, certainly without the consent of the plaintiff; and likewise the court held that the remedy by mandamus was the proper one to effect the remanding of the case. In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 52 L. Ed. 904, 14 Ann. Cas. 1764, apparently modified the Wisner Case, in so far as it held that the defendant could not waive the right to be sued by a nonresident plaintiff in a particular district concerning a matter of which the court had jurisdiction; but the Moore Case was unlike the Wisner Case, in that the plaintiff there waived his right to object to the removal by appearing in the federal court. In Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, the Supreme Court reviewed the Wisner Case at great length, as it did also in Ex parte Park Square Automobile Co., 244 U. S. 412, 37 Sup. Ct. 732, 61 L. Ed. 1368; but in both of these decisions the court dealt mainly with the portion of the Wisner Case that held that mandamus was the proper remedy in case of a federal court's refusal to remand, and modified the case in that respect. In neither of these cases nor in the Moore Case was there any disapproval of that portion of the Wisner Case which held, in effect, that there could be no removal from a state to a federal court, where both plaintiff and defendant were nonresidents of the state in which the suit was instituted, save with the plaintiff's consent.

There is much force in the reasoning in favor of the defendant's right of removal, under circumstances like the present, and confessedly much strength in the contention, as to deny the right of removal to a defendant in all cases in which his property may be attached in a foreign jurisdiction, save where the taking happens to be in a suit brought in the district of the residence of the plaintiff, seems incongruous, and in derogation of his right of removal, and might operate greatly to his prejudice in the local courts of a community hostile to him. This condition as to prejudice, however, has no application here. Every right to which the defendant is entitled will be as safely assured to him in the state court as in this court, and the court does not feel, in the light of this weight of authority, that it should be affected by any preconceived views it may have on the subject, particularly as the Supreme Court has three times reviewed at considerable length the

Wisner Case, and expressed no dissent to the portion thereof which would deny the right of removal in this case. The court is further influenced in its action by the fact that this proceeding is a somewhat novel one, in that it is a simple attachment instituted under a new Virginia statute, not an attachment sued out in and as incident to a suit, as heretofore prevailing in the commonwealth, but a legal proceeding consisting only of the attachment, and since original jurisdiction cannot be acquired by attachment in the federal court (Hughes, Fed. Pro. [2d Ed.] § 106, p. 275; Big Vein Coal Co. v. Read, 229 U. S. 31, 33 Sup. Ct. 694, 57 L. Ed. 1053), the character of this proceeding may give force to the suggestion that the same in no event could have been inaugurated in the federal court, and hence it cannot be removed thereto.

The motion to remand will be granted.

NEWBERRY v. CENTRAL OF GEORGIA RY. CO.

(District Court, M. D. Alabama, E. D. February 17, 1921.)

No. 10.

1. **Removal of causes ⇐118—Amendment changing issues held not allowable after removal.**
   Where an action by an employé against a railroad company, brought in a state court, was removed into a federal court and there tried, plaintiff *held* not entitled, after conclusion of the evidence, to amend the complaint by alleging for the first time a cause of action under federal Employers' Liability Act, § 1 (Comp. St. § 8657), which, if alleged in the original complaint, would have prevented removal under section 6 of the act as amended (Comp. St. § 8662).

2. **Limitation of actions ⇐127(14)—Cause of action barred cannot be introduced by amendment.**
   Allegations necessary to state a cause of action under Employers' Liability Act, § 1 (Comp. St. § 8657), cannot be introduced into a complaint by amendment more than two years after the cause of action arose, and after an action thereunder is barred by section 6 of the act (Comp. St. § 8662).

3. **Pleading ⇐236(4)—Allowance of amendment discretionary.**
   Refusal to allow an amendment of the complaint introducing a new cause of action, after the evidence in the case had been concluded, *held* within the discretion of the court.

4. **Master and servant ⇐217(13)—Risk of unsanitary place assumed.**
   A plaintiff who accepted employment as railroad telegraph operator in a box car office, knowing that the place was leaky, cold, and wet, *held* to have assumed the risk from such exposure.

At Law. Action by M. J. Newberry against the Central of Georgia Railway Company. On motions by plaintiff to set aside verdict and for a new trial. Denied.

W. Moody, of Tuscaloosa, Ala., and Smith & Watkins, of Opelika, Ala., for plaintiff.

Barnes & Walker, of Opelika, Ala., for defendant.

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

CLAYTON, District Judge. This action was brought in the state court and was removed to this court on the ground of diverse citizenship. There were six counts in the original complaint, some asserting a common-law cause of action for negligence and the others a case under the Alabama Employers' Liability Act (Code 1907, § 3910).

No facts were pleaded to show that the plaintiff, the employee of the railroad, was injured while engaged in interstate commerce, or that he was in the service of a railroad engaged in such commerce; on the contrary, the facts pleaded referred exclusively to the common-law right of action and to the right of action under the state Employers' Liability Act. In seasonable time the cause was removed into this court. After more than two years had elapsed from the date of the alleged injury, and on the day of the trial, the plaintiff amended his complaint by adding six additional counts, setting forth a cause of action under the state Employers' Liability Act only. The defendant pleaded the general issue, with leave to give in evidence any matter of special defense in accordance with the Alabama practice.

After all the evidence had been introduced for the plaintiff and the defendant, and when the court was about to charge the jury, the plaintiff offered to amend the complaint by adding two counts, in substance the same, alleging facts that the plaintiff was engaged in interstate commerce at the time of injury on a railroad engaged in such commerce between Columbus, Ga., and Birmingham, Ala., and in proper form prayed judgment under the federal Employers' Liability Act (Comp. St. §§ 8657–8665). The facts of such situation were fully and formally pleaded in the amendment offered.

Upon objection by the defendant the court refused to allow this last amendment upon the ground: (1) That if this cause had been originally brought under the federal Employers' Liability Act it could not have been, under the terms of such act, removed to the federal court, and hence it cannot now be converted into a new and a non-transferable cause of action; (2) the amendment sets forth a new cause of action which is barred by the statute of limitation of two years under the federal Employers' Liability Act, § 6 (Comp. St. § 8662); and (3) under no aspect of the case was the plaintiff entitled to a recovery, for the evidence showed that the plaintiff assumed a risk in working in a leaking, wet, and cold box car telegraph office, knowing the situation and realizing its dangers.

[1] 1. Section 1 of the Employers' Liability Act of April 22, 1908 (Comp. St. § 8657), provides that:

"Every common carrier by railroad while engaged in commerce between any of the several states * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce."

And as amended April 5, 1910, it stipulates that:

"Under this act an action may be brought in [any] court of the United States, * * *" and that "the jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States." U. S. Comp. St. § 8662.

If the amendment disallowed had been a part of the original complaint filed in this case in the state court, this cause would not have been removable to the federal court. This is so obviously true that citation of adjudged cases is hardly necessary. McChesney v. Ill. Cent. R. Co. (D. C.) 197 Fed. 85; Kelly's Adm'x v. C. & O. Ry Co. (D. C.) 201 Fed. 602; K. C. So. Ry. Co. v. Leslie, 238 U. S. 599, 35 Sup. Ct. 844, 59 L. Ed. 1478.

[2] 2. The amendment disallowed was a departure from the original cause of action, for it alleged appropriate facts and sought recovery under the federal Employers' Liability Act. It would have introduced a new cause of action—one under the federal statute. It is settled that a departure in pleading may be either in the substance of the action or defense or the law upon which it is founded. U. P. Ry. v. Wyler, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983. And while ordinarily a new cause of action may be introduced by amendment, the established limitation on the operation of its relation to the commencement of the suit is that if the amendment introduces new matter or a different cause of action not within the lis pendens as to which the statute of limitations has operated a bar at the time of making the amendment, the statute of limitations is as available as if the amendment were a new and independent suit. Mohr v. Lemle, 69 Ala. 180, and A. G. S. R. R. Co. v. Smith, 81 Ala. 229, 1 South. 723, cited with approval in U. P. Ry. v. Wyler, supra.

3. Section 6 of the federal Employers' Liability Act provides that:

"No action shall be maintained under this act unless commenced within two years from the day the cause of action accrued."

More than two years had elapsed before the rejected amendment to the complaint was offered. Manifestly this limitation of two years applies here, where the complaint made in the state court alleged no facts to bring the case within the purview of the federal Employers' Liability Act, and more than two years had elapsed after the cause of action arose and before the amendment was offered. In Walker v. Iowa Cent. Ry. Co. (D. C.) 241 Fed. 395, the law is well stated on page 400, and numerous supporting authorities are cited.

[3] 4. Moreover, the refusal to allow the amendment was a matter of discretion with the court, and is not reviewable unless there has been a manifest abuse of such discretion. Thomsen v. Cayser, 243 U. S. 66, 37 Sup. Ct. 353, 61 L. Ed. 597, Ann. Cas. 1917D, 322; note No. 18 to section 1591 (R. S. § 954) of U. S. Comp. Stat. 1916, vol. 3, p. 3184. This discretion was not abused, in view of the fact that this amendment was submitted after all the evidence for the plaintiff and the defendant had been introduced, the case to that extent closed, and the court was about to charge the jury. Chapman v. Barney, 129 U. S. 677, 681, 9 Sup. Ct. 426, 32 L. Ed. 800.

[4] 5. In addition to what has been said, the evidence in the case left no reasonable doubt of the fact that the plaintiff assumed the risk of working in a box car telegraph office, knowing the situation and realizing the danger; that is, that the place was cold and wet, that the roof was leaking, etc. Breen v. Iowa Cent. Ry. Co., 184 Iowa, 1200,

168 N. W. 901, certiorari to which was denied in the memorandum opinion in 249 U. S. 604, 39 Sup. Ct. 288, 63 L. Ed. 798; Seaboard Air Line Ry. Co. v. Horton, 233 U. S. 492, 34 Sup. Ct. 635, 58 L. Ed. 1062, L. R. A. 1915C, 1, Ann. Cas. 1915B, 475; American Car & F. Co. v. Allen (C. C. A.) 264 Fed. 647; Mullin v. L. & N. R. Co. (C. C. A.) 261 Fed. 156; So. Ry. Co. v. Peters, 194 Ala. 94, 69 South. 611, and other cases cited in footnote "Assumption of Risk in General," page 9428, 8 U. S. Comp. Stat. 1916.

The instructions of the court to the jury and the verdict were in accord with the foregoing views. An order, therefore, will be entered overruling the motion to set aside the verdict and judgment.

UNITED STATES v. MARQUETTE et al.

(District Court, N. D. California, First Division. September 15, 1920.)

No. 8129.

Intoxicating liquors ⊂=257—Unlawful search and seizure.

Seizure of liquor from a private residence prior to the taking effect of Const. Amend. 18, on a search made without a warrant by officers armed with shotguns and pistols, although there was "invitation to enter and consent to the seizure," *held* unlawful, and the owner of the liquor *held* entitled to its return.

Criminal prosecution by the United States against Edward John Marquette and others. On petition of W. W. Powers for return of certain liquors. Granted.

Edward F. Jared, of San Francisco, Cal., for petitioner.
Frank M. Silva, U. S. Atty., of San Francisco, Cal.

DOOLING, District Judge. The petition of W. W. Powers avers that he is the owner of certain liquors, purchased by him before July 1, 1919, and located in San Francisco; that on January 8, 1920, with the consent of one V. W. Sloan, he placed the said liquors in the home of said Sloan for safe-keeping; that on January 9, 1920, certain officers of the government entered into the home of said Sloan, armed with shotguns and pistols, and without warrant or authority so to do seized and carried away the said liquors, and are now holding them to be used as evidence against petitioner upon the trial of an indictment against him for an alleged violation of section 37 of the Criminal Code (Comp. St. § 10201). The petitioner further avers that such seizure was in violation of his rights under the Fourth and Fifth Amendments to the Constitution, and prays for an order that the property so seized be returned to him.

On this petition an order to show cause was issued. The return to such order denies the present ownership of the liquor by petitioner, though it avers a purchase of the same by him prior to July 1, 1919, and sets up certain proceedings had in this court against him upon an indictment charging him with a conspiracy to violate the Reed Amend-

ment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a) in connection with said liquor. It avers that the liquor was first seized to be held as evidence in the prosecution of such indictment; that petitioner pleaded guilty to such indictment; that the liquor was then turned over to him upon condition that he export it to Victoria, B. C. Why such condition was exacted, or by what authority, is not clear, but it is averred that in violation of such condition he sold it to one Marquette, and Marquette was transporting it to the home of a Mrs. Hayes, and not of Sloan, when said Marquette and one Willy were arrested for a conspiracy to violate the War-Time Prohibition Act (Comp. St. Ann. Supp. 1919, §§ 3115¹¹/₁₂f–3115¹¹/₁₂h); the violation charged being a conspiracy to make the sale from Powers to Marquette.

In this indictment Sloan and Powers are included as defendants, and the liquor is now held to be used as evidence against them. The liquor was not seized at the time of the arrest. According to the return, however, an officer was later invited into the home by Sloan and Mrs. Hayes, was shown the liquor by said Sloan, placed a government seal on the door of the room containing it, and put a keeper in charge. Later the liquor was taken by officers of the government in the presence of Sloan and Mrs. Hayes, and by and with their consent, and without objection on their part, from said premises, and this is the seizure complained of. To the averment in the petition that the officers "entered the home of defendant Sloan armed with shotguns and pistols unlawfully," the return denies:

> "That certain or any officers of the government entered the alleged or any home of defendant Sloan armed with shotguns or pistols or any firearms whatever without authority so to do."

Upon the hearing petitioner moved on the pleadings for an order for the return of the property so seized. It is to be noted that there is no denial that the officers entered the home armed with shotguns and pistols; the denial is that they entered it "without authority so to do." It is conceded that they had no search warrant; it is also conceded that they did not seize or attempt to seize the liquor at the time of the arrest of defendants Marquette and Willy; so that I take it from the pleadings their "authority" to enter this private home, whether it be the home of Mrs. Hayes or of the defendant Sloan, was the invitation of Sloan and Mrs. Hayes. The court stated at the hearing that an invitation to enter one's home, given by the occupant thereof to officers who come there demanding admission, and armed with shotguns and pistols, would be regarded, upon any controversy later arising between the owner of the premises and the officers, as an invitation secured by force. I see no reason to change my views.

All this occurred before the Eighteenth Amendment to the Constitution became effective, and while there was no inhibition upon the transportation of liquor. If the liquor were taken unlawfully, the court will not try the issue as to the ownership in this proceeding. Nor is it very material to ascertain whether the place from which the liquor was taken was the residence of Mrs. Hayes, or of the

defendant Sloan, or of both. The liquor was in a private home, where liquor might lawfully be, and could not be taken therefrom without a warrant, except upon consent of the occupants of the home, voluntarily given. A consent accorded to a show of arms, even though no open objection be made, will not be regarded as voluntary. The outlawing of liquor by the Eighteenth Amendment did not abrogate either the Fourth or Fifth Amendment to the Constitution, and the zeal of the enforcement officers in pursuing this recent outlaw cannot be permitted to carry them without warrant across the threshold of the home.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized."

Such is the language of the Fourth Amendment. The protection thus afforded can only be insured by the courts. Every case arising must, of course, be determined upon the facts of that particular case; and where, as here, the record shows an invitation to enter, but also shows the presence of shotguns and pistols, I cannot disassociate the one from the other. As there was no warrant either to search the premises or seize the liquor, and as the only justification pleaded is that of "invitation to enter, and consent to the seizure," under the circumstances recited, I am of the opinion that the motion for an order for the return of the property should be granted upon the pleadings.

It is therefore ordered that the liquor so seized as aforesaid be returned to the petitioner.

MEDUSA CONCRETE WATERPROOFING CO. v. CERESIT WATERPROOFING CO. et al.

(District Court, N. D. Illinois, E. D. June 28, 1920.)

No. 483.

1. **Patents ⇐36—Laboratory tests cannot overcome practical use of product.**
   Evidence of laboratory tests, showing that the patented process and product did not effect the desired result, or testimony of experts to that effect, cannot outweigh the test of practical use.

2. **Patents ⇐328—851,247, for waterproofing Portland cement, held valid and infringed.**
   The Newberry patent, No. 851,247, for waterproofing Portland cement by mixing therewith an insoluble salt of a fatty acid and no glycerine or other like water-attractile substance, *held* valid in the light of its practical use, and infringed by a process using a similar substance in a paste form, whereas in the patented process it was generally used in a powdered form, though it originally was a paste and could be made so again.

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

In Equity. Suit for the infringement of a patent by the Medusa Concrete Waterproofing Company against the Ceresit Waterproofing Company and others. Decree rendered for plaintiff.

Parker & Carter, of Chicago, Ill., for plaintiff.

Rector, Hibben, Davis & Macauley and Jones, Addington, Ames & Seibold, all of Chicago, Ill., for defendants.

CARPENTER, District Judge. This suit involves Newberry patent, No. 851,247, granted April 23, 1907, for waterproofing Portland cement, and process for making the same. That patent was the disturbative feature in McCormick Waterproofing Portland Cement Co. et al. v. Medusa Concrete Waterproofing Co., 222 Fed. 288, 138 C. C. A. 14, where the Court of Appeals for the Seventh Circuit sustained a decree of the trial court holding it to be valid and infringed. In that case the court found that for 40 years those skilled in the art had been aiming to overcome the attraction which concrete had for water. The capillarity of cement construction had been well known, and until Newberry came into the field, nobody had offered anything like a practical solution of the difficulty. As the Court of Appeals said:

"This solution of the problem was not a haphazard achievement."

The instant case introduces, to be sure, another defendant, not bound primarily by the result in the McCormick Case. It has been very ably argued, and a serious attempt made to show that the record is new and demands a different decision. I have examined with great care the record in the McCormick Case. In the present case the new features may be noted as: (a) A different expert; (b) two or three additional citations from the old art; (c) laboratory tests, from which the makers determined that the Newberry process had no practical value.

The new expert, Dr. Gudeman, told a variant of the old story in the McCormick Case, offering no convincing basis for denying the validity of the patent. The torches in the procession of the prior art, as shown in the former case, were dim, and no new light has been shed from the citations, 30 or 40 years old, relied upon by the defendants in this case.

[1, 2] Laboratory tests cannot turn the balance in the scale against practical use. The testimony of experts that a device will not work is of no value, if it does work. In the light of the practical use of plaintiff's process, and its increasing growth, I must assume that Newberry discovered something worth while.

Most of the defendants' argument is based upon a reanalysis of the Sylvester process, which was quite disposed of by the Court of Appeals in the McCormick Case. The patent will be held valid.

As to infringement: Plaintiff's patent tells us to use an insoluble salt of a fatty acid and no glycerine or other like water-attractile substance, and it is mixed in small percentage with the cement. The defendant claims that, because his product is in a paste, it does not come within the claims of the plaintiff's patent. Newberry recommends the drying of the product, although in the process of manu-

facture it is first in the wet or pasty shape of the defendants' product. The Newberry patent says:

"The resultant stearate of lime is to be dried, so that it is in the form of a dry powder."

Newberry testified that the Medusa product was made and sold both in the paste and the powdered form, but—

"that the demand for it in the powdered form greatly exceeds the demand for it in the paste form, because it is more convenient to mix with the cement and other materials when in the form of powder."

The expert Miner testified that the Newberry compound can easily be converted into a paste, the condition in which it was previous to the drying out, as recommended in the patent. As the record shows:

"The only difference between the plaintiff's and defendants' product is the manner of mixing the compound with the cement on the job; the Medusa powder being mixed with the dry material and the water added to that mixture, whereas the Ceresit is mixed with the water and in that form added to the dry material."

The defendants' product is mixed integrally with the concrete; it is an insoluble lime salt of a fatty acid or water-repellant material; it is used in minute quantities, and is free from glycerine and other like water-attractile substances; it is used for the same purpose, and operates in exactly the same way. The infringement is clear.

A decree may be prepared, finding the patent valid and infringed, and the usual reference to the master for an accounting.

PFEFFER et al. v. WESTERN DOLL MFG. CO. et al.

(District Court, N. D. Illinois, E. D. November 1, 1920.)

No. 1228.

1. **Patents ⟸328—51,559 for design for bathing doll, held invalid for want of invention.**
   The Pfeffer design patent, No. 51,559, for a bathing doll, which consisted of decorating a plaster of paris doll of known design with ordinary one-piece bathing costume, *held* invalid for want of invention.
2. **Patents ⟸17—Invention involves doing what ordinary person skilled in art could not do.**
   Doing what has not been done before is not necessarily invention, but that which is done must be something which the ordinary person skilled in the art would not know how to do, if occasion for it arose.
3. **Patents ⟸28—Novelty, without invention, does not sustain design patent.**
   A design is not patentable merely because it creates a pleasing impression on the eye, or is novel or salable; but it must also have invention, which requires more than the mere adaptation of old forms and designs to new purposes.

In Equity. Suit for infringement of a patent by Genevieve Pfeffer and another against the Western Doll Manufacturing Company and others. Bill dismissed.

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

Frank F. Reed and Edward S. Rogers, of Chicago, Ill., for plaintiffs.
Luther Johns, of Chicago, Ill., for defendants.

CARPENTER, District Judge. On September 24, 1917, plaintiff made application for a design patent, and letters patent No. 51,559 were issued to her. Her invention consists in decorating a plaster of paris doll, known as a "pensive kewpie" (Rose O'Neill Wilson design patent No. 44,393, of July 23, 1913), and thereby converting it into a bathing doll, known as a "Splashme doll."

[1] No new or novel costume or features are painted on the doll; the eyes are the type commonly called the "baby doll" eye, well known in the illustrations and drawings of Nell Brinkley; the hair is in a style then in vogue; the costume is a one-piece bathing suit, seen very generally at all beaches, and extensively advertised by enterprising reporters for the daily press. No invention was required for this arrangement. It is simply the act of painting a costume on a doll, and the painting of costumes on dolls is old. This appears from the record, and is also a matter of common knowledge.

[2] One has not necessarily made an invention because he has done what has not been done before. He must do something which the ordinary person skilled in the art would not know how to do, if occasion for it arose. If any artist or workman were directed to paint on a kewpie doll a one-piece bathing suit, cap, "baby doll" eyes, and spit curls, the Splashme doll of the plaintiff is the type of doll he would produce.

[3] It is not enough that the design create a pleasing impression on the eye, or that it is novel or salable; it must also have invention. In this case no new species or variety of doll was created; not even were old parts combined in a new way; each element was put where it naturally belonged, in conformity with everyday practice of dressing. It was merely the selection of a bathing suit for the doll, and was not a creative act. All of the witnesses seem to agree that the work required skill rather than original conception.

"The mere adaptation of old devices, forms, or designs to new purposes of ornamentation, however exquisite the result, will not sustain a patent." Cahoone v. Rubber & Celluloid Harness Co. et al. (C. C.) 45 Fed. 582.

"The adaptation of old devices or forms to new purposes, however convenient, useful, or beautiful they may be in their new role, is not invention." Smith v. Whitman Saddle Co., 148 U. S. 674, 13 Sup. Ct. 768, 37 L. Ed. 606.

If this patent is valid, the patentee could paint dolls with all costumes known at the present date, and exclude the world from doing the same.

Exceptions to the master's report will be sustained, and the bill dismissed for want of equity.

SHARP v. GAMAGE.

(Court of Appeals of District of Columbia. Submitted January 12, 1921. Decided February 7, 1921.)

No. 1375.

Patents ⊜106(2)—Senior application held not to disclose four counts of issue.

The application of the senior party for a patent for dust guards for axle boxes, which showed the lower edge of the guard square, *held* not to meet the issues of four counts calling for the lower edge with semicircular outline, so that priority as to those counts was properly awarded to the junior applicant.

Appeal from the Commissioner of Patents.

Interference proceeding between John H. Sharp and Harry C. Gamage. From a decision of the Commissioner of Patents awarding four of the counts to Gamage, Sharp appeals. Affirmed.

Joseph H. Milans, of Washington, D. C., for appellant.

Lewis J. Doolittle, of New York City, for appellee.

VAN ORSDEL, Associate Justice. This is an interference proceeding involving an invention relating to dust guards for car axle boxes. The applications of both parties disclose a resilient sheet metal plate having its upper edge straight and the lower edge rounded. Sharp also showed a guard having the lower corners clipped instead of rounded. The car axle extends through an opening in the center of the plate surrounded by a circumferential flange with flanges at the upper and lower edges reversely curved.

The issue was originally in eight counts. The Examiner of Interferences awarded priority as to all the counts to Sharp. The Board of Examiners in Chief awarded counts 1, 2, 3 and 8 to Sharp, but held that Sharp could not make the remaining counts, which were awarded to Gamage, and Sharp alone appealed; hence the issue was narrowed to counts 4, 5, 6 and 7. The Commissioner affirmed the board, awarding priority on these counts to Gamage. From this, Sharp appeals.

All the tribunals below found that Sharp, the senior party, was the first to conceive and reduce to practice. With this holding we agree. From a careful study of Sharp's specification and drawings, we are also in accord with the Examiners in Chief and the Commissioner in holding that Sharp is not entitled to make the present claims. The claims, as set forth in count 4, call for—

"a dust guard for car axle boxes consisting of a single resilient plate provided with an opening for the car axle and having integral flanges at its upper and lower edges, the flange at its upper edge being straight and its lower edge being of semi-circular outline and bent away from the body of the plate to constitute a flange extending around said semicircular lower edge."

Sharp's application drawings fail to disclose a lower flange extending around the semicircular lower edge. It shows the lower edge square, with the corners cut off in circular form, leaving the flange ex-

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

tending straight across the bottom between the points where the corners are clipped off. This disclosure does not meet the issue, since the evident purpose is to have the dust guard so shaped that it will fit into and conform to the semicircular bottom of the journal box.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

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.

LOFTUS v. DISTRICT OF COLUMBIA.

(Court of Appeals of District of Columbia. Submitted January 4, 1921. Decided February 7, 1921.)

No. 3435.

Criminal law ⟸404(4)—Proof of custody held insufficient to authorize admission of bottle purchased from defendant.

In a prosecution for unlawful sale of intoxicating liquors, where the witnesses marked for identification a bottle purchased from defendant, but the custody of the bottle was not accounted for during the 18 months between the purchase and the trial, the bottle and contents were not admissible in evidence without proof that either at the time of purchase or when offered it contained whisky.

In Error from the Police Court of the District of Columbia.

Peter Loftus was convicted of selling alcoholic liquors prohibited by law, and he brings error. Reversed and new trial ordered.

Wilton J. Lambert, T. M. Wampler, and Foster Wood, all of Washington, D. C., for plaintiff in error.

F. H. Stephens and F. W. Hill, Jr., both of Washington, D. C., for the District of Columbia.

HITZ, Acting Associate Justice. This case comes to this court upon a writ of error, duly allowed, from the police court of the District of Columbia. The plaintiff in error, hereinafter called the defendant, was charged by an information, filed December 20, 1918, in the first count, with having on December 19, 1918, sold certain alcoholic and other liquors prohibited by law. There was a second count charging him with keeping the same for sale, but at the trial, which took place June 15, 1920, on motion of the defendant, the District elected to stand on the first count. The facts necessary to be stated in view of the conclusion of this court may be summarized as follows:

On December 19, 1918, police officer Bean, in company with another policeman and one Simpson, met Charles Mackall, to whom Bean gave two $1 bills, keeping a record of their serial numbers. Bean then searched Mackall, and found no liquor upon him. Mackall then went out of the back door of the Washington Hotel, where the parties then

were, and the others taking a position in a doorway some half a block or more from the place of business of the defendant saw Mackall enter the same. In a few minutes he came out and handed to Simpson a half pint bottle, which bottle was identified then and at the trial by marks placed on a paper pasted to the bottle. The bottle was then handed by Simpson to Bean; by Bean to the witness Burke, who deposited it at the police station, where it remained in a cell to which Burke had the key for some time, but after his subsequent transfer to another precinct he had no access to said cell. The men in charge of the station had a general supervision over the cell in question and the bottle, but no man was detailed especially for that purpose. When produced at the trial the seal of the bottle had been broken and the cork had been removed and replaced. The contents of the bottle had never been analyzed, nor authentically tasted, but the contents smelled of whisky.

Seasonable objection to the introduction of the bottle and contents as evidence before the jury was made, but the trial court admitted it in evidence to which ruling exception was taken. Much other testimony, not relating to this particular bottle, was introduced, some 18 instructions were asked by the defendant and refused, and after a charge by the court, which is in the record, the jury returned a verdict of guilty, upon which a sentence involving fine and imprisonment was imposed.

[1] A number of assignments of error are presented, but in the view of this court the only one necessary to be considered is the third, relating to the admission of evidence. We think it was error to admit in evidence the half pint bottle and contents, under the proof above recited. Between the date of the alleged sale and the time of trial about 18 months elapsed. The custody of the bottle during that long interval was not accounted for, it had been opened and recorked, and there was no proof to show that either at the time of its alleged purchase or when produced before the jury it contained whisky or other alcoholic drink. Evidence legally sufficient to show that the bottle at the time of its purchase did contain the liquid charged in the information was essential as a basis for conviction.

This, in our judgment, was lacking, and by reason of the error of the trial court in allowing proof of the nature above indicated to go to the jury, the judgment below must be reversed, and a new trial ordered.

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.

CROWELL BROS. v. PANHANDLE GRAIN & ELEVATOR CO.

(Circuit Court of Appeals, Eighth Circuit. February 9, 1921. Rehearing Denied May 7, 1921.)

No. 5522.

1. **Trial ⇐418—Demurrer to evidence waived by subsequent introduction of evidence.**
   A demurrer to plaintiff's evidence at the close of its main case is waived by the subsequent introduction of evidence to the merits by defendant.
2. **Appeal and error ⇐237(3)—Sufficiency of evidence not reviewable, in absence of motion for directed verdict.**
   Where there was no request by defendants for direction of a verdict, and no demurrer to the evidence after the close of all the evidence the question of the sufficiency of the evidence to sustain a verdict for plaintiff is not reviewable in the appellate court.
3. **Evidence ⇐320—Testimony held incompetent, as based on a mere repetition of hearsay.**
   On an issue as to whether two cars of cane seed shipped by defendants to plaintiff were of the kind and grade called for by the contract testimony of an inspector as to the kind and grade of samples tested by him, which he identified as coming from the cars in question only from his record, made from tickets giving the numbers of the cars, placed in the samples by some one of his assistants, to him unknown, who obtained them in the usual course of his business, *held* incompetent; the tickets themselves from which the record was made being merely hearsay evidence which would have been inadmissible, if offered.
4. **Evidence ⇐67(3)—Evidence of character of seed when shipped, based on examination later, admissible, as condition presumed same.**
   Testimony of a witness as to character and mixture of cane seed when examined by him *held* admissible to show its character when delivered on a contract five months before; the presumption being that it was the same as when delivered.

In Error to the District Court of the United States for the Western District of Oklahoma; John H. Cotteral, Judge.

Action at law by the Panhandle Grain & Elevator Company against Crowell Bros. Judgment for plaintiff, and defendants bring error. Reversed.

E. W. Snoddy, of Alva, Okl. (J. P. Grove, Sr., of Alva, Okl., on the brief), for plaintiffs in error.

John Tomerlin, of Oklahoma City, Okl. (W. H. Kimbrough, of Amarillo, Tex., and W. F. Wilson, of Oklahoma City, Okl., on the brief), for defendant in error.

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

SANBORN, Circuit Judge. The writ of error in this case assails the legality of the proceedings at the trial of an action at law which resulted in a judgment against Crowell Bros., partners and sellers, and in favor of the Panhandle Grain & Elevator Company, a corporation, buyer of two cars of country-run black amber and orange cane seed, for $11,623.13, which the buyer had paid before it discovered the fact that the contents of the cars consisted of such a mixture of red amber

cane seed with black amber and orange cane seed that its delivery by the sellers fails to constitute a performance of the contract upon their part. The contract was made in February, 1918. Crowell Bros. shipped the two car loads from Alva, Okl., to Fort Worth, Tex., and drew drafts on the Panhandle Company for the purchase price thereof which it paid before the cars arrived at Forth Worth. Upon their arrival they were unloaded and the Panhandle Company discovered that they did not contain the cane seed it had bought, but a much less valuable mixture. Thereupon, on April 12, 1918, it notified Crowell Bros. of the character of the contents of the cars, that it had not bought the cane seed they contained, and that this cane seed was in storage with the Fort Worth Elevator Company, subject to their disposition. Receiving no answer to this letter, it wrote them again on April 18, 1918, sent them in its letter a statement of its expenses in receiving, storing, and obtaining an inspection of the cane seed, stated in its letter that it had drawn on them for the purchase price it had paid and for its expenses, amounting to $10,889.91, that if they would not pay the draft it would dispose of the seed as soon as possible for their account, that it should expect them to protect it against loss, that it would be better for them to handle the seed; but, if it was obliged to do so, it would handle it to the best advantage it could for their account. The Panhandle Company drew its draft for the $10,889.91, but Crowell Bros. neither paid it nor answered the company's letter. Therefore, on July 31, 1918, the Panhandle Company filed its complaint, setting forth the alleged facts which have been recited, and commenced this action. Crowell Bros. answered with a denial that the cane seed in the two cars was not of the character, kind, and quality sold to the plaintiff, and denied generally every material allegation of the complaint.

[1, 2] The first specification of error is the overruling of the Crowell Bros.' demurrer to the plaintiff's evidence, for the reason that such evidence was insufficient to sustain a verdict in favor of the Panhandle Company. Counsel devote the larger part of their brief to the discussion of the sufficiency of the evidence in this case to sustain the judgment. But this demurrer was interposed at the close of the Panhandle Company's evidence, it was overruled and an exception taken; but the defendants did not stand upon their exception, but thereafter introduced the testimony of many witnesses on the merits of the case in their own behalf. Defendants waive a demurrer to plaintiff's evidence at the close of its main case by the subsequent introduction of evidence to the merits in their own behalf. No request to instruct the jury to return a verdict for the defendants, no demurrer to the evidence was interposed after the close of all the evidence, and the jury returned a verdict for the Panhandle Company. The result is that the questions, was there any substantial evidence to sustain the verdict and judgment? and was the evidence sufficient to sustain them? have not been so presented under the established rules of the federal courts that they may be reviewed or considered by this court, and it must treat them as conclusively answered in the affirmative by the verdict. Barnard v. Randle, 110 Fed. 906, 907, 49 C. C. A.

177, 178; U. S. Fidelity & Guaranty Co. v. Board of Commissioners of Woodson County, Kan., 145 Fed. 144, 150, 76 C. C. A. 114, 120.

Counsel for Crowell Bros. complain that the court below refused to submit to the jury, at their request, the question whether the Panhandle Company, after its refusal to accept the delivery of the seed as a performance of the contract and after its offer to return it to Crowell Bros., did not make such an inconsistent use of it as constituted a waiver of its refusal to accept it and a ratification of the original contract, and that the court charged the jury that there was no substantial evidence in the case to sustain a finding to that effect. The evidence upon which his complaint is founded tended to establish these facts: After the Panhandle Company had refused to accept the cane seed in performance of the contract, had stored it with the Fort Worth Elevator Company, had drawn its draft on Crowell Bros. for the purchase price it had paid them, and had on April 18, 1918, notified them of its acts in this regard, and that if they did not pay its draft it would be better for them to handle the seed themselves, but that if they did not it would expect them to protect it against loss, and it would proceed to sell and handle it to the best advantage it possibly could for their account, and they had not answered any of the letters, it caused the seed that had been in one of the cars to be recleaned to discover what shrinkage had resulted, sent Crowell Bros. a statement of the result of the recleaning and weighing in a letter dated June 27, 1918, and drew a draft on them for $292.95, which it claimed they owed it regardless of the quality of the seed, because the contract price of the seed it actually received was $292.95 less than the amount of the drafts for the purchase price thereof which it had paid before the seed arrived. Again, when the seed arrived at Forth Worth it was unloaded and placed in the elevator of the Forth Worth Elevator Company in the name of the Panhandle Company, and there it remained and that company paid the storage and insurance charges thereon up to the time of the trial. Moreover, the Panhandle Company borrowed of the Forth Worth Elevator Company $1,800, but there was no evidence that it secured the payment of this debt by any lien on, or pledge of, this cane seed, or that the loan was made in reliance thereon.

Counsel argue that the evidence which has now been recited tended to prove that, although the Panhandle Company elected to rescind the contract in April, 1918, it affirmed and ratified it in June, 1918, and later. But this action is not founded on a rescission of the contract. It is based upon an affirmation thereof and on the failure of Crowell Bros. to perform their part of it. It is an action for money had and received by Crowell Bros. for the use and benefit of the Panhandle Company, for the moneys it paid before the seed arrived on the drafts of Crowell Bros. for the contract price of black amber and orange cane seed in the belief that they had shipped that seed when they had not, and the defense of Crowell Bros. was that the cane seed they shipped was that which they contracted to sell. Their answer to the plaintiff was a denial of its assertion that the cane seed they shipped was not the article described in the contract. Their defense is in fact a confession that they shipped the seed and an avoid-

ance of the effect thereof. Moreover, there is nothing in the evidence upon which they now seek to rely inconsistent with the original position of the plaintiff that it did not and would not accept the seed as a performance of the contract and that it held it subject to the order and for the benefit of Crowell Bros., and there was no error in the charge of the court that there was no evidence in the case that would sustain a finding by the jury that the Panhandle Company ever accepted the cane seed or waived its refusal to take it in performance of the contract, nor was there any error in the refusal of the court, at the request of Crowell Bros., to instruct the jury otherwise.

Mr. James E. Robinson was the chief grain inspector of the Fort Worth Grain & Cotton Exchange. He testified for the plaintiff that he inspected samples brought to him by assistants of the cane seed in question taken from the cars before they were unloaded, that he made a record of these inspections in his own handwriting in a book he had, and read this record to the court and jury. On cross-examination he testified that he did not take the samples of cane seed out of the cars himself. On further examination by defendants' counsel he testified:

"Q. And how did you get the information that these samples came from these cars?

"A. Why, they got the—when a man gets a sample, he puts a ticket on it and puts the ticket in the sample. * * *

"Q. What is the custom with reference to your inspection of those samples? Just explain again, in detail, how they come to you and how you know they came out of these cars.

"Mr. Grove (for Crowell Bros.): We object, because it calls for incompetent, irrelevant, and immaterial testimony. (Objection overruled. Defendants except.)

"A. Well, we emptied the samples out into something; when they bring them up here to make the inspection we empty the samples out and we use the sample bags again for sampling other grain. * * *

"Q. And that is the course of dealing and the custom that is employed in the examination of all the cars, is it?

"A. Yes, sir; that is what the United States government requires us to do. The government don't require the inspector to take the samples; we have men to take the samples, and they bring them to this office, and we inspect the stuff.

"Mr. Grove: We move to strike the answer of the witness to the preceding question and withdraw it from the consideration of the court and jury, because it is incompetent, irrelevant, and not responsive to the question. (Motion denied. Exception.)"

Thereupon the witness testified that certain certificates of inspections were prepared and issued under his supervision in strict accordance with the records he had made of the inspection of the samples. These certificates were signed, "J. E. Robinson, Chief Inspector, per H., Deputy," in the handwriting of Mr. Harrison, Mr. Robinson's clerk. They certified that the inspector, Robinson, had inspected the contents of the two cars, giving their numbers, and that they contained certain kinds of cane seed, and among others red amber cane seed. Mr. Robinson testified that these certificates corresponded with the records he made in the book he read to the jury, and that they were correct, except in one particular not material in this case. The certificates were offered and introduced in evidence without exception, but at the close of Mr. Robinson's testimony the defendants moved—

"to strike out the evidence of this inspector and these exhibits for the reason that they show upon their face they were not made by the officer whose deposition was being taken. They show upon their face that this man who testified there didn't make the inspection as chief inspector."

The court denied the motion and Crowell Bros. excepted. They now assign each of the rulings which have been recited as error, but the grounds of the motion last recited were clearly untenable. Concede that the certificates show on their face that they were not made by Robinson, whose deposition was being taken, but by Harrison, his clerk. Yet the testimony had shown that Harrison was authorized by Robinson to make the certificates in accordance with the record of inspection which Robinson had made of the samples and had recorded in the book in his own handwriting. The other ground of the motion that the certificates showed upon their face that Robinson did not make the inspections is demonstrated to be baseless by the certificates themselves, which although they were signed by Robinson, by Harrison, deputy, do not show on their face that Robinson did not make the inspections to which they refer, and the testimony had shown at the time this motion was made that he had made them. There was no error in denying the motion on the ground stated therein.

[3] The other rulings here challenged present the single question whether or not it was error to receive in evidence, at the point in the progress of the trial when it was received, the testimony of Chief Inspector Robinson to the ordinary and regular method and custom of making inspections of cane seed and other grain at the time and place of this inspection under similar circumstances. At the time this evidence was received the Panhandle Company was trying to qualify the certificates of inspection for admission in evidence, in order to prove by them that the contents of the two cars contained a deleterious quantity of red amber seed. It had introduced the testimony of Mr. Robinson to the effect that he had inspected some samples of cane seed and made a record thereof on March 21 and March 25, 1918, that he had no independent recollection of these inspections, that all he knew about it was what his record showed, that he did not take the samples out of cars 26011 and 20388 which contained the cane seed shipped by Crowell Bros., that they obtained samples of seed and grain by shoving triers down into the grain and pulling them out, that he did not know who used the triers to get the samples, that he had then three or four men taking samples, that he had the control and direction of them, and that they took the samples because the Fort Worth Elevator Company ordered them to take them. Asked how he got the information that the samples came from cars 26011 and 20388, he answered, over the objection and exception:

"Why, they got the—when a man gets a sample, he puts a ticket on it and puts the ticket in the sample. He has a ticket like that (indicating), and he puts the car numbers on it and where they are."

Here it was that the questions were asked and the rulings with regard to the custom and method of making the inspections were made. If, at the time these rulings were made, the evidence of the Panhandle

Company relative to the origin and inspection of the samples had been complete, and insufficient to justify a finding that these samples were taken from the contents of the two cars, it may be that the evidence of the method of inspection would have been inadmissible; but the Panhandle Company's evidence was not at that time complete, it was still coming in, the court could not know what the further testimony would be. An inspection made in the ordinary and regular method is presumptive evidence of an inspection with reasonable care while one made otherwise may lack such a presumption. One of the turning points in this case was the character of this inspection, and hence its weight as evidence. Under these circumstances it cannot be said that there was serious error in the rulings here made in permitting the proof of the ordinary course of inspection to be presented to the jury.

But, after the Panhandle Company had rested its case in chief, after the demurrer to its evidence had been overruled and Crowell Bros. had commenced to introduce testimony in their behalf, they moved the court to strike out the testimony of Robinson and excepted to the order denying that motion. They specify this ruling as error, and insist that all his testimony was either incompetent, because there was nothing but hearsay to sustain the claim of Crowell Bros. that the samples he examined and certified were taken from the contents of cars 26011 and 20388, or immaterial, because it had no tendency to determine any issue in the case. That issue was the character and value of the cane seed in the two cars. When this motion was made, the Panhandle Company had completed its evidence. Unless there was competent testimony in the case that the samples Robinson examined and certified were taken from the contents of cars 26011 and 20388, his entire testimony was immaterial, and the motion should have been granted. A diligent search of the record has failed to disclose any such evidence. Robinson testified that he did not take the samples, about which he spoke, from the contents of the cars himself, that he had three or four men under his control taking samples from various lots of grain and seeds, that he could not tell which one of them took the samples he examined and inspected in this case, that he had no independent recollection of the transaction, that all he knew about it was what his record showed, that that record was made by him, without any personal knowledge who took the samples or whence they came, and his statement therein that they were samples from those cars rested entirely on the facts that, "when a man gets a sample, he puts a ticket on it and puts the ticket in the sample and puts the car numbers on it and where they are."

But no witness came to say that he took the samples which Robinson testified about from the contents of cars 26011 and 20388, or that he put tickets in those samples with the numbers of those cars thereon, or that the tickets on those samples stated the truth in the writing thereon. Even if those who took the samples had told Robinson that they took them from the contents of those cars, and that they were fair samples of those contents, and that the writing on the tickets stated the truth and he had offered to testify to all this, his testimony would have

been nothing but hearsay, and therefore incompetent. It would be nothing but the statement that the man or men who took the samples told him these things. If the tickets themselves had been produced and offered, as they were not, with the testimony of Robinson in this case, they would have been likewise incompetent, for they were nothing but written hearsay, nothing but the written statements of some unknown person or persons not under oath, and written hearsay is no more competent than spoken hearsay. Whoever may have taken the samples which Robinson examined, or made the tickets in those samples, if there were any, was a stranger to the parties to this suit. His oral or written statements concerning the crucial issue in it were mere narratives of past transactions, and the ruling against hearsay sternly forbids the reception of evidence of the repetition of the unverified narratives of strangers, whether oral or written, to determine the issues between litigants, and requires that only under the solemnity of the oath or affirmation of the stranger upon whose statement reliance is placed, and then only, after due notice and an opportunity to hear the testimony and to cross-examine him, shall his story become evidence against a litigant. Union Pacific Railroad Co. v. Perrine, 267 Fed. 657, 659 (C. C. A. 8th Circuit, filed July 15, 1920); Board of County Com'rs of Lake County v. Keene Five Cents Saving Bank, 108 Fed. 505, 510, 47 C. C. A. 464, 469, and cases there cited; Edwards v. Bates County, 99 Fed. 905, 906, 40 C. C. A. 161, 162; Thomas v. United States, 156 Fed. 897, 914, 915, 84 C. C. A. 477, 494, 495, 17 L. R. A. (N. S.) 720; Heath v. Waters, 40 Mich. 457, 471; Sperry v. Moore, 42 Mich. 353, 356, 361, 4 N. W. 13. There was no such evidence that the samples which Robinson examined and certified were taken from the contents of cars 26011 and 20388, and there was no basis, no foundation, for the admission of his testimony. It was immaterial, and should have been stricken from the case. That testimony was important, and was unavoidably influential in the disposition of the crucial issue in this case; the failure to take it from the jury could not have failed to be prejudicial to Crowell Bros., and its admission necessitates a new trial of this suit.

[4] There was no error in the reception of the testimony of the witness Hunter to the character of the cane seed in September, 1918. The presumption was that the mixture was of the same nature at that time as when delivered to the Panhandle Company, nor was there any error in the rulings sustaining the objection to the hypothetical question of Mr. Deck. The effect of the facts stated therein was a question of law, and it was immaterial what the witness thought that effect would be considered under the usages and customs of the grain trade.

Let the judgment below be reversed, and let the case be remanded to the court below, with directions to grant a new trial.

EMPLOYERS' INDEMNITY CORPORATION v. GRANT.

(Circuit Court of Appeals, Sixth Circuit. March 15, 1921.)

No. 3492.

1. **Appeal and error ⇐930(1)—Evidence conflicting with that favorable to verdict must be disregarded.**
   In determining on writ of error whether the death of insured was accidental within the policy, the evidence which conflicts with that favorable to plaintiff, for whom the jury rendered its verdict, must be disregarded.
2. **Insurance ⇐455—Death intentionally caused by another is accidental, if insured had no reason to anticipate it.**
   Where a railway conductor armed himself to scare a passenger out of a toilet, from which he had refused to come on the conductor's orders, and was shot and killed by the passenger before he had time even to threaten with his gun, his death was accidental, within an accident insurance policy, if he had no reason to anticipate that the passenger was armed, or that his action would tend to provoke a fatal encounter.
3. **Insurance ⇐668(11)—Whether killing by another was accidental is for jury, where evidence is conflicting.**
   Where insured was intentionally killed by another, and it is necessary to determine from conflicting evidence whether deceased by his wrongful conduct produced his death, or voluntarily and intentionally committed acts from which he foresaw or should have foreseen that death or injury might result, the issue whether the death was accidental must be submitted to the jury.
4. **Insurance ⇐668(11)—Evidence held to require submitting to jury whether killing was accidental.**
   In an action on an accident insurance policy to recover for the death of a railway conductor, who was killed by a passenger whom he had ordered out of a compartment, conflicting evidence as to the circumstances preceding the shooting *held* to require submission to the jury of the issue whether the conductor had reason to believe that his act would provoke an encounter which might result in his death.

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Myrtle Grant against the Employers' Indemnity Corporation. Judgment for plaintiff, and defendant brings error. Affirmed.

H. I. Armstrong, of Detroit, Mich. (Sibley, Armstrong, McNair & Mead, of Detroit, Mich., on the brief), for plaintiff in error.

Frank T. Lodge, of Detroit, Mich. (Lodge & Brown, of Detroit, Mich., on the brief), for defendant in error.

Before KNAPPEN and DONAHUE, Circuit Judges, and WESTENHAVER, District Judge.

WESTENHAVER, District Judge. This action is based on a policy of accident insurance issued October 31, 1917, to Alexander Grant, by occupation a passenger conductor on the Wabash Railroad, whereby the plaintiff in error insured Grant "against loss resulting directly and independently of all other causes, from bodily injuries effected solely through external, violent and accidental means." The insured having met his death while the policy was in force, Myrtle Grant, the beneficiary, brought this action and recovered judgment for the full

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

amount of the policy. This error proceeding is prosecuted by the insurer to reverse that judgment. The main ground relied on for reversal is that the insured's death was not accidental within the true meaning of the policy. This question was raised by a motion for a directed verdict and by numerous requests to charge, and is preserved by several of the assignments of error. The disposition of it requires a brief statement of the evidence.

The insured, while on duty as a passenger conductor, was on June 12, 1918, shot and killed by a colored passenger, James Morgan, at Montpelier, Ohio, a junction and terminal point of the Wabash Railroad. A few minutes before reaching Montpelier, Morgan, who had boarded the train at Chicago with a ticket entitling him to travel to Adrian, Mich., had entered the toilet room and had locked the door on the inside. The conductor's duty, as evidenced by bulletins and rules offered in evidence, required him, while this train was lying at Montpelier, to see that the toilet room was closed, locked, and kept out of use. What happened thereafter depends on the testimony of three witnesses—Albert H. Doyle, an express messenger, Frank Anderson, a colored news agent, and James Morgan, the man who did the killing, and whose deposition was taken after he had been tried, found guilty of first degree murder, and sentenced to be electrocuted. This evidence, viewing it, as is our duty, in that aspect tending most favorably to support the verdict, tends to show these facts:

The conductor, shortly after the train came to a stop, tried the toilet room door, and, finding it occupied and locked on the inside, requested, directed, and finally ordered, Morgan to unlock the door and come out. Morgan answered some three or four times that he could not do so, notwithstanding the conductor repeatedly instructed him that all he had to do was to shove back the bolt and open the door. This conversation was exchanged in an ordinary manner and without any threats of violence or display of anger on either side. Morgan, for some unknown reason, was evidently unwilling to comply with the conductor's order and vacate the toilet, and the conductor evidently interpreted his conduct and replies as a refusal so to do. At some time in the course of this controversy, if such it be, the conductor had stood on the arm and back of the car seat next to the toilet room and had looked in over its glass top. What the conductor saw he related to no one. Morgan, however, says that he was then buttoning up his "pants," and that his revolver was in a small handbag which he had with him. Anderson, the news agent, saw Grant try the door, but does not relate, even if he heard, the remarks then exchanged. At some time, probably after Grant had left, Anderson also got on the arms of the car seat and looked in at which time he says Morgan was standing on the toilet seat in such an unusual position and attitude that he quickly jumped down. He saw, however, no revolver in Morgan's possession.

Grant left, and there is some discrepancy as to the space of time which elapsed before his return. He went to the express car, got a loaded revolver, and returned, followed by Doyle, the express messenger. In answer to some remarks, Grant said: "Well, I want to scare

him out." Upon returning, he got up again on the arms of the car seat, holding by his left hand to an air valve at the side of the car, and, holding the revolver with his right hand clasped around the cylinder, displaying both ends of it, he tapped lightly on the glass top of the toilet, saying, "Come out of here." At approximately the same time, and as soon as his head appeared above the wooden side of the toilet room, a pistol shot sounded, and Grant fell dead to the floor. This shot was fired by Morgan. The bullet entered Grant's forehead just above and slightly to one side of the base of the nose.

[1] A jury would be warranted in finding that the tapping, order, or request, and the appearance of Grant's head above the wooden side of the toilet room, were substantially simultaneous with the firing of the shot, and that Grant had no knowledge that Morgan was armed, or, except as may be inferred from this statement of the evidence, was intending violence. All the testimony tends to show that Grant was in good humor and unexcited, and was not discourteous or violent, or threatening in speech or manner. Morgan's testimony and counsel's inferences, so far as they conflict, if at all, with the foregoing statement of the evidence, must in this proceeding be disregarded.

The trial judge submitted to the jury the issue as to whether Grant's death was due to accidental means. In doing so, he charged the jury in substance that they should approach this question from the standpoint of Grant at the time and under the circumstances as they appeared to him; that his death was not accidental, or covered by the policy, if Grant anticipated, or, under the circumstances, should have anticipated, the fact that Morgan might act in the way he did; and that the burden of proof was upon the beneficiary to show that Grant's death was caused by an agency which, independently of all other causes, constituted an accident; but that, on the other hand, if Grant did not anticipate, or have reason to anticipate, in the light of all the circumstances, that he would get shot, then his death was accidental, and the beneficiary might recover.

[2] In submitting to the jury upon this evidence the issue as to whether Grant's death was accidental, and in thus charging, we perceive no error against the insurer. Policies of accident insurance, indemnifying against death from external, violent, and accidental means, either with or without restrictive or defining language as to what is or is not accidental means, have often been considered by the courts. The law is well settled as to what is or is not accidental means within the meaning of a policy thus phrased; indeed, we discover no inconsistency or conflict in the cases, either in the statement of the law or in the application of the law to the facts of the different cases. And because of this settled state of the law, and the absence of any conflict in the cases, we do not deem it necessary to review the cases or to restate the general principles as to what is or is not accidental within the language of an accident insurance policy. It will be sufficient to refer to a few of the leading cases. See U. S. Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Western Commercial Travelers' Ass'n v. Smith (8 C. C. A.) 85 Fed. 401, 29 C.

C. A. 223, 40 L. R. A. 653; Hutchcraft's Ex'r v. Insurance Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484.

In some cases, however, the insured met his death, as the result of an intentional and designed killing of some third person, and if such killing was not the direct result of misconduct of the deceased, or was unforeseen and not reasonably to be anticipated by him, then his death is held to be the result of external, violent, and accidental means. For cases so holding, see the following: Robinson v. U. S. Mut. Accident Ass'n (C. C.) 68 Fed. 825, affirmed on another ground 74 Fed. 10, 20 C. C. A. 262; Railway Mail Ass'n v. Moseley (6 C. C. A.) 211 Fed. 1, 127 C. C. A. 427; Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; Furbush v. Maryland Casualty Co., 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605; on second appeal 133 Mich. 483, 95 N. W. 55; Hutchcraft's Ex'r v. Insurance Co., 87 Ky. 300, 8 S. W. 570, 12 Am. St. Rep. 484; Richards v. Travelers' Ins. Co., 89 Cal. 170, 26 Pac. 762, 23 Am. St. Rep. 455; Insurance Co. v. Bennett, 90 Tenn. 256, 16 S. W. 723, 25 Am. St. Rep. 685; Ripley v. Railway Passengers' Assurance Co., 2 Bigelow, Ins. Rep. 738, Fed. Cas. No. 11,854; Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104, 28 S. W. 877, 30 L. R. A. 209, 47 Am. St. Rep. 638. Of these cases, the one last cited may be taken as typical. Lovelace, the insured, attempted to eject a man, who was drunken and boisterous, from the office of a hotel. In doing so, and in overcoming resistance, he used no other means than his hands, and while engaged in the effort the other drew a pistol and shot him, causing death. A recovery on the ground that the death was accidental was sustained, because Lovelace neither used nor attempted to use other than natural, physical means to eject by force, and while so doing did not know, nor have reason to believe, that the other person was armed.

There is another group of cases, on which the plaintiff in error mainly relies, in which the assured was killed by a third person, where recovery is not allowed; but in all these cases the deceased engaged in an encounter under such circumstances that he invited his adversary to mortal combat, and either foresaw or should have foreseen that death or injury might result. See Taliaferro v. Travelers' Protective Ass'n (8 C. C. A.) 80 Fed. 368, 25 C. C. A. 494; Hutton v. State's Accident Ins. Co., 267 Ill. 267, 108 N. E. 296, L. R. A. 1915E, 127, Ann. Cas. 1916C, 577; Meister v. General Accident, Fire & Life Ins. Co., 92 Or. 96, 179 Pac. 913, 4 A. L. R. 718. Of these cases Taliaferro v. Travelers' Protective Ass'n may be taken as typical. The deceased had drawn a revolver and had struck his adversary in the face before the latter drew his revolver and fired, and it was held that the insured's death was not accidental, because he foresaw or should have foreseen that death or injury might probably result from his own conduct. Other cases in which death was due, not to intentional killing, but to other causes alleged to be accidental, are cited and relied on, particularly Fidelity & Casualty Co. v. Stacey's Executors (4 C. C. A.) 143 Fed. 271, 74 C. C. A. 409, 5 L. R. A. (N. S.) 657, 6 Ann. Cas. 955, and Maryland Casualty Co. v. Spitz (3 C. C. A.) 246 Fed. 817, 159

C. C. A. 119, L. R. A. 1918C, 1191. No criticism can be made of the law stated therein or the judgments rendered; but they are not in point, and are sufficiently distinguished by reference to U. S. Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60.

[3] Obviously, in applying these legal principles, many cases of intentional and designed killing will arise, in which it will become necessary to determine from conflicting evidence whether the deceased, by his wrongful conduct, produced his death or voluntarily and intentionally committed acts from which he foresaw or should have foreseen that death or injury might result. In all such cases the issue must be submitted to a jury under a proper charge. This course was pursued in the following cases: Furbush v. Maryland Casualty Co., 131 Mich. 234, 91 N. W. 135, 100 Am. St. Rep. 605; Utter v. Travelers' Ins. Co., 65 Mich. 545, 32 N. W. 812, 8 Am. St. Rep. 913; Railway Mail Ass'n v. Moseley (6 C. C. A.) 211 Fed. 1, 127 C. C. A. 427. The same course was followed, when the issue was as to whether the death was accidental, in the following cases: U. S. Mutual Accident Ass'n v. Barry, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60; Insurance Co. v. Patterson (3 C. C. A.) 213 Fed. 597, 130 C. C. A. 175.

[4] In the case at bar it is plain that the court below could not say, as a matter of law, that Grant's death was not accidental, and therefore no error results to the plaintiff in error from the fact that this issue was submitted to a jury under a proper charge.

Three other errors were relied on, namely, admission in evidence of various rules of the railroad and of the statutes of Ohio and Michigan relating to a conductor's duties and powers; permitting an amendment at the close of all the testimony, so as to avoid a technical variance between the declaration and the policy sued on; and misconduct of counsel in argument to the jury. No error is perceived in any of these rulings. The alleged errors are so unsubstantial as not to call for further comment.

The judgment of the court below is affirmed, with costs.

CHARLES A. RAMSAY CO. v. ASSOCIATED BILL POSTERS OF THE UNITED STATES AND CANADA et al.

WILLIAM H. RANKIN CO. v. SAME.

(Circuit Court of Appeals, Second Circuit. December 23, 1921.)

Nos. 97, 98.

1. **Evidence ⟸5(2)—Billboard advertising is matter of common knowledge.**
It is a matter of common knowledge that for some years manufacturers, theatrical companies, and others are in the habit of advertising their wares and attractions by means of posters on billboards throughout the country.

2. **Monopolies ⟸28—Allegations of refusal to deal with lithographers held not to avail plaintiffs, who were not lithographers.**
In an action for treble damages under the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830), allegations that defendant, an association of bill

posters, refused to deal with lithographers furnishing posters to other than members of the association, if meaning anything more than that the members of the association would post bills only for advertisers sending their bills through its licensed solicitors, did not avail plaintiffs, who were solicitors of advertising, and not lithographers.

3. **Monopolies ⇐28—Persons injured by illegal combination entitled to damages, though not engaged in interstate commerce.**
Persons injured by a combination which is illegal under the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830) may maintain actions for treble damages thereunder, though not themselves engaged in interstate commerce.

4. **Commerce ⇐16—Posting of bills on billboards held not to directly affect interstate commerce, so as to come within statute.**
Assuming that the business of advertising solicitors in sending their customers' advertisements to be posted on billboards in various towns and cities throughout the country is, as between them and their customers, interstate commerce, after the posters arrive at destination, the posting of them by bill posters is a purely local service, only incidentally affecting interstate commerce, and rules of an association of bill posters, prohibiting its members from accepting work from solicitors not licensed by the association, regulating prices for bill posting and prohibiting licensed solicitors from employing other bill posters, do not violate Sherman Act (Comp. St. §§ 8820–8823, 8827–8830).

5. **Monopolies ⇐28—When object of former suit or nature of decree not stated, court will reach its own conclusion.**
Under Clayton Act, § 5 (Comp. St. § 8835e), providing that a final judgment or decree in any criminal prosecution or suit in equity under the anti-trust laws shall be prima facie evidence against the defendant in any suit or proceeding by any other party, where the object of a former suit, in which it was held that defendants were engaged in an illegal conspiracy, combination, and monopoly, etc., is not stated, nor the nature of the decree entered, the court will reach its own conclusion as to defendant's violation of the statute.

6. **Monopolies ⇐28—Complaint against association of bill posters held not to allege combination unlawful at common law.**
The complaint in an action by solicitors of advertising against an association of bill posters, alleging that the rules of the association prohibited members from accepting advertising for posting on billboards from solicitors other than those licensed by the association, and regulated prices for bill posting, and prohibited licensed solicitors from employing bill posters not members of the association, did not allege a combination which would be unlawful at common law.

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

Actions by the Charles A. Ramsay Company and by the William H. Rankin Company against the Associated Bill Posters of the United States and Canada and others. Judgments dismissing the complaints, and plaintiffs bring error. Affirmed.

John B. Johnston, of New York City (Thomas G. Haight, of Jersey City, N. J., of counsel), for plaintiffs in error.

Greene & Hurd, of New York City (Richard T. Greene and Daniel S. Murphy, both of New York City, of counsel), for defendant in error Associated Bill Posters and others.

Brower, Brower & Brower, of Brooklyn, N. Y., for defendants in error Fulton and others.

Before WARD, ROGERS and HOUGH, Circuit Judges.

WARD, Circuit Judge. These are writs of error to judgments dismissing the complaints on the pleadings in two actions heard together in this court. The plaintiffs seek to recover treble damages against the defendants on the ground that they have caused the plaintiffs loss of profits in their business as the result of an unlawful combination to restrain interstate commerce and create a monopoly in violation of the Act of July 2, 1890, known as the Sherman Act (Comp. St. §§ 8820–8823, 8827–8830). They describe themselves as in the advertising business, but not as lithographers.

[1] It is common knowledge that for some years past manufacturers, theatrical companies, and others are in the habit of advertising their wares and attractions by means of posters on billboards throughout the country. This has produced the business of solicitors of advertising, who print the bills in case of solicitors who are also lithographers, or buy them for their advertising customers, or get them from their customers, but in each case contract to have them posted on billboards where desired throughout the country; and this has produced the business of persons who actually do the posting on the billboards, known as bill posters.

The defendant Associated Bill Posters of the United States and Canada, a corporation of the state of New York, does no business itself, but is composed of members who are engaged in the business of bill posters, only one being admitted to membership in each town or city. The other defendants are solicitors of advertising.

The rules of the association defendant prohibit its members from accepting from any advertising solicitor, other than one licensed by the association, national work; i. e., bill posting in a different town or city in the same state from that in which the advertiser resides, or in any town or city in a different state. The rules also regulate the prices for bill posting in various places and prohibit the licensed solicitors from employing any bill poster not a member of the association in any town or city where there is one.

[2] It is also alleged that the association has prevented manufacturers of certain posters—that is, lithographers—from furnishing them to customers other than members of the association, by the refusal of such members to deal with them if they do so. This is another way of saying that the members of the association will post bills only for such advertisers as send their bills through its licensed solicitors. Even if it means more than this, it does not avail the plaintiffs, because they are not lithographers, and cannot sustain injury thereby. It will be seen from the foregoing that there is no combination between the advertisers, and that competition in their business is quite unrestrained.

[3] The plaintiffs had been licensed as solicitors by the association, but their licenses were canceled in 1911, as the result of which their profits have been greatly diminished. If the combination is an illegal one under the Sherman Act, the plaintiffs have a right to maintain the actions, even though they are not themselves engaged in interstate

commerce. United Copper Securities Co. v. Amalgamated Copper Co., 232 Fed. 577, 146 C. C. A. 532.

The defendants demurred to the complaints on the ground that they did not state facts sufficient to constitute a cause of action, and moved for judgments on the pleadings, which motion Judge Knox granted.

[4] The business of the solicitors is to send their customers' advertisements to be posted on billboards in various towns and cities throughout the country. Assuming that this business is, as between them and their customers, interstate commerce, we are clear that, after the posters have arrived at destination, the posting of them by the bill posters is a purely local service, not directly affecting, but merely incidental to, interstate commerce. We think this follows from the decision of the Supreme Court in Hopkins v. United States, 171 U. S. 578, 19 Sup. Ct. 40, 43 L. Ed. 290. That case arose out of shipments of cattle from other states to the Kansas City stockyards for sale there. The defendant was a voluntary association, called the Kansas City Live Stock Exchange, composed of commission merchants who cared for and sold cattle, consigned to them by their principals, upon commission. The association did no business itself, but regulated the manner in which its members should do their business. It fixed the commissions to be charged, and prohibited its members from negotiating with any one in the stockyards, either as principal or as commission merchant, not a member of the Exchange, and from transacting business with any person violating any rule of the Exchange, or with an expelled or suspended member after notice issued by the secretary. The same charges of illegal restraint and monopoly, with the same result, were had as are made in this case.

The Supreme Court held that the business of the members of the Exchange was not interstate commerce, that the association affected interstate commerce not directly, but incidentally, and accordingly that it was not within the prohibition of the Sherman Act. We think it follows from this decision that the regulations of the association defendant in this case, both as they affect their own members and also the advertising solicitors licensed by it, is not interstate commerce, and therefore not obnoxious to the act.

[5] The complaint alleges that in an equity suit brought by the United States against these defendants in the District Court for the Northern District of Illinois it was held that they were engaged in an illegal conspiracy, combination, and monopoly in attempting to monopolize interstate commerce. The object of that suit is not stated, nor the nature of the decree entered. The opinion of the District Judge is reported in 235 Fed. 540.

Under section 5 of the Clayton Act (chapter 323, Laws 1914, 38 Stat. 731 [Comp. St. § 8835e]) this decree, if final, constitutes prima facie evidence against the defendants in this case "as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto." We do not know as to what matters the parties in that cause are estopped by the judgment, and as in any event it is to be only prima facie evidence, we may with great deference to

it come to our own conclusion of law upon the facts admitted by the demurrers in these cases.

[6] There is an intimation in the complaint of jurisdiction because of a diversity of citizenship between the plaintiffs and nearly all the defendants, even if there be no jurisdiction under the Sherman Act. But no combination is alleged which would be unlawful at common law.

The judgments are affirmed.

BELKNAP HARDWARE & MFG. CO. et al. v. OHIO RIVER CONTRACT CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1921.)

No. 3459.

1. **United States ⇐67(3)—Suit on government contractor's bond cannot be maintained in equity.**
   A suit by laborers and materialmen on the bond given by a government contractor to the government for their benefit cannot be maintained in equity.

2. **Subrogation ⇐1—Involves substitution in the ownership of a right.**
   Subrogation involves three things, a valuable right, a person who owns the right, and a person who is seeking to be substituted in that ownership.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Subrogation.]

3. **United States ⇐74½, New, vol. 12A Key-No. Series—Laborers and materialmen have equitable priority to fund due contractor.**
   Prior to Act Aug. 13, 1894, as amended by Act Feb. 24, 1905 (Comp. St. § 6923), requiring the bond of a government contractor to provide for payment of laborers and materialmen, the government had in its contracts recognized an obligation to secure the payment of such claims, and that obligation still exists, notwithstanding the protection afforded by the statute, and entitles such claimants to a preference in equity, as against general creditors of the contractor, to the fund received from the government.

4. **United States ⇐74½, New, vol. 12A Key-No. Series—Government contract held not to affect priority of laborers and materialmen.**
   A contract between the United States and a contractor, requiring the contractor to pay all liabilities incurred in the prosecution of the work for labor and material, and providing for payments to be made in conformity to the specifications, which authorized the 10 per cent. deduction from estimated work, does not affect, one way or the other, the equitable right of laborers and materialmen to payment from the funds due the contractor in preference to his general creditors.

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

Suit by the Belknap Hardware & Manufacturing Company and others against the Ohio River Contract Company and others. From a decree dismissing the bill, complainants appeal. Reversed and remanded.

The Ohio River Contract Company undertook to build, for the United States, a work of river improvement in connection with the Ohio river at Louisville. It gave the bond to the United States required by the Act of August 13, 1894,

as amended February 24, 1905 (section 6923, U. S. C. S. 1916), with Bray and Eichel as sureties. It failed to complete the work, and in an action upon the equity side of the court below, brought by a creditor of the contractor, a receiver was appointed for the contractor, and the receiver took over and completed the work, so that it was accepted, and the balance due from the government, being $98,694.64, was paid to the receiver and is now held by him for disbursement, as the court, in the receivership cause, may order. After affairs reached this stage, many of the materialmen and laborers, whose claims had accrued against the contractor before the receiver took over the job, and whom we will hereafter call the claimants, commenced a suit in the court below by the filing of what was called a bill of complaint, which stated the facts already recited, and also alleged that each of the sureties was insolvent, and was also a large general creditor of the contractor. The bill then insisted that the claimants, and others in similar position, were entitled to the whole of the fund so in the hands of the receiver, and that they were also entitled to be subrogated to the exclusion of all other creditors of the insolvent sureties in the claims of those sureties against the contractor and the fund. The bill then prayed that the receiver should pay the fund into court, less costs and expenses, and that the court should distribute the fund among the materialmen and laborers. The amount of claims of this character is said to be in excess of the amount of the fund. The only defendant named in the body of the bill is the contractor, but the title, which is found in the record in connection therewith, names, also, as defendants, the two sureties and the trustee in bankruptcy of one of them, and the receiver. An amendment to the bill shows that the court had given leave to sue the receiver, in an action which is vaguely described, but all parties seem to have treated the leave as sufficient to authorize impleading him in this suit. The receiver answered fully as to the merits of the suit. The surety Bray answered as to the merits, and alleged that he had been discharged in bankruptcy from all demands, including those of the claimants. Bray's trustee in bankruptcy filed a motion to dismiss the action, for reasons some of which formed the basis of the court's later order.

The record shows a number of interlocutory proceedings which we think of no importance. The claimants were very uncertain as to the character of their action. At times they have thought, and they now insist, that it was such an action upon the bond as is contemplated by the statute above referred to. While of this mind, they moved to substitute the United States as the plaintiff in the case. The application was denied. They then moved to transfer to the law side of the docket, but later withdrew this motion. Coming, apparently, to pass upon the trustee's motion to dismiss, the court considered the questions hereafter to be mentioned, and, concluding that the claimants had no lawful cause of action, thereupon dismissed the bill. The court, also, upon his own motion, revoked the order granting leave to sue the receiver, but with a provision that this should be without prejudice to any appellate proceeding or to claimant's future application for such leave on cause shown. From this order of dismissal, the claimants have appealed.

John B. Baskin, of Louisville, Ky. (Baskin & Vaughan, of Louisville, Ky., on the brief), for appellants.

Helm Bruce, of Louisville, Ky. (O. W. McGinnis and W. M. Wheeler, both of Evansville, Ind., and Bruce & Bullitt, of Louisville, Ky., on the brief), for appellees.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge (after stating the facts as above). The record is full of informalities. No effective notice of the proceedings was ever given to the contractor. We might well dispose of the appeal for this or similar reasons; but the underlying merits of the matter have been so fully presented and argued by counsel for the parties

representing the substantial interests involved that we are confident no prejudice will arise from a present consideration of these matters, and we think it better to take this course, and leave to subsequent proceedings the correction of defects that apparently can be easily supplied.

[1] This is, plainly, not a suit upon the bond. Such a suit cannot be maintained in equity. Illinois Surety Co. v. U. S., 240 U. S. 214, 36 Sup. Ct. 321, 60 L. Ed. 609. Any right of action on the bond was barred by time. Texas Co. v. McCord, 233 U. S. 157, 162, 34 Sup. Ct. 550, 58 L. Ed. 893. Further, we cannot see that the bond has anything to do with the matter. A judgment on the bond would be worthless, and the claimants do not ask any such judgment. While the only purpose of the statutory bond is to enable the United States and materialmen and laborers to collect from the sureties their claims against the contractor, it may be (the point has not been argued and is not decided) that, if claimants have an equitable priority in the fund over mere general creditors, the relations between themselves and the sureties may also give them priority over the claims of the sureties for material and labor, if such claims they have; but, with this exception, we think whatever is said about the bond in the bill of complaint is surplusage, and we must look to the remainder to find a meritorious case. It seems to be fairly inferable that the government has accepted the work and has paid over the entire balance of the price and has no claim against the contractor or sureties and has nothing in its hands to disburse. It then appears that the claimants have furnished labor and material, which went into the work which produced the fund, and the sole substantial question is whether they have any equitable lien or priority in the fund as against other creditors of the contractor, who loaned it money or furnished it something besides labor or materials.

[2] The matter of subrogation has been argued at length, and many of the cases cited deal primarily with that subject. We think it has small pertinence. Subrogation involves three elements—a valuable right, a person who owns the right, and a person who is seeking to be substituted in that ownership. If the claimants have an equitable priority in the fund, they need no subrogation; their right is primary; and to assume the existence of a derivative right based on the primary one is to beg the question whether the latter exists. A brief reference to the subrogation case chiefly relied upon makes this clear. In Prairie State Bank v. U. S., 164 U. S. 227, 17 Sup. Ct. 142, 41 L. Ed. 412, it appeared that a public works contract had been made between the United States and a contractor, in 1888, before the existence of any statute which required a surety bond for the benefit of those who furnished labor and material; but, pursuant to custom, the United States had taken from the contractor a bond with Hitchcock as surety, conditioned for the faithful performance of the building contract by the contractor. The contract also provided that the United States, as the work progressed, should make monthly payments on estimates, but should retain 10 per cent. of each estimate until the completion of the work, which retained percentage should be forfeited to the United States, if the contractor made default, though the extent of the forfeiture was made further subject to the discretion of the department.

It is, therefore, plain that the retained percentage in the hands of the United States constituted a security for faithful performance by the contractor. The contractor defaulted, and Hitchcock, the surety, in order to minimize his loss, took over the contract and finished it. Before Hitchcock's assumption of the contract and making of advances, the bank had loaned money to the contractor; the money, apparently, having been used to carry on the contract. Thereupon Hitchcock and the bank became adverse claimants to the retained percentage fund. As the creditor, the United States had two securities for the performance of the contract, one given directly by the principal upon his own property, and one given by the surety of that principal, it seems quite obvious that, when the surety was compelled to pay, he was entitled to be subrogated to the other security held by the creditor against the principal debtor; and so the court held. Such equitable rights in the fund as the bank might have been entitled to came from its voluntary loan to the principal debtor, and hence must be subordinate to the claim of the surety, whose bond was required as a part of the original contract and who had been compelled to pay; and this, also, was held. The relative rights of general creditors and of the laborers and materialmen, if any there were, who had given credit to the contractor were in no way involved in the case. Hitchcock was not subrogated to any such rights; he was subrogated to the United States in its right to use the retained percentage to finish the contract.

[3] Passing, thus, the subject of subrogation, we come back to what we consider the only meritorious question: Did the laborers and materialmen have any right, in analogy to a lien, which would entitle them to equitable priority over other creditors of the contractor in the distribution of the fund? Such right might arise by express contract, or by statute, or upon general principles of equity. In this case there is neither express contract nor express statute. If the right exists, it is to be developed from some equitable considerations.

Mechanic's lien statutes evidence a general recognition of the thought that those who contribute the labor and material going into a structure should have a claim against it for what they have furnished in preference to other creditors of the builder, though the equitable distinction, between those materialmen who are unpaid to-day and the banker who furnished the money which was used to pay those who furnished material yesterday, seems rather arbitrary. It is commonly held that this lien or priority is wholly statutory, and we are not aware of any case (unless those hereafter discussed) where, without the aid of any contract or statute, this vague equity of materialmen and laborers has been thought sufficient to put the owner of the property under obligation to see that they were paid before he settled with the contractor.

It seems, however, that the desire to see this class of claims given some preference was sufficient, so that the United States had someworks that it should have the right to withhold payments in case the times thought proper to provide expressly in a contract for public

contractor did not pay promptly for his labor and materials. Such a situation was involved in Greenville Bank v. Lawrence (C. C. A. 4) 76 Fed. 545, 22 C. C. A. 646; and this contract provision was construed, properly enough, to constitute the fund which was withheld by the United States a security for the payment of these claims. It was further held, and it necessarily followed, that the beneficiaries of this security fund were entitled to its proceeds as against one who merely stood in the shoes of the contractor. The controversy involved arose in 1893. It is stated in the opinion that it was necessary for the United States to assume the protection of labor and materialmen in order that dishonest and reckless contractors, who did not intend to pay such claims, might not obtain contracts, and thus subject Congress to importunities to make good the resulting loss. It may fairly be assumed, we think, that there was some general recognition of this moral or ethical duty resting upon the United States, and that this led to the passage of the bonding act of 1894. The policy of the act may be thought of in two ways. It may have been the congressional intent to substitute this statutory bond, as a protection to laborers and materialmen, in place of the rather vague obligation, which had been to some degree assumed by the United States, to look after their interests, in which case this obligation was eliminated, and after the statute, there was no such duty resting on the United States and no such right to protection remaining in the laborers. It may have been the congressional intent to give to these claimants, by this bond, an additional protection, which would become the ordinary and primary one, and usually would be sufficient, and to do this without diminishing the obligation of the government to see that these claims were paid, as far as that result could be accomplished by the funds which it retained. In that event the equitable priority of such claimants in the fund, if such priority there had been, would remain and could be enforced in the appropriate cases either directly or by subrogation.

It is not necessary to consider which of these views would seem the better one, if the question were open. We think it has been foreclosed by the decision of the Supreme Court in Henningsen v. U. S., 208 U. S. 404, 28 Sup. Ct. 389, 52 L. Ed. 547. In that case, the surety upon a bond of this kind, given pursuant to the 1894 statute, and who had been compelled to pay its surety obligation, was held entitled to priority in the retained fund as against a general creditor of the contractor. The case was essentially different from the Prairie State Bank Case, because there the surety had taken over and completed the contract and the performance of the contractor's obligation to the United States as the other party to the contract, and so had become entitled to the security which the United States held against the contractor; in the Henningsen Case, the contractor himself had completely performed the contract and had finished the work. It would seem, therefore, that subrogation in the Henningsen Case could not be to any security which the United States held against the contractor; there was no such element in the case. The surety's claim of priority in the fund was sustained, and this was done on the stated theory of subrogation. Since there cannot be the transfer of a right by subrogation, unless there is

a right to be transferred, we think the necessary effect of the decision is to hold that the laborers and materialmen, in spite of or in addition to the giving of the bond, had an original and continuing equitable priority in the fund, and that it was this right to which the surety was subrogated. This is not stated in the opinion in very express terms, but it had been pressed upon the court (208 U. S. 407, 408, 28 Sup. Ct. 389, 52 L. Ed. 547) that there could be no such subrogation without such a right, and that there was no such right. On page 410, of 208 U. S., on page 391 of 28 Sup. Ct. (52 L. Ed. 547), the court refers to and assumes that the government, after the bond was given was still charged with "equitable obligations to see that the laborers and supply men were paid." We are constrained to think that the decision necessarily rests upon the existence of this right, as one entitling these claimants to priority in payment out of the fund, and therefore as entitling the surety, as their equitable assignee by subrogation, to the same priority.

If this is the true principle of the decision, it may not be clear what the rights of the parties would be in the various situations that might arise, e. g., as between a surety who had performed the contract and claimants of this class unpaid when the surety took it over, or as between a surety who had paid claims of this class to the limit of his bond and the unpaid remainder of the same class; but those questions can be met when they arise. The same result was reached in Re McGarry (C. C. A. 7) 240 Fed. 400, 153 C. C. A. 326, and in Cox v. New England Co. (C. C. A. 8) 247 Fed. 955, 160 C. C. A. 655. The opinions in these cases do not decide the controlling question—what the right of the laborers and materialmen in the fund is—but they assume that it is decided in the Henningsen Case. In Re Schofield (C. C. A. 2) 215 Fed. 45, 48–50, 131 C. C. A. 353, the precise question is discussed, but seems to be left undecided. The court follows the Henningsen Case, but assumes that it was the same in principle as in the Prairie State Bank Case, not observing what, with all deference, we think the essential distinction already pointed out. When the surety in the latter case stepped in, the United States was the obligee in an unperformed contract, holding security for its performance, and the surety was subrogated. When Henningsen's surety paid up, the United States, the secured creditor, had been satisfied, and had no further claim on the fund, unless it bore the duty to devote the fund to the labor and material claimants; hence the latter proposition must be considered as affirmed. Obviously, the retained fund is devoted to the payment for such labor and material as may be necessary to finish the work after the contractor defaults. Whether it is devoted to pay the contractor's debts of that class is a distinct question, and the cited cases suggest to us some confusion of thought on this subject.

In reaching the conclusion to which the Henningsen Case leads us —that the statute leaves unimpaired an existing obligation by the United States to protect such claimants—we get no help from the fact that the bond which is executed runs to the United States as the nominal obligee. The provisions of the act of 1894 as to bringing suits

show that this is rather a convenience to the claimants than a recognition of any duty by the United States to protect them.

[4] The printed record does not contain the contract and bond at length. Copies were filed, as exhibits, with the bill of complaint, but not included in the transcript. Appellant has caused the copies so filed to be certified to this court, and asks that they be included in the record. We see no objection to this, and it will be ordered that they be so included, but that they need not be printed. We observe nothing in the contract itself which would seem relevant to the issue we have discussed, excepting the several paragraphs which prescribe the various obligations assumed by the contractor to the United States, for breach of which the United States would have a remedy upon the bond, and paragraphs 9 and 12, which say, respectively:

"9. The contractor shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material;" and

"12. Payments shall be made to the contractor as prescribed in paragraph 20 of the specifications hereto attached and forming part of this agreement."

The introductory part of the contract says that it is "in conformity with the advertisement and specifications hereto attached which form a part of this contract." In the copies filed as exhibits with the bill, the advertisement and specifications were not included. Appellant produced at the hearing a copy of such advertisement and specifications, certified by the War Department, and asked that it also be included in the record. We do not clearly see how we can thus bring in a paper which was never presented to the court below, but, as its authenticity does not seem to be questioned, and in order that we might not overlook something inconsistent with the result which we have reached, we have examined this additional paper. We find nothing in it which, as it seems to us, could be thought to bear on the question, save the part which is copied in the margin.[1] Undoubtedly the express provisions in the contract and specification, that the contractor shall pay labor and material claims, and that, when the work is finished, the retained percentage shall be paid to the contractor, look away from, rather than toward, the existence of any remaining obligation by the United States to give such claims priority; but it is to be supposed that these are the common provisions of such contracts, and, indeed, they only express what would be natural implications. On the other hand, we note that the contractor's express promise, in paragraph 9, to pay for material and labor, is a promise to the United States, and is

[1] "20. *Payments.* When funds are available, payments will be made monthly on estimates of work accepted. Ten per cent. will be reserved from each payment until the amount so reserved shall equal $75,000. Upon completion and acceptance of the entire work, all reserved payments will be paid to the contractor. Should payments be discontinued for a period of one year, owing to a lack of funds, one-half of the reserved percentage will be paid to the contractor, it being understood that such payment shall in no manner release the contractor from his obligations under this contract, and that the contract and the accompanying bond shall remain in full force and effect the same as if such reserved percentage had not been paid. When work is resumed, 10 per cent. will be deducted from each monthly payment as before until the total amount reserved again equals $75,000."

secured by the conditions of the bond for "faithful performance," in which the United States has a direct interest. On the whole, we do not think these contract provisions sufficient to require a departure from the rule which we would otherwise follow.

The Henningsen Case was decided under the statute of 1894, and substantial changes were made in 1905, but they do not affect the principle of that case. The chief change is to give the United States priority in the full satisfaction of all its claims under the bond, for completion of the contract or for delay, before the labor and material claimants get their protection. This indicates a less tender care for the interests of such claimants, but we do not see that it affects the question of the underlying obligation of the government to give this protection, in so far as it can be given consistently with the government's priority.

We therefore conclude that the labor and material claimants are entitled to priority in the distribution of the fund in the receiver's hands, as against other creditors. Our order will be that the decree be reversed, with costs, and that the case be remanded, in order that the claimants may recast their pleadings, so as to be in form either an intervention in the receivership case, or an independent bill expressly ancillary to that case, as they may be advised, and that thereafter further proceedings be had in accordance with this opinion.

LINARES et al. v. SUCESORES DE BIANCHI.

(Circuit Court of Appeals, First Circuit. March 15, 1921.)

No. 1453.

Partnership ⇐227—Contract to convey interest in partnership business held contingent on exercising existing option.

A letter in behalf of a partnership, which supposed it had a short option to purchase a sugar plantation at a low figure, confirming an agreement to cede to plaintiffs, who had aided in securing credit for the amount necessary to exercise the option 10 per cent. interest in the business if it was carried out, agreed to give such interest only in the event the option was exercised, so that the partnership was not obliged to convey the interest when, after discovering its option was unenforceable, it renewed negotiations and ultimately purchased the plantation at twice the option price, securing credit from the same bank which had agreed to give credit for the former deal.

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

Suit by Julian Linares and another against Sucesores De Bianchi for specific performance of a contract. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Jorge V. Dominguez, of San Juan, P. R., for appellants.

Benjamin F. Norris, of New York City (Cay Coll Cuchi, of San Juan, P. R., on the brief), for appellees.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

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

ANDERSON, Circuit Judge. This is a suit in equity filed in the District Court for the District of Porto Rico on March 9, 1917, seeking specific performance of an alleged written contract for the conveyance of a 10 per cent. interest to the two plaintiffs in equal shares in the property and business of Central Coloso, a large sugar plantation and mill in Porto Rico.

The decision below was that plaintiffs had made out no case in equity, and the bill was dismissed; plaintiffs appealed.

The record is obscure, inconsistent, replete with incompetent and immaterial evidence, and generally unsatisfactory. But the conclusion we have reached enables us to avoid the most confusing of these defects. The real case is within narrow compass. It turns on the construction of a written contract consisting of two letters.

The plaintiff Luzunaris is a citizen of New York, and familiar with Spanish. The plaintiff Linares is a citizen of Spain, with substantial business connections in Cuba and New York City. The defendants are a partnership in Mayaguez, Porto Rico, who had, or thought they had, in the spring of 1916 an option, to expire not later than June 15, 1916 (the exact date is left uncertain), to buy the Central Coloso for $700,000 or less—$672,000 and $662,000 are also referred to as the option price. Central Coloso is said to be assessed for taxation at over $1,400,000. It was owned or controlled in Paris. The price named in the supposed option was very low, promising large profits to the defendants if they could take it up. They lacked the necessary capital or credit. Thereupon the defendant, Juan Bianchi, a general partner, not speaking or understanding English, came to New York to raise the necessary funds, about $370,000. Luzunaris was an old friend of Juan Bianchi, and acted as interpreter and a sort of agent in efforts to obtain the requisite funds. A little later the help of Linares was invoked. After several unsuccessful attempts elsewhere, arrangements for the desired credit were made on June 8, 1916, with the Royal Bank of Canada, which had a branch in New York, another in Mayaguez, and its main office in Montreal. The arrangements concerning this credit were originally oral, but were confirmed by letters, the first two of which constitute the alleged contract relied upon in this suit. The first letter, written in New York by Linares, is as follows:

"June 8, 1916.

"Sucesores de Bianchi, Mayaguez, Porto Rico—Dear Sirs and Friends: I am pleased to confirm the negotiations with you, through your esteemed gentleman and friend of mine, Don Juan Bianchi, relative to the purchase of the Central Coloso, in Porto Rico, with my co-operation, and so far as I am concerned I stand ready to fulfill my obligations and carry through this negotiation, so skillfully conducted by Don Juan Bianchi, whom I congratulate on this opportunity.

"Besides the sympathies which I feel for Don Juan, which reflect on you, I must sincerely confess that my participation in a negotiation of this nature in Porto Rico, is due to my good wishes toward our friend Mr. Manuel Luzunaris, and in furtherance of this feeling I hereby grant and assign to said party 50 per cent. of my profit on this business, consisting of 10 per cent. on the profits of the Central Coloso, as heretofore agreed with Don Juan.

"By virtue of this purchase, and for greater facility in fixing the legal requisites necessary, I would suggest that a corporation be organized here

with a small nominal capital, and thus make the proper distribution of shares, prior to the transfer of the title, and you may forward immediately to Don Juan a power of attorney, with sufficient powers, should he lack the same, provided my proposition be agreeable to you.

"Yours truly, Julian Linares."

This was handed to Juan Bianchi, and a reply, written, apparently in English, by Luzunaris for Juan Bianchi, and signed by him with the name of the defendant firm, was as follows:

"June 8, 1916.

"Sr. Don Julian Linares, City—Dear Sir and Friend: 'Central Coloso.' We beg to acknowledge receipt of your favor of yesterday, delivered to the undersigned, and besides our gratefulness for your assistance in this negotiation, I avail myself of this opportunity to thank you most heartily for your flattering phrases.

"We also confirm the agreement with you to cede you a 10 per cent. share in the business, if it is carried out, and in regard to the organization of the corporation, this will be dealt with, once that the business has been carried out.

"With reference to the division of your share, we will be pleased to carry it out in accordance with your instructions, and we are glad that you have assigned 50 per cent., out of your 10 per cent., or one-half thereof, to Mr. Manuel Luzunaris, for whom we also feel the highest regard.

"Very truly yours and friends, Sucs. De Bianchi."

On the next day Linares delivered to the bank his letter of guaranty, as follows:

"June 9, 1916.

"Messrs. The Royal Bank of Canada, New York, N. Y.—Dear Sirs: In accordance with the agreement and in order to be able to carry into effect the purchase of the Central Coloso, in Porto Rico, by Messrs. Sucesores de Bianchi, with my co-operation and with credit opened by you for $370,000 to meet the first payment, against collateral furnished by said parties, estimated worth $177,000, plus the sugars from said Central and the personal liability of the gentlemen who constitute said firm, I hereby guarantee you against actual loss in this transaction, and submit herewith my signature for the purpose, begging you to hold confidentially this guaranty and eliminate my name in the course of the negotiations with said Messrs. Sucesores de Bianchi.

"Yours very truly, Julian Linares."

The bank confirmed its oral arrangements for credit to the defendants by the following letter:

"New York, June 8, 1916.

"Mr. Juan Bianchi, New York City—Dear Sir: With reference to our conversation, we have received authority to make you an advance of $370,000, to meet the first payment on purchase of Central Coloso. It is our understanding that this note will bear interest at the rate of 8 per cent., and will be signed by Sucs. de Bianchi and indorsed individually by Francisco Bianchi, Juan Bianchi, and Miguel E. Planes. As security you will furnish various bonds, estimated worth $177,000, a contract for sugar of crop 1917–1918, and title deeds to the property, subject to the lien guaranteeing deferred payments in favor of the former owners. Sugars to be sold through the Sugar Sales Corporation.

"Yours very truly, C. E. McKenzie, Agent."

It will be observed that this letter contains no reference to any actual or prospective guaranty by Linares.

Three days later, on June 12, 1916, the defendant Juan Bianchi wrote the bank as follows:

"Messrs. The Royal Bank of Canada, New York—Dear Sirs: In accordance with the conversation which I had with you this morning, I hereby confirm that the guaranty which Mr. Julian Linares had offered me, in case that you should consider it necessary in order to carry out the business of the purchase of Central Coloso, has been canceled.

"Upon further cable advice from Porto Rico, in connection with this transaction, I will call on you, and we hope, in pursuance of our agreement, that there remains open and at our disposal at your offices in San Juan, Porto Rico, a credit for the sum of three hundred and seventy thousand dollars ($370,000) guaranteed by our securities, provided we receive confirmation of the deal from Paris.

"We again thank you for the attention and confidence you have bestowed upon us, and beg to remain.

"Very truly yours,"

On June 14, the bank wrote Linares as follows:

"Dear Sir: We are in receipt of your letter of the 9th inst., and since then we have been informed by Mr. Bianchi that the guaranty offered by you is canceled.

"Respectfully, E. W., Agent."

The following excerpts from cablegrams also throw light upon the situation and upon the minds of the parties:

"New York, June 6, 1916.

"Sent to Bianchi, Mayaguez:

"* * * Can you extend time for option?"

"New York, June 6, 1916.

"Sent to Bianchi, Mayaguez:

"Propose the following: Consider a good purchase payment; on delivery $370,500. * * * Must make a deposit of our security. Advise me if you agree. Are working the business and have every prospect of success?"

"New York, June 8, 1916.

"Sent to Bianchi, Mayaguez:

"Try to get option extended till Tuesday."

"New York, June 8, 1916.

"Sent to Bianchi, Mayaguez:

"The guaranty is not sufficient—cannot do the business unless we accept—Mr. Linares from Cuba interested 10 per cent. profits. Direction our control—Advise acceptance by telegraph. Feel certain closing. Market is advancing, and looks like going higher next year."

"New York, June 8, 1916.

"Sent to Bianchi, Mayaguez:

"Royal bankers have opened credit. $370,000 on our collateral excluding cash. If you will agree to the conditions. Linares has guaranteed transaction. You can close at once. Confirm condition. Bank have sent telegram to San Juan. Will open a credit. Please apply."

"San Juan, P. R., June 9.

"Juan Bianchi, Hotel Brevoort, New York:

"Purchase closed. Almost sure will be able to make operation Royal here. Call on Royal to-morrow morning there. They expect you. We do not deem necessary nor suitable intervention Linares. Paco."

We again observe that there are many inconsistencies in the record, in what purport to be copies of the same documents as well as in some of the dates appearing on them. The cablegrams are also blind, and obviously defective in punctuation. In this opinion we have taken as accurate the copies, so far as they appear, set forth in the opinion of the court below. But elsewhere in the record and in the briefs we find dif-

ferent renditions of the same documents. Very likely these inconsistencies arise out of translation. They are not sufficiently serious to raise doubts as to the general conclusion.

A few days later than this last cablegram—apparently between June 12 and June 27—the defendants ascertained that the owners in Paris refused to sell at the price contemplated. The fair inference is that the defendants had no valid outstanding option at the price of $700,000, or at any other price. The credit at the bank for $370,000 was accordingly canceled. The trade then under consideration was never made.

But in the late summer one of the other defendants, Francisco Bianchi, went to Paris, opened direct negotiations with the owners, and finally in October, 1916, bought Central Coloso for $1,500,000—obtaining at that time credit from the Royal Bank of Canada for $500,000. But with these later negotiations and the resulting necessary financial arrangements the plaintiffs had nothing whatever to do.

The plaintiffs contend that the deposit of Linares' letter of June 9, 1916, with the bank, followed by the purchase of the Coloso in October of that year, entitled the plaintiffs to the conveyance of the 10 per cent. interest referred to in the two letters of June 8.

Plaintiffs do not, and obviously could not successfully, contend that the purchase in October was in any way dependent upon Linares' short-lived guaranty to the bank in June. It is, in effect, conceded that the financing of the October purchase had no connection with the plaintiff's services to the defendants in June. Plaintiffs did not even introduce defendants to the bank. The defendants had, for a previous purchase, borrowed of this same bank, and their standing with it was excellent. Plaintiffs ground this claim, as they obviously must, on their interpretation of the letters, as a written contract, construed with reference to the subject-matter and in the light of the surrounding circumstances.

The plaintiffs' argument is in substance that defendants agreed with plaintiffs that, in consideration of Linares' guaranty to the bank and the other trifling services rendered by plaintiffs, defendants would, if they ever bought Central Coloso, convey one-tenth to plaintiffs. We are unable to adopt this view. It does not accord with the fair meaning of the language used, interpreted in the light of the circumstances surrounding the parties. The language in Linares' letter, congratulating Juan Bianchi, and suggesting incorporation as a means of effecting the deal, implies a present or almost immediate completion of the trade on terms then supposed to be fully understood.

But there is no room for doubt as to the meaning of Juan Bianchi's acceptance. The vital part is:

"We also confirm the agreement with you to cede you a 10 per cent. share in the *business* [elsewhere stated or translated as *'negotiation'*], if it is carried *out* [elsewhere 'through'], and in regard to the organization of the corporation, this will be dealt with, once that the business has been *carried out* [elsewhere 'once that the negotiation has been *realized*']."

The words "negotiation [or business], *if it is carried out* [*or through*]" mean, we hold, the pending negotiation, for an almost im-

mediate purchase, under a short-lived option supposed to be outstanding, for the very advantageous price of $700,000 or less. The words "*if it is carried through*" explicitly conditioned Bianchi's acceptance upon the actual accomplishment of a definite and perfectly well-understood proposed trade, to effect which he (Juan Bianchi) had come to New York for funds. Juan Bianchi had no intention of binding himself or his firm, if the "negotiation" was *not* carried through. His letter was not a blanket agreement to grant to the plaintiffs a 10 per cent. interest in Central Coloso, if ever, for any price, financed on any security, the defendants became its owners. Neither the language used nor the surrounding circumstances are consistent with a purpose to bind his firm or himself to any such broad, general, persisting, unnatural, and embarrassing agreement. His was merely an undertaking to pay a very large consideration for immediate, very valuable, help to obtain a large sum of money then necessary to enable his firm to close, forthwith, a most advantageous trade, assumed to be otherwise unavailable. He was ready to pay generously for such immediate help to get cash, because *quick* money, as he reasonably believed, meant large profits otherwise unattainable. But Juan Bianchi never contemplated a *quasi* partnership with Linares and Luzunaris, on any other deal than the one then under consideration for the purchase of the Coloso at $700,000 or less. It was *that* deal, at *that* time, concerning which he wrote. That deal was never made. Therefore there was no promise to convey 10 per cent. interest to the plaintiffs.

We have not overlooked the plaintiffs' contention as to the continuity of the negotiations until the property was finally bought in October, 1916, for $1,500,000. But, even if it be true, as the court below found, that it is not "clear that the subsequent transaction by which the defendants bought the Central Coloso did not grow out of the original deal," this means nothing more than that defendants and the owners of Central Coloso continued higgling until a price more than double the price named in the supposed—but apparently invalid and worthless—option was agreed upon. We repeat that the "negotiation" or "business" referred to in the letters of June 8 was a negotiation for closing on an option of $700,000 or less. Plaintiffs' position under this rather narrow written contract is radically different from that of the broker who produces the person who ultimately becomes the desired purchaser, even if on terms much modified.

Careful consideration of all the evidence forces us to the conclusion that the subsequent purchase by the defendants of the Central Coloso was, so far as the plaintiffs were concerned, an entirely separate and distinct transaction, and not the subject-matter of the contingent agreement between the parties on June 8, 1916. Without any fault on the part of the defendants, and entirely contrary to their wish, the supposed option from the owners of the Coloso to the defendants ended or was found nonexistent in June, 1916. With the end or discovered nonexistence of that option ended all contingent right of the plaintiffs arising under the language of the letters of June 8.

As this conclusion disposes of the whole case, it is unnecessary for

us to consider whether Juan Bianchi's acceptance of June 8, in the name of his firm, of Linares' proposition, was conditioned upon ratification by his firm in Porto Rico. The latter part of Linares' own letter indicates that Linares supposed that his proposition addressed to the firm must be reported for its acceptance or rejection. But we hold that, assuming that Juan Bianchi had full power to accept, the acceptance was so conditioned that, on the facts as they turned out, neither he nor his firm was bound.

We think it should, however, be added, that we agree with the court below that the defense of fraud is not made out. There is no substantial evidence of any fraudulent or otherwise unfair dealing by the plaintiffs.

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

MIDWAY IRRIGATION CO. et al. v. SNAKE CREEK MINING & TUNNEL CO.*

(Circuit Court of Appeals, Eighth Circuit. January 28, 1921.)

No. 5570.

1. **Waters and water courses ⟸152(6)—Burden on claimant of subterranean water to prove not from percolation.**
In a suit to determine the right to water drawn from inside a mountain by means of a tunnel and flowing into a stream, as between the owner of the tunnel and a prior appropriator of the water of the stream, the former has the burden of proof to show that such water is not seepage or percolating water from the surface, which but for the tunnel would otherwise have been tributary to the stream.

2. **Waters and water courses ⟸152(8)—Evidence showed that water was gathered by tunnel through percolation from surface.**
Evidence *held* insufficient to sustain the claim of complainant that water, gathered by its tunnel driven several thousand feet into a mountain and flowing into a creek near the entrance, came from subterranean sources, but to show that the water reached the tunnel through percolation from the surface, and before making of the tunnel found its way into the creek by seepage and through springs; it appearing that since the tunnel was constructed the flow of water in the creek above its entrance has materially decreased.

3. **Waters and water courses ⟸127—English rule governing water rights not applicable in arid states.**
The English or common-law rule respecting water rights is not applicable to the Western mountain states, unless adopted by the highest court of the state.

4. **Waters and water courses ⟸143—Subterranean waters cannot be appropriated in excess of reasonable beneficial use.**
By the American rule, adopted by most of the Western states, while the owner of land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, especially if the exercise of such use, in excess of the reasonable and beneficial use, is injurious to others, who have substantial rights to the water.

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

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 536, 65 L. Ed. —.

5. Courts ⇐368—Federal courts follow later rather than earlier decisions of state courts.

If there be any inconsistency in the opinions of the court of last resort of a state, in determining a rule of law which the national courts are bound to follow, the general rule is that the latest settled adjudication will be followed in preference to the earlier ones.

6. Waters and water courses ⇐140—Appropriators of waters of creek entitled to water diverted by mining tunnel.

Complainant constructed a tunnel into a mountain for mining purposes, into which surface water previously tributary to a creek percolated and was discharged at the tunnel entrance into the creek. Complainant did not make use of such water in its business, but undertook to sell the same from the creek, the waters of which had many years before been lawfully appropriated by defendant and applied to beneficial use in the irrigation of its lands, which were otherwise arid and valueless. *Held*, that the tunnel was a part of the natural flow of the creek and subject to defendants' prior appropriation.

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Suit in equity by the Snake Creek Mining & Tunnel Company against the Midway Irrigation Company and others. Decree for complainant, and defendants appeal. Reversed.

The parties will be referred to herein as they appeared in the court below, the appellants as defendants, and the appellee as the plaintiff. The plaintiff by its complaint sought to have its claim to the water flowing from its tunnel, between the portal of the tunnel and the point of diversion, less loss by seepage and evaporation, established and confirmed against the defendants; that it be decreed that the defendants have no right to take and divert from Snake creek below the point where the water, issuing from its tunnel, flows into Snake creek, and the defendants be enjoined from claiming said water or any part thereof.

The material allegations in the complaint are that the plaintiff is the owner of a quarter section of land, and in April, 1910, it commenced to drive a tunnel, the portal of which is on said land, and constructed it 14,500 feet into the mountain at great depth, and is the owner thereof and the water issuing therefrom; that about 2,684 feet from the portal of the tunnel water was encountered percolating through the rocks and soil, which is conveyed through and from the tunnel in a sluice at the bottom of the tunnel, the amount of water flowing from the tunnel in 1918 being 14.38 second feet or 6,454 gallons per minute; that from the portal of the tunnel the water flows about 2,000 feet into Snake creek, which is a tributary of Provo river, both of which are natural water courses; that water was first encountered in the tunnel in January, 1911, and has been increasing ever since, as the tunnel was lengthened; that, in permitting the water from the tunnel to flow into Snake creek, it did not intend to abandon its title to the water, and to become a part of Snake creek or Provo river, subject to appropriation by others, but claimed to own it, with the right to divert it for irrigation or other beneficial purposes; that before the beginning of the irrigation season in 1914 it sold the right to take this water to the Provo Reservoir Company for the purpose of irrigation, which requires it for the growing of crops by its stockholders; that all other waters flowing into Snake creek, Spring creek, and Provo river had been theretofore appropriated for irrigation and other useful purposes; that the defendant Irrigation Company is a corporation for the purpose of irrigation, and denies that plaintiff is the owner of the water flowing from said tunnel, and claims that it was water subject to appropriation and use by it for its stockholders, and diverts for purposes of irrigation all the water flowing from plaintiff's tunnel into the creek; that it has diverted the water below where it flows from the tunnel into the

creek, and deprived the Provo Reservoir Company and its stockholders of the use of said water, which prevents them from raising crops.

The defendants filed an answer and counterclaim. In it they deny that the water is percolating water, in the sense that it is a part of the soil lying therein, but allege that said waters before they enter said tunnel are flowing waters, directly tributary to and part of a natural stream known as Snake creek, varying at times in proportion as the waters in Snake creek vary at different times. They deny that Snake creek and Provo river are public water courses, but allege that long before the plaintiff commenced the driving of the tunnel all the waters of Snake creek, Spring creek, and Provo river had become vested in private ownership of defendant and its stockholders. They deny that any of the surplus waters in said tunnel were subject to appropriation by the plaintiff, or any other person, except the defendants. They claim that the waters from said tunnel have for more than 25 years been appropriated and used by the defendants, who are now the owners thereof, and have the right to use the same for beneficial and useful purposes; no water having been added to the creek or river since the driving of the tunnel. They deny that plaintiff or its predecessors, within 25 years before the institution of their action, ever claimed or asserted that the waters from said tunnel were public waters or subject to appropriation.

In their counterclaim the defendants allege that for more than 25 years they and their predecessors in interest have been the owners of all the waters and water rights for irrigation and other beneficial purposes of the waters and water rights for irrigation of Snake creek, by appropriation and diversion; that the natural sources of said creek consist of rain, melting snow, springs, and seepages, which, before the construction of the tunnel, ordinarily supplied the greater portion of the flowing water of said creek and were the main reliance of the defendants for the supply of water for the irrigation of their land and other beneficial purposes; that said springs and seepages had their source in the bosom of the mountains, and before the construction of the tunnel found their way to the surface of the mountains through natural channels and fissures of the rocks, and found their way into said creek, and were its natural tributaries and feeders; that all the waters of said creek and water rights pertaining thereto are owned by defendants, and are necessary and not more than sufficient, when economically used, for their purposes as stated; that the plaintiff wrongfully and in violation of defendants' rights drove its tunnel, from the mouth of which a substantial quantity of water flows, sufficient to irrigate several hundred acres of land, which waters formerly found their way into the natural surface channel of Snake creek through underground channels and sources; that the tunnel is in the immediate vicinity of Snake creek, its portal being in the canyon through which the creek flows, and in the prosecution of the work undermined, cut off, and diverted the underground flowing streams, springs, and seepage constituting the permanent source of the flowing water of said creek, and thereby caused said waters to flow into the tunnel; that prior to the digging of plaintiff's tunnel the Mountain Lake Mining Company dug a deep tunnel into the mountain at a point higher up the stream and higher in elevation than plaintiff's tunnel, which tunnel of the Mountain Lake Mining Company crosses Snake creek underneath its head; that the driving of the Mountain Lake tunnel dried up some of the springs, which theretofore had come to the surface, and which constituted the headwaters of Snake creek, and ever since the waters which formerly came to the surface through said springs thereafter flowed out of the mouth of said Mountain Lake tunnel; that since the driving of plaintiff's tunnel the volume of water flowing out of the Mountain Lake tunnel has receded one-third, all of which waters formerly found their way into Snake creek and supplied the natural volume of flow thereof; that by constructing its tunnel plaintiff has interfered with the natural supply of the flowing waters of Snake creek; that before the digging of the tunnel the natural subsurface water supply of said creek found its way through natural channels into the stream, uniform in volume relatively during the low-water season; that since then, and by reason thereof, the store waters from within the mountain drained off more rapidly, and by

reason thereof defendants are deprived of water, which otherwise they would have had, and so deprived during the irrigation season each year, when it is necessary for the maturing of their crops; that if plaintiff is permitted to extend said tunnel further it will still more lessen the water supply, and make the farms and homes of defendant's stockholders valueless.

The prayer of the counterclaim is for an injunction, enjoining plaintiff from asserting any claim to the waters flowing from said tunnel and quieting defendants' title to the water flowing from the tunnel and interfering with defendants' free and unrestricted use thereof, and also enjoining it from extending its tunnel further in the mountain. The reply of the plaintiff to the counterclaim is in effect a general denial of the material allegations alleged.

A. B. Irvine, of Salt Lake City, Utah (Sam D. Thurman, of Salt Lake City, Utah, on the brief), for appellants.

H. R. Macmillan, of Salt Lake City, Utah (Andrew Howat, John A. Marshall, and B. S. Crow, all of Salt Lake City, Utah, on the brief), for appellee.

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

TRIEBER, District Judge (after stating the facts as above). It is admitted by the plaintiff in its brief that the evidence establishes that—

"The defendants' predecessors in interest had, more than 25 years before the driving of the tunnel, appropriated all of the water flowing in Snake creek and at some considerable distance below the portal of the tunnel, and diverted the water on to their lands for the purpose of irrigation. These lands are arid, and do not bear any crops unless irrigated, and without water were of little or no value."

[1] The learned District Judge reached his conclusion that the owners of the tunnel were entitled to the water which flowed from it, not on the ground that the preponderance of the evidence sustained the plaintiff's claim, but on the ground that, notwithstanding the prior appropriation of all the waters of the creek by the Irrigation Company and the fact that the portal of the tunnel was located near the bank of Snake creek and up towards its sources, the burden of proof was on the prior appropriators to show that the waters in the tunnel were derived from subterranean waters which flowed into the creek, if they had not seeped into and been collected with and drawn from the ground by the Tunnel Company by the use of its tunnel. The Supreme Court of Utah has expressly held:

"The burden of proof is upon the one who has discovered certain subterranean water and claiming the same to show that such water is, in fact, 'developed water.' Therefore, whoever asserts that he is entitled to the exclusive use of water by reason of his having discovered and 'developed' the same must assure the court, by a preponderance of the evidence, that he is not intercepting the tributaries of the main stream or other body to the waters of which others are entitled." Mountain Lake Mining Co. v. Midway Irrigation Co., 47 Utah, 346, 360, 149 Pac. 929, 934.

This was reaffirmed in Bastian v. Nebeker, 49 Utah, 390, 163 Pac. 1092. The courts of last resort in other mountain states, where conditions are similar to those prevailing in the state of Utah, have reached

the same conclusion. Platte Valley Irrigation Co. v. Buckers I. M. & I. Co., 25 Colo. 77, 53 Pac. 334; Smith v. Duff, 39 Mont. 382, 102 Pac. 984, 133 Am. St. Rep. 587.

This rule seems more rational and logical than the opposite rule, to wit: That the burden is upon the prior appropriators to show that subterranean waters drawn by another by means of a tunnel from the ground that might have constituted the sources of the stream, were in fact the source thereof. Those who run tunnels into the mountain and gather water in this way, near the sources of streams, have better means of knowledge whether they are gathering water tributary to the streams than do prior appropriators down the streams, who are cultivating their lands and have nothing to do with the driving of such tunnels, and it would be an irrational and burdensome rule, probably destructive of their rights, to require such prior appropriators to establish the fact in the first instance, that the owners of the tunnel intercepted the tributaries to the stream.

[2] Adopting this rule, the evidence warrants findings, and we so find, that since the construction of the tunnel, by the plaintiff, the water in Snake creek has been materially lessened to an extent that there is not sufficient water in the creek to enable the stockholders of the defendant company to irrigate their lands, so as to be able to cultivate their lands, which are all agricultural, unless permitted to use the surplus water flowing into the creek from plaintiff's tunnel; that the water flowing into the creek from that tunnel is not used nor necessary to enable the plaintiff to operate its mine and other works connected with its mining operations, and which under its charter it is authorized to carry on; that the water in controversy is sold by it to another irrigation district, formed years after the defendants had appropriated the water in Snake creek; that the waters of the tunnel are percolating waters and from seepage, and which before the construction of the tunnel found their way through the soil and rocks to springs flowing into Snake creek, and had been appropriated and were used by the defendants for irrigating their lands, and that without them their lands cannot be cultivated; that these waters with the water obtained by them from Snake creek and the Ontario tunnel, enabled them to raise crops practically every year, but that the plaintiff's tunnel intercepted considerable of this water, thereby diminishing the water in the creek, and unless permitted to use the water flowing from the tunnel into the creek their lands cannot be cultivated. The evidence fails to establish that the water which passes into the tunnel comes from underground channels. The real issue involved is whether these waters belong to the owner of the soil in which they are found—in this instance the plaintiff—regardless of where they come from. To determine this question, the national courts will follow the rule adopted by the state of the situs, as determined by its court of last resort, if that court has established such a rule. If it has not been so determined, and in the absence of a controlling statute of the state, it is for the national courts, if called on, to determine what the law is. That the statute of the state (section 2780, Comp. Laws Utah 1888), cited by counsel for defendants, does not

apply, has been decided in Crescent Min. Co. v. Silver King Min. Co., 17 Utah, 444, 54 Pac. 244, 70 Am. St. Rep. 810.

[3] The rule which may have prevailed at common law is only material if it has been adopted by the Supreme Court of Utah. As was well said in Starr v. Child, 20 Wend. (N. Y.) 159, approved in People ex rel. v. Canal Appraisers, 33 N. Y. 461, and in Katz v. Walkinshaw, 141 Cal. 116, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35:

"I think no doctrine better settled than that such portions of the law of England as are not adapted to our condition form no part of the law of this state. This exception includes not only such laws as are inconsistent with the spirit of our institutions, but such as were framed with special reference to the physical condition of a country differing widely from our own. It is contrary to the spirit of the common law itself, to apply a rule founded on a particular reason, to a case, when that reason utterly fails."

This principle of law was in effect applied in The Genesee Chief, 53 U. S. (12 How.) 443, 13 L. Ed. 1058, when The Thomas Jefferson, 23 U. S. (10 Wheat.) 428, 6 L. Ed. 358, and The Steamboat Orleans, 36 U. S. (11 Pet.) 175, 9 L. Ed. 677, were in an opinion delivered by Chief Justice Taney overruled. In Jennings v. Kirk, 98 U. S. 453, 458, 25 L. Ed. 240, the rules governing water rights, established by miners, which disregarded the common law respecting the rights of riparian owners, were upheld. In Atchison v. Peterson, 87 U. S. (20 Wall.) 507, 22 L. Ed. 414, quoting from the syllabus, it was held that—

"On the mineral lands of the public domain in the Pacific states and territories, the doctrines of the common law, declaratory of the rights of riparian proprietors respecting the use of running waters, are inapplicable, or applicable only in a very limited extent to the necessities of miners, and inadequate to their protection; their prior appropriation gives the better right to running waters to the extent, in quantity and quality, necessary for the uses to which the water is applied."

The conditions in the Western mountain states, where the lands are practically arid, and therefore agricultural products can only be raised by the aid of irrigation, differ materially from those prevailing in England and therefore, unless the Supreme Court of Utah has adopted the so-called English rule, we do not deem it a proper rule to be applied in that state. It has been so held by the courts of the states where similar conditions prevail as in the state of Utah. Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, 74 Pac. 766, 64 L. R. A. 236, 99 Am. St. Rep. 35; McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849; Los Angeles v. Hunter, 156 Cal. 603, 105 Pac. 755; Comstock v. Ramsay, 55 Colo. 244, 133 Pac. 1107; Wiel on Water Rights (3d Ed.) §§ 1063 and 1066; 2 Kinney on Water Rights, §§ 1193, 1194.

[4] The rule generally adopted by, not only the courts of the arid states, but by most of the American courts, so that it may be said to be the American, as distinguished from the English rule, is that, while the owner of the land is entitled to appropriate subterranean or other waters accumulating on his land, which thereby become a part of the realty, he cannot extract and appropriate them in excess of a reasonable and beneficial use upon the land he owns, unconnected with the beneficial use of the land, especially if the exercise of such use in excess of

the reasonable and beneficial use is injurious to others, who have substantial rights to the water. Meeker v. City of East Orange, 77 N. J. Law, 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798; Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141, affirmed 160 N. Y. 359, 54 N. E. 787, 45 L. R. A. 664; Forbell v. New York, 164 N. Y. 522, 58 N. E. 644, 51 L. R. A. 695, 79 Am. St. Rep. 666; Bassett v. Salisbury, 43 N. H. 569, 82 Am. Dec. 179; Willis v. Perry, 92 Iowa, 297, 60 N. W. 727, 26 L. R. A. 124; Stillwater Water Co. v. Farmer, 89 Minn. 58, 93 N. W. 907, 60 L. R. A. 875, 99 Am. St. Rep. 541.

The rulings of the Supreme Court of Utah are not harmonious. The earliest decisions seem to have favored the English rule, although they were not always harmonious. But in its latest decisions that court has adopted the American rule, although not so stated in express terms, and in effect overruling Roberts v. Gribble, 43 Utah, 411, 134 Pac. 1014, a case much relied on by counsel for plaintiff.

[5] If there be any inconsistency in the opinions of the court of last resort of a state in determining a rule of law, which the national courts are bound to follow, the general rule is that they will follow the latest settled adjudication in preference to the earlier ones. United States v. Morrison, 29 U. S. (4 Pet.) 126, 7 L. Ed. 804; Green v. Neal's Lessee, 31 U. S. (6 Pet.) 291, 8 L. Ed. 402; Wade v. Travis County, 174 U. S. 499, 508, 19 Sup. Ct. 715, 43 L. Ed. 1060; Leffingwell v. Warren, 67 U. S. (2 Black) 599, 17 L. Ed. 261; Quinette v. Pullman Co., 229 Fed. 333, 143 C. C. A. 453; Kibbe v. Ditto, 93 U. S. 674, 23 L. Ed. 1005; Bauserman v. Blunt, 147 U. S. 647, 13 Sup. Ct. 466, 37 L. Ed. 316. The exception to this rule is, where, upon the faith of state decisions, contracts or investments have been made on the faith of these decisions, and which at the time had not been overruled. But in the instant case plaintiff constructed its tunnel for mining only and not to obtain water to sell for irrigation purposes. It therefore cannot be said that it made its investment for the purpose of using the surplus waters for the purpose of sale. For this reason the authorities cited by counsel, based upon the rule of law applied in Gelpcke v. Dubuque, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520; Burgess v. Seligman, 107 U. S. 20, 2 Sup. Ct. 10, 27 L. Ed. 359, and other cases cited, which are to the same effect, is inapplicable, and does not sustain the contention that this court must follow the rulings of the Supreme Court of Utah made prior to and not overruled at the time the plaintiff constructed its tunnel.

[6] It will serve no useful purpose to review the older opinions of that court, as they have been considered by the Supreme Court of Utah in its latest decisions, which we deem it our duty to follow. In Stookey v. Green, 53 Utah, 311, 178 Pac. 586, opinion filed January 27, 1919, that court, referring to Garns v. Rollins, 41 Utah, 260, 125 Pac. 867, Ann. Cas. 1915C, 1159, and Roberts v. Gribble, supra, said:

"In Garns v. Rollins * * * it was held that the run-off, waste and seepage from irrigation are not subject to appropriation as against the owner of the land irrigated who desires to recapture it and apply it on his own land. In Roberts v. Gribble * * * the water in dispute resulted mainly from the irrigation of lands in the vicinity. Defendant's land

became swampy. He put in a drain system, collected the water, and used it upon his own land. In doing so he deprived plaintiff of its use."

The court then said:

"The principle underlying these two cases seems to be that waste and seepage waters from artificial irrigation constitute an artificial, rather than a natural, source of supply, and therefore are not the subject of appropriation. This principle is undoubtedly correct as applied to the facts in the Garns Case, and the Roberts–Gribble Case relies on the Garns Case as authority. If it goes no farther, we are of the opinion its rests upon a firm foundation."

In Rasmussen v. Moroni Irrigation Co. (Utah) 189 Pac. 572, the previous decisions of the court were relied on by appellant. The court, referring to Stookey v. Green, supra, said:

"All of the foregoing decisions, except the two in which the Herriman Irrigation Company was a party, are considered and reviewed in the recent case of Stookey v. Green. * * * The legal effect of those decisions and the principles upon which they rest are so clearly and ably stated by Mr. Justice Thurman that it would be a work of supererogation on the part of the writer to attempt to further review and statement."

The court, in referring to Roberts v. Gribble, says:

"The only case in which it might be said that the facts and conditions somewhat resemble those of the case at bar is the case of Roberts v. Gribble, supra. The decision in that case is, however, squarely based upon the case of Garns v. Rollins, and the facts in the latter case necessarily take the Roberts decision entirely outside of the principles which must control the case at bar. If, however, the case of Roberts v. Gribble shall be construed so as to make it applicable to the undisputed facts of the case at bar, then the decision in that case must be distinguished, and, if necessary, modified, so as to limit the same to the facts in the case of Garns v. Rollins, which is the sole basis of the decision of the Roberts v. Gribble Case."

The court then adopts as the correct principle the rule found in 2 Kinney, Irr. and Water Rights, §§ 1193 and 1194, which is quoted in full and reproduced here:

"It was not until the more recent scientific investigations, before mentioned, as to the movements of underground waters through the soil, that these percolating waters tributary to surface waters were recognized as belonging to any particular class, or that any rights could be acquired in them other than the rights which could be acquired to the soil itself, through which they found their way, of which soil, under the prevailing common-law rule, they were considered component parts. But, by these geological and topographical investigations made by the government and others, it has been proven in many instances that waters percolating through the soil of watersheds were not only the sources of supply, but the only source of supply of certain streams and other surface bodies of water. It being proven absolutely that these percolating waters physically are directly tributary to these streams, the law has kept pace with these scientific investigations proving this fact; and therefore it follows that in law they should be, and in many jurisdictions are, dealt with and treated as tributary waters. And, where rights to the waters of the stream itself have been once acquired, by appropriation or otherwise, it is unlawful for persons owning land bordering on the stream to intercept the waters percolating through them on their way to the stream, and apply it to any use other than its reasonable use upon the land upon which it is taken, if he thereby diminishes the flow of the stream to the damage of those having rights therein. Therefore this rule modifies the common-law rule that the owner of the land is also the owner of all the water found percolating as a part of the soil itself, and that

he may use and dispose of it as he sees fit, to the extent that he may only use these waters so percolating through his land, subject: First, to the rights of others to the water flowing in the stream which this water augments, upon the same principle as though this water was a part of the stream itself. * * *"

In the concluding part of the opinion the court said:

"The fact that the water in question may be percolating or seepage, as contradistinguished from the water flowing in known and defined underground channels, does not alter the case. The controlling question always is: *Was the water in question appropriated and put to beneficial use by others before the interception and attempted appropriation thereof by the landowner?*" (The italics are ours.)

See, also, McClintock v. Hudson, 141 Cal. 275, 74 Pac. 849, a tunnel case, in which the facts are much like those in the instant case. In this connection it is proper to state that these two opinions were rendered after the decision in this case was filed in the court below.

The water in controversy is unconnected with plaintiff's use of the tunnel—in fact, is not used for the plaintiff's own use, its business being mining, and not farming—and therefore it cannot be said that selling it is a reasonable, or, so far as its business is affected, a beneficial, use. See Mr. Justice Baskin's concurring opinion in Herriman Irr. Co. v. Keel, 25 Utah, 96, 124, 69 Pac. 719, on that point. To sell it to other irrigation companies cannot be said to be a reasonable and beneficial use for its business, when the effect of it is, as the evidence in the case at bar clearly establishes, that it is destructive of defendants' rights to use the water of Snake creek, which they had, 25 years before the driving of the tunnel by the plaintiff, appropriated, and without it their lands would become absolutely valueless.

The decree in favor of the plaintiff must be reversed, and a decree entered dismissing its complaint. On the counterclaim, defendants are entitled to an injunction enjoining plaintiff from asserting any claim to the surplus waters, flowing from the portals of the mine into Snake creek, not wanted for operating its mines, and quieting defendants' title thereto. The prayer for an injunction enjoining the plaintiff from extending its tunnel further in the mountain will be denied.

MARSHALL v. HINES, Director General of Railroads.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1921.)

No. 5541.

1. Railroads ⇐370—Lookout to warn persons on switch track not required.

A railroad company *held* not negligent in failing to station an employé on the switchboard of the tender of an engine backing on a switch track, to warn persons of its approach.

2. Negligence ⇐99—Contributory negligence of person killed on switch track held slight.

Under Rev. St. Neb. 1913, § 7892, providing that contributory negligence shall not bar recovery for personal injury, when the contributory

negligence was slight and the negligence of defendant was gross in comparison, as construed by the Supreme Court of the state, a man who alighted from an automobile in the daytime 30 feet in front of a building, across from a raised platform and switch track, and in full view of an engine which he knew to be on the switch track, and which was then backing toward the building at a speed of 6 miles an hour and some 500 feet distant, crossed the track to the platform and walked along in front of it 20 feet toward the coming engine, and then started across the track, and was struck by the tender and killed, *held* chargeable with more than slight contributory negligence as compared with the negligence of the engineer, if, as charged, he failed to ring the bell, and which precluded recovery for his death.

3. **Courts ⊂=352—Verdict directed on clear proof.**
It is the established rule in the federal courts that if, at the close of the trial of the questions of negligence of the defendant and contributory negligence of the person injured, the evidence so clearly shows that the latter was chargeable with negligence which directly contributed to his injury that a finding to the contrary could not be sustained by the court, it is its duty to direct a verdict for defendant.

4. **Negligence ⊂=82—Test of contributory negligence stated.**
In a case of alleged contributory negligence, the question is not whether the negligence of plaintiff or that of defendant was the more proximate cause of the injury, but it is whether or not the negligence of the injured person directly contributed to cause it.

5. **Negligence ⊂=83—"Last clear chance" doctrine stated.**
The "last clear chance" doctrine is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury, and does not include cases where by the exercise of ordinary care defendant might have made such discovery in time to avoid the injury.

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

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action at law by Elizabeth Marshall, administratrix, against Walker D. Hines, Director General of Railroads. Judgment for defendant, and plaintiff brings error. Affirmed.

J. S. McCarty, of Lincoln, Neb. (G. W. Berge, of Lincoln, Neb., and J. H. Agee, of Superior, Neb., on the brief), for plaintiff in error.

Jesse L. Root, of Omaha, Neb. (Byron Clark, of Omaha, Neb., M. V. Beghtol, of Lincoln, Neb., and J. W. Weingarten, of Omaha, Neb., on the brief), for defendant in error.

Before SANBORN and CARLAND, Circuit Judges.

SANBORN, Circuit Judge. Elizabeth Marshall, administratrix of George L. Marshall, brought an action against the Director General of Railroads for $25,000 damages for his alleged negligence in the operation of an engine and three cars on a switch track at Superior, Neb., which, she alleged, caused the injury and death of Mr. Marshall. The Director General denied the negligence averred and alleged that Mr. Marshall's injury and death were caused by his own negligence. The issues were tried by a jury. At the close of the evidence the court directed a verdict for the Director General, hereafter called the de-

fendant, and a verdict and judgment accordingly were entered. The administratrix, hereafter called the plaintiff, sued out this writ and her counsel made several specifications of error; but they are all included in the single charge that the trial court erroneously instructed the jury to return a verdict for the defendant. Complaint of this ruling presents the question whether or not the evidence was such that the court below could, in the exercise of its judicial discretion, have sustained a verdict or judgment for the plaintiff if it had been rendered, and has induced an exhaustive examination of the evidence, which has disclosed these facts:

Mr. Marshall was run over and mortally injured by an engine operated by the defendant on a switch track of the railroad company at Superior, Neb., about 1 o'clock in the afternoon on a bright sunshiny day in August, 1918. This switch track was a stub track serving a mill, so that it was necessary in operating it to back the engine in upon or out over it, and the engine was backing west, tender foremost, with three cars following it, when the accident happened. About 400 feet west of the mill, which was situated near the end of the stub track and on the south side of that track which extended west from the mill toward its junction with the main track, there stood a large brick building, about 195 feet long, with a cement platform about 4 feet high on the north side of it, which was owned by the Henningsen Produce Company. The switch track alongside this building lay on the land of the Produce Company, parallel with and about 46 inches north of the cement platform, but east of the northeast corner of this building this track curved to the south, so that further east it lay 4 feet south of the line on which it lay opposite the building. North of this track, and approximately parallel with it, was the public road 30 feet wide. The land between this road and the Produce Company's building was not inclosed, and customers of that company with their teams and others passed over it on their way to and from that building when engines or cars were not using this switch track but it was not a public highway.

Mr. Marshall was about 60 years of age, a resident of Superior, a man in full possession of all his faculties, long familiar with the situation of the track, the road, the cement platform, the switch track, and their uses, a carpenter by trade, who had previously worked in and about the Produce Company's building. Mr. Johnson, a witness called by the plaintiff, was the secretary-treasurer and manager of the Produce Company, which was engaged in dealing in butter and eggs, storing produce, making butter, and handling poultry. On the day of the accident he engaged Mr. Marshall to do some carpenter work at the Produce Company's building. A few minutes before 1 o'clock in the afternoon of that day he went to Mr. Marshall's residence and took him in his automobile to a point on the public road north of the Produce Company's building opposite the middle of and about 30 feet from it, where they alighted and walked south to the cement platform. They came to the place where they stepped out of the automobile upon the road from the east, and on their way they passed at a distance of about 5 feet the engine and the three cars, which were

then standing on the switch track at the mill 400 to 500 feet east of the east end of the Produce Company's building. Before they reached the cement platform the engine commenced to back west towards them upon the switch track and to draw the three cars after it, and when they reached the platform, Johnson, who had seen the engine and cars coming, told Mr. Marshall to look out for the engine. There were steps leading from the ground up to the surface of the platform at the extreme west end of it, and others of like character at a point about 45 feet east of the place where Mr. Marshall and Mr. Johnson reached the platform.

Johnson testified that he thought Marshall heard him at that time tell him to look out for the engine, and that he had heard what he said in an ordinary tone of voice in the conversation they were having before they arrived at the platform. When Mr. Johnson gave Mr. Marshall this first warning, the backing engine was about 350 feet east of Mr. Marshall. As soon as Johnson had given Mr. Marshall this warning, he jumped up onto the platform as he was accustomed to do; but Marshall, who was carrying some of his tools, failed to follow him, and when Johnson had landed on the platform and straightened himself up he saw Mr. Marshall about 15 or 20 feet further east toward the coming engine, with his feet on the ground and his hands on the platform. Thereupon Johnson shouted at the top of his voice to get out of the road of that engine, which was then about 100 or 175 feet east of him. Marshall looked up at Johnson, but did nothing more. Then Johnson immediately shouted his warning again. Marshall glanced over his shoulder, threw up his hands, and started north across the track; but he stumbled, and the tender caught him before he had crossed the track. While there were a few trunks of trees and a few branches between Johnson and Marshall and the engine at times between the time when they left the automobile and the time the tender caught Mr. Marshall, the engine and train were readily visible to each of them all this time, and as they went from the automobile to the platform, and as Marshall went east between the first and second warning, his face must have been toward them. The engine moved west at a speed of about 6 miles per hour. On account of the curve in the track east of the Produce Building, the engineer, who was leaning out of the window of the cab looking west, could not see the place where Marshall was until the engine had passed the northeast corner of the Produce Building, and when he did so he was about 65 feet from Mr. Marshall.

[1] There were no employés of the defendant on the switchboard of the backing tender to notify pedestrians of the approach of the engine, but the failure of the defendant to place or maintain employés in that position in his railroad yards or on his switch track under such circumstances as those existing in this case was not a breach of his duty to exercise reasonable or ordinary care in the operation of the switch track, and did not constitute actionable negligence. C., St. P., M. & O. Ry. v. Kroloff, 217 Fed. 525, 531, 133 C. C. A. 377, 383.

[2] Section 7892 of the Revised Statutes of Nebraska of 1913 provides that, in actions for damages for injuries to a person, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery, when the contributory negligence was slight and the negligence of the defendant was gross in comparison, and the rule established by the Supreme Court of Nebraska by its construction and application of this statute is that—

"If plaintiff is guilty of negligence directly contributing to the injury, he cannot recover, even though defendant was negligent, unless the contributory negligence of plaintiff was slight, and the negligence of the defendant was gross in comparison therewith. If, in comparing the negligence of the parties, the contributory negligence of the plaintiff is found to exceed in any degree that which under the circumstances amounts to slight negligence, or if the negligence of defendant fails in any degree short of gross negligence under the circumstances, then the contributory negligence of plaintiff, however slight, will defeat a recovery." Morrison v. Union Pac. Co., 177 N. W. 158; Sodomka v. Cudahy Packing Co., 101 Neb. 446, 163 N. W. 809.

Conceding that the defendant did not ring the bell or sound the whistle of his switch engine as it came along over the switch track, a fact left in doubt by the evidence, a stranger or licensee, such as Mr. Marshall was, could not walk from the public road, with his face towards the engine and cars on the switch track in plain sight 400 to 500 feet distant, across the switch track to the cement platform, then turn after a warning to look out for the engine, and go towards it 15 or 20 feet, without taking the care or exercising the diligence in the use of his eyes or ears to protect himself from the approaching train, without being guilty of much more than slight negligence in comparison with the failure of the defendant to ring the bell or sound the whistle of a switch engine moving on the switch track, and there is no escape from the conclusion that under the Nebraska statute and its interpretation by the Supreme Court of that state the contributory negligence of Mr. Marshall was fatal to this action.

[3] Nor was it less fatal under the established rule in the federal courts. If, at the close of the trial of the questions of the negligence of the defendant and the contributory negligence of the person injured, the evidence so clearly discloses the fact that the latter was guilty of negligence which directly contributed to his injury, that a finding to the contrary could not be sustained by the trial court, it is its duty to instruct the jury to return a verdict for the defendant. Southern Pacific Co. v. Pool, 160 U. S. 438, 440, 16 Sup. Ct. 338, 40 L. Ed. 485; Patton v. Texas Pacific Ry., 179 U. S. 658, 660, 21 Sup. Ct. 275, 45 L. Ed. 361; Chicago Great Western Ry. v. Roddy, 131 Fed. 712, 713, 65 C. C. A. 470, 471; Western Union Telegraph Co. v. Baker, 140 Fed. 315, 319, 72 C. C. A. 87, 91.

[4] Nor is the question, in case of alleged contributory negligence, whether the negligence of the plaintiff or that of the defendant was the more proximate cause of the injury; but it is whether or not the negligence of the injured person directly contributed to cause it. Gilbert v. Burlington, C. R. & N. Ry. Co., 128 Fed. 529, 63 C. C. A. 27; Pyle v. Clark, 79 Fed. 744, 746, 25 C. C. A. 190, 192; Motey v. Pickle

Marble & Granite Co., 74 Fed. 156, 159, 20 C. C. A. 366, 369; Missouri Pac. Ry. v. Moseley, 57 Fed. 921, 923, 925, 6 C. C. A. 641, 643, 644; Western Union Teleg. Co. v. Baker, 140 Fed. 315, 318, 72 C. C. A. 87, 90; Schofield v. C., M. & St. P. Ry. Co., 114 U. S. 615, 618, 5 Sup. Ct. 1125, 29 L. Ed. 224; Railroad v. Houston, 95 U. S. 697, 702, 24 L. Ed. 542. So it is that the question of the negligence of the defendant becomes immaterial, and may be disregarded, if the evidence of Mr. Marshall's contributory negligence was of such a conclusive character that the exercise by the trial court of a sound judicial discretion would have compelled it to refuse to give effect to a contrary verdict, if it had been rendered, and a careful reading and review of the evidence has convinced that it was of this character. It demonstrates Mr. Marshall's familiarity with the mill, the Produce Company's building, its cement platform, the switch track by its side, its customary use, his passage within a few feet of the engine and three cars standing upon it at the mill, as Mr. Johnson brought him to the place opposite the middle of the Produce Company's building and about 30 feet from the platform, his walk from that point south to the platform, Johnson's warning to him to look out for the engine as he stood by his side at the platform just before Johnson jumped upon it when the engine was already coming towards them at a distance of 450 feet, Mr. Marshall's movement towards the engine 15 or 20 feet thereafter, Johnson's second warning when the engine was 170 feet from Mr. Marshall, and the undoubted fact that this engine and the cars were in plain sight of Mr. Marshall, from the place where Mr. Marshall was from the time he left the automobile until he was injured. If he had looked, he must have seen them, and must have known of their approach. The track itself was a signal warning of his danger. He knew that it was only a question of time when, as he stood upon or too near that track, an engine would come over it and might injure him; it was his duty, before he stepped upon the switch track, and as long as he remained so near it that an engine or cars passing upon it could strike him, to make a vigilant use of his eyes and ears to perceive its coming, and of his feet to escape it. The only rational deduction that can be drawn from the evidence is that he failed to discharge his duty diligently to use his senses to perceive and escape the approaching engine, and that this failure directly contributed to his injury.

[5] But counsel for the plaintiff argue that, notwithstanding the contributory negligence of Mr. Marshall, the plaintiff was entitled to recover under the exception to the defense of contributory negligence known as the last clear chance doctrine, which they define to be that, if the defendant or his engineer saw or could by the exercise of ordinary care have seen Mr. Marshall and his danger in time to stop the engine before it struck him, the defendant is liable for the ensuing injury. The plaintiff's definition of the last clear chance doctrine is too broad and erroneous. The exception it presents is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. It does not include cases where, by the exercise of ordinary care, the plaintiff might

have made such a discovery in time to avoid the injury. Atchison, T. & S. F. Ry. v. Taylor, 196 Fed. 878, 880, 116 C. C. A. 440, 443; Iowa Cent. Railway Co. v. Walker, 203 Fed. 685, 686, 121 C. C. A. 579, 580; Denver City Tramway Co. v. Cobb, 164 Fed. 41, 43, 90 C. C. A. 459, 460; Kansas City, C. & S. Co. v. Shoemaker, 249 Fed. 458, 459, 161 C. C. A. 416; Id., 245 Fed. 117, 157 C. C. A. 413, 414. There is no evidence in the record in this case that the defendant, his engineer, or any of his employés discovered Mr. Marshall or his peril before he was injured.

The result is that there was no error in the court's direction to the jury to find a verdict for the defendant, and the judgment below must be affirmed. It is so ordered.

BARBER v. OTIS MOTOR SALES CO.*

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

No. 147.

1. **Patents ⇐328—781,802, for gas engine valves, void for anticipation.**
The Barber patent, No. 781,802, for valves and valve gear for explosive engines, claims 8 and 9, covering inlet and exhaust valves so constructed as to be readily removable for cleaning and repair, which is the sole purpose of the invention, *held* void for anticipation.

2. **Patents ⇐66—Imperfect device may anticipate.**
If the mechanism made under a prior art patent is capable of producing, or is designed, adapted, or is used to produce, the same results or perform the same function, it may be an anticipation, though it is imperfect.

3. **Patents ⇐73—Proof to carry back date of invention must be beyond reasonable doubt.**
One who seeks to carry the date of invention back of the date of an anticipating patent assumes the burden of proof, and must establish the earlier date by evidence so cogent as to leave no reasonable doubt.

4. **Words and phrases—"Internal combustion engine."**
An "internal combustion engine" is one in which the fuel charge, consisting of a combustible gaseous mixture, is ignited and exploded inside of the engine; the sudden explosion of the gases producing the combustion serving to force down the piston in the cylinder, thereby imparting motion to a crank shaft or other part.

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

Suit in equity by William Barber against the Otis Motor Sales Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 265 Fed. 675.

Jeffery, Kimball & Eggleston, of New York City (Robert D. Eggleston, of New York City, of counsel), for appellant.

Samuel E. Darby, of New York City, and Fred Francis Weiss, of Brooklyn, N. Y., for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

⇐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. —.

MANTON, Circuit Judge. Letters patent No. 781,802 were applied for on February 24, 1902, and issued on February 7, 1905, to William Barber. The patent is for a valve and valve gear for explosive engines. This suit was commenced in May, 1915, in the Northern District of New York. After final hearing, a decree was entered for the plaintiff, holding claims 8 and 9 of the patent in question valid and infringed. The opinion may be found in 231 Fed. 755, and this result was affirmed in 240 Fed. 723.

Shortly thereafter the plaintiff brought suit in the District Court for the Southern District of New York against the Reo Motor Car Company of New York. At the final hearing the District Judge there dismissed the bill. Barber v. Reo Motor Car Co., 245 Fed. 938. No appeal was taken from this decree. Thereafter the appellant moved in the District Court for the Northern District of New York to reopen the interlocutory decree granted herein, which was affirmed on appeal. The motion therefor was granted, the mandate of this court recalled, and a further hearing was had, after filing an amended answer setting forth prior art patents not called to the District Judge's attention. The District Judge adhered to his previous ruling and held claims 8 and 9 valid and infringed. It is from this interlocutory decree so entered that the appellant appeals.

[1] There were pleaded and proved in the trial of Barber v. Reo Motor Car Co. in the Southern district of New York, prior patents which were claimed to anticipate the patent in suit. These were before the District Judge at the last hearing in this action, which resulted in the decree appealed from. None of the prior patents now relied upon as anticipation were cited in the patent office. The purpose of the invention is described by the patentee as follows:

"The object of my invention is to provide a motor engine of the explosion vapor type of a simple and cheap form of construction, so made that the inlet and exhaust valves thereof may be quickly and easily removed from the body of the motor without disturbance of the other parts, and quickly cleaned, adjusted, or renewed, as occasion may require, and returned to position."

The claims in suit are as follows:

8. In an explosion motor, the combination with an explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the explosive vapor inlet, of a valve seat ring provided with gas passages located in the end of the head portion of the T-passage adjacent to the explosion chamber, a puppet valve carried by the valve seat ring opening toward the explosion chamber, a spring normally keeping the valve in the closed position, and a screw plug provided with a perforate peripheral wall and a closed outer and an open inner end closing the outer or air end of the head portion of the T-shape passage and holding the valve seat ring in position thereof, through the perforations in the wall of which the explosive vapor passes from the main or stem portion of the T to the valve at the open end of such plug, substantially as shown and described.

9. In an explosion motor, the combination with an explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the exhaust orifice of the explosion chamber of a screw plug closed at the outer end, open at the inner end, and having a perforated peripheral wall, so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber located in the head portion of the T-shaped passage, a puppet valve the stem of which projects

outward through the head of the plug seated upon the inner end of the plug, so as to cut off communication between the main stem portion of the T-passage and the explosion chamber, except when the same is forced away from the seat and toward the explosion chamber, a spring for normally keeping the valve in the closed position and means for forcing the valve stem inward so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof so as to permit of removal of the plug and valve by the unscrewing of the plug, substantially as shown and described.

[4] Internal combustion engines are engines in which the fuel charge, consisting of a combustible gaseous mixture, is ignited and exploded inside of the engine; the sudden explosion of the gases producing the combustion serving to force down the piston in the cylinder, which imparts motion to a crank shaft or other part. The operation in such engine is that the inlet valve opens in, and the quantity of gaseous mixture is sucked into, the explosion chamber through the inlet valve upon the downward stroke of the piston, and the mixture is then compressed by the upward stroke of the piston, and at the top of the stroke the compressed gas is exploded by an electric spark or other form of ignitor, thereby forcing the piston down, this being the power stroke, and the exhaust valve is opened at the end of this stroke, and the exhaust gases—that is, the products of the combustion—are expelled through the exhaust valve and exhaust pipe into the atmosphere by the upward stroke of the piston. The inlet valve again opens, a new charge of fuel gases enters the combustion chamber on the next downward stroke, and the cycle of operation is repeated. Such engines have an inlet valve and an exhaust valve, which must open or be opened at proper times for the admission of the fuel gas to the engine and for the discharge of the exploded gases from the engine.

The explosions in such engines are very rapid—from 50 to 500 or more per minute—depending upon their speed, and this results in the exhaust valves being subject to a very high temperature, making them likely to warp, and causing soot or carbon to adhere to the valves and valve seats, which require occasional cleaning or repair. This condition has always existed in this class of engines, and provisions have always been made for the removal of such valves. But the appellee's invention concerns the facilities for the valve removal. It is the ease of removability of the valves that was the sole object of the patentee. The invention does not in any way improve the functioning or operation of the engine. Nor does it improve its efficiency. It purports to cover an automatic inlet valve—that is, an inlet valve operated by the suction of the engine and not by mechanical means—and an exhaust valve with a means for mechanically operating it. There is no patentable relation of each to the other, and the claims we shall treat separately.

Valves are designed for removal usually in two ways: First, with the valve seated directly against the inside of a cylinder casting, the valve is of necessity larger than the irremovable valve opening which it closes, and cannot be removed through that opening, but has to be withdrawn from the inside, which necessitates taking down the cylinders. Second, where the valve is seated against a removable valve

seat, so that the valve and valve seat can, at the same time, be withdrawn outwardly. This latter construction is known in the art as a valve cage. The valve cage type has two principal designs, which differ as to the method of screwing the cage to the engine: First, the screwed bolt design, in which the valve cage is held in place by two or more screw bolts; and, second, the screw plug design, in which the cage itself is screw-threaded, so that it can be screwed directly into the cylinder casting. Both designs are identical in function and efficiency. It is the latter design which is covered by claim 8 of the appellant's invention. The screw plug design, as we shall refer to later, was known to the art at the time of the appellee's invention.

It is essential that the inlet and exhaust valve open and close at the proper time to make the engine function. For most inlet valves and all exhaust valves, mechanical means for opening them have been employed in the past, and the mechanical means employed have been a cam shaft in connection with a rod, called a push rod or rocker arm, actuated at one end by the cam shaft and at the other end actuating the valve stem, so as to open the valve. No matter whether such valves were operated by suction or mechanically, it was necessary to remove them from time to time for cleaning or repairing. The appellee's inlet valve structure consists of a bushing containing the inlet pipe, which is screwed into the top of the cylinder casting and locked into position by a lock nut. A valve seat ring, carrying the valve with valve stem expanding upward, is inserted by hand into this bushing in the cylinder cavity. To hold the valve seat ring in position and to close the opening of the outside, a screw-thread plug, having a perforated wall, is screwed into the bushing, thereby forming an inclosed chamber, into and through which the gas would flow from the inlet pipe into the combustion chamber when the valve is pulled down by the suction from the engine cylinder. By unscrewing the screw plug, the valve seat ring carrying the valve may be readily lifted out for cleaning or repairing. The valve itself is a common type of poppet valve in closed position by a spring and operates as valves of this type do.

The value of the combination is that, by unscrewing the screw plug, the valve may be removed for cleaning and repairing. Because it is actuated by suction, and not mechanically, it can easily be removed. The structure is known in the art as a screw plug valve cage, and it is in two pieces, instead of in one piece, and is operated by suction, instead of mechanically. Referring to the language of claim 8, it appears that the valve, which is removable, is—

"In an explosion motor, the combination with
"(1) An explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the explosive inlet, of
"(2) A valve seat ring provided with gas passages located in the end of the head portion of the T-passage adjacent to the explosion chamber,
"(3) A puppet valve carried by the valve seat ring opening toward the explosion chamber,
"(4) A spring normally keeping the valve in the closed position and
"(5) A screw plug provided with a perforate peripheral wall and a closed outer and an open inner end closing the outer or air end of the head portion of the T-shape passage and holding the valve seat ring in position thereof,

through the perforations in the wall of which the explosive vapor passes from the main or stem portion of the T to the valve at the open end of each plug, substantially as shown and described."

Examining the prior art patents, which the appellant contends are sufficient to defeat this claim, we find sufficient to support the contention of the appellant. We think that the patent to Wolgrath (French, British, and Swiss patents of 1899 and 1900) anticipated the appellee. There the inlet valve assembled is the same as the appellee's, both functionally and structurally. The Wolgrath valve is operated by suction, and his structure is in two parts, a valve seat ring carrying the valve, and the screw plug to hold the valve seat ring in position. The ring has gas passages. It carried a poppet valve normally held in closed position by a spring. The screw plug has a perforated peripheral wall to permit passage of the gas from the inlet pipe through the cage into the explosion chamber. There is a T-shape gas passage, as in the appellee's structure; that is, the inlet pipe forms the stem of the T, and the valve structure forms the head of the T, and the testimony of the appellant's expert is to the effect that the two are structurally and functionally identical. It was issued May 3, 1900, a year and nine months prior to the appellee's application. The appellee, however, contends that his date of invention would support his claim that this patent does not anticipate. We shall deal with that question later, as the same answer is made to several of the prior art patents which we will here consider.

Another British patent was issued to Bousfield on February 10, 1900, and applied for March 9, 1899. This was the type of screw plug valve cage inlet valve structure. The appellant's expert says it is identical with the inlet valve of the appellant. There is no contradiction of this testimony. Indeed, the appellee's expert testified:

"By Mr. Eggleston: Q. Is there any other element you do not find in the Bousfield patent? A. I think not.

"Q. So you find every element except the spring for normally keeping the valve in a closed position? A. I think I find all the other mechanical elements described. The spring is there, and that is what it is for; but I would not say that that is what it does or would do.

"Q. But you do find a spring, and the function of the spring is intended to keep the valve in a closed position? A. I do find a spring, and have no doubt but what that spring is intended for that.

"Q. And there is no question but what it operated, but how long you are unable to say? A. Exactly."

Unless the appellee has satisfactorily established his date of invention as prior to the grant of this patent, it is a bar here.

The patent granted to Fessard (1899 patent) was issued two years prior to appellee's application. The drawing shows screw threads at the bottom of the plug, and we do not think that it was of a flanged type of screw cage, as held by the District Judge below. The experts called by both appellant and appellee say that it was a screw plug valve cage, and not a screw bolt valve. It was therefore a complete anticipation of this claim.

In addition thereto, there is the patent to Hirsh of 1895, which was of the same type and contained each element of the combination of

claim 8. The Fessard, Bousfield, and Hirsh patents, and the Beaumont publications (published by Lippincott in 1900, preface dated March, 1900), are sufficient, in our opinion to constitute a complete anticipation of this claim. As we shall point out later, we do not think that the appellee has successfully carried back his date of invention.

Claim 9 covers appellee's exhaust valve structure and operating mechanism. Exhaust valves are not operated automatically by the suction of the engine, but mechanical means for opening them are necessary. The means employed by the patentee consist of a push rod actuated by a cam, which push rod has a right-angle extension and is so mounted that the extension is normally held by a set screw under the valve stem, so as to lift the valve when the cam lifts the push rod. By removing the set screw, the extension to the push rod may be rotated away from the valve stem and the valve cage removed. The novelty which is covered by the combination of claim 9 is the push rod having a right-angle extension, mounted so as to be rotatable away from underneath the valve stem, in order that the valve cage may occasionally be unscrewed and removed for cleaning and repairing. It is claimed that there is no infringement, because appellant's inlet valve structure and operating mechanism follow the prior art, and not the appellee's patent, and that the claim covers and is expressly limited to an exhaust valve structure, whereas the infringing structure is, in fact, an inlet valve structure. Reading the claim, it will be observed that it covers:

"In an explosion motor, the combination with

"(1) An explosion chamber having a T-shaped gas passage the main central or stem portion of which forms the exhaust orifice of the explosion chamber of

"(2) A screw plug closed at the outer end, open at the inner end, and having a perforated peripheral wall, so as to give free communication between the central hollow thereof and the main stem or central passage and the explosion chamber, located in the head portion of the T-shaped passage,

"(3) A puppet valve the stem of which projects outward through the head of the plug seated upon the inner end of the plug, so as to cut off communication between the main stem portion of the T-passage and the explosion chamber, except when the same is forced away from the seat and toward the explosion chamber,

"(4) A spring for normally keeping the valve in the closed position and

"(5) Means for forcing the valve stem inward so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof so as to permit of removal of the plug and valve by the unscrewing of the plug, substantially as shown and described."

The first four elements of this claim cover a screw plug valve cage which we have above dealt with. The fifth element is claimed to cover any means for operating the valve, so mounted as to permit of the ready and easy removal of the valve cage. It is not claimed for this combination that it relates in any way to improve the functioning or operation of the engine, but is solely directed to the object of facilitating the removal of the valves for cleaning and repair purposes. We think that this claim was anticipated by prior patents.

In the Hirsh patent, No. 532,555 of 1895, the inventor stated that his invention is directed to the valves and valve-operating mechanism

of internal combustion engines, and that his improvement is especially applicable to engines where minimum of space and concentration of power are desirable. We think the patentee Hirsh shows the fifth element of claim 9 as above stated in saying:

"Means for forcing the valve stem inward so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof so as to permit of removal of the plug and valve by the unscrewing of the plug."

Hirsh provides for a rocker lever pivot on a fulcrum pin on a bracket which is fastened to the frame of the engine. The end of the rocker is operated by an ordinary double grooved cam; the other or lower end contacts with the valve stem, forcing the valve stem inward, so as to open the valve. This lower end of the rocker lever is joined to this body part, so that the lower part, or valve-operating end of the lever, may be swung laterally away from the valve stem. In ordinary running, the lower end is held in normal operating position over the valve stem by the flat spring. By pressing with the hand the lower part of the rocker lever sidewise against the spring, so that it will assume the position shown by the dotted lines in Figure 19, the screw plug carrying the valve may be readily unscrewed and removed. It thus appears that the Hirsh valve-operating means is adapted to be removed from contact with the valve stem without removal from the support thereof, so as to permit of removal of the plug and valve by the unscrewing of the plug.

It is contended, however, by the appellee, that Hirsh's engine is not a gas engine; but it is clear that in the Hirsh engine, as in every type of internal combustion or explosive engine, an exhaust valve is necessary to permit the exploded gases to leave the combustion chambers. Hirsh's engine is an explosive engine, and the exhaust valve structure and operating mechanism performs the same function in exactly the same way as in appellee's engine. It is further contended that the contour of Hirsh's cam, as shown in the patent drawing, is not sufficiently accurate to open and close the valve at exactly the proper time; but Hirsh, in his specification, says that his cam is so timed as to produce the proper operation of the parts. Hirsh's is a double grooved cam and apparently well known in the art.

[2] Assuming that there are imperfections in Hirsh's mechanism, that would not defeat what is claimed for it by the appellant. Pickering v. McCollough, 104 U. S. 310, 26 L. Ed. 749; Westinghouse Air Brake Co. v. Christensen Engineering Co., 128 Fed. 437, 63 C. C. A. 179. If the mechanism made under the prior art patent is capable of producing the same results, or is designed, adapted, or used to produce the same results or perform the same function, it may be successfully set up as an anticipation. Loom Co. v. Higgings, 105 U. S. 580, 26 L. Ed. 1177; Consolidated Co. v. Met. Brewing Co., 60 Fed. 93; Mosler v. Lurie, 209 Fed. 364, 126 C. C. A. 290.

The British patent to Hall of 1899 was for improvements in motors for propulsion of vehicles. There is described and shown in the patent a means for operating the exhaust valve, so mounted as to permit

the ready and easy removal of the valve. Figure 6 shows "a means of forcing the valve stem inward so as to open the valve actuated by the motor," and the cam rod which is used is mounted in a sleeve or casing which is so pivoted that by loosening the nut or screw it, together with the cam rod, may be swung out of operative position and away from the valve stem. The patentee says as to the purpose of this construction:

"This enables me, by slacking out one or two screws, to swivel this cam rod out of position and withdraw the exhaust and gas valves without interfering with any other parts, and saves me from taking it out of gear or time with the crank shaft."

"The engine also has an improved arrangement of exhaust governor gear by which the exhaust and gas valve may be taken out without interfering with any other parts, or without having to throw the said gear out of time with the crank shaft."

While the Hall specification does not in so many words describe the exhaust valve and mechanism with particularity, it appears from the testimony that the drawing accompanying the patent indicates its form and character. One skilled in the art would have no difficulty, at the time that the appellee applied for his patent, in understanding from the Hall specifications the broad embodiment of the combination in suit.

The British patent to Jerram of March 31, 1900, is for an improvement in gas, oil, and light motors, and is directed to the valves and their operating mechanism, express mention being made of the removability of the valves. The valve assemblage shown in the cross-section, Figs. 3 and 4, is the type of screw plug valve cage, with poppet valve spring perforated peripheral wall, with screw threads at the bottom, and there is the T-shaped gas passage. An examination of the drawings shows that the valve plugs have no flanges, contrary to the appellee's contention, and are of such shape that they could not be held by the screw bolts, and are necessarily screw-threaded, so as to be screwed into the cylinder casting. The inventor in his description says:

"Means for forcing the valve stem inward so as to open the valve actuated by the motor and adapted to be removed from contact with the valve stem without removal from the support thereof, so as to permit of removal of the plug and valve by the unscrewing of the plug."

To move any one or more of the valves, it is simply necessary to turn the handle upward, thereby removing the disks, which movement swings the rock levers upward and away from the valve stems. The valve plug may then be unscrewed and removed, and the patentee says:

"The levers (*11,11,11,11,12,12*) swing on the spindle (*13*), having on each end eccentric portions (*14,14*); one has a handle attached to enable the levers to be bodily swung out of the way to allow the withdrawal of the valve boxes (*V, V, X, X*) for cleaning purposes."

We think the Jerram patent anticipates the appellee's invention.

[3] Unless it can be said that the appellee has successfully fixed the date of invention antedating these patents of the prior art, we are forced to the conclusion that the patent in suit has been anticipated thereby; that is, he must establish his date of invention antedating the patents to Bousfield (British) applied for March 9, 1899, accepted Jan-

uary 20, 1900, printed copies on sale February 10, 1900, issued April 3, 1900; the Hall (British) patent, February 25, 1899, accepted February 24, 1900, printed copies on sale March 17, 1900, issued May 8, 1900; Jerram, applied for February 26, 1900, accepted March 31, 1900, printed copies on sale April 20, 1900, and issued June 12, 1900; Wohlgrath (French) applied for January 17, 1900, issued May 3, 1900.

At the time of the trial of Barber v. Reo in the District Court for the Southern District of New York, and upon the rehearing granted in this trial, the appellee endeavored to establish his date of invention so as to avoid the patents above referred to. But the testimony is unsatisfactory. It will be observed that the four anticipating patents were issued nearly two years prior to appellee's application, and printed copies of the Bousfield were made and on sale in the British Patent Office more than two years prior to appellee's publication. The appellee testified that he made his preliminary sketches in 1897. It appears that he testified on another trial that he made his preliminary sketches in 1899, and upon the first hearing in the case at bar he testified that he commenced designing and developing the motor engine of his patent the last part of 1898 and the beginning of 1899. He says he made rough sketches and kept them, and that he did this work in a shop at Coney Island avenue and the Boulevard, Brooklyn, N. Y., and before he had a shop at 224 State street. However, on the first hearing, he testified that the shop on State street is the place which he had prior to the invention of his motor. He gave no satisfactory excuse for his former testimony. He has given inconsistent testimony as to matters which he uses for fixing the dates, such as when he occupied or vacated several shops he had, the birth of his child, inventions as to muffler and spark plug, and the collapsible running gear for which he filed applications for patents. Finally, he stated that his memory for dates and numbers was not very good. He gave poverty as a reason for not filing his application for his patent until 1902, when at one time he declares the invention thought came to him in 1897. But it appears from his own testimony that he was engaged in business and owned a factory in 1900.

His wife testified to making an entry in their family Bible of the birth of a child, and thus fixing the date when she saw her husband making drawings; but it is apparent that the appellee was interested in other patents. She did not identify the drawings, and says that her husband was constantly making drawings of different devices, and had been doing so for a period of eight years. She could not fix a date as to when he made drawings of various inventions which he was interested in. The testimony of the pattern maker does not aid the appellee, nor did that of the iron moulder. Both were confused as to their dates.

We find no testimony from any of the witnesses called on behalf of the appellee which satisfactorily demonstrates that the appellee had in mind and was working upon the combination of mechanical elements which are embraced within claim 9 of the patent in suit, nor is it satisfactorily shown that at the time now claimed by the appellee as the date when he devised the patent in suit he was engaged in pre-

liminary work or drawings thereof. There is no such testimony as would tend to bear the burden of establishing that the appellee at such date was engaged in the work of securing instrumentality for removing the exhaust valve.

One who seeks to carry the date of invention back of a date of an anticipating patent assumes the burden of proof, and must establish the earlier date by evidence so cogent as to leave no reasonable doubt in the minds of the court that the transaction occurred substantially as stated. Moline Rock Plow Co. v. Rock Island Plow Co., 212 Fed. 727, 129 C. C. A. 337. The rule as to the burden cast upon the appellee in endeavoring to fix such a date is very strict. It is so easy to fabricate or color evidence of prior invention, and so difficult to contradict it, that proof has been required which does not admit of reasonable doubt. Thayer v. Hart (C. C.) 20 Fed. 693. In Clark Thread Co. v. Willimantic Linen Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521, it was said:

"A conception of the mind is not an invention until represented in some physical form."

We think that the credible evidence in the case warrants the conclusion that the appellee's valves were not complete until some time subsequent to the summer of 1900, and that the appellee's invention is anticipated by the patents of the prior art above referred to.

The decree is reversed.

UNITED STATES v. WELLS FARGO & CO.

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

No. 151.

Customs duties ⟸93—Express receipt is not a "bill of lading," so as to make indorsee liable for duty.

An express receipt for merchandise, which names the consignee and is marked "nonnegotiable," *held* not a bill of lading, within the meaning of Tariff Act Oct. 3, 1913, § 3, par. B (Comp. St. § 5519), the indorsement of which passes title to the merchandise, and its indorsement by the consignee to a connecting carrier does not make such carrier the consignee, nor render it liable for duty on the merchandise, even though it makes entry of the same.

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

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

Action by the United States against Wells Fargo & Co. Judgment for defendant, and the United States brings error. Affirmed.

Francis G. Caffey, U. S. Atty., and John E. Walker, Sp. Asst. U. S. Atty., both of New York City.

Stockton & Stockton, of New York City (Kenneth E. Stockton, of New York City, of counsel), for defendant in error.

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

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On May 20, 1918, there was imported into this country from Canada, and entry made thereof with the collector of customs of the port of New York, three barrels of coal tar colors. Declaration on the entry was made by the defendant in error, and it was stated Hintze & Co. of 623 Broadway, New York City, N. Y., was the purchaser or ultimate consignee. The importation was from Cornwell, Ontario. Entry for immediate transportation was made to the collector of customs at Niagara Falls, N. Y., on May 24, 1918, to be shipped in bond to New York City, namely, via Wells Fargo & Co. express.

When the consumption entry was made with the collector of customs of New York, no bill of lading was presented to the collector, but a merchandise receipt issued by the Canadian Express Company, dated May 11, 1918, was presented. On its face the shipment was addressed to Hintze & Co., New York, and there was indorsed thereon: "Deliver to Wells Fargo & Co. Hintze & Co." Below this indorsement was the indorsement of Wells Fargo & Co. On entry, the duties on the importation were estimated at $585, and this was paid to the collector by Wells Fargo & Co. Duties on the importation were liquidated by the collector on January 21, 1919, in the sum of $663. It is the difference between the liquidated duties and the estimated duties, namely, $78, which is sought to be recovered here. The statute invoked is section 3, paragraph B, of the Customs Administrative Act (Tariff Act of October 3, 1913 [Comp. St. § 5519]) providing:

"That all merchandise imported into the United States shall, for the purpose of this act, be deemed and held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly endorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof; and in case of the abandonment of any merchandise to the underwriters the latter may be recognized as the consignee."

The Secretary of the Treasury on August 13, 1915, promulgated the following Customs Regulations:

"Art. 219. *Bill of Lading.*—A bill of lading is necessary to establish the right to make entry in every case where it is the custom to issue such a document.

"Where, as in the case of express companies, it is the practice to issue shipping receipts in lieu of bills of lading, such receipts may be accepted for the purpose of entry. * * *

"Art. 220. *Who may Make Entry.—Filing of Bill of Lading.*—Entry may be made by the consignee named in the bill of lading, or by the indorsee thereof or by the holder of a bill of lading consigned to order and indorsed by the consignor. * * *"

Unless the defendant in error is the consignee, even though entry of this merchandise was made by it, it is not liable. Was it the consignee? The receipt was indorsed by the ultimate consignee; but is this document, so indorsed, a bill of lading within the meaning of the statute and the treasury regulations? The defendant in error was a common carrier for the consignee. The owner of the property in the first instance is to be regarded as the consignee. Baldwin v. United

States, 113 Fed. 217, 51 C. C. A. 174. In the Baldwin Case, it was held the custom brokers were the consignees, although they were consignees in trust for another for whom the goods were undoubtedly imported. In the case at bar, however, the defendant in error presented to the collector at the time of entry a document called a merchandise receipt, issued by the Canadian Express Company, which is a receipt from a Canadian shipper of the merchandise in question, which contains the value of the barrels and the address of Hintze & Co., the consignee. The indorsement directing delivery to the defendant in error, it is urged, makes it the consignee for the purpose of fixing importation duties, and because it is so indorsed it is argued that the holder of this document comes within the phrase of the subdivision reading as follows:

"The holder of a bill of lading duly indorsed by the consignee therein named."

If the receipt, with its indorsement, is not a bill of lading as provided by the statute, then there was no error in the court below. A distinguishing feature of the bill of lading is that it represents the goods, so that by the delivery of it, under the practice of merchants, there is a symbolical delivery of the goods and thus the obligations of contracts of sale are satisfied. By the indorsement of a bill of lading, the property rights to the goods can pass from hand to hand, without the actual necessity of removing the goods themselves or the delivery thereof. Customs Administrative Act, § 3, defines persons who might make entry of imported merchandise and who must pay the customs duties thereon. It was the evident intent of Congress to impose liability upon the owners of the merchandise and the consignee is presumptively the owner of the goods. The consignee is presumptively the owner of the goods, since it is provided that he might make entry of the goods, with attendant assumption of liability for customs duties. It is recognized that title might pass from the consignee by indorsement of a bill of lading, and it was provided that in such event the indorsee should have the rights and liabilities of the original consignee. So the practice has been that a bill of lading is surrendered only when the goods are delivered. The transfer of title is made by indorsement of the bill of lading, and the indorsee then becomes entitled to the goods from the carrier, and, by the usage of merchants, the indorsement of the bill of lading from the consignee to the new title owner becomes a fixed practice. Carriers then became subject to the rule that the goods could not be delivered, except upon surrender of the bill of lading, and the holder or transferee of the bill of lading was expected to present the bill in order to obtain delivery of the goods, and was entitled to delivery of the goods upon such presentations. Ga., Fla. & Ala. Ry. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948.

An express receipt has not had the same effect of passing title. Upon presentation of a freight receipt, even though indorsed, the right to delivery of the merchandise does not follow. The carrier express company issued the receipt which authorized delivery to the consignee

himself or to his duly authorized representative, and that is all. The obligation of the express company, which gives the express receipt, is to deliver to the person who shows himself to be the consignee or his authorized representative under all the circumstances. The express receipt is not demanded for the delivery of the goods, and it has not been customary, in forwarding goods, to forward the express receipt as a symbol of goods shipped. If the express receipt authorized the defendant in error to make delivery to a person on behalf of the consignee, the company is justified in making this delivery; but the fact that authorization is indorsed on the back of the express receipt does not pass title. It created a right to demand delivery of the goods, which may be revoked by a subsequent order of the consignee to the express company to disregard the indorsement. If such an order be given, the express company would be unauthorized to deliver to any one except the original consignee.

Thus it will be observed that a bill of lading is both the receipt and a contract by the carrier to deliver to the consignee or the holder of a duly indorsed document, and an express receipt serves one purpose, to wit, a receipt limiting the carrier's liability in case of loss and damage upon contingencies named in it. A distinction between a bill of lading and a receipt is indicated by the enactment of Congress (Act June 29, 1906, c. 3591, § 7 [Comp. St. §§ 8604a, 8604aa]), where the issuance of a receipt or bill of lading is referred to, indicating that there are two different forms which might be issued. Rule 2 of the Official Express Classification No. 25, effective July 1, 1917, which is part of the tariffs filed with the Interstate Commerce Commission pursuant to the Interstate Commerce Act, provides:

"(c) Shipments destined to points in the United States and adjacent foreign countries must not be accepted when consigned 'to order of' or 'to notify' a bank, or any person.

"(d) Uniform express receipts are not negotiable and shipments must not be accepted, the delivery of which is conditioned upon surrender of the original receipt at time of delivery."

We may take judicial notice of this. Boston & Maine R. v. Hooker, 233 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593. We therefore conclude that the indorsed express receipt in question is not a bill of lading within the meaning of subdivision III of the Customs Administrative Act.

Judgment below affirmed.

WARD, Circuit Judge (concurring). The Express Company is a common carrier, and, whatever the document under consideration be called, it is not only a receipt for the goods, but a statement of the terms upon which they are to be carried. In other words, it is a bill of lading. As, however, it is not to order and is marked "nonnegotiable," it does not represent the goods, and the indorsement upon it does not constitute delivery of the goods.

For this reason the decree should be affirmed.

UNITED STATES WILLOW FURNITURE CO. v. LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE.

(Circuit Court of Appeals, Second Circuit. February 10, 1921.)

No. 162.

1. **Admiralty ⟸83—Not error to refuse to send case to commissioner.**
The commissioner is an officer of the court, whose services may be availed of or dispensed with at the option of the court itself, there being no legal obligation on an admiralty tribunal to send any part of a case to a commissioner, so that the contention that the trial judge erred in not sending the case to the commissioner cannot be sustained.

2. **Shipping ⟸140—Bill of lading held to limit recovery to invoice value and freight, less proceeds.**
Where no package of the damaged goods exceeded the minimum value fixed by the bill of lading, which made the basis of settlement the invoice value, libelant is entitled to recover the invoice value, plus the freight, minus the net proceeds of the sale of the damaged goods, but not expenses and insurance, which are ordinarily recoverable in cases of total loss.

3. **Shipping ⟸140—Customs duties not subtracted from sale price of damaged goods, where bill of lading fixed basis.**
Where the bill of lading made the invoice value the basis of settlement for damaged goods, it was error to subtract from the sale price of such goods the customs duties paid thereon, since the sale price is presumed to have included the enhancement of value occasioned by the imposition of duties.

4. **Shipping ⟸140—Expenses of trucking and sale of damaged goods deducted from sale price.**
Where the shipper is entitled to recover the invoice value of the goods, plus freight, but minus the net proceeds of the sale of the damaged goods, the expenses of trucking the damaged goods and of conducting the sale are to be deducted from the proceeds of the sale to ascertain the net proceeds.

5. **Shipping ⟸131—Consignee allowed interest on damages from date of liquidation.**
Though the allowance of interest in admiralty is discretionary, it will be allowed on a libel to recover damages to a shipment of goods, where no reason appears for denying such allowance, the interest to be computed from the date of the liquidation of the damages by the completion of the sale of the damaged goods.

6. **Appeal and error ⟸845(2)—Appellant cannot attack computation of exchange, where agreed statement included equivalent.**
On appeal in admiralty from an allowance of damages for imported goods based on the invoice value stated in francs, appellant cannot complain of the computation of the rate of exchange, where the agreed statement of facts stated the invoice value in both francs and dollars.

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

Libel in admiralty by the United States Willow Furniture Company against La Compagnie Générale Transatlantique. Decree for libelant, and respondent appeals. Reversed and remanded.

Libelant (hereinafter called Willow Company) was the ultimate consignee and actual owner of four consignments of bundles of willow shipped from Bordeaux to New York on steamers under charter to respondent and under

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

the respondent's bills of lading. The willow was delivered so injured by water that two of the consignments were entirely wet, and of the others one was 80 per cent. and the other 91 per cent. wetted. Action was brought to recover damages for this cargo injury, and was tried on an agreed statement of facts, from which it appears that respondent admitted some liability and contested only the extent thereof.

The stipulation contained these words: "The aggregate invoice value of all of said willow damaged as aforesaid, without any charges for inland or other transportation or for other purposes whatever, is 33,980.92 francs, or $6,223.61, which constitutes the invoice value (without any charges whatever added for any purpose) of the damaged willow."

It further appears that Willow Company sold the damaged cargo for the gross sum of $1,184.41. It also appeared that the ocean freight, truckage in New York, customs duties, and expenses of sale were in the aggregate much more than said sum of $1,184.41. The defense or mitigation rested upon the eleventh article of the bill of lading under which the goods were carried. With unimportant differences in translation, the text of that article is found in Kuhnhold v. Compagnie Générale (D. C.) 251 Fed. 388. A material part of the article is that "in default of declaration of value the cargo owner shall not be allowed in any case more than one franc per cubic decimeter or per kilo, at the choice of the company, nor more than one thousand francs per package." It appeared that no single package of this willow had as great value as 1,000 francs, and that no value had been attached to the consignment by declaration in the bill of lading.

The trial court, with the foregoing facts before it, entered a decree in favor of Willow Company for $6,598.65, "the amount of the damages and loss sustained by it, and, in addition, the costs and disbursements of this action." Thereupon respondent took this appeal, assigning for error that the court erred in (1) failing to submit the case to a commissioner for assessment of damages and for the purpose of taking evidence as to the French law; (2) in computing the amount of damages; and (3) in assessing damages in money of the United States at the rate of exchange which existed at the time of shipment of the goods.

Joseph P. Nolan and Edward J. Garity, both of New York City, for appellant.

John N. Boyle and Pratt, Koehler & Boyle, all of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). In the view taken of the eleventh article of respondent's bill of lading the court below followed Kuhnhold v. Compagnie Générale, supra, and we agree that that case was properly decided, at least in so far as it affects the present litigation. The questions now in controversy did not, however, arise in the litigation referred to.

[1] As to the contention that the trial judge erred in not sending the case to a commissioner for any purpose, we overrule it. The commissioner is an officer of the court, whose services may be availed of or dispensed with at the option of the court itself. There is no legal obligation on the admiralty tribunal to send any part of a case to a commissioner. We may add that it is clear in this case that all the facts necessary for computation of damages were either agreed upon or proven without contradiction, while, as for the law of France, the time to prove that was at the trial; nor do we see that any contested question here existed that could be ruled by French law.

[2] The principle upon which damages were assessed was as follows: Inasmuch as no value had been declared, and no bundle of willow was worth as much as 1,000 francs the libelant should recover the value at the port of shipment (Bordeaux), less what the injured goods realized in New York. As by the stipulation above quoted the invoice value of the injured willow was $6,223.61, without any charges whatever added thereto, this figure was the starting point of computation in exact accordance with the eleventh article of the bill of lading. The effect of the bill of lading was to exclude from recovery expenses, charges, and insurance which ordinarily in cases of total loss are recoverable. The Umbria, 59 Fed. 489, 8 C. C. A. 194, the reversal of which case in 166 U. S. 405, 17 Sup. Ct. 610, 41 L. Ed. 1053, does not affect this ruling.

Thus, owing to the low value of each package of willow, this case is one where, by agreement embodied in the bill of lading, the basis of settlement is invoice value, and it follows that the rule of damages is as stated in Pearse v. Quebec S. S. Co. (D. C.) 24 Fed. 285, and The Oneida, 128 Fed. 687, 63 C. C. A. 239, viz. libelant was entitled to recover invoice value plus freight, minus the net proceeds of the damaged goods. In theory, therefore, the ocean freight should have been added to the invoice value; in practice, of course, it made no difference whether it was so added or subtracted from the proceeds of the injured willow.

[3, 4] But in subtracting from such proceeds the customs duties we think error was committed. The market value of any imported goods, injured or uninjured, at the port of destination, is presumed to include that enhancement of money value occasioned by the imposition of duties; and when such duty-paid goods are sold the price obtained is by the customs duties so much the greater. The matter is one of common practice, but was in effect passed on in The Eroe, 9 Ben. 191, Fed. Cas. No. 4,521, affirmed 17 Blatchf. 16, Fed. Cas. No. 4,522, where the cargo owner was not required to account for any refund of duties obtained by him in respect of the damaged goods for injury to which he sued. The expense of trucking the willow and the charges of the auctioneer or salesman were, of course, allowable in arriving at the net proceeds of such sale.

[5] Appellee insists, on this new trial, that interest should have been allowed on its recovery. The case is one for breach of contract, even though that breach may have been, in and of itself, a tort, and we perceive no reason why interest should be denied. Indeed, the apostles contain no record of any denial; the matter seems to have been overlooked by the trial judge. On claims of this nature rulings in favor of interest have, we think, been uniform, though the date of accrual has not always been the same. In The Eroe, supra, Judge Blatchford held that interest ran "from the date of the arrival of the vessel." It is more usual to allow interest (which in the admiralty is always discretionary) from the date of the liquidation of the damages, as was evidently done in the Pearse Case, supra—the damages being liqui-

dated by the sale of the damaged goods. It follows that libelant's recovery should be stated thus:

Invoice value	$6,223.00	
Ocean freight	796.49	
		$7,020.10
Proceeds of sale	$1,184.41	
Less truckage and sales expense	345.42	
		838.99
Libelant's recovery		$6,181.11

—with interest from date of conclusion of sale of damaged goods, viz. April 16, 1918.

[6] The assignments of error relating to the translation of damages expressed in francs at the "rate of exchange which existed at the time of shipment of the goods" we are not able to consider. We have above quoted from the agreed statement of facts exactly what the parties stipulated as the invoice value of the damaged willow; behind that we cannot go, but may add that there is nothing in the apostles to show at what rate of exchange, or as of what time, any such transference of francs was calculated. As the appellee has received some benefit from this appeal without itself having appealed, there will be no costs of this court. The disposition of costs in the District Court is left to the District Judge.

Decree reversed, and cause remanded for further proceedings not inconsistent with this opinion.

PEDERSEN et al. v. UNITED STATES.

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

No. 87.

1. **Criminal law ⇐114—Jurisdiction of offense committed on high seas is dependent on "district into which offender is first brought."**
   The temporary stopping of a vessel on which defendants were held in custody at the quarantine station in the Eastern district of New York *held* not a bringing of defendants into that district, within the meaning of Judicial Code, § 41 (Comp. St. § 1023), providing that "the trial of all offenses committed upon the high seas * * * shall be in the district where the offender is found or into which he is first brought," and the District Court of the Southern District of New York, where defendants were landed and arrested, *held* to have jurisdiction to try them for an offense committed on the high seas.

2. **Criminal law ⇐1170½(2)—Permitting impeaching questions held harmless error.**
   Permitting the prosecution to ask questions of its own witness which tended to discredit or impeach him, but the answers to which were unfavorable to the prosecution, if error, *held* not prejudicial.

3. **Criminal law ⇐393(2)—Diary of defendant, lawfully obtained by prosecution, admissible in evidence.**
   Admission in evidence of a diary kept by one of defendants, which came lawfully into possession of the government, *held* not error.

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

4. Criminal law ⟸404(3)—Weapons used admissible in evidence.

On trial of defendants, as officers of an American vessel, for unlawfully beating, wounding, and imprisoning seamen, clubs, brass knuckles, and knives found in defendants' quarters on the vessel, some of them identified as having been used in the assaults, *held* admissible in evidence.

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

Criminal prosecution by the United States against Adolph Cornelius Pedersen, Leonard Roy Pedersen, and Adolph Eric Pedersen. Judgment of conviction, and defendants bring error. Affirmed.

Dudley Field Malone, Isadore Shapiro, and Edward W. McDonald, all of New York City, for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. Adolph C. Pedersen, master of the American barkentine Puako, and his sons, Leonard R. Pedersen, the first mate, and Adolph E. Pedersen, the second mate, were indicted for willfully, knowingly, unlawfully, and feloniously beating and wounding seven members of the crew, and of willfully, knowingly, unlawfully, and feloniously and without justifiable cause imprisoning three members of the crew while the said barkentine was on the high seas in July and August, 1918, and out of the jurisdiction of any particular state of the United States, and within the admiralty and maritime jurisdiction of the United States, on a voyage from Victoria, British Columbia, Canada, to Capetown, South Africa, contrary to the form of section 291, U. S. Criminal Code (Comp. St. § 10464), which reads:

"Whoever, being the master or officer of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, beats, wounds, or without justifiable cause, imprisons any of the crew of such vessel, or withholds from them suitable food and nourishment, or inflicts upon them any cruel and unusual punishment, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both. Nothing herein contained shall be construed to repeal or modify section forty-six hundred and eleven of the Revised Statutes."

Section 41 of the Judicial Code (Comp. St. § 1023) provides for the place of trial in such cases as follows:

"The trial of all offenses committed upon the high seas, or elsewhere out of the jurisdiction of any particular state or district, shall be in the district where the offender is found, or into which he is first brought."

The cause came on for trial before Judge Mack. All three of the defendants were found guilty of beating Frank Grielen and Jack Jones, being the second and fourth counts of the indictment; the master, of beating James Campbell, the fifth count; the master and first mate, of beating William Jones, the sixth count; the master, of beating Bjarnie Olsen, the seventh count; the master, for imprisoning James

Campbell, the eighth count. The jury recommended clemency in the case of the mates on account of their age; the first mate being at the time of the trial in September, 1919, 20 years and the second mate 18 years of age.

[1] The first objection of the defendants is that the District Court for the Southern District of New York had no jurisdiction to try them. This depends upon the construction to be given section 41 of the Judicial Code, supra.

October 1, 1918, the United States Consul General at Capetown, discharged the defendants as master and mates of the barkentine, and as they were leaving the consulate they were arrested by the British immigration authorities as prohibited immigrants under Immigration Regulations Act 1913. Thereafter they were taken on a British transport to the naval camp at Rockingham, England, from there to Brest, France, in the United States destroyer Woolsey, and from there to New York on the United States warship Rochester. This steamer stopped at Quarantine without dropping anchor, and after the usual medical examination proceeded to New York City, where the defendants were arrested by the United States marshal for the Southern District of New York.

Quarantine is in Richmond county in the Eastern district of New York. The statute determines the place of trial with reference to things taking place, not upon the high seas, but within a district or districts of the United States. Though in custody on the Rochester, the defendants were not actually arrested until their arrival in the Southern district of New York.

The decision of the Supreme Court in the case of United States v. Arwo, 1 Wall. 486, 22 L. Ed. 67, and of the Circuit Court in the case of United States v. Baker, 5 Bl. 6, Fed. Cas. No. 14,501, show that the temporary stop at Quarantine did not constitute a bringing into the Eastern district of New York. In the Arwo Case the defendant was brought in irons on an American ship to the quarantine anchorage of New York Harbor, in the Eastern district of New York, where she lay for five days. He was then delivered to the harbor police, who took him without process from any court to New York City, where he was delivered to the United States marshal; a warrant for his arrest being thereafter issued. It was contended that he had been first apprehended and first brought into the Eastern district, but the court held that the Southern district of New York had jurisdiction.

In the Baker Case the prisoners were brought into Hampton Roads, in the Eastern district of Virginia, on a United States warship, where after some two days' delay they were transferred to the United States revenue cutter Harriet Lane, which brought them into New York, where they were arrested under judicial process. Judges Nelson and Shipman held that the act gave jurisdiction in the alternative, and that the Southern district of New York, in which they were finally arrested, had jurisdiction to try them.

Section 97 of the Judicial Code (Comp. St. § 1084), which provides that "the District Courts of the Southern and Eastern Districts shall

have concurrent jurisdiction over waters within the counties of New York, Kings, Queens, Nassau, Richmond, and Suffolk, and over all seizures made and all matters done in such waters," has no application to jurisdiction over offenses committed upon the high seas; nothing being done in connection with the offense within the waters in question. The defendants were both found and first brought into the Southern district of New York, and the trial court was right in sustaining the jurisdiction.

[2] The defendants next object that the trial judge erred in permitting the government to impeach its witness Mattson, the ship's carpenter. After his testimony, on direct, defendant's counsel on cross-examination read in evidence an affidavit made by him at Capetown September 12, 1918, which was in several respects inconsistent with his testimony on direct. He insisted, however, that both the affidavit and his testimony were true. Obviously this called for explanation. He was a plain man, not appreciative of distinctions of language, especially in English. The government attempted to show, by reading from the minutes of the grand jury, that he had there given a different account in respect to several statements contained in his affidavit. All this, however, was stricken out by the court, leaving only one or two questions which were asked before recess, to which the witness answered that his testimony before the grand jury was the same as his testimony in court. The situation was eventually solved by the court's reading to the witness the affidavit of September 12, sentence by sentence, asking him to make explanation whenever he wanted to do so. The result of this was to greatly reconcile the testimony on direct and cross-examination. The witness evidently did not appreciate the difference between actual knowledge and hearsay, and he admitted that many of the statements in his affidavit were made upon mere suspicion, and others upon statements made to him by the captain. We think that the government did not impeach the witness, and that the court exercised a wise discretion in admitting the explanations given by the witness.

All that was left of the government's examination of Mattson in connection with his testimony before the grand jury was as follows:

"By Mr. Miller: Q. Mr. Mattson, you have said in response to one of Mr. Malone's questions, this afternoon, that no force and duress was used to compel you to sign this affidavit of September 12th, and also that nobody told you what to say in it; is that correct? A. Yes.

"Q. Do you remember the following questions and answers being asked of you and given by you before the grand jury in March of this year, when you were called there to testify? * * * 'Q. (reading). Was the second mate present? A. The second mate was. Q. Did he tell you what to say? A. He did not tell me then what to say. Q. When did he tell you what to say? A. Well, they told me several things; what to say, and so and so. Q. That was when? A. Well, that was long ago.' * * *

"The Court: * * * What counsel wants to know is whether or not you told the grand jury that you had signed this statement because of fear of the captain or the mates, or because they had told you what to say. Did you tell the grand jury that?

"The Witness: I never told them that, as I know.

"Q. Are you sure that you did not? A. I am sure; I do not remember that I did. * * *

"Mr. Miller: I am reading from the minutes of the grand jury.

"The Court: Ask him specific questions now as to that particular subject.

"Q. I want to ask if he was asked these questions and gave these answers: 'When did he tell you what to say? A. Well, they told me several things what to say, and so and so. Q. When was that? A. Well, long ago. Q. Long before you made this affidavit? A. Yes.'

"The Court: I think we have gone far enough in that.

"Mr. Malone: Your honor has granted me an exception to all of this.

"The Court: Yes. You may submit any authorities on the proposition before the court meets again. You state that you did not make any statements to the grand jury contrary to what you are now swearing to this jury, is that correct?

"The Witness: That is correct.

"The Court: As to that statement made at Capetown?

"The Witness: That is right. * * *

"By Mr. Miller: Q. You testified this morning you were not afraid of the captain, in answer to a question of Mr. Malone. Is that correct? A. I did, yes.

"The Court: Did you testify before the grand jury you were afraid of the captain?

"The Witness: Yes, I believe I did testify that; but I was not. I was never afraid of him.

"Q. Then, Mr. Mattson, you did testify before the grand jury that you were afraid of him. That is correct, isn't it? A. I never did; I don't think I never know anything about that.

"Q. You said in your last sentence that you did? A. I never was afraid of him.

"Q. I am not asking whether you were."

The answers of the witness were unfavorable to the government, and it did not offer in evidence the minutes of the grand jury. If error, it is harmless, and not reversible error.

[3] The next objection of the defendants is that the trial judge erred in permitting the government to offer in evidence the private diary of Adolph E. Pedersen, after he had demanded its return of the United States attorney before the trial. The objection is that in this way he was made to testify against himself as the result of an unlawful seizure of the book, in violation of the Fourth and Fifth Amendments of the Constitution. 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; Silverthorne Lumber Co. v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319.

There is some contest whether the return of this particular book was demanded, and whether the order of the District Court, requiring the government to return various books and papers to the defendant, covered it. However, we will assume that the defendant did call for this book, that it fell within the order of the court, that the United States attorney ought to have surrendered it, and refused to do so. There is not the least evidence that the book was seized by the government. On the contrary, it seems quite clear that it, with other papers, was taken from the barkentine by the British authorities, and by them turned over to the United States Consul General and by him forwarded to the Department of State at Washington. Having come in this way into its possession, the government had the right to use it and offer it in evidence in connection with the attitude of the defendant toward the crew.

[4] The finding in the officers' quarters of clubs, brass knuckles, knives, etc., justified offering these things in evidence, because they were consistent with the kind of treatment the members of the crew testified they had received, and were in some cases identified as actually used. We find no merit in various other objections.

The defendants had a fair trial, and the judgment is affirmed.

THE ANNA C. MINCH (two cases).

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

Nos. 129, 130.

1. **Collision ⊜22—What constitutes "inevitable" accident depends on facts in each case.**

In determining whether a collision was due to "inevitable accident," the word "inevitable" must be considered as a relative term, and construed, not absolutely, but reasonably, with regard to the circumstances of the particular case.

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

2. **Collision ⊜123—"Inevitable accident" affirmative defense.**

The law allows the party or vessel inflicting an injury by collision to be relieved of responsibility by proving that the accident was inevitable in the technical admiralty sense; that is, that it was of such a sort that it would not have been prevented by the use of that degree of reasonable care and attention which the situation demanded, but the burden is heavily upon the party asserting such a defense.

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

3. **Collision ⊜68—Breaking adrift in freshet due to inevitable accident.**

A steamer which broke from her mooring in Buffalo river during a spring freshet, carrying large quantities of ice, due in part at least to the breaking of an ice dam immediately below, subjecting her to such pressure as to cause all her lines, which were admittedly sufficient under any conditions to be ordinarily anticipated, to part at once, and which came into collision with a vessel moored below, *held* exonerated from liability on the ground of inevitable accident.

4. **Collision ⊜69—Conforming to ordinary custom not a fault.**

A steamer which had wintered with a grain cargo in Buffalo Harbor *held* not chargeable with negligence in complying with the ordinary custom by leaving one of her anchors there buoyed when passing into the river to discharge in the spring.

Ward, Circuit Judge, dissenting.

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

Suits in admiralty by William M. Tashenberg and another and by the American Steamship Company against the steamer Anna C. Minch; the Kinsman Transit Company, claimant. Decrees for respondent, and libelants appeal. Affirmed.

For opinion below, see 260 Fed. 522.

These causes are brought to recover for injuries done by the Minch to the steamer Wickwire and the boat Tashenberg Bros. (severally owned by libel-

ants), when, on March 27, 1916, the Minch went adrift in the Buffalo river (or creek) and, drifting with the current, collided with the Wickwire and forced her into collision with the other vessel. The Buffalo river is an affluent of Lake Erie, not naturally navigable for modern vessels. By dredging, a channel averaging 200 feet wide has been established in a fairly straight line for about 1⅜ miles from the river's mouth. At this point there is a bend of about 90 degrees to the eastward, in which bend is situated the Ohio street lift or drawbridge. Above the bend the river (still navigable) is fairly straight for another five-eighths of a mile.

The river bottom contains soft clay and mud overlying rock to a depth ranging from one to several feet, and this rock bottom extends upstream as far as the Ohio street bridge. Above that bridge the channel is cut through solid rock. The summer river currents are slight, or wholly absent, though rapid fluctuations in Lake Erie may produce quite strong currents within no more than a mile of the river mouth. But heavy rainfalls and spring freshets are attended by strong outflowing currents, and these conditions sometimes damage vessels by tearing them from their moorings, though such conditions are not frequent. Heavy ice forms in the river, usually in December, and that ice commonly goes out in the spring during a freshet in the river, and the combined effect of the then prevailing strong outflowing currents and the heavy moving ice is at times very great, and during such times the liability of damage to vessels is considerable. The foregoing description of the scene of disaster is taken from an official survey of the Great Lakes, published by the War Department in 1915, and in evidence herein.

The Minch, partially loaded, lay just above the Ohio street bridge, and therefore just above the bend alluded to. Her bow was upstream and she was moored with her starboard side to the bulkhead and opposite the elevator, into which she was discharging the "storage cargo" of grain with which she had spent the winter in Buffalo Harbor.

For some days before March 27th the water of the river had been rising in freshet, the ice was very heavy, and the conditions of exactly the kind described in the above lake survey. In anticipation of difficulty, additional lines were put out and fastened in a manner discussed in the opinion below. The Minch had no steam up, and, although she carried two anchors, had left one of them buoyed in Buffalo Harbor, a proceeding proved to be customary with vessels coming into the river after spending the winter in the harbor. The other anchor weighed two tons, was ready to be dropped upon the opening of the usual compressor, and was governed by a windlass of well-known and approved construction. One way in such an apparatus of controlling the jerk of the cable chain is to drop a riding pawl upon the chain, and this pawl is designed to be kept out of contact (until wanted) by a rope or lanyard which holds it up until released.

At least one of the fasts of the Minch ran through the windlass room, and in proximity to the windlass, pawl, and lanyard. In the afternoon of March 27th, descending ice, encountering the Ohio street bridge at the bend aforesaid, had formed a kind of dam, which it was thought proper by the fireboats of the city of Buffalo to break. The master of the boat that did this testified that "the ice was hanging right onto the bottom, and there was clampers probably 10 or 12 or 15 or 20 feet square, standing up 5 or 6 or 7 feet above the level of the water; that is, underneath the bridge where she jammed up, and, according as I would break it, it would let go."

The fireboat projected itself against this mass of ice, and, as the captain said, "the first time I hit it, it didn't come, but I could see it was coming; * * * but when I hit it the second time, over near the starboard side of the draw, that is where it came; * * * she came with a mad rush, and I couldn't turn around. I went round on the port wheel, and seen I couldn't make it, and I straightened up, and just then I saw the Minch coming through the bridge." The testimony is clear that the Minch's lines went all at once, and she began to go down the stream with the torrent of ice and water released by what the fireboat had done, at a rate estimated by her master of from 8 to 10 miles an hour. There were some 16 other vessels moored on one side or the other of this narrow channel below the Minch; yet that vessel passed through the draw of the nearby Ohio street bridge, passed a dozen

other steamers, through the draw of the Michigan street bridge, more than half a mile below, and then struck the Wickwire, moored about 500 feet below the Michigan street bridge, doing the damage complained of.

As soon as the Minch went adrift, her mate, on the captain's order, opened the compressor in the attempt to stop the vessel by means of her anchor; but the lanyard which held the pawl out of contact with the chain cable had parted, releasing the pawl into the stop position. As soon, therefore, as the chain began to run, it meshed with the pawl, and the anchor went no further. Much testimony was offered to the effect that the bottom was rock, with such a slight covering of mud that no anchor would hold, if indeed, owing to the ice which had formed in the Creek and over which the freshet was running, any anchor could have gotten to the bottom.

After a protracted trial, in which numerous witnesses were orally examined, the trial judge sustained the defense of vis major and dismissed the libel. These appeals followed.

Harvey L. Brown, Fred W. Ely, and John B. Richards, all of Buffalo, N. Y., for appellants.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It is perhaps unfortunate that so many terms have been used by the courts for describing the kind of excuse presented at bar for inflicting upon an innocent sufferer what the law ordinarily calls a tort. "Accident" is a very plastic word. Ætna, etc., Co. v. Vandecar, 86 Fed. 285, 30 C. C. A. 48. Vis major, or the act of God (Southern Pacific Co. v. Schuyler, 135 Fed. 1015, 68 C. C. A. 409) has been thought to be identical in meaning with inevitable accident (Bouv. Law Dict., sub nom "Vis major"). The phrase "pure accident" (The Transfer No. 19, 194 Fed. at 78, 114 C. C. A. 155) is not practically distinguishable from "unavoidable accident" (Merrit, etc., Co. v. Cornell, etc., Co., 185 Fed. 262, 107 C. C. A. 367). The most widely accepted phrase, "inevitable accident," is preferable in maritime law, not only because it is the most commonly used, but because it has acquired, under repeated decisions of authority, a plain and easily stated technical meaning.

[1] It was very early pointed out that the word "inevitable" must be considered as a relative term, and construed, not absolutely, but reasonably with regard to the circumstances of each particular case. Amoskeag, etc., Co. v. The John Adams, 1 Cliff. 404, Fed. Cas. No. 338, citing The Europa, 2 Eng. L. & E. 559. Remembering this limitation, which really signifies no more than that inevitableness is always a question of fact governed by evidence, our courts have, we think, uniformly adopted the rule of The Merchant Prince, L. R. Prob. Div. (1892) 179, and it has been restated at length by Justice Lurton (when Circuit Judge) in The Olympia, 61 Fed. 120, 9 C. C. A. 393, and specifically adopted by this court in a line of cases from The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552, to The Westchester, 254 Fed. 576.

[2] In any discussion of the defense of inevitable accident it is to be borne in mind that that which is to be found inevitable is the injury done to the complaining party. What the law would normally call a tort becomes an accident, if its infliction was inevitable in the sense

Lacombe, J., ascribed to the word in The Lackawanna, 210 Fed. 264, 127 C. C. A. 80. The law allows the injuring party to relieve himself of responsibility by proving if he can—

"that the accident was inevitable in the technical admiralty sense; that is, that it was of such a sort that it would not have been prevented by the use of that degree of reasonable care and attention which the situation demanded. The burden, of course, is heavily upon [the party] asserting such a defense. Sometimes it is established by showing what was the real cause of the accident, * * * and further showing that such cause became efficient without any negligence on the part of" the injuring person or thing.

In the present case the second branch of the rule of The Merchant Prince—i. e., the exhaustion of all possible causes—is not applicable, because there is no doubt as to how the Minch came to go adrift and to continue her drifting. We are concerned only with the question of fact whether the operation of those causes could have been prevented by "reasonable care and attention," which is but another way of inquiring whether the injury complained of was proximately caused by the force or power over which the party defendant had by the exercise of ordinary care and skill no effective control. And proximate cause also is a question of fact. Muller v. Insurance Co., 246 Fed. 759, 159 C. C. A. 61, citing cases. Nor is the nature of the problem changed by the statement that the conclusion of inevitable accident is "not to be lightly arrived at" (The Bayonne, 213 Fed. 217, 129 C. C. A. 561), which is but a variant of the above-quoted remark from The Lackawanna, that the burden of this defense is heavily upon him who asserts it.

[3] It is not denied that when the Minch went to her mooring place she was properly fastened, even for ordinary spring weather in Buffalo river. Several hours before this disaster conditions evidently demanded additional fastenings, and the master accordingly put out lines, until he had running from a heavy bridle at his bow an eight-inch harbor towline securely fastened to two spiles on the wharf. Three parts of a six-inch mooring line joined his forward port and starboard bitts to another spile on the wharf, while the connection between the wharf and the forward starboard bitts was further strengthened by two parts of a ten-inch hawser. No attack is made upon the quality of any of these lines, yet, as above stated, they all went at once.

It is used as an argument against the Minch that the other vessels in the river for the most part held to their moorings; but we find as a fact that the Minch was so placed as to be peculiarly exposed to the flood of ice and water caused by the breaking of what was practically a dam at the Ohio street bridge. The other craft encountered the torrent only when its initial force had been somewhat exhausted. Undoubtedly it was the duty of the Minch's master to take precautions against trouble; we think he did so, so far as the number and placing of his lines was concerned; indeed, the matter is summed up by a statement of one of libelant's witnesses that the Minch "had lots of lines out"; and when asked, "You don't condemn the number of lines he had out as too little?" the answer was, "No."

It is next asserted that the lines were not equalized, because, when the additional fasts were put out, the vessel was not slacked back on the current until all lines were taut. At the time, however, when these lines were put out, the current was not heavy; additional fastenings were provided against what might occur, and the new ropes were tautened by the use of a tackle with two double blocks and the capstan. When libelant's witnesses (or some of them) say that you cannot do "much more with a tackle than with hand power," the statement is disproved by the engineering evidence in the record and by common knowledge. Luce's Seamanship, p. 70 et seq.

But what we deem the conclusive proof that the Minch's lines were all taut and all holding at the same time is the fact that they all went together. If they had been unequally tautened, there would naturally have been a perceptible interval between the snapping of the taut lines and that of those that were slack when the taut ones parted.

[4] Criticism of the Minch's management is also made, in that she had left one anchor out in the harbor. It is proved that such is the ordinary custom of lake craft in Buffalo Harbor and river, and entirely apart from the fact that in harbor waters one two-ton anchor was obviously sufficient for the reasonably to be expected needs of a vessel of the Minch's size, we hold as matter of law that it was no fault of the master to comply with the ordinary custom of his trade; to do so was exercising that ordinary care and skill which is all that is expected of him.

Finally, it is said that it was negligence to open the compressor and start the anchor without examining into the condition of the riding pawl. Negligence is never anything more than lack of care according to the circumstances; the circumstances surrounding this episode were that haste was required. It is close to a miracle that the Minch drifted safely, injuring neither herself nor any one else, through two drawbridges and past a double line of shipping. The anchor was a last resort to save the vessel from contacts reasonably to be expected before she would drift more than her own length. Speed was of the essence; the riding pawl had been triced up shortly before. We find it fairly established as matter of fact that the flying cable ends in the windlass room had severed the lanyard; so that the question becomes one of fact: Was it the absence of the ordinary skill of his calling on the part either of the mate or the master to fail to examine the conditions of the riding pawl before opening the compressor?

The matter is not one of law, but of fact, and we answer the question in the negative. It may be argued thus—that if the mate had examined and tested his machinery including the riding pawl before he started the compressor, and a collision had happened (as it well might) within the time that would have been required for such examination—he would most certainly have been accused of negligence for doing that which it is here said he ought to have done. No trier of the facts can hold an ordinarily skillful man to such exiguous care.

In conclusion, it may be observed that we are here favored with Judge Hazel's very careful and persuasive exposition of evidence

(largely expert), given in open court. The differences of opinion manifested in the record are acute; in our judgment, most of the criticisms of the Minch's management are excellent illustrations of how much more accurate is hindsight than foresight. But all that the crew of the Minch were bound to was a reasonable exercise of that foresight which grows out of ordinary skill in their several occupations. This we think they manifested, and conclude that the accident to libelant's boats was in the technical admiralty sense inevitable.

Decrees affirmed, with costs.

WARD, Circuit Judge (dissenting). The claimant's defense is that the steamer was broken away from her moorings and collided with the vessels owned by the libelants as the result of vis major, without any contributing negligence on its part; i. e., that the accident was inevitable. The law applicable to the situation is perfectly simple, viz. the claimant, having proved the cause of the accident, was further bound to prove that it could not have been prevented by the exercise of due care on its part, which is care according to the circumstances. The Merchant Prince, L. R. Prob. Div. (1892) 179, followed in this circuit in The Edmund Moran, 180 Fed. 700, 104 C. C. A. 552, and many other cases.

Now here there was no sudden emergency. The danger that the force of the increasing current and pressure of ice might tear the steamer adrift from her moorings was perfectly apparent, and had been so since early morning, and until 5 p. m., when the steamer went adrift. The city fire tugs were working to break up the ice jams all day, and if there was an ice jam down to the bottom of the stream at the Ohio street bridge some distance astern of the steamer the effect of the tugs breaking it loose was also apparent. Under such circumstances due care was a very high degree of care indeed.

It was in view of this obvious situation that the master by 11 a. m. had put out heavy additional mooring lines. The large, half-loaded steamer at that time must have been straining heavily on her original fasts. These additional lines, with one exception, were put out and tautened by hand power. Three men only were employed to handle the heavy cables, although there were 12 aboard. A 10-inch manila hawser were tautened by a tackle on the windlass. It seems perfectly clear that the strain on the other additional 6 and 8-inch lines could not have been equalized with that on the original lines by hand power. The only way it could have been accomplished would have been by slacking the original lines, letting the steamer go astern on the current, and then making fast all the lines. This was not done.

That 7 or 8 lines, even if the strain were equalized, could all part at the same time, I do not believe; but, as the court relies upon the testimony of the master on this point, I will state it as follows:

"A. As the ice moved, our moorings parted practically at the same time, and we started with the ice. * * *

"Q. Now, when it comes down to the time of the actual breaking away, which line parted first? A. They parted so near all together that it would be impossible to say which went first. * * *

"Q. Then the forward lines parted first—leave it that way. How long afterwards did the after lines part? A. About a second or some such a matter. * * *

"Q. Of the manila lines and cable forward you cannot tell us which ones parted first? A. No, sir.

"Q. And within what space of time did they all part? A. Practically like snapping your finger.

"Q. You can't tell us whether the harbor towline went before the big 10-inch hawser? A. No. * * *

"Q. Give us the maximum time from the time the first line parted until all your lines forward were gone; was it half a second? A. Half a second was a very small period of time.

"Q. You said you thought the after lines went within a second of the forward lines? A. Yes.

"Q. How much time was there from the time the first forward line parted and the last? A. The space of time was very short; that is about as close as I could give it to you; I couldn't say positively as to the time. * * *

"Q. There was no way you could tell, from the sound of the parting and from the appearance and the movement of the lines, as to whether the cables held as long as the manila lines, or not? A. I was more concerned with trying to get her stopped than the time it took to part them."

Estimates of time are uncertain at the best. The master's estimate was not likely to be very accurate in such an emergency as this, nor did he pretend to exactness. It seems to me unreasonable to conclude from it that the strain on the lines must have been equalized. I am quite satisfied that it could not have been.

The next evidence as to want of care is in connection with the anchor. Being entirely without steam, the only thing left to stop the steamer, if sent adrift, was a 4,000-pound anchor hanging at the hawse pipe. Common prudence required the master to see that it was in complete readiness to go. I think he ought to have kept one of his 12 men standing by to open the compressor instantly. When the lines parted, he immediately sent the mate from the forward deck to the windlass room to do so. There is evidence from which it might be inferred, as the opinion of the court does infer, that the lanyard which held up the riding pawl had been parted by the flying end of some part of the lines, and the pawl dropped upon the anchor chain lying in the wildcat. However, the mate, without stopping to see whether the chain was clear, opened the compressor and the chain was immediately stopped by the pawl. The weight of the anchor made it impossible to free the chain in time to let the anchor go before the collision.

It is true that the bottom where the steamer lay was rocky, and the anchor might not have taken hold; but she went for a long distance before the collision over a mud bottom, which was good holding ground, and who can say the anchor would not have stopped her way? In this particular, too, there was lack of care according to the circumstances.

It is significant that, out of 19 vessels moored on either side of the Buffalo river, only the Minch was broken from her moorings by the force of the current and the ice.

I think the decree should be reversed.

FRONTERA TRANSPORTATION CO. v. ABAUNZA.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1921.)

No. 3484.

1. **Equity ⇐32—That mortgaged property is in foreign country does not exclude jurisdiction to cancel mortgage.**
   A federal court of equity *held* to have jurisdiction of a suit to cancel a mortgage on real estate in Mexico, where complainant was a citizen and defendant an alien residing and served in the district of suit.
2. **Courts ⇐328(2)—In suit to remove cloud on title, value of property determines jurisdiction.**
   In a suit to obtain cancellation of a mortgage as a cloud on the title of property alleged to exceed in value $3,000, the value of the property and not the amount conceded to be due and tendered in payment of the mortgage *held* the amount in controversy for the purpose of federal court jurisdiction.
3. **Courts ⇐37(3)—Objection to jurisdiction waived by answering after motion to dismiss.**
   A defendant, who, though moving to dismiss on the ground that the bill did not show the jurisdictional amount involved, did not ask a hearing on the motion, but answered, claiming a much larger amount, and obtained a decree in his favor, from which he does not appeal, cannot insist on want of jurisdiction.
4. **Judgment ⇐21—Amount must be stated in United States money.**
   A federal court *held* without authority to render a judgment for a sum in money of a foreign country, or otherwise than in money of the United States.

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

Suit in equity by the Frontera Transportation Company against Gonzalo Abaunza. Decree for defendant, and complainant appeals. Affirmed in part, and reversed in part.

Edwin T. Merrick, Ralph J. Schwarz, and Morris B. Redmann, all of New Orleans, La., for appellant.

W. J. & H. W. Waguespack, of New Orleans, La., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. Frontera Transportation Company filed its bill in the United States District Court for the Eastern District of Louisiana, seeking to restrain the enforcement of a mortgage executed by it to Gonzalo Abaunza, covering certain property worth much more than $3,000, to declare said mortgage canceled as constituting a cloud on the title to the property described therein, and for general relief. The complainant was a citizen of South Dakota, and the defendant, an alien, permanently resided in the Eastern District of Louisiana, and was personally served with subpœna. The property was located outside of the United States, in Mexico.

The bill averred the creation of the mortgage to secure a debt for over 86,000 pesos of Mexican money, and that it had been paid, except 42,479.50 pesos, Mexican money, principal. A tender of the

principal and interest due in Mexican money and its wrongful refusal were alleged. It was also alleged that the mortgage gave to the complainant the right to tender an amount in American money equivalent at the rate of exchange quoted, on the day of payment, by the Banco Mercantil de Vera Cruz or the Banco de Londres y Mexico, located at Vera Cruz, Mexico, and that complainant on June 14, 1915, tendered $600 for the principal and interest then due, being the amount in American money then equivalent at said rate of exchange for said Mexican pesos then due, which was then and there refused by the defendant, and complainant immediately deposited said sum of money with the Commercial National Bank in New Orleans, La., to the credit of the defendant, and has left it so deposited until the day of filing this suit, and now tenders said sum in court; that it has demanded of defendant the cancellation of said mortgage and the return of said notes, but defendant refuses to so cancel, or return same, and threatens to institute legal proceedings in the republic of Mexico to foreclose said mortgage; that the existence of said mortgage is a slander and cloud on the title to said property, which is worth well above the sum of $3,000.

The defendant filed an answer, in which he moved to dismiss said bill for want of jurisdiction, on the grounds: (a) That the suit is to remove a cloud and to cancel a mortgage, and is therefore one in rem of a local nature, and triable only in the country where the property is situated. (b) That if not a suit in rem, and if triable by this court, the test of jurisdiction is not the value of the property in Mexico, or of its use or enjoyment in Mexico, but the value of the notes and mortgage, which complainant states to be $600, which value it fixes at $600, and that the jurisdictional amount is therefore to be taken as less than $3,000. He also denied the making of a sufficient tender, averring that the pesos tendered were not a legal tender, and that the sum of American money equivalent to the legal tender Mexican pesos was $23,646.92. He prayed that a judgment for the sum due to him be decreed to be paid in American money, and that unless so paid in 30 days the plaintiff be enjoined from disposing of the mortgaged property or taking any proceedings to cancel said mortgage.

Considering the motion to dismiss:

[1] 1. If the property was within the jurisdiction of the United States, its statutes prescribing in which one of its courts the case should be filed would control as to jurisdiction between such courts. But where the property is wholly outside of the United States, and jurisdiction in personam of the defendant can be had, with personal service, the complainant being a citizen and the defendant an alien, the complainant is entitled to try his cause in the United States, and the existence of a right to resort to a foreign court is no answer to his complaint.

It is well settled that where a court of equity acquires jurisdiction by personal service, it can proceed in personam to compel the defendant to do all things necessary, in a case where the res is beyond the territorial jurisdiction of the court. Cole v. Cunningham, 133 U. S.

107, 117, 119, 10 Sup. Ct. 269, 33 L. Ed. 538. The location of the property in Mexico, therefore, does not defeat the jurisdiction of the District Court.

[2] 2. The suit in this case is not a suit to recover $600, but to remove a cloud on the title to a piece of property. The averments of the bill concerning the $600 are the statements of the complainant of what it concedes it should pay in order to do equity as a prerequisite to getting the relief it seeks; i. e., the removal of the cloud on its title. If, instead of the bill averring that plaintiff had tendered, and complainant had refused, the sum now tendered, it had averred that defendant had received this sum which complainant averred was all that was due, but wrongfully refused to surrender plaintiff's notes, or to cancel this mortgage, and that this operated as a cloud on and slander of the title, the property being worth well above $3,000, it could not have been claimed that this was a suit in which the averments of the plaintiff showed that no value was involved.

Here a decree is sought to prevent the defendant from using his mortgage and these notes for any purpose, and to clear up the title to this entire property, which is alleged to be worth much more than $3,000. Where a suit was brought to clear a title and set aside a deed of trust and vacate a deed executed to a purchaser, under a foreclosure, and, if this was not done, then to allow complainant to redeem on payment of the mortgage debt, interest, and costs (less than the jurisdictional amount), the value of the lands, not the amount required to redeem, is the amount in controversy. Greenfield v. United States Mortg. Co. of Scotland (C. C.) 133 Fed. 784; Squire v. Robertson (C. C.) 191 Fed. 733; Lehigh Co. v. New Jersey Co. (C. C.) 43 Fed. 547.

[3] 3. In this case the defendant, while moving in its answer to dismiss the bill on the ground that the same does not show the jurisdictional amount, has also by the same answer, which, in this, is strictly responsive to the bill, averred the fact that the amount of the mortgage debt involved exceeds greatly the sum necessary to give jurisdiction, and has had a finding by the court that the amount necessary for a tender is over $5,000. It has sought a decree in its favor and has secured the same. As was said by the District Court, while having the right to insist on a hearing, separately, of its motion to dismiss the bill because of its alleged failure to show the requisite jurisdictional amount the defendant did not ask such hearing, but proceeded to the introduction of testimony without invoking such ruling or the exercise of the court's discretion.

It is not now presenting any cross appeal, but seeks an affirmance of the decree dismissing the bill on its merits, and awarding it a decree on its own prayers for relief. The defendant is not in a position now to insist that the amount in controversy does not exceed the sum of $3,000, exclusive of interest and costs. Boyd v. New York & H. R. Co. et al. (D. C.) 220 Fed. 174, 178, 179.

4. We agree with the lower court that the plaintiff was not entitled to tender the character of pesos tendered at par, or the equivalent in American money of this amount of such pesos, in payment of its

debts. There is sufficient evidence to sustain the finding of fact that such pesos, even if received in payment of debts in Mexico, were never received at par with the Mexican pesos based on metallic money which were recognized as constituting legal tender at par, and that the court correctly found that no sufficient tender of the debt, still due on the notes secured by the mortgage, had been made to entitle the complainant to a decree requiring the defendant to cancel and surrender said notes and mortgage. The decree of the District Court dismissing the plaintiff's bill should be affirmed, as the court found that he had failed to show a sufficient tender to entitle him to any part of the relief prayed.

[4] The plaintiff has no prayer asking that the sum found due on the mortgage be fixed and he be allowed to pay the same. The defendant by his answer in the nature of a cross-bill prayed for a decree ascertaining in American money the sum due and seeking a decree therefor. The decree is for Mexican pesos, with no finding of their equivalent value in legal tender of the United States. We do not think that the court has the right to render a judgment in Mexican pesos or otherwise than in money of the United States of America. The court should have either found what sum in American money the plaintiff should pay, or should have declined to render a decree for affirmative relief for the defendant, if the proof was not sufficient to enable such finding to be made. So much of the decree therefor as finds in favor of the defendant the sum of 42,479.50 Mexican pesos, with interest as stated, and directs the plaintiff to pay the same, and on default thereof awards an injunction against the plaintiff, is reversed; in other respects, it is affirmed, the costs of appeal to be equally divided between appellant and appellee.

THE HIGH CLIFF.

(Circuit Court of Appeals, Second Circuit. January 26, 1921.)

No. 120.

1. **Salvage ⇐51—Appellate court may increase or diminish award.**
   The appellate court has power to increase or diminish the amount of a salvage award.
2. **Salvage ⇐34—Mere towing to safety low order of service.**
   The mere towing to safety of a drifting barge or scow is usually regarded as a salvage service of a low order of merit and is compensated by a small reward.
3. **Salvage ⇐26—Services in harbor not highly compensated.**
   Salvage services rendered in a harbor, where tugs are abundant and on the ground or near by are not of a high order.
4. **Salvage ⇐26—Award depends on circumstances of particular case.**
   Each case of salvage is to be disposed of on its own merits, and while the amount of compensation awarded is to some extent in the discretion of the court, it is guided by certain general principles, such as that when the risk was inconsiderable and the service slight the award should be

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

little more than compensation for the work done, but if the service was attended with unusual danger and difficulty the award should be proportionately higher.

5. Salvage ⇐27—Excessive award reduced.

Where a barge lying alongside a steamship in a slip in the daytime, and having on board a cargo worth $200,000, broke loose during a severe wind storm and was drifting up the slip, when she was taken in charge by a tug lying in the same slip and pushed farther up the slip, where she was made fast to a pier in a protected place, the service requiring not to exceed three-quarters of an hour and being attended with no danger, an award of $5,000 *held* excessive and reduced to $2,500.

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

Suit in admiralty by the Olsen Water & Towing Company against the barge High Cliff; the Warner Sugar Refining Company, claimant. Decree for libelant, and claimant appeals. Modified and affirmed.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

Harrington, Bigham & Englar, of New York City, for appellant.

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

ROGERS, Circuit Judge. The question which this case presents is whether an award of $5,000 for salvage services rendered to the barge High Cliff by the steam tug Marie Olsen on February 26, 1918, was excessive and out of proportion to the services rendered. As is usual in all cases of this nature, the claimant insists that the court below overestimated the salvage services, and on the other side it is as strongly insisted that the award cannot be so regarded.

[1] That it is within the power of this court to increase or to diminish the amount of a salvage award will not be denied. The testimony which was taken before the court below is all in the record, and this court may examine it for itself and reach its own conclusions. If it appears that an award is clearly inadequate or is unreasonably excessive, the court can modify it accordingly. Irvine v. The Hesper, 122 U. S. 256, 7 Sup. Ct. 1177, 30 L. Ed. 1175; The Connemara, 108 U. S. 352, 2 Sup. Ct. 754, 27 L. Ed. 751.

[2] The mere towing to safety a drifting barge or scow is usually regarded as salvage service of a low order of merit, and is compensated by a small award. Scows Nos. 1 and 10 (D. C.) 141 Fed. 477; The John Fleming (D. C.) 136 Fed. 486, affirmed in 144 Fed. 1021, 74 C. C. A. 680; 35 Cyc. 765.

[3] It has long been settled in this circuit that salvage services rendered in harbor cases, where tugs are abundant and on the ground or near by are not services of a high order. The O. C. Hanchett, 76 Fed. 1003, 1004, 22 C. C. A. 678.

[4] In some foreign countries the amount or proportion to be paid for salvage services is fixed by law. But in England and in this country the rate of salvage compensation is governed by no determinate rules applicable to all cases. The proper rate of compensation is nec-

essarily to some extent in the discretion of the court on a just estimate of all the circumstances of the individual case. Each case of salvage is to be disposed of on its own merits. There are, however, certain general principles which serve to guide courts in the exercise of their discretion. When the risk is inconsiderable and the service slight, the award should be little more than mere remuneration pro opere et labore. The Benjamin A. Van Brunt (D. C.) 164 Fed. 775. If the service is attended with unusual danger and difficulty, the award will be proportionately higher. Luckenback v. Scows 3 & 16 (D. C.) 50 Fed. 570. The highest compensation ordinarily allowed in the most meritorious cases is one moiety, which is rarely given except in the case of a derelict. While seldom more than one-half or less than one-third is given there are many cases in which the award has been under 5 per cent. In The Henry Frank (C. C.) 11 Fed. 763, which would seem to be an extreme case, a steamboat valued at from $35,000 to $40,000 broke from her landing in the harbor in a gale of wind, and without any steam or other propelling power and with only a watchman on board drifted down stream to her own peril and that of the shipping in the harbor. Two tugs went to her assistance and towed her after much trouble to a place of safety. A salvage award of $300 was allowed by the District Judge, and on appeal to the Circuit Court the amount was not disturbed; Circuit Judge Pardee saying that he saw no reason to disturb it, unless it should be as to the rate of distribution between the libeling boat and the crew—three-eighths to the men and five-eighths to the boat.

In Texas Co. v. Texas & Gulf S. S. Co. (C. C. A.) 263 Fed. 868, an award of $1,700 for taking up and towing to a place of safety a wooden barge found adrift and worth about $50,000 with a cargo of about 6,000 barrels of oil was held adequate by the Circuit Court of Appeals in the Fifth Circuit. The court in so holding stated that there had been no great danger to life or property in rendering the service. In the same case an award of $1,000 was held inadequate, and was increased to $3,500. The award was to an iron tank steamship, worth from $2,250,000 to $2,500,000, with a cargo worth about $300,000, for time lost and deviation from her course in towing the barge found adrift, causing a delay of 22 hours and 40 minutes.

We are not unmindful that in such cases as the one now before the court the amount allowed by the trial court is not to be lightly disturbed, as the trial court has much the duty of a jury. But it sometimes has happened that this court has thought that justice required it to increase the amount allowed below, as in Water Front Contracting & Lighterage Co. v. Goodwin-Gallagher Sand & Gravel Co., 252 Fed. 117, 164 C. C. A. 229, or to reduce it as in The George W. Elzey, 250 Fed. 602, 162 C. C. A. 618. And see The Kanawha, 254 Fed. 762, 166 C. C. A. 208.

[5] In the case now before the court the value of the services rendered by the tug are to be distinguished from cases involving rescue of vessels in open water, accompanied by great danger to life and property, or where the salvors display great daring or skill. Here we have a covered barge in a slip, partially protected from wind and sea.

The tug lying in the same slip and but a few hundred feet distant, came to the barge, put a line on her, dropped back farther into the slip, and berthed the barge to the pier. The services took a short time, and were rendered in broad daylight, and with a bargeman on the barge to handle the lines.

An examination of the record shows that the High Cliff is a covered wooden barge about 125 feet in length, and that she was constructed by uniting half of a carfloat and half of a boat known as the Stone Cliff. She was purchased by the claimant in October, 1917, for $4,125.08, and she had on board at the time the services were rendered a cargo of aluminum worth $200,000.

The barge on the day in question lay alongside the steamship Yadkin, about 150 feet from the end of the pier at the foot of Thirty-First street, South Brooklyn. The barge was made fast to the steamer by two lines at each end. The master of the barge testified that he was awakened about 5 o'clock by the rough weather and by the heavy sea that had set in. A little before 7 o'clock the near line broke, and later the other lines broke, and the barge drifted up the slip. There is conflicting testimony as to whether the barge had broken loose from the steamship and was drifting up the slip when the tug took her in tow. The master of the barge testified that she had already broken loose, and those on the tug contended otherwise. Between the hours of 7 and 8 of the morning in question the velocity of the wind, as shown by the official in charge of the Weather Bureau at New York City, was 75 miles an hour. The tug took the barge in tow, and took her in tow within the slip, and pushed her farther over into the still waters of the slip.

The captain of the tug was asked on cross-examination how much time was consumed by the tug in rendering the service, and he replied about three-quarters of an hour. Another of the libelant's witnesses testified that it was between half an hour and three-quarters of an hour. No other witness testified on that subject for the tug. The master of the barge put the time at 10 minutes. We conclude, therefore, that the time actually occupied by the tug in the salvage service did not exceed three-quarters of an hour, and may have been considerably less than that.

It also appears that in pushing the barge up the slip the tug was simply pushing her where the wind was taking her. The captain of the tug was asked on cross-examination:

"With the wind blowing in the slip as you have testified, in which direction would she go? Toward the bulkhead or out into the bay? A. She would go up toward the bulkhead. Q. That would be a safe place? A. That would be a safe place, yes; if she moved at all, she would go up there. Q. It was up in that direction that you put her? A. Yes."

And the captain of the salvaged barge testified that he did not consider the barge was in any danger in drifting up the slip after he got past the Moran scow, and that he had already passed the Moran before the tug came to his aid. Asked as to the distance the tug was from the barge, he testified as follows:

"Q. About how much of the distance did the Olsen tow you, or push you, altogether? A. Just across the slip like. Q. Two or three hundred feet? A. Yes."

After the tug pushed the barge into the smooth waters of the slip no further service by the tug was rendered. The captain of the tug was asked:

"Q. You didn't do any pumping on her afterward? A. No. Q. And she moved all right. She didn't sink, did she? A. No; she did not."

The captain of the barge testified that he did not ask for the aid of the tug. His testimony was as follows:

"Q. Did you at any time request any one on the tug Olsen to take hold of you or render you any assistance? A. No, sir. Q. Are you positive of that? A. I am positive of that. Q. Did you have any conversation at the time that the tug Olsen first came up to you in regard to any assistance to be rendered? A. No, sir. Q. You didn't ask them for any assistanec, of any kind? A. No, sir. Q. There has been considerable testimony here from several witnesses that the High Cliff was still made fast to the steamer at the time that the Olsen took you in tow, and that you were taken in tow at your own request. What do you say as to that? A. No; I was drifting up the slip when the Olsen took hold of me."

In this he was flatly contradicted by the captain of the tug who testified as follows:

"Q. I would like to know what, if anything, the captain of the barge said, or called out, before you put a line to him? A. 'Take me away from here,' he said, 'I am sinking.' Q. Are you able to state who he said that to? A. He said it right to me; I was up in the pilot house."

There is testimony in the record to the effect that a number of vessels sank that day, but it does not appear that any boat within a slip went down. That the storm was severe is admitted, although at the time the services were rendered it had not reached its climax. But at the time of the service, if the testimony of the captain is true as to the position of the barge, she was not in danger. If his testimony is not true, and the barge would have gone to the bottom if the service had not been given, she and her cargo could have been raised without great expense. The time actually taken in rendering the service was short, and the tug was at no time in danger.

In view of all the circumstances we have come to the conclusion that an allowance of $5,000 is not warranted, and that the decree should be modified, by reducing the amount so awarded from $5,000 to $2,500, and, as so modified, the decree should be affirmed.

It is so ordered.

THE PROGRESSIVE.
THE SLATINGTON.

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

No. 100.

1. **Collision ⊂⊃106—Tugs, while maneuvering to get on course, governed by special circumstance rule.**
The starboard hand rule does not apply to a tug backing preparatory to getting on her definite course; but such a situation of maneuvering a vessel is covered by the special circumstance rule, Inland Rules, art. 27 (Comp. St. § 7901).

2. **Collision ⊂⊃95(7)—Mutual fault of tugs for collision between tows.**
Two tugs each *held* in fault for a collision between their tows at night in North River, while maneuvering preparatory to starting on their respective courses; one for not waiting in her slip until an interfering tug and tow were out of the way, and the other for not keeping a proper lookout.

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

Suit in admiralty for collision by Ida M. Flannery, owner of the barge Howe, against the steam tug Progressive; with the tug Slatington impleaded. Decree against the Progressive alone, and her claimant appeals. Modified, by holding both tugs liable.

Alexander & Ash, of New York City (Peter Alexander, of New York City, of counsel), for claimant-appellant.

Harrington, Bigham & Englar, of New York City (Leonard J. Matteson, of New York City, of counsel), for claimant-appellee.

Herbert Green, of New York City, for libelant-appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The libelant is the owner of the coal barge Edward G. Howe, and filed this libel for damages sustained by her while she was in tow of the tug Progressive and when she came in collision with a railroad float in tow of the tug Slatington. The suit was commenced against the Progressive alone, and her owner brought in the Slatington by petition under the fifty-ninth rule of admiralty.

On the 20th of February, 1918, about 9 o'clock in the evening, a clear night, with the wind northwest strong, and tide strong ebb, and while in the North River off the New Jersey shore, and abreast of the entrance of the Morris Canal Basin, about midway between the Game Cock dock and the Lehigh Valley float bridges, the tows collided. The distance off the New Jersey docks is given as 400 to 1,000 feet. The tugs drew their tows out into the river and rounded to in an endeavor to get them on their respective courses and cut across towards the New York shore with a strong wind and tide. The Progressive, owned by the Newtown Creek Towing Company, was engaged to tow the Howe light from the Game Cock dock, Jer-

sey City, to the Erie Basin. The barge was lying on the south side of the dock outside of two other vessels, well up on the slip, and a Lehigh Valley tow of light barges, bound for South Amboy, lying across the end of the pier. The latter tow was arranged in three tiers, the first of which was fast to the end of the dock while the other tiers tailed down stream with the tide, across the mouth of the slip, leaving room for the tug to enter, but not enough for her to take her tow out into the river.

The Progressive went into the slip, bow toward the bulkhead, and met the Howe first alongside of her starboard side. She had to remain at rest until the way was clear for her to make her exit, and at about the same time the Lehigh Valley tug, the Genessee, picked up the light tow, which impeded her exit, on a hawser, and started for Perth Amboy, going up and across and around it, under a port wheel. The master of the Progressive stationed his mate on the stern of the Howe as a lookout, and blew his slip whistle, and backed out into the river under two bells. The effect of the ebb tide, acting upon the tug and tow as they emerged from the slip, turned their sterns down stream and carried them down to the Lehigh Valley float rack near by. The Progressive continued under sternway until the bow or inner end of the Howe was about 100 feet clear of the docks, when she was stopped and went ahead under one bell under a port wheel to straighten herself, and towed up the river below the tow of the Genessee. The lookout then stationed himself on the bow of the Howe, where he remained until the collision. While thus maneuvering, the Slatington took the railroad float from one of the Lehigh Valley float bridges about 500 feet below the Game Cock dock, bound for Pier 34, North River. The float was lying in her berth stern out.

The Slatington navigated into the river bow first, around a line from her own bow to the lower corner of the stern of the float, and backed out into the river until the inshore end of the bow of the float was about her own length clear of the float bridges. As she came into the tideway, the tide turned the stern of the tug and the stern of the float down stream. The float was carried from 325 to 350 feet down the river below the point of departure. The Slatington then went to the port down river side of the float, placed her bow against the float's port side near her stern, made fast with a headline, and shoved her around and up the river, until her stern was headed up stream and her bow down stream. It was intended that this be done preparatory to picking her up alongside, portside to portside, and towing her, stern foremost, to her destination.

The master of the Progressive says that, when the Progressive was under the port helm and got headed up stream, he saw the Slatington under his stern about 200 or 300 feet away, exhibiting to him her red and green lights, and that the Genessee was then a little above the Progressive in the river, and the tail tier in her tow was about 30 to 50 feet away. The Genessee had been heading up toward the middle of the river, and started to turn down and proceed on her voyage to Perth Amboy. The Progressive and the Howe were then between the two tows, with the Genessee above and the Slatington below.

The master of the Slatington says that he was just making fast to his float after pulling her out into the river and downward again to move the float forward when the collision occurred.

The judge below held the Progressive solely at fault and exonerated the Slatington. He applied the crossing course rule, holding that the Progressive, instead of awaiting a consent to her request to cross, went ahead, crossed the Slatington's bow, and that the starboard hand rule was violated. The Slatington undoubtedly, in turning her tow around stern up the river, moved her up stream a considerable distance. When she hauled the car float out from the float bridges, the tow was carried down stream by the tide a distance estimated at 350 feet, and the collision occurred about midway between the upper float bridge and the Game Cock dock. The Game Cock dock is about 500 feet above the bridges. The Progressive blew two whistles to the Slatington to allow her to go across her bow. She received no reply, and blew a second signal of two whistles, and received no reply, and crossed; but the danger of collision was then imminent, and she blew her alarm whistle, stopped, and backed, and her tow came in contact with the up-river end of the car float. When the vessels came together, the way went entirely off the float; but she was still moving slowly up stream. At the time of collision, it was apparent that the Progressive had ported her wheel, so that she was headed straight across the river and the Slatington was heading up stream.

[1] We think the court below should not have imposed liability upon the Progressive solely upon the ground that she violated the starboard hand rule. The maneuvers of the three tugs created a situation in their navigation which should be governed by the special circumstance rule. The starboard hand rule does not apply to a tug backing preparatory to getting on her definite course, whether it be up or down the river. But such a situation of maneuvering a vessel is covered by the special circumstance rule. Article 27, Act June 7, 1897, c. C–4, § 1, 30 Stat. 102 (Comp. Stat. § 7901); The Servia, 149 U. S. 144, 13 Sup. Ct. 877, 37 L. Ed. 681; The William A. Jamison, 241 Fed. 950, 154 C. C. A. 586; Bouker No. 2, 254 Fed. 579, 166 C. C. A. 137.

[2] We think that, if it be true that the Genessee interfered with the navigation of the Progressive, as related by the master of the Progressive, the Progressive was at fault in coming out of the slip when she did. She should have anticipated the handicap which would be hers by the presence of the Genessee preceding her out of the slip into the tideway. This was a situation which she could have perceived, and should have calculated in her navigation.

We think, further, that the Progressive's master was at fault in assuming that the Slatington was an overtaking vessel, and mistakenly blew a signal of two whistles, which was improper under the circumstances. Two inconsistent accounts of the happening of the collision are set forth in the answer of the Slatington. The original answer alleged:

"At 9 p. m., February 20, 1918, the tug Slatington pulled a Lehigh Valley car float from Bridge No. 6, Lehigh Valley Terminal, Jersey City, New Jersey,

for the purpose of towing this float to Pier 34, North River. The weather was clear; the tide was ebb. To pull the float from the bridge, the Slatington placed a headline on the bumper end of the float. After making the line fast, the engines of the Slatington were reversed and she hauled the float out from the bridge. After the float had been hauled out into the stream, the ebb tide carried the stern of the Slatington and the bumper end of the float down the river. The Slatington then came ahead under a port helm, with her bow against the float, shoving the float around until the toggle end of the float was headed upstream. While the Slatington was executing this maneuver, her master observed a tug, which subsequently proved to be the Progressive, with a number of boats in tow on hawsers, leaving the Packer dock. The Packer dock is a short distance to the north of the Lehigh Valley float bridges. The Progressive with her tow then headed to the eastward across the toggle end of the Slatington's float. The Progressive was able to hold herself up against the ebb tide, but her tow was swept down the stream by the tide until the tow collided with the Slatington's float. So far as those on the Slatington could observe, no damage was done to the tow of the Progressive."

And the amended answer alleged:

"At 9 p. m., February 20, 1918, the tug Slatington proceeded to the Lehigh Valley float bridges, at Jersey City, N. J., for the purpose of towing Lehigh Valley carfloat No. 420 to Pier 34, North River. The weather was clear; tide strong ebb; wind from the northwest. The Slatington placed a headline on the outer or bumper end of float No. 420 and backed out clear of the pier heads with the float. The ebb tide carried the stern of the Slatington and the bumper end of the float down the river. The Slatington then came alongside the float, and proceeded to get out her towing lines in order to take the float in tow on the port side of the tug. While thus engaged in making the float fast, and while the engines of the Slatington were at rest, a tug with a hawser tow was observed coming out from the Packer dock into the stream. Another tug, which afterwards proved to be the Progressive, with the barge Edwin G. Howe in tow on her starboard side, was also observed coming out from Packer dock and heading downstream. Instead of holding well up from the Slatington and her tow, the Progressive recklessly endeavored to cross too close to the bows of float No. 420, and was swept down by the tide, until the barge Howe came into collision with the port forward corner of the float. No damage was done to float No. 420, and no damages to the Howe was observed."

These contradictions are worthy of note and must be considered, as well as the contradiction in the testimony of the master as to the maneuvering which he said took place on his part, when he said that, after hauling the car float clear of the piers, he put the bow of his tug against her port side near her bumper end or stern, and shoved her stern around from downstream to upstream, and that after pulling the car float clear of the float bridges. This is inconsistent with the claim and allegations of the answer that, after pulling the car float clear of the float bridges, the tug went ahead under a port helm and shoved the float around until her toggle end or bow was headed upstream. The master admits that he never saw the Progressive, and did not know that they were in the river until after he had shoved the stern of the tow upstream, at which time the Progressive was only 100 feet away from the upstream end of the float. It was thus apparent that there was a fault in the navigation of the Slatington in failing to have a proper and efficient lookout. If there was a floatman on the bow of the float, he should have reported the presence and proximity of the Progressive and her tow. If the master of the vessel was depending upon the floatman to report other vessels in the river, the fault

is clear, for the reason that the floatman, acting as a lookout, failed to perform his duty. A lookout properly stationed, attending to his duty, could at least have heard the whistles of the Progressive and reported to the master at the time the tows were 300 or 400 feet apart. If the master had been advised as to the situation, he might have averted the collision by blowing an answering signal and navigating accordingly or by stopping and backing. We think the Slatington was at fault.

Accordingly the decree will be modified, by holding both vessels liable.

MAUREL v. SMITH et al.

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

No. 101.

1. **Copyrights ⇐41, 42—Title held in trust for coauthors.**
Complainant, who was the author of the scenario for a comic opera, made a contract with managers for completion and production of the opera, providing that her rights therein should be fully protected. One of the three persons secured pursuant to the contract to write the libretto, lyrics, and music, respectively, obtained a copyright in his name, but which gave the names of those who collaborated in its production. *Held*, that he held the legal title in trust for the benefit of complainant to the extent of her rights reserved by her contract.

2. **Literary property ⇐7—Subject to same law as other personalty.**
An author has the same rights in his work as the owner of other personalty, and may sell the same outright, or dispose of it on such conditions or with such restrictions as he might any other property.

3. **Copyrights ⇐41, 42—Equity has jurisdiction to determine rights of co-owners.**
Equity *held* to have jurisdiction of a suit to determine the respective rights of coauthors of an opera in a copyright therefor taken in the name of one, and in the proceeds of contracts for its production.

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

Suit by Fred de Gresac Maurel against Harry B. Smith and another, to determine her interest and rights in a certain dramatic and literary property, in the opera "Sweethearts," and declaring the defendants trustees for the plaintiff of the statutory copyrights held by them to the extent of an equal share with each of the defendants, Harry B. Smith and Robert Smith. Decree for plaintiff. Defendants appeal. Affirmed.

For opinion below, see 220 Fed. 195.

Otto Sommerich, of New York City, for appellants.
Nathan Burkan, of New York City, for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. [1] The appellee was the author of a scenario which has been the subject of several titles, to wit, "The White Swan," "Princess Tulip," and finally "Sweethearts." In Sep-

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tember, 1912, the appellee made a contract with the firm of Werba & Luescher, theatrical managers, whereby she agreed to complete this scenario, then entitled "The White Swan," and to deliver it to the managers on or before October 2, 1912. She accepted, as her collaborator to complete the work and to write the lyrics for the opera, one Harry Blossom, and she granted a performing license to the managers. That contract provided that the managers would advertise the name of the appellee on the programs, printing, and advertising matter as follows: "The White Swan" (or substituted name of the opera); opera, books and lyrics by Fred de Gresac (appellee subsequently married Mr. Maurel) and Harry Blossom; music by Victor Herbert. The contract further stipulated that the appellee did not grant any publishing rights in the opera to the managers, and the managers agreed that no changes, interpolations, additions, or eliminations of any kind should be made in the opera without the appellee's consent in writing.

The scenario was in French, and the appellee read a translation thereof for one of the managers, and submitted a translation of the first act to them. The managers thereupon made a contract with Mr. Blossom for the completion of the libretto and lyrics. Later Mr. Blossom decided that he could not collaborate on this work, and the managers asked the appellee for her consent to have substituted Harry B. Smith. Appellee gave her consent, upon condition, however, that it would not affect her rights under the contract between herself and the firm of managers, and the reservation of the publishing rights was particularly mentioned. Such consent to the substitution of Harry B. Smith was noted in writing at the foot of the contract. The managers thereafter arranged a meeting between the appellee and the appellant Harry B. Smith, and it was then agreed that the two would collaborate, and that such work would be done upon the same terms as agreed upon with Mr. Blossom. The appellee delivered the second act of the manuscript of the scenario to Mr. Smith, in which she indicated her pleasant satisfaction to work with the appellant, and stated she was willing to help in the dialogue, if he was short of time. The appellant Harry B. Smith accepted the second act, but did not communicate with the appellee, either directly or indirectly, but did communicate with the managers, and said he would undertake the work upon condition that his brother, Robert B. Smith, would be permitted to associate with him. The managers telephoned the appellee and obtained her consent, but she stated that such consent was given providing her interest in the contract was not interfered with and remained the same, to which the managers replied:

"Absolutely, there is to be no change concerning yours."

On December 10, 1912, a contract was made between Werba & Luescher and the appellant Harry B. Smith for the development of the scenario and the writing of the lyrics. Under this contract, the firm of Werba & Luescher were obligated to advertise the names of Harry B. Smith and Fred de Gresac (appellee), as the sole and exclusive authors of the book and music of the play, and Robert B. Smith as the sole and exclusive author of the lyrics of the same, on all the billing and

advertising matters used in advertising the performance of the play. On the 23d of December, 1912, Robert B. Smith entered into a contract with G. Schirmer, Incorporated, for the publication of the lyrics and vocal score of the said opera. The recital of this agreement referred to—

"'Sweethearts,' the book whereof is by Fred de Gresac and Harry B. Smith, and the music by Victor Herbert. The stellar role of which is to be enacted by Miss Christie McDonald, to be produced under the management of Werba & Luescher of New York."

The appellant Harry B. Smith did write the book of the opera, and Robert B. Smith wrote the lyrics. The lyrics that were written with their titles were blended into the book, and were led up to by cues that were written by both appellants. In the development of the opera, the book was amended so as to fit the lyrics into the book with some color of continuance. After the contract between the appellants and the managers was made, the appellants did not, directly or indirectly, communicate with the appellee, nor was she asked to furnish any material for the work.

On March 14, 1913, she did, however, receive a check for $500 as advance royalty under her contract. This check was sent by the managers. With the letter which accompanied the check, she was invited to attend the rehearsals and it was stated that "the dialogue was then getting pretty well set and they would like her opinion." On April 17, 1913, the appellant Harry B. Smith applied for a copyright to the opera. In his application for such coyright, he named as authors of the work, Harry B. Smith, Fred de Gresac, and Robert B. Smith. With the application, he sent the completed manuscript of the play, in which were incorporated all lyrics that were composed by himself and by the other appellant. The copyright was issued to Harry B. Smith and contained the following:

"The title of the dramatic composition registered is 'Sweethearts.' Book by Harry B. Smith and Fred de Gresac. Lyrics by Robert B. Smith. Music by Victor Herbert. A comic opera in two acts, book and lyrics."

Thereafter the vocal numbers and the vocal score of the opera were published under the contract between Robert B. Smith and G. Schirmer, Incorporated. The title page of the vocal score contained the following inscription:

"'Sweethearts.' A comic opera in two acts. Book by Harry B. Smith and Fred de Gresac. Lyrics by Robert B. Smith. Music by Victor Herbert."

The first performance took place in March, 1913, and the play was unusually successful. In October, 1913, an offer was made to place the opera for public performance in New Zealand, Australia, and South Africa. Appellee's consent was asked, and she refused, unless she received 25 per cent. of the proceeds of the performances. This demand was acquiesced in by the appellants. They, however, state the reason for their acquiescence was that they did not have a copyright in Australia. Under an agreement of October 3, 1913, entered into between Victor Herbert, Fred de Gresac, the appellants, and the J. C. Williamson, Limited, exclusive performing rights of the opera in Australia, New

Zealand, and South Africa were granted, payment to be made 50 per cent. to Victor Herbert, 25 per cent. to Fred de Gresac, and 25 per cent. to the appellants. That contract, in its recitals, referred to the appellee as one of the authors of the opera. The evidence shows that the appellant Harry B. Smith had previously collaborated with appellee on six comic operas, and the contracts made in respect to these collaborations were upon the basis of equal co-owners, and that Smith was to copyright the joint work, but hold such copyright in trust for the appellee to the extent of her rights. When the appellee demanded her share of the publishing royalties paid by G. Schirmer, Incorporated, from the appellants, they denied that she had any right whatever in the play, and have since maintained this position.

In view of the evidence, it is clear to us that the work of completing the book and writing the lyrics of the opera "Sweethearts" was undertaken, not only with the consent of the appellee, but under an agreement by which she was to share in the profits obtainable from the sale of the book of the opera and in its dramatization and musical production.

When the firm of Werba & Luescher interested appellant Harry B. Smith, and asked for his substitution in the place of Mr. Blossom, the scenario was accepted by such managers upon which to complete the book of opera now known under the title of "Sweethearts." What took place thereafter through the efforts of the appellants and also Victor Herbert was a confusion of literary labor contributed by independent efforts. The appellee furnished the scenario, the appellants Smith the libretto and lyrics, and Victor Herbert the music. The appellee protected her rights and imposed the conditions or restrictions as to the extent of the use of her scenario, and thus protected her rights and property, which she had acquired in the finished product. Such rights seem to have been respected by the appellants in the publication of the book of the opera, in the application for and the grant of copyright, and, indeed, in every stage up to the time of payment of the royalties.

[2] The rights of property which the appellee had were transferable by sale and delivery, and there is no distinction, independent of statute, between literary property and property of any other description. The right to sell and transfer personal property is an inseparable incident of the property. An author or proprietor of a literary work or manuscript possesses such a right of sale as fully and to the same extent as does the owner of any other piece of personal property. It is an incident of ownership. Therefore sales may be absolute or conditional, and they may be with or without qualifications or restrictions, and the law relating to personal property is applied in determining the character of a sale of literary property. Parton v. Prang, 3 Cliff. 537, Fed. Cas. No. 10,784. The managers and the parties recognized this property right flowing from the collaboration of labor. It was agreed to advertise the name of the appellee, and no changes or eliminations of any kind were to be made in the opera without her consent, nor were any rights to be granted by the managers without her consent, and the appellants consented to use the scenario of the appellee and to

labor with reference to it. Thus was mingled the labor of the appellants and the appellee. In the contract which the appellants made with the managers, Werba & Luescher, and in the grant of the rights for other countries, they recognized the appellee's work. Therefore, when the appellants granted rights to G. Schirmer, Incorporated, they could but transmit what they had to part with, and they could not transfer what interest the appellee had. Fairbanks v. Sargent, 117 N. Y. 333, 22 N. E. 1039, 6 L. R. A. 475.

Indeed, the very contract between the appellant Robert B. Smith and G. Schirmer, Incorporated, recognized the appellee as the coauthor of "Sweethearts," and in the application for a copyright Harry B. Smith did the same. The result is that there was a joint co-operation in carrying out the effort to complete the opera. It is not essential that the execution of the work should be equally divided; as long as the general design and structure was agreed upon, the parties may divide their parts and work separately.

"The pith of joint authorship consists in co-operation, in a common design, and whether this co-operation takes place subsequent to the formation of the design by the one, and is varied in conformity with the suggestions and views of the other, it has equally the effect of creating the joint authorship as if the original design had been their joint conception." Coppinger, Law of Copyrights (4th Ed.) pp. 109, 110.

In Dam v. Kirk La Shelle Co., 175 Fed. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173, in an action for infringement of copyright, this court recognized the obligation to protect one who prepared the framework of a play and said:

"The story was but a framework, * * * but the right given to an author to dramatize his work includes the right to adapt it for representation upon the stage, which must necessarily involve changes, additions, and omissions. It is impossible to make a play out of a story—to represent a narrative by dialogue and action—without making changes, and a playwright who appropriates the theme of another's story cannot, in our opinion, escape the charge of infringement by adding to or slightly varying his incidents."

We conclude that the rights which the appellants had in the use of the scenario were only such as were permitted pursuant to the agreement of the parties to collaborate to produce the opera "Sweethearts." Therefore, as between the appellee and the appellants, who are coauthors and jointly interested with the appellants in the work when the play was copyrightd by the appellant Harry B. Smith, the copyright is deemed to have been taken out in the name of one as a trustee for all the true owners. The consent to take out the copyright in the name of one does not destroy the interest of the others, who have jointly labored with the applicant for such coprighted play. The legal title to a copyright thus obtained vests in the person in whose name the copyright is taken out. The question of such ownership is dependent upon the circumstances of the case. T. B. Harms & Francis, Day & Hunter v. Stern, 229 Fed. 42, 145 C. C. A. 2; Press Pub. Co. v. Falk (C. C.) 59 Fed. 324; Black v. H. G. Allen Co. (C. C.) 42 Fed. 618, 9 L. R. A. 433. Here the joint owners of the work are represented by Harry B.

Smith, so far as the record title of the copyright is concerned; but he holds it as such trustee.

[3] But it is contended that the relief granted by the decree below is at variance with the allegations of the bill of complaint. We find no variance between the complaint and the proofs which justify the claim. Lockhart v. Leeds, 195 U. S. 427, 25 Sup. Ct. 76, 49 L. Ed. 263; N. P. Pratt Lab. Co. v. Buffalo Forge Co., 184 Fed. 287, 106 C. C. A. 429. The action was properly maintainable in equity. The action is brought to secure an adjudication that the copyrights taken up by the appellant Harry B. Smith are held in trust for the appellee—at least to the extent of her rights as co-owner. Where two or more persons have a common interest in a property, equity will not allow one to appropriate it exclusively to himself, or to impair its worth as to others. The settlement of rights between joint tenants or joint owners of property is the subject-matter of equity jurisdiction, and we think that such rights are involved in this litigation. Jackson v. Ludeling, 21 Wall. 616, 22 L. Ed. 492.

In determining the interest of the appellee, the court below awarded the appellee an interest of one-third and the Smiths one-third each in whatever rights the Smiths had in the copyrights under any agreements with G. Schirmer, Incorporated, or Victor Herbert, the composer. It declared the appellee a co-owner to the extent of one-third interest with the Smiths in any interest which all three of them may have had in moving picture rights of the opera, in any other territory, not copyrighted, which has not passed to Werba & Luescher under the appellee's contract with them, and, further, it decreed an accounting against Robert B. Smith of any profits which he may have received from the statutory copyrights. It held that in the account any proper cross-equities may be considered. We think this declaration of the interest of the appellee was proper.

The decree is affirmed.

BENTON HARBOR-ST. JOSEPH GAS & FUEL CO. v. MIDDLE WEST COAL CO.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1921.)

No. 3453.

1. **Pleading ⊜146—All elements of recovery must be pleaded in counterclaim.**
   Where the defense is a counterclaim arising out of a different contract and relating to a different transaction from that sued on, and not a mere set-off growing out of the same transaction, the defendant must allege all the elements essential to recovery.

2. **Evidence ⊜46—Court properly takes judicial notice of orders of Fuel Administration.**
   The trial court properly took judicial notice that the orders of the Fuel Administration fixing prices expressly exempted from their operation contracts in force at the time they were promulgated.

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3. **Payment ⟨⟩82(4)—Voluntary payments in excess of Fuel Administration prices cannot be recovered.**
Even if a contract for the sale of coal at stipulated prices be construed to provide for readjustment of the prices to conform to the orders of the Fuel Administration, a buyer, who made no request for readjustment, but without objection voluntarily paid the price stipulated in the contract, cannot thereafter recover from the seller the amount of the payments in excess of the Fuel Administration prices.

4. **Pleading ⟨⟩237(6)—Defective allegation of counterclaim can be amended to conform to proofs.**
The omission from an allegation of counterclaim of an essential averment may be supplied by an amendment to conform the pleadings to the proofs, if the proofs show the facts essential to the recovery.

In Error to the District Court of the United States for the Southern Division of the Western District of Michigan; Clarence W. Sessions, Judge.

Action by the Middle West Coal Company against the Benton Harbor-St. Joseph Gas & Fuel Company, in which the defendant asserted a counterclaim. Judgment for plaintiff, after objection to evidence in support of the counterclaim was sustained, and defendant brings error. Affirmed.

Jas. T. McAllister, of Grand Rapids, Mich. (Hatch, McAllister & Raymond, of Grand Rapids, Mich., and Jeffery, Campbell & Clark, of Chicago, Ill., on the brief), for plaintiff in error.

Julius H. Amberg, of Grand Rapids, Mich., and Murray Seasongood, of Cincinnati, Ohio (Willard F. Keeney and Julius H. Amberg, both of Grand Rapids, Mich., and Murray Seasongood, of Cincinnati, Ohio, on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On the 22d day of August, 1919, the Middle West Coal Company brought an action in the District Court of the United States for the Western District of Michigan, Southern Division, against the Benton Harbor-St. Joseph Gas & Fuel Company, to recover balance due for coal sold and delivered by the plaintiff to defendant under the terms and conditions of a contract in writing dated May 24, 1918.

The defendant admits its indebtedness on this contract in the sum claimed by plaintiff, but asserts a counterclaim of $5,666.82, which it avers it paid to plaintiff upon another contract for the purchase of coal dated July 1, 1917, in excess of the maximum price therefor, authorized by the United States Government Fuel Administration. The answer also contains a second, third, and fourth defense, all of which are waived.

The plaintiff in writing demanded a bill of particulars, which was not furnished by defendant. After the jury had been impaneled and sworn and the cause stated, counsel for plaintiff objected to the introduction of any evidence under the plea and notice of set-off and recoupment: First, because no bill of particulars of the demand upon which the defendants seek to recover by way of set-off or counter-

claim had been filed; and, second, because upon the pleadings themselves there is no right in the defendants to recover any such demand.

The court refused to sustain this objection, upon the theory that no bill of particulars had been filed, but, without passing upon its merits, indicated that in its opinion the plaintiff had waived this by proceeding to trial without objection. It did, however, sustain the objection upon the ground that this first defense, set-off, and counterclaim fails to state the necessary elements of recovery. This objection was sustained without prejudice to any further action which the defendant might take thereon, and opportunity was given to the defendant to withdraw the same.

For the purpose of properly presenting the question in the record, the defendant was permitted to exhibit to the court certain letters exchanged between the plaintiff and defendant at the time the contract described in the counterclaim was made and executed. It is claimed on the part of the defendant that these letters must be read as part of that written contract. If it be conceded that the letter written by the plaintiff in error and forwarded to defendant in error, with the contract, and the reply of the Middle West Coal Company thereto must be read into the original contract of July 1, 1917. Nevertheless the plaintiff in error must fail in this action.

[1] This first defense in its plea and notice is not a mere set-off growing out of the transaction described in the declaration. On the contrary, it is a counterclaim arising out of an entirely different contract, relating to an entirely different transaction, although both contracts relate to the sale and purchase of coal. That being true, it was incumbent upon the defendant to allege the necessary elements of recovery. On the contrary, this defense and counterclaim merely recites the fact that a contract entirely apart from the one sued upon was made; that in this contract it agreed to pay for coal to be delivered under its terms $3.50 per net ton, f. o. b. mine; that, in case there were any changed conditions imposed by the government or not, this price was to be fixed and readjusted in a spirit of fairness and equity; that the price mentioned would be automatically adjusted to meet any price regulations fixed by the government of the United States; that the government did on the 21st day of August, 1917, fix a price of $2.35 a ton, which price obtained until October 11, 1917; that thereafter the government at various times fixed various prices up to and including May 25, 1918, which was the last price fixed by the government during the continuation of this contract.

[2] Further allegations of this defense are that the plaintiff shipped to the defendant 17,931,700 pounds of coal and collected from the defendant therefor the sum of $31,395.05, an excess of $5,666.83 over and above the maximum amount authorized by the United States Government Fuel Administration orders. It is admitted, however, that the Fuel Administration orders fixing prices expressly exempted from its operation contracts in force and effect at the time it was promulgated. The trial court also properly took judicial notice of this fact. Caha v. United States, 152 U. S. 211, 14 Sup. Ct. 513, 38 L. Ed. 415; Foster v. United States, 256 Fed. 207, 167 C. C. A. 423.

[3] There is, however, no averment in this first defense and counterclaim that this payment for coal delivered in accordance with the contract of July 1, 1917, and at the price named therein, was not voluntary on the part of the defendant, or that such payment had been made through mistake or induced by the fraud or fraudulent representation of the other contracting party. Nor does aught appear, except that each of the parties to that contract observed and performed its terms and conditions as therein written, without objection on the part of either and without complaint of any kind or character.

Under such circumstances there can be no recovery for money voluntarily paid without protest, without an allegation and proof of fraud, mistake, or duress, even though, under the contract and the letters taken in connection therewith, it was incumbent upon the part of the plaintiff below, in the spirit of fairness and equity, to have consented and agreed to a readjustment of the price. Lamborn v. County Commissioners, 97 U. S. 181, 185, 24 L. Ed. 926; Railway Co. v. Commissioners, 98 U. S. 541, 25 L. Ed. 196; Marmet Coal Co. v. People's Coal Co. (C. C. A. 6) 226 Fed. 647, 141 C. C. A. 402; Taylor & Sons v. Bank (C. C. A. 6) 212 Fed. 898, 902, 129 C. C. A. 418.

The facts in the case of L. Lazarus Liquor Co. v. Julius Kessler & Co. (No. 3391) 269 Fed. 520, decided by this court in December, 1920, are almost identical with the facts in this case, although in that case the defendant repudiated its contract and demanded payment of a larger sum before any goods would be delivered to the plaintiff. The plaintiff did protest as to this demand, but later, when the goods were ordered and shipped, it paid without protest the full amount demanded. This court held there could be no recovery.

[4] While the first defense and counterclaim contains no allegation that the contract price for this coal was paid under protest, or that defendant was induced to pay the same through fraud, mistake, or duress, yet that would not be of serious importance, if the evidence exhibited to the court tended to establish either of these grounds for recovery. In such case the court would have allowed, upon terms or otherwise as it may have thought proper an amendment to conform the pleadings to the proofs. For this reason we have examined the correspondence which was offered by defendant as tending to show a contract to readjust at the end of the period, and thus meet the objection that the payments were voluntary; but these letters wholly fail to show any definite contract obligation, and particularly do they fail to show an agreement to readjust at the end of the contract period, but rather, if at all, at the time of the happening of the contemplated conditions which would call for such readjustment in the price. Under the doctrine announced in the cases above cited, payment of the contract price after these conditions had arisen, without demand for a readjustment of this price, and without protest, and without a definite promise to readjust at the end of the contract period, cannot be recovered.

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

CALCUTT et al. v. GERIG.

(Circuit Court of Appeals, Sixth Circuit. February 18, 1921.)

No. 3451.

1. **Conspiracy ⇐19—May be inferred from concerted actions.**
In a civil action for conspiracy, plaintiff need not prove preliminary meeting of the plaintiffs, or a definite plan or agreement by them to injure his person or property; but it is sufficient if the proof shows a concert of action in the commission of the unlawful acts, from which the natural inference arises that they were in furtherance of a common design of the alleged conspirators.

2. **Conspiracy ⇐19—Evidence held to sustain finding of conspiracy to interrupt plaintiff's show.**
Evidence of acts by defendants in preventing the exhibition of plaintiff's show, which included assault on plaintiff and his employes and destruction of his property, *held* sufficient to warrant the jury in inferring a conspiracy by the defendants to commit the unlawful acts.

3. **Conspiracy ⇐13—Parties subsequently participating in unlawful acts are co-conspirators.**
All who participated in unlawful acts committed in furtherance of a conspiracy are equally liable as co-conspirators, regardless of whether they were original parties to the conspiracy or not.

4. **Conspiracy ⇐13—Conspirators liable for destruction of property by mob in their absence.**
Conspirators, who had incited a mob to destroy plaintiff's property in order to prevent the exhibition of his show, are liable for the acts of destruction done by the mob after the conspirators had left the scene.

5. **Evidence ⇐253(2)—Declarations of conspirator before object was fully accomplished are admissible.**
Where the purpose of the conspiracy was to prevent plaintiff from giving his show and to compel him to leave the town, the acts and statements of one of the conspirators, after he had agreed to abandon the show, but before he had left town, were admissible against all.

6. **Conspiracy ⇐19—Evidence of reason for conspiracy to prevent show held incompetent.**
In a civil action for conspiracy to prevent plaintiff from exhibiting his show in a certain town by mob violence, evidence of the labor situation and the necessity that the farmers should harvest their crops as the reason for the opposition to the show was incompetent on behalf of defendant.

7. **Trial ⇐193(1)—Federal judge can express opinion on evidence.**
The trial judge can express an opinion as to the facts and comment upon the evidence, if he is careful to advise the jury that it, and not the court, is the trier of the facts, so as to leave the jury free to exercise its own judgment as to the facts.

8. **Trial ⇐240, 244(2)—Argumentative charge, unduly emphasizing evidence, held not invasion of jury's province.**
The objection that the charge was argumentative, and unduly emphasized the evidence of plaintiff, so that the court's opinion would necessarily be inferred from the language, does not require reversal, where the court stated that his charge was only for the purpose of suggesting the method of consideration, and that if he should omit any evidence, or not correctly repeat it, the jury should understand he was mistaken, and should act upon their own recollection.

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In Error to the District Court of the United States for the Western District of Tennessee, at Memphis; John E. McCall, Judge.

Action by T. H. Gerig against N. W. Calcutt and others. Judgment for plaintiff, and defendants bring error. Affirmed.

C. L. Sivley, of Memphis, Tenn. (Sivley, Evans & McCadden, of Memphis, Tenn., and Draper & Rice, of Dyersburg, Tenn., on the brief), for plaintiffs in error.

J. F. Bickers and Harry Spears, both of Memphis, Tenn., for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. On March 13, 1919, T. H. Gerig filed his amended declaration in the District Court for the Western District of Tennessee, averring among other things that, at and prior to the time of the commission of the grievances complained of, he was and had been the operator and manager of a minstrel show known as the "Old Kentucky Minstrels"; that this show was billed in advance to give a performance in the city of Dyersburg, Tenn., on the night of June 21, 1918; that the plaintiffs in error, with others, on or about said date, entered into a wicked, willful, malicious, and unlawful conspiracy to oppress, threaten, intimidate, and injure or kill plaintiff, break up his show, ruin his business, destroy his property, and scatter or drive his employés out of town; that in pursuance of this conspiracy they notified him that he would not be permitted to show in Dyersburg, and that he must remove his show out of town; that while plaintiff, his wife and ticket seller were selling tickets for the evening performance, these plaintiffs in error assaulted him and his ticket seller, scattered plaintiff's money and tickets, caused his employés to scatter through fear of death or injury; dragged, carried, and pushed plaintiff and his ticket seller several blocks; cursed, abused, and threatened to hang them and to destroy plaintiff's show; that they caused a mob to form for the purpose of assisting them, and became the self-constituted leaders of said mob; that thereafter they took plaintiff to the mayor's office, where they again threatened him with bodily injury and the destruction of his property, and compelled him to take back the amount of money which he had paid for state, county, and city licenses for the privilege of giving the performance; that thereafter said defendants did mistreat plaintiff and his wife and compelled him to distribute money among numerous people who were collected in and about his show tent and compelled him to tear down his tent and move out of Dyersburg; that by reason of this unlawful, willful, and malicious conspiracy, and the words, acts, and conduct in furtherance thereof as above stated, the plaintiff was deprived of exercising his rights and privileges as a citizen of the United States; that he was prevented from giving a performance in the city of Dyersburg, was caused much loss of time and money, and was forced to distribute a considerable amount of money among various people and was compelled to take down his tent and move his show out of town; that he was greatly

injured on and about his head, neck, arms, body, and legs; that he was greatly shamed, humiliated, mortified, and outraged; that he was caused great mental and physical pain and anguish; that he was placed in great fear of death, or bodily injury; that his nervous system was seriously and permanently injured and impaired, and his capacity for work, labor, and carrying on his business and the enjoyment of life was greatly damaged and impaired, for all of which injuries he asks a recovery in the sum of $50,000, actual and punitive.

To this declaration the defendants pleaded not guilty. Trial was had upon the issue so joined, and the jury returned a verdict in favor of Gerig and against the plaintiffs in error, N. W. Calcutt, J. A. Green, O. P. Bishop, C. S. Hall, and John Hurt, for actual and punitive damages aggregating $5,000. Judgment was rendered for the full amount of the verdict.

At the close of the plaintiff's evidence, defendants made a motion for a directed verdict, which motion was sustained as to the defendant Walter Harrell, and overruled as to the other defendants. This motion was renewed at the close of all the evidence by the defendants Calcutt, Bishop, Hurt, Hall, and Green, which motion was based on the claim that the evidence did not show any conspiracy on the part of the defendants, nor any circumstances that would indicate a conspiracy had been formed, and that the evidence was not such as to hold any of the defendants for a personal liability, unless the charge of conspiracy had been established, which motion was overruled by the court and exceptions noted.

It is insisted on behalf of the plaintiff in error that the overruling of this motion was prejudicial error; that the plaintiff had predicated his cause of action upon the charge of conspiracy; that there was no evidence tending to establish such conspiracy, and therefore no recovery could be had as against either of them individually or all of them collectively.

[1] While perhaps there is no proof in this record of any preliminary meeting of these plaintiffs in error, or of a definite plan or agreement entered into by them to injure plaintiff in his person or property or deprive him of his lawful rights as an American citizen, yet such proof is not essential to the establishing of a conspiracy, and indeed would be wholly impossible in the great majority of cases of this character for the evident reason that conspirators do not, as a rule, invite the public into their confidence or advise the contemplated victim or victims in reference to such preliminary matters. Alaska S. S. Co. v. International Longshoremen's Ass'n (D. C.) 236 Fed. 964. It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention, and purpose of the alleged conspirators to commit the same. Farmer v. U. S., 223 Fed. 903–907, 139 C. C. A. 341.

[2, 3] Evidence was offered on the part of the plaintiff tending to establish each and all the material averments in his amended declaration. The evidence offered on the part of the defendants was in direct

conflict therewith. The credibility of the evidence was therefore a question for the jury. If the jury believed the evidence offered on the part of the plaintiff, it could arrive at no rational conclusion, other than that the conduct of plaintiffs in error was in furtherance of a definite plan and conspiracy to injure plaintiff in his person and property and deprive him of his rights as an American citizen to conduct this legitimate business in the city of Dyersburg without hindrance or molestation. It also follows that all those who participated in this unlawful violence inflicted on the plaintiff are equally liable as co-conspirators, regardless of whether they were originally parties thereto or not. Steamship Co. v. Longshoremen, supra. It is therefore apparent that it was not error for the court to overrule the motion for a directed verdict.

[4] It is further insisted, however, that it was error to permit evidence to be introduced in reference to the destruction of property at the tent while these defendants were at the mayor's office. It would seem almost unnecessary to say that persons responsible for mob violence cannot escape liability for the necessary and natural consequences thereof. It would be just as reasonable to say that a man might start a fire, and then by retiring to some distant spot avoid responsibility for the destruction wrought by the conflagration he initiated.

[5] It is also insisted that it was error to permit evidence in reference to the acts and statements of Calcutt after the plaintiff had agreed at the mayor's office to abandon the show if his license fees were returned to him. The purpose of this conspiracy, if any existed, was to prevent the plaintiff from giving this show and compel him to leave Dyersburg. Any action or statement on the part of any one or more of the conspiracy until that object and purpose had been fully accomplished is competent evidence against all.

[6] It is further insisted upon the part of the plaintiff in error that the court erred in refusing to permit the witnesses Green and Calcutt to explain to the jury the labor conditions in and around Dyersburg which caused the farmers to object to Gerig's show on the grounds that it disturbed the harvesting of the crop. Such a defense cannot be permitted. It could in no way justify or excuse acts of violence of the kind and character charged in the amended declaration, and which the evidence offered by plaintiff tended to establish. If this plaintiff was violating any legal rights of the farmers, or of any other class of citizens, they had a remedy at law or in equity; but the law does not tolerate mob violence, no matter how offensive the show might have been to some or all of the citizens of Dyersburg.

[7] It is further insisted that the court erred in its charge to the jury, in that every incident and circumstance testified to by the plaintiff was enlarged upon and magnified in the charge, and that every detail, however trifling, that tended to discredit the defense, was presented to the jury in the most favorable light to the plaintiff; that the charge of the court was argumentative, and placed the defendant at a disadvantage; and that it did not leave the jury free to exercise its own judgment as to facts.

The right of the trial court to express an opinion as to the facts and comment upon the evidence under the federal rule, is very fully stated in the case of Vicksburg Ry. Co. v. Putnam, 118 U. S. 545, 553, 7 Sup. Ct. 1, 30 L. Ed. 257, in this language:

"In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to a jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."

This statement as to the federal rule has been followed and approved by the Supreme Court in later cases, and this court has consistently applied this interpretation of the rule in all cases where this question was involved. The court, in this case, was careful to advise the jury several times in the charge that it, and not the court, was the trier of the facts. In one place in this charge this language is used: "So you take the whole case, and determine for yourselves upon all this evidence." And again: "You are the exclusive judges of the credibility of witnesses and the weight of the evidence." And again: "Then it comes to you upon the question of fact, and you must determine the rights of these parties upon the evidence." And again: "There is no evidence as I recall, but you will remember how that is." It would therefore appear from this charge that the court did leave the jury free to exercise its own judgment as to the facts. McLanahan v. Universal Ins. Co., 26 U. S. (1 Pet.) 170, 7 L. Ed. 98.

[8] As to the objection that the charge was argumentative, and unduly emphasized the evidence of plaintiff, and that whatever tended to discredit the defense was presented to the jury in the most favorable light to the plaintiff, it would appear upon a careful reading of this charge that it comes fairly within the doctrine announced in the case of Railway Co. v. Putnam, supra. The court, however, in this connection instructed the jury in the following language:

"Only for the purpose of suggesting to you the method of consideration, I shall call your attention to the facts in evidence, and if I should omit any you will remember them and act upon them, or if I should not correctly repeat the evidence then you will understand that I am mistaken about it, and act upon your own recollection."

In the case of Young v. Corrigan, 210 Fed. 442, 127 C. C. A. 174, this court held that:

"It was not error for the trial court in the charge to express an opinion relative to plaintiff's failure to produce a certain witness, where the jury was given to understand that it was not bound by such opinion. The jury was sufficiently advised in this regard. The comments criticized did not trench upon the province of the jury, or go beyond the limits of reasonable expression of opinion."

See Simmons v. United States, 142 U. S. 148–155, 12 Sup. Ct. 171, 35 L. Ed. 968; Doyle v. Railway Co., 147 U. S. 413–430, 13 Sup. Ct. 333, 37 L. Ed. 223; Allis v. U. S., 155 U. S. 117–123, 15 Sup. Ct. 36, 39 L. Ed. 91.

In the case of Shea v. U. S., 251 Fed. 440, 163 C. C. A. 458, the trial court, among other things, charged the jury as follows:

"There is little chance for dispute here, in the court's opinion, but that the paraphernalia employed to impress Hoblitzel with the thought that he was in touch with the real turf exchange, so called, where real wagers on the outcome of real horse races might be laid, were but the furniture of this swindle. The large amount of apparent money was but a simulation, the telegraph and telephone instruments were but shams, in that neither was a real instrument of communication; the announcements and posting of races were shams; the bookings were tricks. Any one who devised this scheme produced just such a fraudulent device as the statute condemns."

It was insisted that this charge was erroneous, for the reasons, first, that it instructed the jury that this so-called "turf exchange" was a sham and a fraud; and, second, that the charge as a whole was unduly argumentative in favor of the prosecution. This court, however, held that there was no other reasonable inference to be drawn from the evidence in that case, and that:

"While the charge of the court was argumentative, in the sense that it contained a considerable discussion of the testimony, which was applied to the various elements of the offense charged, we are not impressed that it was unduly so, or that it went beyond the limitations upon the trial judge's right of comment as previously expressed in this paragraph."

The charge of the trial court in the case under consideration, upon the whole, was no more argumentative nor positive in the expression of opinion than was the charge in the case of Shea v. U. S., supra. In fact, this charge does not in terms express any opinion of the trial court, but, on the other hand, it might reasonably be urged that such opinion would necessarily be inferred from the language used by the court. However, the court did not comment upon any fact or circumstance or the absence of any evidence within the power of the defendants to produce, that was not proper to be considered by this jury, in determining the question submitted to it, and was very careful to tell the jury that these comments were merely for the purpose of suggesting a "method of consideration," and that if the court did not correctly repeat the evidence, then the jury should understand that the court was mistaken about it, and that the jury must act upon its own recollection. It would, therefore, seem that this objection to the charge is fully answered by the cases of Young v. Corrigan and Shea v. U. S., supra.

Upon the question of conspiracy, the court specifically charged that the plaintiff was bound to prove a conspiracy before he would be entitled to recover.

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

PRINCESS AMUSEMENT CO. v. WELLS.*

WELLS v. PRINCESS AMUSEMENT CO.

(Circuit Court of Appeals, Sixth Circuit. February 19, 1921.)

Nos. 3437, 3438.

1. **Contracts ⟸187(1)—Equity can entertain suit on contract made for complainant's benefit.**
One for whose benefit a promise is made, though not himself the promisee, may sue in equity for the enforcement of the promise; it being immaterial that the suit might have been maintained by the promisee.

2. **Courts ⟸347—Under federal equity rule, answer held admission of defendant's refusal to sue on contract for plaintiff's benefit.**
Where plaintiff brought suit on a contract for his benefit against the promisee and the promisor, and alleged that the promisee had refused to bring the suit, an answer by the promisee that it made no claim to the sum involved and had no interest in the litigation, without denial that it refused to bring the suit, is, under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), confession of that allegation.

3. **Contracts ⟸202(2)—Facts held to sustain finding plaintiff breached promise not to exhibit "vaudeville."**
The fact that, subsequent to the making of a contract in which he promised not to exhibit vaudeville in his theater, plaintiff exhibited musical tabloids, in connection with which there were specialties between the acts, while the scenes were being shifted, warrants the District Judge in finding that plaintiff had breached his promise, though it would seem that the presentation of musical tabloids, without the specialties, would not have been vaudeville.

4. **Contracts ⟸312(4)—Agreement to refrain from exhibiting vaudeville held not sole consideration, so that breach thereof was only partial breach of contract.**
In a contract between plaintiff and defendant, who were competing theater proprietors, and a booking office whereby plaintiff's exclusive right to booking privileges of the office were transferred to defendant, and plaintiff promised to refrain from exhibiting vaudeville in his theater during the contract, and was to receive a stipulated weekly payment, the promise to refrain from the exhibition of vaudeville was not the sole consideration for the weekly payments, and hence a breach of such promise was a partial breach only.

5. **Contracts ⟸273—Party cannot partially repudiate for other's breach.**
A party to a contract cannot repudiate, after breach by the other, only the payments he was required to make under the contract, while retaining benefits he obtained thereby.

6. **Contracts ⟸318—Partial breach does not forfeit all rights.**
Where plaintiff promised to refrain from exhibiting vaudeville during the 5-year term of a contract between himself, defendant, and a booking office in return for stipulated weekly payments, the breach of such promise for 22 weeks of the period does not forfeit his rights to the weekly payments for the entire period, unless such forfeiture was expressly agreed upon by the parties.

7. **Contracts ⟸318—Agreement held not to require forfeiture for partial breach.**
Where one of three contracts simultaneously entered into provided that, if plaintiff's grantee should conduct vaudeville in the theater, the stipulated payments to plaintiff under another of the contracts should cease during the continuance of such competition, but revive on cessation thereof, the breach of plaintiff's promise to refrain from exhibiting

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 623, 65 L. Ed. —.

vaudeville for a portion of the 5-year period did not, under the contract, forfeit his rights to the weekly payments for the entire period, though a letter by defendant stated that payments were to be made so long as plaintiff lived up to his agreement; that letter not being shown to have been brought to plaintiff's attention, and not expressly providing for forfeiture of all payments for plaintiff's breach.

8. Damages ⟸190—Evidence held to permit award of damages for breach of contract not to show vaudeville.

In an action for the stipulated payments to be made under a contract whereby plaintiff agreed not to exhibit vaudeville in his theater during the term, evidence of the comparative receipts in plaintiff's and defendant's theaters during the contract period, including the time when plaintiff was exhibiting vaudeville in violation of his promise, *held* sufficiently to establish the damage to defendant by the breach of his promise to entitle the defendant to an award of such damages as an offset to the recovery by plaintiff of the stipulated payments.

Appeal from the District Court of the United States for the Middle District of Tennessee; Edward T. Sanford, Judge.

Suit by Jake Wells against the Princess Amusement Company and another. Decree for the complainant against the named defendant for a part only of the amount claimed, and complainant and the named defendant appeal. Reversed and remanded, with directions.

Jordan Stokes, Sr., of Nashville, Tenn. (Moe Levy and Stokes & Stokes, of Nashville, Tenn., on the brief), for plaintiff.

W. C. Cherry and T. T. McCarley, both of Nashville, Tenn. (J. G. Stephenson, of Nashville, Tenn., on the brief), for defendant Amusement Co.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Wells owned a vaudeville theater at Nashville, Tenn., called the Orpheum. He had an exclusive contract with the United Booking Offices for booking vaudeville attractions at the Orpheum. The Princess Amusement Company also owned a vaudeville theater at Nashville, called the Princess. The two theaters were in active competition. An agreement whereby Wells' competition in vaudeville should be eliminated and the Princess should obtain the exclusive right to vaudeville bookings from the United Booking Offices was evidenced by three simultaneous written contracts, dated November 25, 1912, being (1) an agreement (Exhibit A) between the Princess Company, the Booking Offices, and Wells, whereby the Booking Offices agreed to book vaudeville attractions for presentation each week at the Princess for at least 35 consecutive weeks in each vaudeville season for a period of 5 years—the Princess Company agreeing to take such attractions only from the Booking Offices. The Princess Company agreed to pay to the Booking Offices $100 per week for each week that the Princess should be operated (plus a certain commission on salaries of the vaudeville "attractions"). Wells agreed not to operate a vaudeville theater in Nashville so long as the Princess faithfully performed the agreement stated. (2) By the second contract (Exhibit B) the Booking Offices agreed to pay Wells $75

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

each week that it should receive the $100 from the Princess Company. While not in terms expressed in the contract, Exhibit A, it was definitely understood between all the parties that Wells was to receive $75 per week out of the $100 to be paid by the Princess Company; the contract, Exhibit B, expressly reciting such payment as one of the considerations for Wells executing the agreement, Exhibit A. (3) By the third contract (Exhibit C) the Princess Company and the Booking Offices agreed that in case Wells should sell the Orpheum, and the purchaser should conduct a competing vaudeville theater, the payments of $75 per week referred to should be discontinued "during the period of such competition, but not longer; the same to be revived and continued on the cessation of such competition." [1] For 22 weeks immediately following the taking effect of these contracts the Orpheum exhibited what is called musical tabloid. The Princess Company, claiming that this production was a breach of Wells' agreement not to operate a vaudeville theater, refused to pay to the Booking Offices the $75 per week which was to go to Wells, paying, however, the remaining $25 plus the commissions on salaries, and receiving bookings under its contract with the Booking Offices for the full 5-year period. On October 5, 1915, Wells brought suit on the equity side of the court below for the recovery of the agreed payments of $75 per week. The meritorious defense was made that Wells, by exhibiting the so-called musical tabloid for 22 weeks, had broken his contract, and so was entitled to recover nothing.[2]

Upon hearing on pleadings and proofs, the District Court held that Wells had violated his agreement by the 22 weeks operation in question, but that the Princess Company, having retained the full benefit and consideration otherwise, including Wells' surrender of his exclusive contract with the Booking Offices and the procuring of the latter's contract with the Princess Company, was liable to Wells for the amount of the agreed weekly payments, subject to the right of the Princess Company to recover such damages as it had suffered from Wells' breach. The master, to whom the ascertainment of such damages was referred, found that sum to be $9,906.27. The District Court set aside the master's findings for reasons hereafter stated, and entered decree in Wells' favor for $17,100 (the amount of the agreed weekly payments), with interest from the filing of the bill of complaint on the amount then due, and on the weekly payments subsequently accruing from the time they respectively became due. Both parties appeal—Wells, on the ground that his showing of musical tabloid was not a breach of his contract; the Princess Company, not only because of the decree against it for the agreed weekly payments,

[1] Wells owned a considerable string of vaudeville theaters, including, besides the Orpheum, theaters at Knoxville and Chattanooga, Tenn. Contemporaneously, and as part of the transaction between the Princess Company, Wells, and the Booking Offices, the competing Knoxville and Chattanooga theaters made similar agreements with the Booking Offices and Wells. Those contracts are not in issue here.

[2] Other more or less technical defenses were made, which it is unnecessary to state here.

but because it was disallowed damages. Its further defenses will appear in the course of this opinion.

[1] 1. *Jurisdiction.* (a) The Princess Company contends that the present suit is not one of equitable cognizance. This contention is without merit. The rule is well settled that one for whose benefit a promise is made, though not himself the promisee, may sue in equity for the enforcement of the promise. It is immaterial that the suit might have been maintained by the United Booking Offices.

[2] (b) The bill in the present suit was filed by Wells, as sole complainant, against the Princess Company and the Booking Offices. The District Court overruled a motion to dismiss on the ground that Wells had failed to prove that the Booking Offices had refused to join with him in bringing the suit or to lend him the use of its name. The bill alleged the Booking Offices' refusal to institute suit or permit its name to be used for such purpose. The Booking Offices answered that it made no claim to the sum sought to be collected, had no interest in the litigation, and did not ally itself with either of the other parties. The District Court correctly held that the failure of the Booking Offices to deny the allegation that it had refused to bring the suit must be deemed confessed under the Thirtieth equity rule (198 Fed. xxvi, 115 C. C. A. xxvi), and that its refusal to join as plaintiff may be inferred. Osgood v. Franklin, 2 Johns. Ch. (N. Y.) 1, 7 Am. Dec. 513. It is thus immaterial that in a former suit by Wells against the Princess Company alone the Booking Offices had been held a necessary party. There is nothing in the record of the previous suit in the state court by the Booking Offices against the Princess Company which militates against this conclusion. Moreover, Wells is not suing as assignee of the Booking Offices' rights, nor in its interest. So far as concerns federal jurisdiction, through diversity of citizenship, it is immaterial whether the Booking Office is aligned with complainant or defendant. Wells will hereafter be called plaintiff, and the Princess Company will be called defendant.

2. Did Plaintiff Violate His Contract? The concrete question is whether, by producing musical tabloid, he in effect operated a vaudeville theater. Plaintiff produced 12 witnesses, including himself, all experienced in the theatrical world, including theatrical managers, a manager and producer, an operator and owner, a vaudeville promoter, and the editor of a theatrical paper. Their testimony tended to show the existence of a well-defined distinction between vaudeville and musical tabloids—vaudeville consisting of a number of unrelated acts put together, thereby forming a varied or variety bill, the actors being separately engaged, and the performance having no plot; while musical tabloid, which originated but shortly before the contract in question was made, consists of a condensation of a musical comedy, given as an entirety by one company (paid as such), preserving the plot of the play, the costumes, etc., but cutting out the dialogue, and perhaps otherwise abbreviating the performance, as well as lessening the number of performers, so enabling the presentation of the same performance several times a day and at low prices.

On the other hand, musical tabloids seem to have been devised to

meet the demand for attractive, low-priced shows; they were generally adopted as part of vaudeville entertainments, and were booked and played as such, both before and after the contract was made, not only by the defendant, but by plaintiff elsewhere than at the Orpheum. There was testimony that the profession regarded theaters showing musical tabloids as vaudeville theaters, not being otherwise found in either of the four general divisions of legitimate, vaudeville, burlesque, and moving picture. There was testimony that one of the reasons why defendant wished to eliminate plaintiff was to enable it to get musical tabloid as part of vaudeville, and that in the negotiation of the contract plaintiff did not suggest that he intended to exhibit tabloids. Defendant also invokes certain dictionary and other definitions of vaudeville, referred to in the margin of this opinion.[3]

From this record, we should hesitate to conclude that when the contract was made there was any well-recognized classification of musical tabloids as necessarily vaudeville. The fact that musical tabloids would naturally and frequently form part of vaudeville shows might well account for their being booked, advertised and regarded as vaudeville attractions; i. e., as parts of a "variety" performance. Being low-priced, they would naturally be exhibited in vaudeville or low-priced theaters. Indeed, it does not satisfactorily appear that previous to the making of plaintiff's contract strictly musical tabloid had been exhibited without the addition of unrelated specialties. From this record, we should be disposed to think that musical tabloids when so produced were not vaudeville. True, they competed more or

[3] The Standard Dictionary: "A gay song; a dramatic piece in which there are light or comic songs; a theatrical entertainment consisting of (1) a slight dramatic sketch or pantomime *interspersed with songs or dances*; (2) a series of short sketches, songs, dances and acrobatic feats *having no dramatic connection.*"

"Encyclopædia Britannica: "In English usage vaudeville is practically synonymous with what is generally known as musical comedy; but in America it is applied also to music hall *variety entertainments.*"

Webster, 1859: "A short comic piece *interspersed with species of light songs.*" Webster, 1884: "A theatrical piece, usually a comedy the dialogue of which is *intermingled with light and satirical songs sung in familiar airs.*" Webster, 1913: "A theatrical entertainment consisting of a slight dramatic sketch or pantomime *interspersed with songs and dances.*"

Appleton's Encyclopedia (1911): "Entertainment interspersed with music and having *humorous or satirical allusions* to current topics of the day."

De Koven's 1894 article on Vaudeville: "In the French sense of the term, it means a comedy of more or less farcical order, in which a certain number of songs, ballads, *rarely concerted numbers*, usually incidental to and *without particular reference to the action*, have been so to speak inserted."

Universal Encyclopedia: "A name applied to a light kind of dramatic entertainment, an entertainment interspersed with music and *having humorous and satirical allusions to current topics of the day.*"

From articles in "Variety," a theatrical paper:

Schenck's statement (1913): "The current musical comedies are nothing more than vaudeville shows lacking variety."

O'Connor's article (1912): "A tabloid for vaudeville is a musical comedy condensed, chorus girls, *comedians and comediennes.*" And again: "They provide entertainment that draw patrons from the *burlesque house* and the *vaudeville theaters.*"

All italics in this opinion, both in text and notes, are ours.

less with vaudeville, certain patrons of the one being patrons of the other; but the same is true of motion pictures as related not only to vaudeville, but to the legitimate theater; which is but to say that if there were no motion pictures both vaudeville and legitimate would be better patronized, and vice versa; but such competition does not put them all in the same class. Defendant's manager gives what seems to us a correct statement of the distinction between musical tabloid and vaudeville, viz.: That where the exhibition is confined to a musical tabloid in which the plot and the characters taken by different actors are preserved, to produce "just one whole play by itself," without any special independent features brought into it, it is not vaudeville, but that if, in connection with the musical tabloid, during the intermissions between the scenes or acts, other features are put on, it is vaudeville.

[3] It appears that plaintiff withdrew his newspaper advertisement of the Orpheum as a vaudeville theater, and its operator, at the time the musical tabloids in question were produced, testified that there were "no separate vaudeville acts with these tabloids during the time we were playing them." He said, however, that during the exhibition "there were frequently specialties in between the acts while the scenes were being shifted. The specialties were in connection with the thread of the show, given by people in the show." This testimony fairly indicates that in connection with the musical tabloids there were given disconnected features, by way of an additional entertainment, thus indicating a performance more or less vaudeville in character. Naturally, the only object of introducing special features was to make the performance more attractive than the tabloid alone would be. This impression is heightened by the Orpheum's street car advertisement of December 9, 1912, which refers to "*Keith Vaudeville*, a musical frolic in three divisions. The time, place and girl. 20 people, mostly girls"—as well as by the Orpheum's program for the week of January 20, 1913, presenting "Vaudeville's Musical Comedy Stars, Edward Joly and Winnifred Wilde, and their tabloid musical comedy aggregation, presenting 'Over Night in Boston'—a mixture of vaudeville and pretty girls in one large act, with three scenes";[4] also by the fact that the same musical tabloids were billed and advertised in other cities as vaudeville acts. If tabloid was ever given without specialties, plaintiff was able to show it, and should have done so. We hence conclude that the District Judge was justified in finding that Wells violated his agreement during the 22 weeks.

[4] 3. *The Effect of Plaintiff's Partial Breach of the Contract.* Defendant contends that the sole consideration for its promise to make the weekly payments was plaintiff's agreement not to operate a vaudeville theater, and so invokes the rule that one who commits the first breach of a contract cannot maintain an action against the other for a subsequent failure to perform. We think it plain, however, not only from the record generally, but from the written contracts them-

[4] We have not overlooked the explanation given of this reference to vaudeville.

selves, that the consideration for the weekly payments was not merely plaintiff's agreement not to operate a vaudeville theater, but included his surrender of his existing booking contract and the turning of the same over to defendant.[5]

[5] We find in the record no competent evidence to the contrary of our conclusion. Plaintiff's breach did not go to the entire consideration for defendant's promise to make weekly payments. If defendant had repudiated the contract by reason of plaintiff's partial breach, the entire failure of consideration would have defeated action for the weekly payments; but under elementary principles defendant could not rescind so much only as related to the weekly payments, and at the same time hold onto the remaining consideration received from plaintiff. Lyon v. Bertram, 20 How. 149, 155, 15 L. Ed. 847; Thomas China Co. v. Raymond (C. C. A. 6) 135 Fed. 25, 67 C. C. A. 629; Roseboom v. Corbitt (C. C. A. 6) 196 Fed. 627, 634, 116 C. C. A. 301. The authorities cited by defendant contain nothing to the contrary of the obligation of a party to a contract, which has been broken by the other party, to elect whether or not to renounce it entirely for such breach. Instead of repudiating the contract, defendant has attempted to repudiate only its own payments; it has enjoyed the exclusive booking rights for the full 5-year term, and for nearly nine-tenths of that time entirely free from plaintiff's competition.

[6, 7] The record affords no room for a claim of continuing breach by plaintiff throughout the term of the contract. Relief from the weekly payments during the entire 5-year term would thus be unconscionable and unwarranted, unless such result was expressly agreed upon by the parties. Bradford v. Furniture Co., 115 Tenn. 610, 92 S. W. 1104, 9 L. R. A. (N. S.) 979. Such is not the case. The contract, Exhibit A, between plaintiff, defendant, and the Booking Offices contains no provision for forfeiture, or even for damages in case of plaintiff's default, although making provision for payment of liquidated damages by defendant in case of its breach. The contract, Exhibit C, between defendant and the Booking Offices provides that in case plaintiff's grantee of the theater should conduct vaudeville, the weekly payments of $75 going to plaintiff "shall be discontinued during the period of such competition, but no longer; same to be revived and continued on the cessation of such competition." True, the letter accompanying the return by defendant to the manager of the Booking Offices of the contract, Exhibit A, states that— .

"The contract is executed and delivered with the understanding, although not recited therein, that of the weekly payments which we are obligated to make $75 is to be paid Wells, *so long as the terms of his contract are lived up to by him*, but if he breaches his contract he forfeits the $75 weekly payments, to say nothing of any further damage that might result to us in the event of such breach of his contract by him."

[5] The contract, Exhibit A, to which defendant was a party, not only recites that the Booking Offices "is obligated to said Wells to book and secure vaudeville attractions exclusively for said Wells" in Nashville, and plaintiff's willingness "to consent that the Booking Offices may book vaudeville acts for" defendant, but expressly states that "Wells hereby consents to the Booking Offices executing this agreement," etc.

But not only is it not clear that this statement was brought to plaintiff's attention before the contract took effect, but the statement does not necessarily, or even naturally, suggest that defendant would claim a forfeiture of weekly payments during the entire 5-year term as the result of any competition whatever on plaintiff's part, no matter for how short a period. On the contrary, considered in connection with Exhibit C, the statement would naturally be interpreted to mean "during the period of such competition." The very provision for weekly payments, continued until the end of the 5-year period, instead of the payment of a lump sum on the making of the contract—thus providing against breaches by plaintiff until the very end of the contract period—negatives the idea that plaintiff's refraining from competition was a condition precedent to any recovery by him, and that the two considerations were nonseverable.

Moreover, this case is in equity, and equity does not favor forfeitures. The case is not one for the application of the doctrine of "unclean hands," especially in view of defendant's attempted repudiation of all liability. We therefore conclude that defendant is liable for the weekly payments, unless for the 22 weeks in question. Further discussion of the manner of relief for that period is postponed to the consideration of the question of damages.

[8] 4. *The Damages.* It appeared by the testimony taken by the master that during the 23 weeks immediately preceding the taking effect of the contract, viz. from July 1, 1912, to December 9, 1912 (which we shall call the first period), the Princess played 6 weeks of tabloid vaudeville, the receipts from which averaged $2,046.84 per week; that during the remaining 17 weeks of that period the Princess exhibited separate-act vaudeville, the receipts therefrom averaging $1,400.91 per week—making a weekly average for the entire 23 weeks from both tabloid and separate-act vaudeville of $1,589.60. It further appeared that during the first 22 weeks of the contract period (which we shall call the second or competing period), during all of which time Wells was exhibiting tabloid at the Orpheum, the Princess exhibited 11 weeks of separate-act vaudeville, the weekly receipts therefrom averaging $1,650.27, and 11 weeks of tabloid vaudeville, with average weekly receipts of $2,045.63; that during the 7 weeks (which we shall call the third period) immediately following this second or competing period the Princess exhibited tabloid vaudeville for 4 weeks with average weekly receipts of $2,012.28, and 3 weeks of separate-act vaudeville with average weekly receipts of $1,548.30—making an average from both kinds of shows during the 7 weeks of $1,813.39. From these figures the master correctly deduced that the Princess received during 6 weeks of the first period, when it was playing tabloid vaudeville and the Orpheum was playing separate-act vaudeville only, a weekly average of $645.93 more than when the Princess was playing separate-act vaudeville; also that during the 11 weeks of the second, or competing, period, when the Princess played tabloid vaudeville and the Orpheum gave the same kind of entertainment, the Princess' weekly receipts averaged $395.35 more than when it played separate-act vaudeville. The master concluded that during the 11

weeks of the competing period during which the Princess played tabloid vaudeville it was damaged by Wells' competition by the difference between $645.93 and $395.35, or an average of $250.55 per week; and that during the 11 weeks while the Princess was unable to get tabloids its damage was $645.93 per week, being its surplus receipts from tabloid vaudeville as against separate-act vaudeville during the 6 weeks prior period.[6] The master awarded damages at $250 per week for 11 weeks and $650 per week for the remaining 11 weeks of competition. The district court set aside the master's findings, for the reason that, in the court's opinion, the damages were not proven with reasonable certainty, but were merely conjectural and speculative.

That tabloid vaudeville proved much more popular and profitable than separate-act vaudeville clearly appears from a comparison of the Princess' average weekly receipts from tabloid and separate-act vaudeville, respectively, during the three periods stated, viz.: During the first period $2,046.84 for tabloid as compared with $1,400.91 for separate-act vaudeville; during the second period, $2,045.63 as compared with $1,650.27; and during the third period $2,012.28 as compared with $1,548.30. The master's findings of the measure of the Princess' damage would be quite persuasive if, first, the data presented are sufficient to enable a proper comparison of the results of the period of competition as compared with noncompetitive periods; and, second, the finding be not overcome or seriously weakened by other and practical considerations.

The master's conclusion receives tangible support from the further facts: (a) That in the third period, while the Princess was playing musical tabloid, its average weekly receipts were $463.92 more than when playing separate-act vaudeville—the Orpheum giving during that period plays which did not compete with the Princess; (b) that the Princess was not operated to full capacity during the 11 competitive weeks of musical tabloid, as evidenced by the fact that its average weekly receipts were $519.32 less than in the most productive one of those weeks, and nearly $500 less than in 2 or more others of those weeks; and (c) the testimony of the Princess' manager, given without cross-examination and without direct dispute, that the Princess' receipts during the 22 weeks' competitive period were greatly below normal, although his estimates of the extent of subnormality were probably extravagant.

We think, however, defendant's experience during 6 weeks of tabloid previous to the contract period and 11 weeks during that period not such as alone to furnish an unqualifiedly safe measure of damages. During the 6-weeks period the Orpheum played no tabloids. The presence of other theatrical attractions (the record does not show the extent of the same) would naturally affect attendance at both the competitive theaters, and the attendance at both is shown to have sub-

[6] It would seem that receipts may properly be used for purposes of comparison in place of profits, as the cost of producing tabloid and separate-act vaudeville appears to be substantially the same, and it seems to be taken for granted (at least inferentially) throughout the record and briefs of counsel that the admission prices were the same for both classes of shows.

stantially varied at different seasons of the year, being larger throughout the cooler months than in the warmer periods,[7] although the 23 weeks of the first period added to the contract period made up substantially the theatrical year. It does not, however, necessarily follow that the first and second halves of the year would normally average the same in respect to receipts.

There are also practical considerations opposed to the absolute adoption of the master's theory: (a) During the 11 weeks of the competing period when both the Princess and the Orpheum were playing tabloid, the former's average weekly receipts were but about a dollar less than during the 6 weeks of the earlier period, when the Princess was playing musical tabloid and the Orpheum was playing separate-act vaudeville; (b) during the 11 weeks of the competitive period, while the Princess was playing separate-act vaudeville and the Orpheum was playing tabloid, the Princess' average weekly receipts were about $250 more than during the 17 weeks of the first period, when both the Princess and the Orpheum were playing separate-act vaudeville; (c) the average weekly receipts of the Princess during the 22 weeks of competition (during 11 of which the Princess played tabloids) were nearly $280 more than during the preceding 23 weeks, when the Princess played tabloids for but 6 weeks, and the Princess' average weekly receipts from tabloids during the second period were about $33 larger than during the third and wholly noncompetitive period, although it seems at least a partial aswer to the considerations stated in this subdivision, that the competing period was probably more profitable naturally than the 7 weeks of the third period; (d) the Princess' average weekly receipts during the 3 weeks of the third period, while the Orpheum was not competing in any way, were about $100 less than during the 11 weeks of the competing period, while the Princess was giving separate-act vaudeville and the Orpheum was playing musical tabloids.

Again, the Orpheum's receipts did not generally vary to anything like the same extent as those of the Princess. During the 6 weeks of the first period, while the Princess was playing tabloid and the Orpheum separate-act vaudeville, the Orpheum's average weekly receipts were $1,248.86; during the six weeks of the first period when the Princess and the Orpheum were both playing separate-act vaudeville, the latter's average weekly receipts were $1,218.16; and during the 11 weeks of the competing period (between January and May), while both theaters were playing tabloid, the Orpheum's average weekly receipts were $1,208.49.

But while we are unable to adopt the master's measure of damages, and while it is manifestly impossible to compute defendant's damages with entire mathematical accuracy, we think the record affords sufficient data for a reasonably certain determination, taking into account all the various considerations applicable thereto, and this, we think, is all that is required. Weinman v. De Palma, 232 U. S. 571–575, 34

[7] The Princess closed for about 2 months during the extreme hot weather of summer.

Sup. Ct. 370, 58 L. Ed. 733. The record is such as would justify submitting to a jury the question of damages were the case at law. Compare Hollweg v. Schaefer Brokerage Co. (C. C. A. 6) 197 Fed. 689, 701, 117 C. C. A. 83.

We think it a significant and helpful consideration that during the 11 weeks of the competing period, while the Princess was playing separate-act vaudeville and the Orpheum was playing tabloid, the latter's weekly average receipts were practically $200 more than during the other periods to which we have called attention, and the fact of this excess is all the more significant when considered in connection with the comparative stability of the Orpheum's receipts during the other periods mentioned. When to this is added the comparative uniformity of the Princess' receipts when giving musical tabloids and the very large falling off of its receipts during the period of the Orpheum's competition by musical tabloid, we think it a safe and conservative conclusion that defendant suffered damages averaging at least $200 per week (less the $75 weekly payment, which otherwise it would have to pay) during the entire 22 weeks of competition. Beyond this we do not feel justified in going. As this competitive period was equally divided, so far as the Princess is concerned, between tabloid and separate-act vaudeville, it is not necessary to apportion the weekly damage between the two periods. We think the award should extend over the entire 22 weeks of competition.

We are unable to agree with the conclusion of the learned District Judge that there is an absence of evidence that defendant endeavored to obtain the musical tabloids which plaintiff exhibited during the competitive period. As we understand the record, it shows that plaintiff, shortly before the contract was made, booked for his string of theaters a long list of musical tabloids; that defendant's manager in effect asked the Booking Offices for the booking of these tabloids; that the latter recognized defendant's right thereto and endeavored to induce plaintiff to consent to it; that plaintiff refused to do so, and that but for such refusal the Booking Offices would have booked them, or caused them to be booked, to the Princess. If tabloids were vaudeville attractions the Booking Offices was under duty to the Princess to book them for it, and it was equally plaintiff's duty, not only not to interfere with such bookings, but to aid in carrying them out, and thus comply with his express consent "that the Booking Offices may book vaudeville acts for the [Princess] theater company exclusively."

Our order will be that the judgment of the District Court be reversed, and the record remanded, with directions to enter a new decree awarding complainant on account of the agreed weekly payments $17,100, with interest thereon (as awarded by the court below), and to award defendant damages against complainant in the sum of $4,400, with interest thereon from the filing of this opinion. As the plaintiff thus recovers the full amount of the weekly payments, there should be no deduction from the damages on their account. The defendant will recover costs of this court.

R. E. HAMILTON & SONS CO. et al. v. MOSS-JELLICO COAL CO.

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

No. 3394.

1. **Appeal and error ⟸977(5)—Denial of new trial reversible only for abuse of discretion.**
An exercise of discretion by the trial judge in overruling a motion for new trial cannot be reviewed, but relief can be had only for failure to exercise judicial discretion; that is, for an abuse of it.

2. **Appeal and error ⟸994(1), 995—Evidence cannot be weighed.**
The Circuit Court of Appeals cannot weigh the evidence or pass on the credibility of the witnesses.

3. **Sales ⟸52(5)—Evidence held to sustain finding that acceptance of orders was conditional.**
In an action for refusal to deliver the coal ordered by plaintiffs, which orders plaintiff claimed defendant had accepted by partial deliveries thereof and by the course of dealing, evidence *held* to sustain the jury's finding that the shipments were made on the assumption that pending negotiations for a contract for defendant's entire output would be consummated and that the acceptance was conditional on the consummation of those negotiations.

4. **New trial ⟸77(1)—Prejudice of jurors against nonresident held not shown.**
Where plaintiffs and their attorneys were nonresidents of the district, but made no application for change of venue, the fact that the officers of the defendant coal company and its counsel were prominent residents of the mountain district of the state, and that the mountaineers (as asserted) were a clannish people, does not show that the verdict for the defendant was the result of the jurors' prejudice, especially where it did not appear how many of the jurors were from the mountains, and plaintiff's counsel disclaimed any suggestion that improper influences were intentionally brought to bear upon them.

5. **Evidence ⟸110—Held admissible to show attempt to fabricate evidence of contract.**
In action for failure to deliver coal ordered by plaintiffs, where the defense was that the orders were accepted only on condition that pending negotiations resulted in the sale of their output to plaintiffs, evidence that plaintiffs' general manager had written a letter, the carbon copy of which he retained, so his files would show a contract for the output, while he destroyed the original, is admissible, though the witness could not give the language of the letter.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by the R. E. Hamilton & Sons Company and others against the Moss-Jellico Coal Company for breach of contract. Judgment for defendant, and plaintiffs bring error. Affirmed.

L. J. Crawford, Jr., of Newport, Ky. (Froome Morris, of Cincinnati, Ohio, and L. J. Crawford, of Newport, Ky., on the brief), for plaintiffs in error.

T. G. Anderson, of Middlesboro, Ky. (M. H. Rhorer, of Middlesboro, Ky., and J. M. Robsion, of Barbourville, Ky., on the brief), for defendant in error.

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

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. On various dates from August 7, 1916, to September 5, 1916, both inclusive, plaintiff's assignors, who were jobbers and brokers in coal at Detroit, sent defendant, a coal-mining company in Kentucky, eight separate written orders for specified amounts and kinds of coal, aggregating 111 cars, in response to seven of which orders defendant made shipments aggregating 11 cars; no shipment being made in response to the eighth order. This action was brought for defendant's failure and refusal to deliver the remaining 100 cars; plaintiff asserting an unconditional contract to make such deliveries, through an alleged acceptance of the various orders by the shipments made on seven of them, and, as to the last order, by the course of dealing as to the earlier ones. Defendant admitted the receipt of the orders, the making of the shipments, and refusal to make further deliveries. It denied, however, that it had unconditionally accepted any of the eight orders, asserting (to quote the language of plaintiff's brief):

"That the parties had had certain negotiations looking to an output contract whereby plaintiff would take, at stipulated prices, all the coal of defendant's mine, with some exception, and that it was understood and agreed that the orders were not to be binding unless an output contract was consummated."

As counsel correctly say:

"This left the single simple defense that the orders were conditional upon the signing of an output contract. Defendant contended that they were so conditioned, and plaintiff contended that they were unconditional, and that all negotiations concerning an output contract had ceased before any order was sent in or coal shipped."

It is conceded that no output contract was ever made. The issue thus raised was submitted to the jury, under instructions not excepted to then nor criticized now. The jury found for defendant, so accepting its contention and rejecting that of plaintiff.[1] Plaintiff moved for a new trial, which was denied.

[1] 1. The grounds of the motion for new trial, so far as now important, are that the verdict is against the law, against the evidence, not supported by sufficient evidence, and the result of prejudice on the part of the jury. It is elementary that an exercise of discretion by the trial judge in overruling a motion for new trial cannot be reviewed. Relief can be had only for a failure to exercise judicial discretion; in other words, for an abuse of it. 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.

[2] The denial of motion for new trial was not, in our opinion, an abuse of discretion. The verdict was not against the law, provided the jury's finding upon the facts is accepted. The proposition that

[1] The verdict also awarded defendant $485.51 on a counterclaim for coal delivered to plaintiff and not paid for. This was concededly proper, if defendant was right on the main issue.

the evidence was insufficient, or that the verdict was against the evidence, requires not only a weighing of the evidence, but a passing upon the credibility of witnesses, which we cannot do. Plaintiff made no motion for a direction of verdict in its favor; but, had it done so, the trial judge did not abuse his discretion in denying the motion for new trial, provided the verdict was supported by substantial testimony, even if both the trial court and this court should think the verdict against the weight of the evidence. In our opinion the verdict was clearly supported by substantial testimony.

[3] It is conceded that there had been negotiations between the parties for an output contract. The material difference between the parties is that plaintiff contends these negotiations had been definitely abandoned as early as the first part of August, and before the first orders for coal shipments were sent in; while defendant contends that the negotiations were still pending and open, that there never was an unconditional acceptance of the orders in question, but that their acceptance was conditioned upon the making of written contract for mine output, and that the shipments had were made in the expectation and belief that the output contract would be made. There was substantial testimony tending to support defendant's contention. The orders in question were never accepted, unless by force of the partial shipments; assuming that partial shipment prima facie showed acceptance, such showing was not conclusive, although the burden of showing the contrary was on defendant.

The witness Craven, who participated in negotiating the contract on the part of plaintiff's assignors, testified that between August 17th and 30th he went with Sallee, now plaintiff's general manager and then one of plaintiff's assignors, to the office of defendant's counsel to "fix up a contract"; that Sallee then said he wanted to go to Louisville to see what his manager there could do toward handling some of the coal, and then he would fix up a contract and send it back to Middlesboro, where defendant seems to have had its office; that Sallee told the witness to keep the orders which had already been entered, and that he would send orders until the contract was fixed up; that, on defendant's president being told of this, he stated that he wished the contract made before any more orders were taken, and did not wish to ship until he was sure he was to be taken care of all through the year. The counsel referred to testified that defendant's president, in the presence of Sallee, instructed the witness to prepare a contract with reference to a sale of a portion of the output of the mine, with certain restrictions, and that Sallee expressed a preference to have the contract drafted in Louisville, stating that he would have it prepared and mailed back to defendant's president, who in turn would present it to counsel for approval.

The testimony of this witness was expressly corroborated by the testimony of defendant's president, who testified that, the contract not having been sent, he wired Sallee, a week or ten days later, to forward it. The witness Bennett testified that Sallee on August 7th stated that he had a contract with defendant all but signed up. The witness Hubbard also testified that Craven on September 5th request-

ed the witness to draw up a contract for a portion of the output, and was told that the witness had no authority to do so, that it was left to the manager or president at Middlesboro, where the contract would be drawn up and signed by the parties. On August 5th, two days before the first order for coal, plaintiffs wrote defendant that they had "practically sold the output of your mine and expect to send you orders covering the same within the next day or two." The testimony referred to, in connection with the other testimony in the case, would support an inference that acceptance of the orders, except so far as covered by the shipments, was postponed until the output contract should be made.

[4] The contention that the verdict was palpably the result of prejudice on the part of the jury is too unsubstantial to justify serious consideration. It is based on the proposition that Moss, defendant's president, was also president of another coal company; that the witness Bennett was a director in defendant company and president of another company; that the witness Hubbard had been in the coal business in that locality for 15 years; that all three "have lived in the mountains all their lives," and are "obviously men of standing and influence in the mountains, and inferentially are widely known"; that defendant's counsel were all prominent and successful practitioners from the mountain community, and known throughout the mountains; that at the time of the trial one of defendant's counsel, who addressed the jury, was running for Congress in a district composed exclusively of mountain counties, and was later elected by a large majority; that the plaintiff, on the other hand, lived and did business at Detroit, Mich., one of their counsel living and practicing in Cincinnati, and two on the Kentucky side of the river; and that the Kentucky mountaineers are "notoriously clannish." The record does not show how many of the jurors were from the mountains; presumably some were. Plaintiff's counsel expressly disclaim any suggestion that improper influences were purposely brought to bear upon the jury. There was no motion for a change of venue. The trial court, to whom the motion for new trial was addressed, knew more about the surrounding conditions than this court can know. To say the least, the trial judge was presumably unable to conclude that Kentucky mountaineers, even if as "clannish" as plaintiff asserts, would be so moved by prejudice as unfairly to champion the cause of coal-mining corporations.

[5] 2. The witness Craven was permitted to testify that in October, 1916, Sallee told the witness that he was sorry he had not signed the contract with defendant; that Sallee, after getting some second sheets like those used in the previous July, dictated a letter to the defendant, dating it as in that month, saying "This is what I wanted with the second sheets. I wanted to complete my files the same color of the second sheets that the original copies were written on;" that he then destroyed the original letter and kept the carbon copy to complete his files, saying, "Now, that completes our contract with them." The stenographer's testimony substantially corroborated that of Craven. This testimony is challenged as irrelevant. It was

taken subject to objection and exception, although the ground of the objection was not stated, and we would thus not be bound to consider it. In our opinion the testimony was relevant. Sallee had testified that in July or August he told defendant's president that "I would write him a letter and we would consider it a contract. I did write him a letter." The criticized testimony (if believed) tended to show that Sallee understood in October that the unfilled orders had not been unconditionally accepted, and that they were being held awaiting the making of such contract, and that Sallee wrote the letter in question with the design of aiding a false and fraudulent assertion that a contract had been reached. The facts that the letter in question was never actually sent, and that no attempt was made on the trial to prove such sending, and that the language of the letter could not be given by the witness, did not make the testimony irrelevant. The facts last referred to affected only the credibility of the testimony. The act itself was relevant, if believed to have been committed. That question was for the jury.

We find no error in the record, and the judgment of the District Court is affirmed.

SANITARY PRODUCTS CORPORATION v. INDIVIDUAL DRINKING CUP CO.

(Circuit Court of Appeals, Third Circuit. February 14, 1921.)

No. 2598.

Patents ⊂=328—1,043,854, claims 1–3, 6, for cup dispensing device not infringed.

The Luellen patent, No. 1,043,854, claims 1–3, 6, for a cup-dispensing device, as limited by the prior art, *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the Individual Drinking Cup Company against the Sanitary Products Corporation. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 267 Fed. 196.

O. Ellery Edwards, Jr., of New York City, for appellant.

Dunn, Goodlett, Massie & Scott, of New York City (Clifford E. Dunn and C. A. L. Massie, both of New York City, of counsel), for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

BUFFINGTON, Circuit Judge. In the court below, the plaintiff, the present owner of patent No. 1,043,854, granted November 12, 1912, to Luellen, for a cup-dispensing device, brought suit against the defendant, charging infringement of claims Nos. 1, 2, 3, and 6 thereof.

The validity of this patent having been theretofore upheld in another District Court of the circuit (see Individual Drinking Cup Co. v. United States Drinking Cup Co., 220 Fed. 331), the court below followed that decision and confined itself to the question of infringement. Its opinion, reported at 267 Fed. 196, found, and a decree following it adjudged, the defendant infringed claims Nos. 1, 2, 3, and 6 thereof. To that question of infringement we also confine ourselves, but, by way of safeguarding ourselves, and to avoid confusion, we note the subject-matter to which this patent was, and that to which it was not, addressed.

Touching the latter matter that to which the patent is not addressed, we note that the widespread use of individual articles of different sorts was something that was in existence long before this patent was granted, and that with the creation of a demand for such individual articles Luellen had nothing to do. He found, for example, existing, economical, serviceable, individual paper cups in wide use, and his object was to find novel means to deliver such individual cups, and thereby share in an already existing market.

But, in seeking to invent a new device, he found at hand the devices and inventions of many men, who had in the last few years labored in this same field of automatic, mechanical supply of individual articles to individual users, and in the art many machines with slot receipt of coins and resultant delivery of individual articles, surprising in number, variety, and volume. It will thus be seen that Luellen entered a well-tilled field, in which were many inventions, and wherein mechanical advance of novel, additional, and useful improvements would naturally be expected from those who were making self-delivering devices for these almost numberless articles of individual use, each of which presented its own individual problem, due to size and proportions.

We will, as the court below did, assume for present purposes that Luellen made an invention in this well-occupied field; so we turn to his patent to ascertain, first, what was the invention he made and disclosed, and, second, what was the range of invention his claims covered. For we who administer the patent laws have need to keep constantly in mind not only the statutory requirements, but the further fact that the consideration the patentee renders for the grant of his patent, is that—

> "Before any inventor * * * shall receive a patent for his invention, he * * * shall file * * * a written description of the same * * * in such * * * exact terms as to enable any one skilled in the art * * * to make * * * and use the same."

Bearing this statutory prerequisite in mind, we turn to Luellen's patent to learn what was the invention he made, disclosed, and claimed. Now, it is quite evident that the general idea of a storage chamber for paper drinking cups was not original with him, nor was the idea of withdrawing a cup from such chamber by a user. Indeed, he neither said in his application, nor did he present or obtain any claim for such single features. What he did disclose was a particular type of storage container and a particular mode of withdrawing cups from such container. To that end he showed a tube vertically held in place on and

by an enveloping standard. This tube had two elements, each and both so functionally necessary that, if either were omitted, his device would not work. Take, for instance, the element, "a receiving chamber," one found in every claim here involved. In that respect his invention disclosed a tube which functionally became "a receiving chamber" by reason of its having an opening at its top, which top opening alone permitted the introduction into the tube of the cups, and thereby enabled the tube to become that stipulated and functioning element of all the claims which was described as "a receiving chamber."

We use the word "alone" advisably—"alone permitted the introduction into the tube of the cups"—for it will be noted that the other end of the tube, in order to constitute it "a delivery opening," and thus meet another requirement found in every claim, was restricted and narrowed to such an extent that the cups could not be inserted through the lower end of the tube, but only through the open top. It follows, therefore, first, that the device disclosed by Luellen and the invention he claimed to make, had as its central and dominant feature, a tube, chamber or container in which the cups had to be inserted from the top; and, secondly, that unless an opening was made at the top and the cups inserted at the top, the device would not work. And no other kind of a chamber was described or suggested in his specification. Such being the case when he put the element "a receiving chamber" in each of his claims, it is clear that his disclosed invention was accurately and functionally described, and therefore fully and functionally protected, by giving to that element, "a receiving chamber," a construction which applied to the top-opening and top-receiving tube which, and which alone, he disclosed.

Now, without entering into details, what we have said as to the element of "a receiving chamber" substantially applies also to the element "a delivery opening." To make the tube function, and the device of Luellen operate and deliver the cups, the lower end of the tube had to be contracted; for if it was not contracted, it would not retain the cups, and therefore could not deliver them as needed. It will therefore be seen that the gist and entire functional operative capacity of the tube of the invention was a tube open at the top to receive, and contracted at the bottom to retain and deliver. This was the alleged invention he disclosed, this was the invention the public was entitled to use at the end of his monopoly. If he had in view any other form of tube or device, he did not disclose it, and therefore did not meet the statutory requirement, namely:

> "A written description of the same * * * in such exact terms as to enable any one skilled in the art * * * to make * * * and use the same."

In view of the restricted field open to Luellen's inventive effort, and of the fact that none of the elements of his claims are in themselves novel, and that novelty and invention, if found, must be found in a new combination of old elements, we are of opinion the claim is correspondingly restricted, and should not be expanded to cover subsequent advances in this art, which used other forms and appliances

which functioned in different ways. Indeed, to expand Luellen's limited claims, and give them a broad, sweeping construction, might endanger his patent. Take, for example the functional anticipatory significance of patent No. 570,113, granted October 27, 1886—13 years before Luellen—to Wilson for a cork cabinet. Without entering into details, it suffices to say that Wilson showed 14 tubes of different sizes, adapted to chamber and deliver 14 different sizes of corks. These tubes were vertically attached to the inside of a swinging cabinet door. The tubes were open at the top, and the corks were introduced at this open top, and this open top made the tube function as a cork-receiving chamber. The tube was contracted at the bottom, so as to cause the upper and larger end of the cork to retain and store itself and the corks above it in the tube, while the lower and smaller end of such lowest cork protruded from the lower end of the tube.

Physically and functionally, Wilson's individual delivery mechanism initially received, and thereafter stored, retained, and delivered, flexible corks in precisely the same mechanical and functional way that Luellen's did flexible cups. Indeed, the functional operative likeness of the two devices is such that to differentiate them we must resort to sanitation grounds, and those grounds of a very narrow sort. After Luellen's cups were put into the top of his tube, as stated in his patent, the "top of the tube is closed by a cap or cover *16* to exclude dirt." In Wilson's device the open top of his tube would only be closed, and then but relatively so, by the top of the cabinet when the door was shut, but as in the practical use of the cabinet in a drugstore, the door would usually be left open to allow quick access to the corks, and as no suggestion of sanitation or hygiene was made in Wilson's patent, it is fair to say that the top closure he made was a mere mechanical incident with no functional purpose. The mechanical operative difference between these two devices being thus restricted, not even to open-top charging of their tubes, but solely to the closing of those open tops after they are charged, it would seem to follow that the tight closing of Luellen's top-open tube as contrasted with Wilson's loose closing tube, is the substantial novel mechanical element which alone differentiated his flexible-cup delivery device from Wilson's flexible-cork delivery device, and if the presence of this top closure is of such substance as to involve invention over Wilson, it follows that the absence of such top closure in a later flexible-cup delivery device is of like substance to avoid infringement.

Applying the above general principle and reasoning to the device of the defendant, it necessarily follows that infringement was not shown. The defendant's device has a solid glass tube, the upper globular end of which cannot be opened, and its lower end is of the same diameter as the tube body. Its construction is such that the tube cannot be filled with cups from the top, it can and must be filled from the bottom, and when filled the lower end of the tube, being of the same size as the body of the tube, neither retains the cups in storage, and has no functional agency in discharging the stored cups; but both retention and discharge are effected by devices below the lower end of the tube, which are not functionally effected by any modifying action of the tube itself.

We are therefore of opinion the device of the defendant does not in-

fringe, and the decree of the court below, granting an injunction on these claims, must be vacated.

The defendant is also charged with infringement in its sale of a paper carton in which nested paper cups are shipped, and from which, where the carton is hung upon a wall, they can be withdrawn one by one.

Bearing in mind the limited field, as above stated, of the patent in suit, we note this paper carton or container differs from the disclosure of the patent in suit in several particulars. In addition to being a dispensing chamber when the cups are being used, it brought into the art the additional function of being a shipping box, and a difference when used as a dispenser, in that it is fragile and temporary and is only used once. In that respect it is unlike the permanent and substantial chamber of the patent. But, apart from these structural differences, its restraining paper lugs at the foot of the carton, which hold the nested cups in place, make the chamber functionally different from the tapering, narrowed delivery end of the plaintiff's patent, in that the former are flexible, and themselves fall back into the wall of the paper tube, and this functional feature permits the nested cups being packed in the tube from below, a thing impossible in the practical use of the patentee's device.

Without entering into a further discussion, it suffices to say we regard this square paper carton adapted by its new element of flexible, yielding cups, to receive cups from below, to constitute a functionally different combination from that disclosed by the patent, and therefore not an infringement.

THE ST. S. ANGELO TOSO.

(Circuit Court of Appeals, Third Circuit. February 11, 1921.)

No. 2597.

1. **Evidence ⟸441(9)—Not admissible to establish express warranty not contained in contract.**
   Where there was no warranty in a contract purporting to contain the whole engagement of the parties, evidence to prove an express warranty *held* properly excluded.

2. **Sales ⟸273(3)—Implied warranty of fitness of coal for intended use.**
   Sales Act Pa. 1915 (P. L. 547) § 15 (Pa. St. 1920, § 19663), providing that "where the buyer, expressly or by implication makes known to the seller the particular purpose for which the goods are required and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not) there is an implied warranty that the goods shall be reasonably fit for such purpose," *held* to apply to a sale of coal to a navigation company, to be delivered to buyer's steamers and paid for at a stated price per ton "trimmed in bunkers," and where it was understood that the seller would buy the coal from others, and the buyer therefore had no apportunity to examine it, there was an implied warranty that the coal delivered should be reasonably suitable for steaming purposes.

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

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Libel by the Charles D. Norton Coal Company against the steamship St. S. Angelo Toso. Decree for respondent, and libelant appeals. Affirmed.

For opinion below, see 265 Fed. 783.

Vivian Frank Gable, William E. McCall, Jr., and Owen J. Roberts, all of Philadelphia, Pa., for appellant.

Malcolm Sumner, of New York City, and Wolf, Block & Schorr and Joseph J. Brown, all of Philadelphia, Pa., for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Charles D. Norton Coal Company filed a libel against the "St. S. Angelo Toso" to recover the contract price for 992 tons of coal sold to Societa Nazionale di Navigazione, the owner of the steamship. The respondent pleaded a warranty as to the quality of the coal and defended on its breach. The court, finding warranty and breach, dismissed the libel. This appeal followed.

The case arose out of an oral contract confirmed by correspondence wherein the Navigation Company purchased from the Coal Company "1,000 tons bituminous coal for delivery to our steamers, * * * price * * * to be $5.81 per ton trimmed in bunkers."

When alongside the steamer and after its failure to respond satisfactorily to burning tests, the Navigation Company rejected the coal and refused payment. It remained on lighters until sold to another concern.

[1] The warranty pleaded was both express and implied. Nothing in the terms of the contract indicated an express warranty. As the contract purported to contain the whole engagement of the parties (Seitz v. Brewers' Ref. Co., 141 U. S. 510, 517, 12 Sup. Ct. 46, 35 L. Ed. 837), the learned trial judge was quite right in disregarding evidence offered in proof of an express warranty,—which concerned previous negotiations for the purchase of bunker coal of first quality for another ship,—as forming no part of the contract in suit. The sole question therefore is one of implied warranty and turns on the Pennsylvania Sales Act of 1915, P. L. 547 (Pa. St. 1920, §§ 19649–19726), and on the sufficiency of the evidence to invoke its provisions. The statute provides:

"Section 15. * * * Where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is an implied warranty that the goods shall be reasonably fit for such purpose."

This section of the Pennsylvania Sales Act is in the exact terms of a section of the Uniform Sales Act adopted by many states, which in turn followed quite literally a like provision of the English Sale of Goods Act of 1893. Williston on Sales, Appendix. It is in effect a qualification of the doctrine of caveat emptor. Though its principle was found in the civil law, it had its rise at common law in a dictum

in Gray v. Cox, 4 Barn. & C. 108, 115 (1825), grew into general application through decisions of courts in diverse jurisdictions, and is now firmly established by many statutory enactments.

In this case an implied warranty that the coal shall be fit for the purpose for which it was purchased depends for its validity upon the two statutory essentials—that the buyer had communicated to the seller the particular purpose for which the coal was required and that it relied on the seller's skill and judgment in selecting it. As to the first essential, it is not denied that the Navigation Company, the buyer, in requiring that the coal be "trimmed in bunkers" thereby made known to the seller the particular, and indeed the only conceivable, purpose for which coal so placed was to be used, namely, that of making steam by which to propel the ship.

Having complied with the statute in disclosing the purpose for which the coal was required, the next question was, whether the coal was of a quality to meet that requirement. The learned trial judge made findings of fact—which we see no reason to disturb—that the coal which the seller supplied the buyer

"contained foreign matter consisting of slate, mud, sand and stone which was estimated by the respondent's witnesses to compose about twenty-five per cent. of its bulk. As a result of tests made on board the vessel, the coal would not keep up steam; the fires could not be kept up and consequently pressure could not be maintained in the boilers. While the normal speed of the vessel was twelve miles an hour, the steam developed with the coal supplied would not enable it to maintain speed in excess of seven miles an hour."

On these findings we affirm the judge's conclusion that the coal, although of merchantable quality as evidenced by its subsequent sale, was not reasonably fit for the purpose for which it was required. Having established this element of an implied warranty as defined by the statute, the case is narrowed to the issue on the other, namely, whether "it appears that the buyer (relied) on the seller's skill and judgment" in selecting the coal. The facts on which this question turns were briefly these:

The Coal Company, the seller, was both a producer of coal and a dealer in coal. It had previously sold to the Navigation Company coal it had produced from its own mines; but in the instant transaction it informed the buyer that the coal it would deliver would not be its own but would be such as it could procure elsewhere. And so it happened. The Coal Company found this coal running to the piers, purchased it en route and sold it to the Navigation Company by the contract in suit. The buyer had no opportunity to see the coal before it was purchased, or to inspect it before it was delivered.

Prior to the statute, the rule applicable in such case, as stated in Dushane v. Benedict, 120 U. S. 630, 636, 7 Sup. Ct. 696, 697 (30 L. Ed. 810) was this:

"When a dealer contracts to sell goods which he deals in, to be applied to a particular purpose, and the buyer has no opportunity to inspect them before delivery, there is an implied warranty that they shall be reasonably fit for that purpose."

As expressed in Jones v. Just, L. R. 3 Q. B. 197 (cited with approval in Dushane v. Benedict):

"It must be taken as established that on the sale of goods by a manufacturer or dealer, to be applied to a particular purpose, it is a term in the contract that they shall reasonably answer that purpose, and that on the sale of an article by a manufacturer to a vendee who has not had an opportunity of inspecting it during the manufacture, that it shall be reasonably fit for use or shall be merchantable, as the case may be."

In Rodgers v. Niles, 11 Ohio St. 48, 53 (78 Am. Dec. 290), the Supreme Court of Ohio recognized an implied warranty:

"Where it is evident that the purchaser did not rely on his own judgment of the quality of the article purchased, the circumstances showing that no examination was possible on his part, or the contract being such as to show that the obligation and responsibility of ascertaining and judging of the quality was thrown upon the vendor, as where he agrees to furnish an article for a particular purpose or use."

See also Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 113–116, 3 Sup. Ct. 537, 28 L. Ed. 86; Seitz v. Brewers' Ref. Co., 141 U. S. 510, 516–520, 12 Sup. Ct. 46, 35 L. Ed. 837; Pullman Car Co. v. Metropolitan Railway Co., 157 U. S. 108, 15 Sup. Ct. 503, 39 L. Ed. 632; Gillespie Brothers & Co. v. Cheney, L. R. 2 Q. B. 59, where, citing cases, the general rule and the exceptions are referred to.

This common-law rule was embodied in the different state enactments of the Uniform Sales Act. In construing the provision of the Ohio Sales Act, identical with that of the Pennsylvania Sales Act now under discussion, the Circuit Court of Appeals for the Sixth Circuit, in Kansas City Bolt & Nut Co. v. Rodd, 220 Fed. 750, 754, 755, 136 C. C. A. 356, held that, where the buyer had no opportunity for previous inspection, he "was entitled to rely, and will naturally be presumed to have relied, upon the seller's skill and judgment," following the rule laid down in Kellogg Bridge Co. v. Hamilton, supra. In the latter case, the court—dealing, it is true, with a manufacturing seller, but before the distinction between manufacturer and dealer had been abolished—said:

"According to the principles of decided cases, and upon clear grounds of justice, the fundamental inquiry must always be whether, under the circumstances of the particular case, the buyer had the right to rely and necessarily relied on the judgment of the seller and not upon his own."

Applying these rules to the circumstances of the sale and purchase of coal in this case, where admittedly the seller was the only one who had an opportunity to inspect the coal before its purchase and delivery, it appears from the very nature of the transaction that the buyer did rely, as it had to do, on the seller's skill and judgment to select and deliver coal which was reasonably fit for the purpose for which it was bought. Hence we find that the requirements of the statute raising a warranty by implication were satisfied—if its terms extended to a sale between *dealer* and *buyer*. This the libelant denies.

Prior to the general enactment of the Uniform Sales Act a distinction was made by some courts between a seller who was a producer, that is, a grower or manufacturer, and a seller who was a dealer, bas-

ed on the better knowledge which the former had of the quality of his goods. Notable among these were the courts of Pennsylvania. Sellers v. Stevenson, 163 Pa. 262, 29 Atl. 715; Wise v. Wilby, 30 Pa. Super. Ct. 484. But the Pennsylvania Sales Act used terms which on their face seem to abolish this distinction (as by like terms in the English Sale of Goods Act the distinction was abolished), for they define the seller, on whose skill and judgment the buyer relies, as one "whether he be grower or manufacturer or not." Gillespie Brothers & Co. v. Cheney, L. R. 2 Q. B. 59. Whatever doubt may have been entertained as to the precise meaning of this expression in the Pennsylvania statute, it was set at rest by the construction given it by the Supreme Court of Pennsylvania in Griffin v. Metal Product Co., 264 Pa. 254, 107 Atl. 713. That case concerned the sale of high-speed steel by the seller—whether a manufacturer or dealer is not clear—to a buyer, and centered on the question whether there was an implied warranty that the steel should be reasonably fit for the purpose for which the seller knew it was to be used. The court said:

"Before the passage of the Act, it had been repeatedly so held, so far as relates to the grower or manufacturer of the goods sold, and the only change made thereby was to extend the rule to *every seller*, 'whether he be the grower or manufacturer or not' "

—citing and quoting from Kellogg Bridge Co. v. Hamilton, supra.

We are of opinion therefore that the court's decree dismissing the libel on the finding of an implied warranty and breach thereof was without error and must be

Affirmed.

GREY v. NICKEY BROS., Inc.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1921.)

No. 3595.

1. **Vendor and purchaser ⟸18(3)—Acceptance of option held unequivocal.**
   A telegram by a party having an option for purchase of land, which stated: "Will exercise our option. * * * Mail deed with draft. * * * Answer"—was an unequivocal acceptance of the option, and not merely an expression of future intention to accept, and therefore made the option a binding contract.

2. **Vendor and purchaser ⟸18(3)—Attorney's letter held not to make purchaser's acceptance conditional.**
   A letter by the purchaser's attorney, dated the same day as a telegram accepting the option, which stated that the examination of the title had not been concluded, but was being vigorously prosecuted, and expressed the hope of closing the transaction the next week, does not indicate that the acceptance of the option was conditional, even if the attorney had authority to modify the acceptance.

3. **Vendor and purchaser ⟸18(3)—Acceptance of option within time sufficient, unless there is clear intent to require performance.**
   Where an option for the purchase of land is given, time is usually made of the essence in so far as acceptance is concerned; but, unless it is the clear intention of parties to require acceptance and performance within the time limit, such limit does not relate to performance.

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

4. Vendor and purchaser ⟸75—Option held not to require performance within limited time.

A 30-day option for the purchase of a large tract of land which contemplated the execution of the deed, a mortgage and notes for the purchase price, and the ascertainment of the amount of income and profit tax the vendor would have to pay, requires only acceptance within 30 days, and permits performance within a reasonable time thereafter, especially where the vendor so construed it by promising, in reply to telegram of acceptance, to send papers in a few days.

Specific performance ⟸97(1)—Tender of performance by purchaser held unnecessary, where vendor stated he would not convey.

Where the purchaser, within a reasonable time after exercising his option, was proceeding to have corrected defects in the title and in the abstract, and in good faith attempting to carry out the contract, when the vendor tendered a deed which contained unusual clauses, waiving purchaser's rights under the state Constitution and laws which were not provided for in the option, and thereafter positively stated he would not convey the property, the failure of purchaser to tender payment of the purchase price did not defeat his right to specific performance.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit for specific performance by Nickey Bros., Incorporated, against James P. Grey. Decree for complainant, and defendant appeals. Affirmed.

J. C. Theus, of Monroe, La., and Elias Gates, of Memphis, Tenn., for appellant.

Henry Bernstein and F. G. Hudson, Jr., both of Monroe, La., and J. W. Canada, of Memphis, Tenn., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This is a suit to compel specific performance of a contract for the sale of real estate. January 29, 1919, appellant, for the consideration of $100, granted to appellee an option to purchase certain lands in West Carroll parish, La., the provisions of which, material to the question at issue, are: That appellee should exercise the option within 30 days; that upon exercise of the option within the time specified appellee should pay appellant $20,000 upon the purchase price of $50,600, "upon the delivery of a valid, fee-simple deed with full covenants of warranty, conveying an absolute, unincumbered, fee-simple title; $15,300 on or before one year; $15,300 on or before two years from date of deed, with interest at 6 per cent. per annum, payable semiannually, evidenced by notes secured by a mortgage or deed of trust on the above-described land; the cash payment to be paid on draft with exchange attached to deed at the Bank of Commerce & Trust Company, Memphis, Tenn."; that any additional amount of federal income or profit tax, payable for the year 1919 by appellant by reason of the sale, should be added to the purchase price up to an amount not exceeding $3,000, to be evidenced by a note and secured by mortgage or deed of trust; that appellant should furnish appellee the data showing such increase; that appellant should furnish appellee a complete abstract of title within 15

days, failing which the option should be extended 15 days after a complete abstract should be furnished; that if the land contained less than 1,840 acres, according to government survey, the purchase price should be decreased by $27.50 per acre, and if it contained more than 1,840 acres, according to government survey, the purchase price should be increased at the rate of $27.50 per acre; that appellee should have the right to continue the option for an additional 30 days upon payment to appellant of $500 at or before the expiration of 30 days.

It was admitted by the pleadings that February 27, 1919, appellant received from appellee the following telegram:

"Will exercise our option to buy land West Carroll Parish, La. Mail deed with draft to our bank here. Answer."

And on the same date sent the following telegram in reply:

"Telegram. Will send papers within few days."

In his answer appellant alleges that on March 4, 1919, his agent tendered a deed in accordance with the contract at the office of appellee, and was informed that an officer of appellee company, who was attending to the purchase of the lands, was absent, and that appellant's agent would be notified of his return; that such notice was never given; that appellant heard nothing further from appellee until March 2, 1919, when he received a letter from appellee's attorney stating that the examination of the abstract had not been completed; and that appellee had failed to comply with the terms of the option either by accepting the title or paying the sum stipulated for an additional option, and that on March 25, 1919, appellant notified appellee that its right to exercise the option had expired. The answer also denied that appellee had accepted the offer of sale contained in the option.

February 28, 1919, appellee's attorney mailed to appellant the following letter dated the previous day:

"Messrs. Nickey Bros. have asked me to advise you that the examination of the title to your lands in West Carroll parish, La., has not yet been concluded, but is being vigorously prosecuted, and that we hope to close the matter the latter part of next week if title proves satisfactory, as we have every reason to believe that it will."

March 17, 1919, appellee telegraphed to appellant as follows:

"Our attorneys report several defects in your title. No patents were ever issued by the state of Louisiana covering these lands. Certain back tax proceedings are irregular. It is possible that these defects can be cured. Will you have your attorney do this or will you authorize us to have our attorneys do it at your expense? Answer."

March 25, 1919, appellant wrote appellee the following letter:

"The time having expired within which you were to accept title to my Louisiana lands, described in our agreement of January 29, 1919, executed by us at Hendersonville, North Carolina, and you not having exercised your option or accepted title to the lands, I wish to notify you that all agreements between us have lapsed and are no longer in effect, and that I consider myself in no manner bound by same. This notice goes forward to you by registered mail, to-day. Please return to me at Hendersonville, N. C., the abstract of title and oblige."

It may be assumed that appellant did not furnish a complete abstract of title, although it is true that an incomplete abstract was furnished within 15 days from the date of the option. The District Judge held the abstract furnished was not a complete one, and the evidence abundantly sustains that finding; but, inasmuch as no assignment of error is based upon the finding of the court as to the insufficiency of the abstract, it is unnecessary to state the particulars wherein it was deficient. During the time the 30-day option was running, appellant's agent had procured the patents inquired about by appellee on March 17; but appellant withheld from appellee the information that patents had been procured, although he was acquainted with that fact as early as the second day of March. The deed provided that appellant should furnish appellee the data showing the increase in his federal income or profit tax, and that appellee should accept such statement as correct. The deed further provided that a failure to pay the interest on any of the notes should cause all the notes to become due, at appellant's option; that an attorney's fee of 10 per cent. should be paid upon the notes if placed in the hands of an attorney for collection after maturity; and that in case of foreclosure by executory process appellee should waive the notices required by the laws of Louisiana, and should confess judgment for the full amount of the notes, including attorney's fees. The form of notes prepared by appellant provided that appellee waived all rights of redemption and of notice of seizure and appraisement of real estate secured to it by the Constitution and laws of Louisiana in regard to the collection thereof.

The District Court found the equities to be with appellee and entered a decree requiring specific performance. The assignments of error present the questions: (1) Whether appellee accepted the option; (2) and, if so, whether the option required performance as well as acceptance within thirty days; and (3) even if it did not, whether appellee failed without a valid excuse to tender performance.

[1] 1. An option, such as this is, differs from the usual offer only in that it cannot be withdrawn during the period given for its acceptance. It becomes a binding contract when accepted. The acceptance, of course, must be unequivocal and unconditional. It is insisted that the telegram above quoted was equivocal, in that it only expressed the future intention of appellee to exercise the option. Construing the whole telegram, it is quite apparent that the offer was a present one, because request was also made to mail deed and draft to the bank in accordance with the terms of the option, and in addition appellant was requested to answer. The acceptance, therefore, was unequivocal.

[2] It is said, furthermore, that the acceptance was conditional, when taken in connection with the letter from appellee's attorney bearing the same date, but mailed the succeeding day, and received about March 2d following. Appellant replied on same date with telegram of acceptance, as already stated. We have, then, an offer to sell and an acceptance, which raises the option, which theretofore was binding upon only one of the parties, to the dignity of a contract, binding upon both parties. The rights of the parties had become fixed before

the attorney's letter was sent. Waiving the question of his authority to modify the contract, it is not apparent from his letter that it was his intention to do so. The statement therein contained, that he hoped "to close the matter up the latter part of next week if the title proves satisfactory as we have every reason to believe that it will," could more reasonably be said to relate to the time when appellant might expect the transaction to be closed than to a withdrawal of the offer of acceptance in the event the title did not prove to be satisfactory. The acceptance was not, therefore, rendered conditional by the letter from appellee's attorney.

[3] 2. Time is usually made of the essence of a contract in so far as acceptance is concerned. Of course, it may be also as to performance of the things to be done by the purchaser; but, unless it is the clear intention of the parties to require both acceptance and performance within the time limit, the time within which an option is to be exercised, relates only to acceptance and not to performance. Watson v. Coast, 35 W. Va. 463, 14 S. E. 249; Ellis v. Bryant, 120 Ga. 890, 48 S. E. 352; 27 R. C. L. 344.

[4] A contract precedes its enforcement or execution. It could not well have been contemplated that the cash payment should be made, the deed, mortgage, and notes executed and delivered, and the amount of the income or profit tax appellee was to pay determined, within 30 days. Appellee had until the end of the 30 days to accept the option. Even if it could be said that he should also have been ready to pay, yet it was not intended that he should do so before he received the deed which appellant was bound to execute. The contract was so construed by appellant. He made no objection at the time to complying with the requests of appellee, but on the contrary stated that he would "send the papers within a few days." The parties never proceeded upon the idea that the option had to be performed; that is to say, that the cash payment had to be made, and the deed, mortgage, and notes executed and delivered within 30 days. It follows that the option contemplated an acceptance within 30 days, and performance within a reasonable time thereafter.

[5] 3. It is contended that appellee failed, even after the time limit of 30 days had expired, to pay, or to offer to pay, the purchase price. The evidence shows that appellee was proceeding upon the theory that appellant intended to carry out in good faith his obligations under the contract; that in examining the title it was discovered there was some question as to whether the taxes had been paid, and that the abstract failed to show patents from the state or government of some of the lands. Appellee notified appellant of these defects in the title, and stated further that there were other imperfections in the abstract. Appellant failed to answer the telegram which requested him to inform appellee's attorney whether he would have patents issued, or whether appellee should do so, although at that time appellant had the patents in his possession. Appellee cannot be held to have been in default for not accepting the deed and making the cash payment. The deed contained unusual conditions not required by the option, or authorized by custom in conveyancing, such as the provision waiving rights under

the Constitution and laws of Louisiana. While appellee was in good faith investigating the title, and relying upon the right to close the transaction within a reasonable time, appellant notified it in the most positive terms that he would not convey the property. Under these circumstances, appellee was not under the necessity of going through the idle ceremony of tendering performance.

The decree is affirmed.

EDDY v. ST. CHARLES LAND CO.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1921.)

No. 3492.

1. **Specific performance ⇐61—Acts constituted abandonment of contract.**
The acquiescence by complainant in the sale by defendant company of a tract of land, which it was developing by means of canals and ditches, including a part of the tract which complainant had contracted to purchase, thereby becoming a member of the company, when an overflow from the Mississippi destroyed the drainage works, *held* an abandonment of his contract, and to preclude his afterwards maintaining a suit for its specific enforcement.

2. **Specific performance ⇐7—Plaintiff estopped from maintaining suit.**
Complainant, who had contracted for the purchase of a part of a tract of land owned by defendant, by consenting to the sale by defendant of the entire tract, in the proceeds of which he was entitled to share, and by afterwards contracting with the purchaser for the repurchase of his part, *held* estopped to maintain a suit for specific performance of his original contract.

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

Suit in equity by W. E. Eddy against the St. Charles Land Company. Decree for defendant, and complainant appeals. Affirmed.

Henry P. Dart, of New Orleans, La. (Benjamin W. Kernan and Henry P. Dart, Jr., both of New Orleans, La., and R. L. Russell, of Princeton, Ill., on the brief), for appellant.

Charles Carroll, of New Orleans, La. (Edward C. Craig, of Mattoon, Ill., Joseph W. Carroll, of New Orleans, La., and Donald B. Craig and Fred H. Kelly, both of Mattoon, Ill., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a bill by the appellant for the enforcement of the specific performance by the appellee, St. Charles Land Company (herein referred to as the Land Company) of a written contract, made on December 16, 1911, whereby the latter agreed to sell and the former agreed to buy described tracts and lots situate in the Land Company's drainage district No. 1, in St. Charles parish, La. The stated consideration was the sum of $6,359.20, $1,589.30 of which was paid when the contract was made, $791.30 thereof in cash

and $798 in the Land Company's preferred stock. The balance of the price was evidenced by the appellant's three interest-bearing notes, payable, respectively, on or before January 1, 1914, January 1, 1915, and January 1, 1916; the vendor retaining a vendor's privilege for the unpaid portion of the price, and agreeing to convey the land by warranty deed upon payment in full of the stated price. The contract contained the following:

"The said St. Charles Land Company reserves in favor of itself, its successors or assigns, a perpetual servitude on the lands above described, and on all land within said drainage district No. 1 of said St. Charles Land Company, for the purpose of keeping up and maintaining the levees and ditches constructed by said St. Charles Land Company, its successors or assigns, on said drainage district No. 1, and also for keeping up, maintaining, and operating the pumping plant on said drainage district and keeping the same in good condition and repair. The vendee acquires a right in and the use of all the driveways, roads, levees, ditches, and pumping plant on said drainage district No. 1.

"It is further contracted by and between the parties hereto (1) that both said St. Charles Land Company and the vendee herein will pay their pro rata share of keeping up the pumping plant, levees, and ditches constructed by said company on said drainage district No. 1; (2) that the parties hereto and all future purchasers shall comprise a corporation or association, which shall levee, ditch, and drain said district and maintain the drainage thereof, and for said purposes, shall levy an annual rate or charge on the owners of land in said district, and at the meetings of the members of said corporation or association each person or corporation in interest shall have a vote for each acre of land, or fraction thereof, owned by such person or corporation in the farm lots, and also a vote for each building lot owned by such person or corporation in the townsite; and (3) that any and all purchasers of lots or land in said district shall, by reason of such purchase, ipso facto, become members of said corporation or association."

At the time the contract was entered into the Land Company was engaged in the work of draining and reclaiming the land embraced in its drainage district No. 1, which was a tract of 2,860 acres, part of a tract of more than 13,000 acres it had bought. Canals and ditches had been dug, a pumping station had been installed, and the work of pumping was in progress. In May, 1912, a crevasse occurred in a levee of the Mississippi river above the Land Company's land, with the result that that land was completely inundated for a considerable time, and ditches and canals were filled up with washed material and soil, making it impossible to drain any of the land without dredging canals and ditches. Before this disaster occurred the Land Company had spent all its capital in the purchase of land and in its drainage work, and was indebted to its president in the sum of $28,000, which he had advanced to keep the work going. It could not borrow the money required to carry on its project of reclamation. The appellant was informed by officials of the Land Company of its financial condition, of its inability to proceed with the drainage undertaking, that the officers of the company thought it advisable to sell its lands as a whole and to divide the proceeds among the stockholders, restoring stockholders who had used their stock in making the first payment on land contracted for to the same footing they occupied before they parted with their stock.

The plaintiff acquiesced in these suggestions, and expressed his

satisfaction when informed that the company would not expect him to make the deferred payments called for by his contract. Thereafter the Land Company employed L. B. Langworthy to negotiate a sale of the land as a whole. After the appellant was informed that this had been done his conduct indicated acquiescence. He inquired as to the prospects of success of the efforts to secure a purchaser. When informed that Langworthy had given an option on all the land at a stated price, the appellant expressed his satisfaction, and by estimating what the proposed sale, if made, would yield a share by dividing the price stated in the option by the total number of preferred shares issued by the Land Company, including those he had held, manifested his understanding that the land he had contracted for would be embraced in the proposed sale if made, and that his interest in that sale would be that of a holder of preferred stock of the Land Company. On January 2, 1914, a contract was made to sell all the Land Company land to T. P. Welsh, to whom the option had been given. That contract was ratified at a meeting of the shareholders of the Land Company. Appellant had timely notice of that meeting and that the matter of ratifying the sale to Welsh would come up at that time. Appellant did not attend that meeting, at which the sale to Welsh was ratified. In no way did he indicate that he objected to the making of the proposed sale.

By an agreement made in April, 1914, evidenced by a letter addressed by Welsh to the plaintiff, and the latter's telegram in reply to that letter, the appellant contracted for the purchase from Welsh of the same land embraced in his contract with the Land Company on terms materially different from those stated in the last mentioned contract. The appellant did not comply with the terms of that contract or offer to do so. In January, 1915, Welsh sold all the Land Company land to the St. Charles Development Company, which had no connection whatever with the Land Company; the two corporations being composed of entirely different stockholders. Prior to April 20, 1915, the St. Charles Development Company spent large sums in draining and developing the land it had bought from Welsh, and sold portions of it, including the land embraced in the appellant's contract with the Land Company. After the appellant was informed of the just mentioned facts, on the date last mentioned he manifested to the Land Company his willingness and desire to pay the amounts called for by his three above-mentioned notes for the balance of the purchase price for the land he had contracted for, with interest thereon.

His bill in this case was filed in November, 1915. The granting of the relief prayed for was resisted on the grounds, among others relied on, that the contract sought to be specifically enforced was rescinded or canceled by agreement of the parties, and that the appellant had estopped himself to demand specific performance of that contract by the appellee.

[1] We think that the evidence adduced required the conclusion that the contract sought to be specifically enforced was abandoned or canceled by the parties. The appellant's conduct and expressions during

the period of several years between the abandonment by the Land Company of the drainage project, to which its contract with appellant made the latter a party, liable to contribute his share of the expense involved, and the resumption of work on that project by a successor financially able to carry it to completion, was inconsistent with the continued existence of the contract in question, or of an intention on the part of the appellant to comply with his obligations under the contract or to exact performance by the Land Company. That the appellant understood that that contract had ceased to be in effect long prior to the filing of the bill, and that the sale to Welsh embraced the land which was the subject of that contract, was plainly disclosed by the documentary proof of appellant's agreement to buy that land from Welsh, the Land Company's vendee. That transaction, showing, as it did, that he understood that he had to deal with Welsh to get the land for which he had formerly contracted with the Land Company, was inconsistent with the claim asserted by the bill in this case. The evidence as a whole convincingly shows that the appellant consented to and approved the sale by the Land Company of all the land, including that which was the subject of the contract in question. The contract was capable of being abandoned or rescinded by an express or implied agreement between the parties to that effect. Lasher v. Loeffler, 190 Ill. 150, 60 N. E. 85; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122; 6 R. C. L. 914, 922, 923. Of course a contract which has ceased to exist is not subject to be specifically enforced.

[2] Even if denial of the relief sought was not justifiable on the above-considered ground, that action is justifiable on the ground of estoppel. The evidence showed that in adopting and carrying out the plan or policy of selling the land as a whole, including that which was the subject of the contract with the appellant, the Land Company was apprised of and relied on the clearly manifested consent of the appellant that that course be pursued. When the Land Company offered all the land for sale, when its agent gave the option, and when the sale was made to Welsh in pursuance of his exercise of his option, the Land Company acted in reliance in good faith on expressions and conduct of the appellant manifesting his consent and desire that the land he had contracted for be included in what was so dealt with by the Land Company. Thereby the Land Company was influenced to change its position and to incur obligations as seller to a third party, which were inconsistent with those imposed upon it by its contract with the appellant. By consenting to the Land Company's sale of all the land as a whole the appellant estopped himself to demand the specific enforcement of the Land Company's contract to sell him part of that land. His acquiescence during the considerable period of time when the Land Company was undertaking to bring about such a sale, and his silence when he knew that that plan was being carried out, in reliance on his consent to that being done, had the effect of depriving him of the right to exact specific performance of the contract in question. Preston v. Preston, 95 U. S. 200, 24 L. Ed. 494; Kirk v. Hamilton, 102 U. S. 68, 26 L. Ed. 79; Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554.

There is no suggestion that anything has occurred to keep the appellant from enjoying his share as a stockholder in the benefit of the sale to Welsh, or from being restored to the position he occupied before he made the contract with the Land Company.

The decree appealed from is affirmed.

DRUMMER v. ST. CHARLES LAND CO.

BASH et al. v. SAME.

(Circuit Court of Appeals, Fifth Circuit. March 8, 1921.)

Nos. 3493, 3494.

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

Suits in equity by Gustus Drummer and by C. Millicent Bash and Ethel Bash Field, as administrators, against the St. Charles Land Company. Decrees for defendant, and complainants appeal. Affirmed.

Henry P. Dart, Jr., of New Orleans, La. (Dart, Kernan & Dart, of New Orleans, La., and R. L. Russell, of Princeton, Ill., on the brief), for appellants.

Charles Carroll, of New Orleans, La. (Edward C. Craig, of Mattoon, Ill., Joseph W. Carroll, of New Orleans, La., and Donald B. Craig and Fred H. Kelly, both of Mattoon, Ill., on the brief), for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. There is no material difference between the facts of these two cases and those of the case of Eddy v. St. Charles Land Co., 271 Fed. 254. Following the decision rendered in the cited case, the decree in each of the above-entitled cases is affirmed.

In re GREENBERG.

Petition of JOHN HANCOCK MUT. LIFE INS. CO.

(Circuit Court of Appeals, Second Circuit. January 14, 1921.)

No. 112.

1. **Insurance ⇐586—Beneficiary of life policy subject to displacement has no vested interest.**

   The beneficiary of a life insurance policy, who may at any time be displaced as beneficiary by the insured against his will, cannot have a vested interest.

2. **Bankruptcy ⇐143(12)—Trustee may enforce payment of surrender value of life policy.**

   Where a bankrupt's trustee has become owner, as an asset of the estate, of a policy of insurance on the bankrupt's life, having a surrender value, payable to bankrupt's wife as beneficiary, but containing a provision that the insured could change the beneficiary "from time to time with the consent of the company by written notice to said company," provided, however, that "no other than the insured's estate, father, mother, husband, wife or dependent child will be made beneficiary under this policy," the company has no interest which can justify its refusal to pay the surrender value to the trustee.

Ward, Circuit Judge, dissenting.

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

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the Matter of Joseph Greenberg, bankrupt. Petition by the John Hancock Mutual Life Insurance Company to revise an order of the District Court. Affirmed.

Greenberg became bankrupt while in possession of a policy of life insurance in the Hancock Company. The policy had been obtained some years before petition filed, by the bankrupt himself, and therein his wife was designated as beneficiary. The lower court has found as a fact that Mrs. Greenberg never did "at any time take out, own, or pay for the policy" above named.

By the policy terms the insured bankrupt could "change the beneficiary from time to time with the consent of the company by written notice to said company," provided, however, that "no other than the insured's estate, father, mother, husband, wife or dependent child will be made beneficiary under this policy."

This proceeding began by the trustee (having the policy in possession) demanding that the insurance company pay him the surrender value of the same. From this we assume that previous demand had been made upon the bankrupt, pursuant to section 70 of the act (Comp. St. § 9654), that he pay the trustee such surrender value, that he had declined so to do, and that the policy had therefore, pursuant to the statute, passed to the trustee as assets. No other assumption is consistent with the form of this proceeding, which is an application to compel the insurance company to pay over said surrender value pursuant to the trustee's requirement.

The insurance company appeared, has never objected to the jurisdiction, and contended, and still contends, that the policy is vested in the wife, or (if no such vesting has actually taken place) that it, as insurer, may refuse to give its consent to any change of beneficiary and thereby defeat the trustee's claim.

The District Court, having made the finding of fact above set forth, held that the insurance company's action was unwarranted and "arbitrary." It therefore entered an order requiring the payment of the admitted surrender value. To review such order this petition was filed.

Frederick C. Tanner, of New York City (Morris E. Kinnan, of New York City, on the brief), for petitioner.

Bernard Bernbaum, of New York City, for trustee in bankruptcy.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The beneficiary of a life insurance policy, who may at any time be removed from the benefited position by the insured and against the beneficiary's will, cannot have a vested interest. In Grems v. Traver, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, affirmed 164 App. Div. 968, 149 N. Y. Supp. 1085, there was one policy considered much like the one at bar; but the court held as a fact that such policy "was taken out for the especial benefit of the wife under agreement that it should be held for her protection." No such agreement is here shown, and it may be noted that the cases from United States courts cited and relied on in the Grems Case are from lower courts, and for the most part wholly inconsistent with the subsequent decision in Cohen v. Samuels, 245 U. S. 53, 38 Sup. Ct. 36, 62 L. Ed. 143.

This being a petition to revise, we can inquire only into the law; the facts (unless without any evidence to support them) we must take as found by the lower court. That court having declared that the

bankrupt's wife never took out, owned, or paid for the policy, there is no ground for asserting that the wife was within the protection of section 52 of the Domestic Relations Law (Consol. Laws, c. 14) of this state. By "owned" we take it that the District Judge meant that the policy had not vested in the wife, which is the meaning in which we used the word in Re Samuels, 254 Fed. 776, 166 C. C. A. 221.

[2] This case presents but one point, for, strictly speaking, the wife is not before us at all; she is not making any claim to the policy or the proceeds thereof; she is not a party to this proceeding, which is against the insurance company alone, and at bar that company substantially takes the position that it can, by refusing consent to a change of beneficiary, secure to the wife the enjoyment of that to which she makes no demand. This raises the question as to the scope of the phrase which gave to the insured the right of changing his beneficiary "from time to time with the consent of the company by written notice to said company."

It is doubtless true that where a specific and formal manner of changing beneficiary, issuing new certificate or policy of insurance, or of assigning the policy itself, is agreed to and plainly expressed when the policy is obtained, no other method of effecting such change or assignment can ordinarily be recognized, at least as between conflicting claimants. The matter is amply discussed in Freund v. Freund, 218 Ill. 189, 75 N. E. 925, 109 Am. St. Rep. 283; and see a long list of citations in L. R. A. 1915A, 109.

But the contest here is not between the original beneficiary and another person selected for succession by the insured. By force of the bankruptcy statute the trustee has succeeded by operation of law to all the rights of the bankrupt in the premises. For practical purposes this contest is between the insured bankrupt and his insurer, and the question would be the same if Greenberg had attempted to substitute for his wife another beneficiary (within the class limited in the policy) and the company refused consent to the change. Under such circumstances it is to be remembered that this exact provision for the consent of the company to the change is solely for its own protection. John Hancock, etc., Co. v. White, 20 R. I. 457, 40 Atl. 5. And so the question becomes this: Can the insurer coerce the will of the insured in respect of change of beneficiary, although its own rights are not in any way endangered?

No similar proceeding on the part of an insurer can, we think, be discovered in the books; but on principle the matter is covered by the decision of Justice Brown, then District Judge, in Supreme, etc., v. Cappella (C. C.) 41 Fed. 1, and Lahey v. Lahey, 174 N. Y. 146, 66 N. E. 670, 61 L. R. A. 791, 95 Am. St. Rep. 554, to the effect that where the insured is physically unable to comply with the formalities, or where the insurer itself is so physically unable, equity will deem that to be done which ought to have been done and proceed accordingly. In the present instance there is no physical inability; there is a flat refusal to perform on the part of the insurer, for reasons having no relation to its own security, or indeed to its own business. It is avowed at bar that the company prefers to pay the bankrupt's wife

the whole of the policy rather than pay the trustee the surrender value thereof.

Bankruptcy is equity, and just as it will presume on occasion that that has been done which ought to be done, so on other occasions it will compel that to be done which ought to be done. This is one of those occasions.

The order under review is affirmed, with costs.

WARD, Circuit Judge (dissenting). The question in this case is whether the beneficiary of the policy can be changed without the Insurance Company's consent. This is a question of law which we can dispose of upon petition to revise. Of the cases cited by the court, Grems v. Traver, 87 Misc. Rep. 644, 148 N. Y. Supp. 200, involved a policy under which the insured had the right to change the beneficiary at any time, and in John Hancock Insurance Co. v. White, 20 R. I. 457, 40 Atl. 5, the court held that the company was estopped from refusing to consent to the change.

I cannot see how any court can delete this provision of a contract or say that it will be disregarded because "arbitrary." If the bankrupt were to ask the Insurance Company to consent to substitute his trustee in bankruptcy in place of his wife as beneficiary, it would be the plain duty of the company to refuse, and the refusal for the protection of the wife could not be regarded as arbitrary. On the contrary, consent would defeat the purpose of the policy, which was to protect the wife. Yet the order of the court below accomplishes this very thing.

The case of Cohen v. Samuels, 245 U. S. 53, 38 Sup. Ct. 36, 62 L. Ed. 143, does not control. The ratio decedendi proceeded upon facts not found in this case at all. In it the insured had an absolute right to change the beneficiary and this right the court held under section 70 (a) subd. (3) of the Bankruptcy Act (Comp. St. § 9654) was vested in the trustee as one of the "powers which he [the bankrupt] might have exercised for his own benefit. * * *" And also under subdivision (5) as "property which prior to the filing of the petition he could have transferred. * * *" The bankrupt in this case could have done neither of these things and his trustee stands in no better position.

I think the order should be reversed.

LAURIA v. UNITED STATES.

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

No. 133.

1. Aliens ⇐54—No time limit in deportation of alien convicted of crime before entry.

The provision of Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), limiting to five years the time within which an alien, who at the time of entry was a member of a class excluded by law, may be arrested for deportation, *held* not to apply to an alien who was convicted, or who admits the commission prior to entry, of a crime involving moral turpitude.

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

2. Aliens ⇐40—Act of 1917 authorizes deportation of aliens entering before its passage.

The provisions of Immigration Act Feb. 5, 1917, § 19 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj), relating to deporting of aliens, *held* retrospective with respect to aliens convicted, or who admit the commission prior to entry, of a crime involving moral turpitude, and to authorize the deportation of such an alien who entered before its passage.

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

Habeas corpus by Salvatore Lauria against the United States. Writ dismissed, and petitioner appeals. Affirmed.

Merwin & Kinkel (M. Edwin Merwin, of New York City, of counsel), for appellant.

Stephen T. Lockwood, U. S. Atty., and Edward N. Mills, Asst. U. S. Atty., both of Buffalo, N. Y.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellant arrived in the United States on the 8th of May, 1910. After a hearing before an immigration inspector on the 30th of May, 1912, he was deported for the reason that it was proved that he was convicted of a crime involving moral turpitude, namely, highway robbery, and sentenced to six years' imprisonment in the city of Girgenti, Italy, on the 13th of February, 1895. His final warrant of deportation was dated the 17th of June, 1912. Thereafter, and on the 27th of December, 1914, he entered the United States at Niagara Falls, coming from the Dominion of Canada. He falsely stated to the immigration officials that he was a resident of the United States and thus gained his admittance, and lived in the United States until his apprehension by the immigration inspectors in Buffalo, N. Y. He was taken into custody on a warrant of arrest dated December 10, 1919, signed by the Acting Secretary of Labor. As a result of his hearing before representatives of the Department of Labor, a final warrant of deportation was issued on May 5, 1920. The reason assigned therefor was that upon his own admission he was guilty of a crime involving moral turpitude before his entry into this country. He sued out a writ of habeas corpus in the court below. The District Judge dismissed the writ.

[1] It is the contention of the appellant that the time limit in the statute for his deportation had expired—that is, more than five years had elapsed since he last came into the United States—and that by virtue of section 19 of the act of 1917 there was no power to deport him. Under section 19 of the Act of February 5, 1917 (39 Stat. 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼jj]), appellant is within one of the classes who are excluded from entering this country. It is provided by section 3 (section 4289¼b), under the heading "What Aliens Deported," that "any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude" shall be taken into custody and deported. The same act (section 19) further provides:

"That at any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported." Comp. St. § 4289¼jj.

It will be observed that section 3 is a provision intended to exclude certain classes of undesirable aliens. Section 19, in the first three lines, provides in general terms for exclusion within five years, of any alien who, at the time of entry, was a member of one or more of the classes excluded by law. But the act then proceeds to state specifically what aliens are to be deported. From the general provision of the first three lines, the act specifically enumerated classes to be excluded, but provides amplification of the general provisions of the first three lines and reads:

"Any alien who at any time after entry shall be found advocating or teaching the unlawful destruction of property * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

"Or who is hereafter sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry. * * *"

"Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States. * * *"

"Any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported."

Effect must be given to each provision of the act. The five-year limitation contained in section 19 is not exclusive, and the five-year limitation must give way to the particular provision of the act which extends the time during which deportation may be made by reason of the latter provision of the statute just referred to. Since it is provided by section 3 that certain classes, "idiots, imbeciles, feeble-minded persons, epileptics, insane persons, * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude," shall be excluded from the United States, it is apparent that Congress intended, when it legislated as to this, in section 19 of the act, to extend the time for deportation to the specific cases mentioned beyond the five-year period. It is only by this construction of the statute, that due regard can be given to each provision of section 19. To so construe the act as to require the apprehension and taking into custody and deporting the emigrant prior to the five-year limitation, would be to disregard some of the provisions of section 19 and would lead to conclusions which would be dangerous to the public. We think Congress intended to pronounce classes of aliens who are undesirable and, by general provision of law, exclude all within five years, but provided specifically that certain classes, including the class to which the appellant belongs, might be taken into custody and deported at any time. Congress has the power to order the deportation of aliens who are undesirable in the United States. Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978.

We do not think the result here announced is in conflict with In-

ternational Mercantile Marine Co. v. United States, 192 Fed. 887, 113 C. C. A. 365, which is relied upon by the appellant. There this court considered the Act of February 20, 1907, § 20, 34 Stat. 898. It provided that any alien entering the United States in violation of law shall be taken into custody and deported at any time within three years after the date of his entry from the port of entry, at the expense of the owner or owners of the vessel or transportation line by which he came into the country, and section 21 declared that in case the Secretary of Labor shall be satisfied that an alien has been found in the United States in violation of law, or that an alien is subject to deportation, he should cause such alien, within three years after landing or entry, to be taken into custody and returned to the country from whence he came. It was held by this court that where an alien unlawfully in the country was arrested before the expiration of three years from the date of his entry, but was not offered to the steamship company for deportation until after the three years had expired, but within a reasonable time after his arrest, the steamship company was not bound, to deport him at its own expense.

In the cases of United States v. Oceanic S. N. Co., 211 Fed. 967, 128 C. C. A. 465, and Botis v. Davies (D. C.) 173 Fed. 996, the court did not have under consideration the Alien Immigration Act of February 5, 1917, and such cases are not helpful to the question here presented.

[2] The appellant contends, however, that he is entitled to have his case adjudicated and his right to remain here determined by the Alien Immigration Act in effect at the time of his entry into the country in December, 1914. At that time, the statute provided that apprehension and deportation must be made within three years.

Section 19 of the Alien Immigration Act provides that the provisions of this section, with the exceptions heretofore noted, shall be applicable irrespective of the time of entry into the United States. The Department of Labor in immigration, prescribing rules on May 1, 1917, provided as follows:

"Subdivision 1. *Classes of Warrant Cases.*—All cases in which aliens may be arrested and deported are either stated in detail or mentioned in section 19. They fall into the following divisions. With respect to each of these divisions the law is retrospective or not and the time within which deportation proceedings may be instituted is limited or not, as indicated below."

(S)—"Any alien who was convicted or who admits the commission prior to entry of a felony or other crime or misdemeanor involving moral turpitude; no limitation; retrospective."

We find this rule to be warranted by the statute. We think that the intention of Congress was plain to make an alien of the class to which the appellant belongs, subject to apprehension and deportation whenever found, even though his entry into the country was prior to the effective date of the Alien Immigration Act of 1917.

Judgment affirmed.

THE ST. PAUL.

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

No. 115.

1. **Admiralty ⇐103—Final order disallowing claim against fund appealable; "disbursement."**
The return by a marshal as a "disbursement," in his bill of costs arising out of the seizure and sale of a steamship, of a claim for wharfage, which he neither contracted nor paid, was improper, and such item was properly treated as an unadjudicated claim against the proceeds of the vessel, and a final order disallowing such claim in part is appealable.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Disburse—Disbursements.]

2. **Admiralty ⇐53—Allowance of wharfage against vessel in custody.**
A company authorized by the court to discharge the cargo of a steamship in custody of the marshal took her to its pier, where it held her for some three months after she was discharged, pending an appeal by it from an order refusing to confirm a sale at which it was the purchaser. *Held*, that it was entitled to wharfage during such time not at usual commercial rates, but in such reasonable sum as it would have cost to keep the vessel at a less expensive berth.

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

Suit in admiralty by J. Aron & Co., Incorporated, against the Steamship St. Paul. The Hudson Navigation Company appeals from an order allowing wharfage. Affirmed.

See, also, 262 Fed. 1021.

The St. Paul, while laden with cargo, was seized at the instance of numerous libelants (beginning in April, 1919), whose claims were ultimately consolidated into a cause entitled as above. Under process in that case the United States marshal had custody of the vessel on June 11, 1919. The ship, however, was in wretched condition; for on or before May 27th she had caught fire, and salvors, to extinguish the flames, had been obliged to sink her as she lay anchored, and thereafter raise her with cargo already injured and liable to further depreciation.

These facts appearing, the District Court, on June 11th, ordered that the marshal be "authorized to permit the Hudson Navigation Company to move the said steamship from her present anchorage to Pier 32, N. R., and to make an arrangement with the said Hudson Navigation Company for the discharge of [the cargo at said pier]; the amount of the cost of discharging, storing, and caring for the cargo to be subject to the approval of the court; the said Hudson Navigation Company to look to the said cargo for the payment of the cost of said discharging." Accordingly the Hudson Company took charge of the ship, in the sense of directing where she should lie, and removed cargo until July 17, when discharge was complete; but the pier alongside contained cargo for a long time afterwards.

The cargo being out, an order was entered on August 5th permitting "the various owners of cargo" to "withdraw their cargo from the custody of the marshal" on terms which would produce a fund wherewith to pay Hudson Company for unloading and caring for the goods. By the same order, it was referred to a commissioner to ascertain what should be paid to Hudson Company for its labors and expenses in unloading and delivering cargo.

While unloading was in progress, and on July 8th, the marshal (by virtue of process in this suit) sold the steamship; Hudson Navigation Company was the successful bidder, but the court refused confirmation, and directed a resale on August 7th. From the order refusing confirmation Hudson Company appealed to this court, and obtained a stay in respect of such resale pending determination of the appeal. Appellant took nothing by its appeal, and resale was had November 24th.

Meanwhile the reference proceeded to ascertain what the Hudson Company should be paid for unloading and delivering cargo under the order of June 11th. That company claimed that cargo should pay all wharfage, not only down to time the ship was empty (July 17), but thereafter until October 8th (when the ship was removed to another berth), apparently because the pier was more or less occupied by cargo, down to and perhaps after the date of such removal. The commissioner however held that, with unloading completed on July 17, "the berthing of the ship ceased to be a charge against the cargo in whole or in part"; but he allowed against cargo a charge for use of pier, diminishing as the space occupied diminished. In result, out of a charge of $26,500 by Hudson Company for wharfage and storage, the commissioner disallowed $10,962.50, as representing wharfage charges against the St. Paul after she was empty, and the commissioner's report was confirmed on December 15th by an order not complained of.

Thereupon Hudson Company submitted to the United States marshal a bill (as appears by reference to the original exhibit) against "S. S. St. Paul and owners" for $10,962.50 wharfage at Pier 32, N. R., from July 17 to October 8, 1919, and this amount the marshal inserted in his "bill of costs" against the fund of $100,305 produced by the resale of the St. Paul. It is therein called a "disbursement," which it is not, in the proper sense of having been either paid out by the marshal or contracted for by him. The proceeding is really a method of advancing a claim against a fund in court.

The marshal's bill was taxed by the lower court on January 22, 1920, and the wharfage claim allowed from July 17 to August 7, or in the sum of $2,625, but all wharfage after the latter date was refused. Thereupon the Hudson Company appealed from such disallowance of wharfage, and of certain other items concerning which we think no further mention is necessary.

Barber, Watson & Gibboney, of New York City (Stuart G. Gibboney and Joseph Diehl Fackenthal, both of New York City, of counsel), for appellant.

Harrington, Bigham & Englar, of New York City (T. Catesby Jones, of New York City, of counsel), for appellees.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The question of law presented by this record is whether we have any right to hear the appeal. It has been often held that mere questions of costs are not appealable (The Ada, 255 Fed. 52, 166 C. C. A. 378, citing cases), and, since it is out of a taxation of the marshal's "bill of costs" that this appeal grows, we are asked to dismiss it.

But it is a mistake to suppose that in the proper sense of that word the marshal has, or can have, any costs at all. That official is entitled under the statute to certain fees and to his reasonable expenses in caring for property under seizure. But he is no party to the suit, he has no opponent, and cannot collect costs; he does get fees, as does the clerk of court, and expenses beside. The habit is firmly fixed of calling the fees of both clerk and marshal their "costs," but the word is misleading.

But this wharfage item is not even a "disbursement," for the marshal never authorized berthing the St. Paul at Pier 32, and never promised to pay for such berth—indeed, this is admitted. What he has done is this: He has presented in his bill the demand of Hudson Company to be paid for services rendered the ship—a kind of service which might have been enforced by libel in rem or by petition against the proceeds of the res.

The method here pursued is without precedent, and not to be approved as such; but we feel justified in treating the claim as it was below, viz. as a demand for preferential payment, or as an asserted superior lien on the proceeds of the steamship. Consequently a final order refusing (in part) such payment out of, or lien upon, a fund in the registry is the subject of appeal. Trustees v. Greenough, 105 U. S. 527, 26 L. Ed. 1157.

[2] The reason moving the District Court to refuse all wharfage after August 7th we may accept, from the concessions of counsel rather than the record, to be the fact that on that date a resale would have occurred had not this appellant procured a stay. But such stay did not mean that the steamship was ordered to remain at Pier 32—one of the most expensive places in this harbor. It was just as possible and just as necessary, after the stay as before, to exercise economy and common sense in caring for the St. Paul, and to keep her at Pier 32 was neither good sense nor economy.

But it was Hudson Company that took the ship to Pier 32, and that company also kept her there after she was emptied. Why this was done the record does not tell, further than to prove that the damaged cargo was removed so slowly that certainly until long after August 7, and perhaps as late as October 8, the pier was still so incumbered with cargo, that where the St. Paul lay was an undesirable berth. The inference is that whatever could be gotten for wharfage was so much clear gain. This condition of affairs lasted 82 days, during which Hudson Company pressed on the steamship (so to speak) a berth at Pier 32.

We cannot approve the reason advanced for refusing wharfage after August 7th, but are of opinion that the duty of Hudson Company, the moment cargo was unladen, was to order the boat to an inexpensive place; and if it was preferred to keep her at Pier 32, the charge must be reasonable for the St. Paul, not for Pier 32 under ordinary conditions. In fact the order appealed from awarded $2,625 for the first 21 days of the 82-day period. We think the award should have been a reasonable charge for 82 days, and some evidence of what a reasonable charge was is shown by what it cost to berth the St. Paul from October 8th to November 24th, when she was at last sold. Applying this measure, Hudson Company has by the award of $2,625 been, if anything, overpaid.

The order is affirmed, on the ground that the award made was sufficient, although of the reason given therefor we disapprove. There will be no costs.

McADOO, Director General of Railroads, v. ANZELLOTTI.

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

No. 71.

1. **Master and servant ⟸217(11)—Risk of known danger assumed.**
Where a defect is known to the employee, or is plainly observable by him, he cannot continue to work in the unsafe place or use the defective appliance, in the face of his knowledge and without objection, without assuming the risk.

2. **Master and servant ⟸203(1)—Assumption of risk and contributory negligence distinct defenses.**
Assumption of risk and contributory negligence are different and distinct defenses, and where the evidence of assumption of risk at least raises a question of fact for the jury error in refusing to submit it to the jury is not cured by submitting the question of contributory negligence.

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

Action at law by Pasquale Anzellotti against William G. McAdoo, Director General of Railroads. Judgment for plaintiff, and defendant brings error. Reversed.

For opinion below, see 262 Fed. 568.

Writ of error to judgment on verdict, entered in the District Court for the Southern District of New York, in an action for personal injuries, brought under federal Employers' Liability Act (U. S. Comp. St. §§ 8657–8665). When injured, Anzellotti was a freight handler for the Lehigh Valley Railroad, and had been so for some six or seven months. His work was to load bags of flour on a hand truck, in a freight car, on a float moored to a pier. From the door of the car a gangplank led to the pier, and Anzellotti and other workmen let their loaded trucks run down the inclined plank; they holding the handles with the load behind them.

There was much freight already on the pier, so piled (to a height not clearly shown) as to leave a gangway for horsedrawn trucks or wagons in the center of the pier, and narrower passages from the unloading gangplanks to this central road. Anzellotti starting his hand truck down the gangplank, passed (on the run) through the narrow passage between piles of freight into the central gangway, turned into the same, and there ran into the wheels of a horse-drawn wagon, capsizing his own truck and receiving injuries for which this action was brought.

While alleging generally a failure on the employer's part to furnish him with a safe place to work, the specific negligence relied on was failure to provide any system of warning, in respect of approaching horse trucks, to men who (like Anzellotti) had to run down the gangplank, with loads so heavy that the hand trucks could not be stopped on the inclined plank; the piles of freight on the pier being so high that the approach of vehicles in the central gangway could not be seen until the laborer reached the intersection of central and transverse passage ways. It was admitted by plaintiff below that this condition had existed (whenever there was much freight on the pier) as long as he had worked for defendant, that he was familiar with the danger, that the central gangway was at times much frequented by vehicles, and he knew that he would have no means of ascertaining the proximity of a vehicle other than his own observation.

These facts appearing in the plaintiff's case, defendant at the close thereof moved to dismiss, or direct a verdict, because (inter alia) plaintiff was familiar with the conditions proved, which had existed for some time, that

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the same were "open and obvious," and "whatever risks there were in the situation" plaintiff assumed.

Over due exception the court refused to even submit to the jury any question of assumption of risk, being of opinion that the evidence above outlined presented no such question, but only one of contributory negligence, assuming that negligence existed on the defendant's part. Defendant rested without offering any testimony. The case was sent to the jury with a charge making no mention of any risk or of its assumption. Plaintiff had a verdict, and defendant brought this writ.

Allan McCulloh, of New York City (Clifton P. Williamson and H. S. Ogden, both of New York City, of counsel), for plaintiff in error.

William H. Wack, of New York City, for defendant in error.

Before WARD, HOUGH and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). To trace the origin of the rule of assumption of risk, to do the same for that of contributory negligence, and compare and reconcile the decisions thereunder may be interesting or impossible (18 R. C. L. pp. 639 et seq., 693 et seq.); but neither for the trial court nor this court is the inquiry profitable, because both courts are bound by decisions of long standing and ruling authority. Risk assumption and contributory negligence are things "quite apart" and separately to be considered. Choctaw, etc., Co. v. McDade, 191 U. S. 64, 68, 24 Sup. Ct. 24, 48 L. Ed. 96; Lauria v. Du Pont, etc., Co., 250 Fed. 353, 356, 162 C. C. A. 423.

The distinction between the two has been stated with acuteness by Sanborn, C. J., in St. Louis Cordage Co. v. Miller, 126 Fed. 495, 502, 61 C. C. A. 477, 63 L. R. A. 551, and is said to be briefly this—that assumption of risk rests in contract and contributory negligence in tort. This decision and distinction is repeated in Chicago, etc., Co. v. Crotty, 141 Fed. 913, 916, 73 C. C. A. 147, 4 L. R. A. (N. S.) 832, in an opinion by Justice Van Devanter when Circuit Judge, and it was followed in another circuit in Chicago, etc., Co. v. Ponn, 191 Fed. 682, 688, 112 C. C. A. 228.

[1] Whether the definition attempted in the St. Louis Cordage Co. Case is the last word or not, the rule that the two things are two things and not identical has never been departed from in the subsequent decisions of the Supreme Court; e. g., Schlemmer v. Buffalo, etc., Ry., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596; Seaboard Air Line v. Horton, 239 U. S. 595, 36 Sup. Ct. 180, 60 L. Ed. 458; Erie Railroad v. Purucker, 244 U. S. 320, 37 Sup. Ct. 629, 61 L. Ed. 1166; Boldt v. Pennsylvania, etc., Co., 245 U. S. 441, 38 Sup. Ct. 139, 62 L. Ed. 385. It must be accepted as fixed law that, while the servant is not obliged to pass judgment upon his master's method of transacting his own business, and may assume that reasonable care will be used in furnishing a safe place to work and the appliances necessary for the work, it is just as true that, where a defect is known to the employee, or is so patent as to be readily observed by him, he cannot continue to work in the unsafe place or use the defective apparatus, in the face of knowledge and without objection, without assuming the hazard incident to such a situation. The test is not in the exercise of care to discover the

danger, but whether the defect or danger was known to or plainly observable by the workman.

This rule has been fully accepted and expressed in this court. General Lighterage Co. v. Hansen, 228 Fed. 497, 143 C. C. A. 79; Delaware, etc., Co. v. Busse, 263 Fed. 516; Delaware, etc., Co. v. Tomasco, 256 Fed. 14, 167 C. C. A. 286; and the Lauria Case, supra. It is in the first instance for the court to say whether the facts proven do or do not present a case of assumption of risk. That case may be so plain as to require a direction at the hands of the court in favor of the defendant master, or it may present circumstances concerning which fair-minded and intelligent men may differ, in which event there is a question for the jury; but it cannot be identified with contributory negligence and so disposed of, as was here done.

[2] Since this writ was taken, the Supreme Court has twice emphasized the importance and independence of the defense of assumption of risk under the federal Employers' Liability Act. Southern Pacific Co. v. Berkshire, 254 U. S. 415, 41 Sup. Ct. 162, 65 L. Ed. —— (Jan. 3, 1921); Pryor v. Williams, 254 U. S. 43, 41 Sup. Ct. 36, 65 L. Ed. —— (Nov. 8, 1920). The Berkshire Case is an extreme example of imputed knowledge on the part of the workman. The risk held to be assumed was one of many "mail cranes" standing so near the railway track on which the decedent operated an engine that he was killed, evidently by leaning out of his cab and striking the crane. It was admitted that there was "no evidence whatever" that decedent "actually knew that the crane arm extended close enough to the track to cause the injury." Yet it was held as so clear that decedent must have known of this danger that to "allow the jury to find a verdict for the plaintiff was to allow them to substitute sympathy for evidence and to impose a standard of conduct that had no warrant in the common law."

While we think that the danger in this case was patent, it is proven that it was known, and long had been known, to plaintiff below. That it was a danger did not require the teaching of the event; therefore it was a present risk, and therefore it was assumed.

While on this record we are of opinion that a verdict should have been directed for the defendant, our holding goes no further than that the refusal of the court to act in any way upon the requests of the defendant was error, and requires a new trial, which is granted, with costs to the plaintiff in error.

BURTON v. GREIG.

THE VILDFUGL.

(Circuit Court of Appeals, Fifth Circuit. January 28, 1921.)
No. 3571.

1. Seamen ⇐29(5)—**Evidence held not to show owner's negligence in care of steam pipe which burst.**
On libel to recover damages for the death of a seaman caused by a bursting pipe, evidence that the pipes had been thoroughly tested a year before, and the vessel inspected a month before, and that after the explosion no flaw could be detected in the pipe, with expert testimony that sound pipes might be broken by suddenly turning steam into a pipe containing water, *held* not to show that the shipowner was chargeable with any negligence with reference to the pipe.

2. Seamen ⇐29(2)—**Owner does not insure safety of seamen.**
The American rule allowing indemnity for the death of a seaman resulting from unseaworthiness of the vessel does not make the owner of the vessel an insurer of all the appliances on the vessel, so that there can be no recovery for the death of a seaman caused by a bursting steam pipe, where there was no evidence to establish negligence of the vessel owner with reference to that pipe.

Appeal from the District Court of the United States for the Southern District of Alabama; Robert T. Erwin, Judge.

Libel in admiralty by Hilda Burton, widow of Abraham William Burton, individually and on behalf of her minor children, against Joachim Greig, as owner of the steamship Vildfugl. From a decree dismissing the libel (265 Fed. 418), libelant appeals. Affirmed.

Rene A. Viosca, of New Orleans, La. (M. C. Scharff, of New Orleans, La., on the brief), for appellant.

Esmond Phelps, of New Orleans, La., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a libel in admiralty by the appellant, the widow of Abraham William Burton, suing in her own behalf and in behalf of her minor children, against the appellee, owner of the steamship Vildfugl, to recover damages resulting from the death of the deceased on September 18, 1919, while employed as a fireman on said vessel, caused by the blowing out of a steam pipe connected with the engine boiler, while the vessel was in the Mississippi river at the port of New Orleans.

[1] The evidence was not such as to call for a finding that the shipowner was chargeable with any negligence with reference to the pipe which burst. Evidence showed that such a general survey and overhauling of the vessel as is customarily made every four years was made in August, 1918, by Lloyds' surveyors at New Orleans, and that at that time very expensive repairs were made on the vessel, and the steam pipes from the boilers to the engine were then annealed and tested by hydraulic pressure to double the working pressure, and were then found to be tight and sound in every respect. Lloyds'

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surveyors again examined the vessel in August, 1919, giving her at that time, as stated by one of the surveyors, "a general look-over." No defect in the steam pipes was then noticeable, and questions then put to the vessel's engineer as to how its machinery and boilers were working elicited nothing which suggested the existence of a defect in the steam pipes. Expert evidence was adduced, which tended to prove that such a pipe as the one in question may be weakened or fractured by what is known as "water hammer," which is the force or blow to which a pipe containing water is subjected by a rush of steam pushing the solid mass of water, and that the strength of a pipe may be impaired as a result of frequently repeated water hammering, or it may be burst by one operation of that force, if the valve is opened suddenly and steam is let into a pipe in which water has accumulated. Unless steam is let in suddenly, a sound pipe, frequently subjected to water hammer, could reasonably be expected to withstand that force several years before breaking or becoming unsafe.

No one except the deceased was present when the casualty which caused his death occurred. It was not disclosed to what extent or how that pipe had been subjected to water hammer. It was exhibited to the trial court. The following was said in the opinion rendered by the presiding judge:

"Even after the pipe blew out, an examination of it has failed to show any defect in the pipe, much less one which could have been discovered by the most careful examination."

While the evidence did not furnish any satisfactory basis for a conclusion as to what was responsible for the bursting of the pipe, it was consistent with the theory that, shortly before it burst, it was subjected to undue strain by the negligence of some one in the use made of the appliance. The condition in which the pipe was found to be after it burst indicated that it had remained sound until it was fractured by the application of a force, other than the working pressure of steam, which a sound pipe could not withstand.

[2] It seems that under the evidence adduced the shipowner could not be held liable for the consequences of the bursting of the pipe, unless it had so far warranted that appliance as to be responsible to an employee injured by the bursting of it, though that would not have happened, but for the negligence of the injured person or a coemployee. We are not of opinion that the shipowner is to be held to have insured the adequacy or safety of that appliance. In The Osceola, 189 U. S. 158, 23 Sup. Ct. 483, 47 L. Ed. 760, it was decided that a vessel was not responsible for injuries happening to one of its crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel. The opinion in that case contains a review of the authorities on the subject of the liability of a vessel or its owner for personal injuries received by a seaman while in the performance of his duty. The following is a quotation from that opinion:

"Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

"* * * That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. Scarff v. Metcalf, 107 N. Y. 211.

"That all the members of the crew, except perhaps the master, are, as between themselves fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.

"That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

"It will be observed in these cases that a departure has been made from the continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876, above quoted, Couch v. Steel, 3 El. & Bl. 402; Hedley v. Pinkney, etc., Co., 7 Asp. M. L. C. 135, [1894] App. Cas. 222; and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own."

The concluding paragraph of the above quotation indicates that it was the view of the court that the enactment of the English statute mentioned had the effect of making the English and the American law alike in the matter of allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness, or a failure to supply and keep in order proper appliances appurtenant to the ship. The statute makes it plain that under the English law such indemnity is not allowed when all reasonable means have been used to insure the seaworthiness and safety of the ship. We understand that under the American law the shipowner is not an insurer of such an appliance as the pipe in question, and is not liable for the consequences of the bursting of it, if due care was used in furnishing the appliance and in keeping it in safe condition and repair. As the evidence adduced failed to show that the shipowner, or any one for whose default he would have been responsible, was negligent in either of the respects mentioned, and as it was consistent with the theory that the bursting of the pipe was due to a fellow servant's negligence, the conclusion is that the court did not err in dismissing the libel.

The decree is affirmed.

THE PETROLINE.

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

No. 159.

Seamen ⊂=29(5)—Injury not shown to have been due to unseaworthiness of ship.

Evidence *held* insufficient to show that injury to a seaman by the falling of a hatch cover on his hand was due to unseaworthiness of the ship, in that the stick or block furnished for use to hold up the cover when raised for ventilation was worn and defective.

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

Suit in admiralty by Soicho Sco against the steamship Petroline; the Saxoleine Steamship Company, Limited, claimant. Decree for claimant, and libelant appeals. Affirmed.

Silas B. Axtell and Arthur Lavenburg, both of New York City, for appellant.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. De Grove Potter and Harry D. Thirkield, both of New York City, of counsel), for appellee.

Before ROGERS, HOUGH and MANTON, Circuit Judges.

MANTON, Circuit Judge. In his libel filed, the appellant seeks to recover $5,000 damages for personal injuries. In the first cause of action, he claims indemnity because of the unseaworthiness of the vessel, and asks $2,500; in the second cause of action he seeks $2,500 damages for the failure of the ship to furnish proper medical attention. Upon the trial, the second cause of action was withdrawn in open court.

Recovery is sought against the steamship in rem and against the Saxoleine Steamship Company, Limited, in personam. The steamship company has not appeared. The claimant has filed an appearance in the in rem suit, and a stipulation of value was approved and filed in the sum of $3,000. The answer filed denies the allegations of the libel and the claimant affirmatively defends upon the ground that the injury occurred on a British ship on the high seas, and that the law of Great Britain and Ireland is the controlling law, and that no maritime lien exists, and therefore this suit in rem must fail. The unseaworthiness of the vessel is claimed in the libel because of the fact that a hatch cover was not provided with proper supports or braces. It is claimed that, in opening the hatch cover so as to afford air to the hold below, it was necessary to use a piece of wood or stick which was inadequate, ineffective, and wholly unsuitable for the purpose for which it was being used.

It appears that the libelant is a subject of Japan, and on the 6th of October, 1917, signed shipping articles from the port of New York as an able-bodied seaman on the steamship Petroline for a voyage to the United Kingdom and return to the United States. On the 20th of December, 1917, while on the high seas and on the return voyage to the United States, libelant was assisting in opening hatch No. 5 on the port side of the vessel, when the hatch cover came down on his right hand, crushing several of the fingers of his hand. It is the claim of the libelant that a piece of wood or stick was used to hold up the hatch cover, and that it was worn and defective, and therefore inadequate and unfit for the purpose for which it was being used.

Libelant's story of the accident is as follows:

"Q. Did you see it, or did you not see it? A. I didn't see the wood drop; but I suppose it must drop, because when I lifting off the hand I didn't see the wood dropping.

"Q. Did you see the wood outside on the deck anywhere?

"The Court: This same piece of wood.

"Q. After the accident I mean? A. I didn't see it outside, but I found the wood was inside of the tank.

"Q. Did you see it, pick it up in your hands, and examine it? A. No; I didn't see it.

"Q. At any time? A. I could not wait—

"Q. Either before or after the accident? A. Then I went to bed; I could not see.

"Q. Had you seen this piece of wood before the accident happened? A. When I was ordered by the chief mate to come down to help that lifting up the cover, I kept my attention to lifting up the cover, and I did not pay much attention to the wood, that depending on the chief mate. * * *

"Q. Hadn't you seen these sticks lying on deck, or on the top of the tank, before this? A. I did not know where this particular wood was there; but I saw some other woods on the bridge, under the bridge deck. * * *

"A. The chief mate order us to lift up the cover, so that I didn't pay any particular attention to that particular wood.

"Q. And you didn't see how the accident happened: you said that in your direct examination; is that correct? A. My whole attention was to lifting up the cover, and I was told you before I didn't pay any attention to that wood."

The libelant called another witness, Inouye, a former fireman on the steamship; but he did not see the alleged defective block of wood, although he did say he saw a block of wood on deck. Its application to the function of holding up the lid was not disclosed. Another witness, Miyosihe gave testimony to seeing blocks of wood which were worn. He did not see this block of wood used upon No. 5 hatch for two or three days before the accident to libelant. Another witness, Kitano, while not seeing the occurrence, gave testimony that there was a block in use at the time which was defective. He testified as follows:

"Q. You said one end was broken off; which end do you mean? A. They used any block that was found nearby conveniently.

"Q. They don't use any special block to No. 5 hatch? A. No. * * *

"Q. Did you ever see this block that they used at No. 5 hatch at the time of his injury, again after that time you examined it, an hour after the accident? A. Used it a good many times after that. * * *

"Q. You say you saw this block of wood that was used at No. 5 hatch to hold the hatch cover up, after this man was hurt? A. I saw a good many blocks, but I cannot tell which they used at No. 5."

If there was a block or blocks of wood which were used for holding up the lid of the hold in question, there was no proof showing any connection by use of the blocks of wood with the accident to the libelant. It is not shown that a defective block was used which brought about the happening of the accident. This result follows after a consideration of all the testimony offered on behalf of the libelant. The chief officer of the vessel testified that he was present when the libelant was assisting in lifting the cover of the hatch, and described the occurrence as follows:

"Yes; I was present. We were lifting the tank tops; these other three men and I was putting in the tongs. I lifted three on one side of the deck, passed over to the port side of the deck, lifted one there, then came to the second one on that side, which is the fifth on that deck, placed the tong on the tank top to lift, when the men passed ahead of me; but this man was standing back of me when I called to him to come along. He was touching or taking out the tong, thinking it was not properly fixed as it ought to be; but he had no right to touch it, unless we were there every man, and then take

hold of it and see if it was properly secured. It was not very heavy, but too heavy for any single man or two men to handle. * * *

"Not if he hadn't interfered with the main tong. We had lifted back on that deck four tank tops before we got to this one; when they lifted the tank top, I shifted the tong in, the same as I did the others, and the men let the tank top go down to the tong; then we walked towards the sixth tank top, to lift that, and this man stayed behind. I turned around to tell him to come along; he was looking at the tong and touching it, as if he saw it was not properly in place. As soon as he touched it with his hand it fell upon him. He had no right to go near it when it was put in."

It also appears that, if there was a worn, defective block, there were others available for use, and the master, therefore, did not provide a ship which was unseaworthy. Hanrahan v. Pacific Transport Co. (C. C. A.) 262 Fed. 951.

In view of our conclusion that libelant has failed to prove a cause of action upon which he rested, it becomes unnecessary for us to discuss the question of law presented on the briefs of the appellant and appellee as to whether or not the British law governs, since the ship was a British-owned vessel, and the fact that the occurrence was on the high seas. The subject of rights or liabilities arising from fault and neglect, and the law applicable thereto, together with the rights of members of the crew of a ship, are fully discussed in The Belgenland, 114 U. S. 355, 5 Sup. Ct. 860, 29 L. Ed. 152; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; The Wildenhus, 120 U. S. 1, 7 Sup. Ct. 385, 30 L. Ed. 565; Patterson v. Bark Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002; Sullivan v. Nitrate Producers S. S. Co. (C. C. A.) 262 Fed. 371; The Eagle Point, 142 Fed. 453, 73 C. C. A. 569.

As to the rule in the British courts see Smith v. Brown (1871) L. R. 6 Q. B. 729, and The Vera Cruez, 10 App. Cases, 59.

The court below correctly found the facts against the libelant, and with these conclusions we agree.

Decree affirmed.

LOSQUADRO v. HUDSON CONSUMERS' ICE CO.

(Circuit Court of Appeals, Third Circuit. February 21, 1921.)

No. 2573.

1. **Sales ⇐85(2)—Interruption of deliveries within terms of contract.**
Where a contract by defendant to supply plaintiff with artificial ice provided that it should be relieved from deliveries in case of "any conditions brought on by war impairing or disarranging the working schedule of the plant," plaintiff *held* not entitled to damages because of higher prices paid during the time the plant was shut down owing to war orders.

2. **Sales ⇐182(1)—Termination of contract question for jury.**
Where a contract for the furnishing of artificial ice by defendant to plaintiff for a fixed term at a stated price provided that it should be suspended during any time war conditions should impair or disarrange the working schedule of defendant's plant, whether war conditions which caused the closing down of the plant for a time were such an impairment or disarrangement throughout the term of the contract as relieved defend-

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

ant from further deliveries, or whether the contract was terminated by the receiving of ice by plaintiff at a higher price after operation was resumed, *held* questions for the jury.

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

Action at law by Vito Losquadro against the Hudson Consumers' Ice Company. From the judgment, plaintiff brings error. Reversed.

Lionel P. Kristeller, of Newark, N. J., for plaintiff in error.

Arthur J. Westermayr, of New York City, for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Hudson Consumers' Ice Company, an ice manufacturer of New Jersey, engaged to sell Losquadro, a retail dealer in New York, artificial ice in given quantities at named prices for a prescribed period. The contract relieved the Ice Company from deliveries in the event "that an embargo or shortage of coal occur, or any conditions brought on by war impairing or disarranging the working schedule of the plant," and permitted Losquadro to purchase ice from any other concern "until the resumption of business by the" Ice Company.

Both parties proceeded under the contract until the United States Food Administration, conserving war resources, contracted with the Ice Company with reference to its allotment of ammonia for the year 1918, and until the Ice Comptroller of the State of New York, by order of April 12, 1918, made under authority to regulate the production, marketing and sale of ice within the State of New York, stopped the Ice Company's deliveries in that State.

The effect of this order was to force the Ice Company to shut down its plant. It then arranged with the Knickerbocker Ice Company of New York to supply Losquadro with natural ice in the amount called for by the contract, but at a price fixed by the Ice Comptroller, which was higher than the contract price for artificial ice. Pursuant to this arrangement, Losquadro for a month or more obtained ice from the Knickerbocker Ice Company but made payments to Hudson Consumers' Ice Company.

Upon the withdrawal of the Ice Comptroller's order on June 1, 1918, the Ice Company resumed the manufacture of ice and notified Losquadro that he could get artificial ice at its plant. In response Losquadro inquired the price and on being informed that it would be 45 cents per cake (the contract price being 37½ cents per cake) Losquadro took several loads. Upon receiving a bill at the higher rate at the end of a week he refused payment and the Ice Company declined longer to supply him with ice at the contract price. Whereupon Losquadro brought this suit, seeking damages, first, for the difference between the contract price of ice and the price fixed by the Ice Comptroller and paid by him during the period in which the defendant's works were closed; and second, for loss resulting from the Ice Company's refusal, after resumption of operation, to furnish him ice at the contract price for the remainder of the term of the contract,

which ended October 31, 1918. The court entered what was in effect a judgment of non-suit, except that, after deducting a debit against the plaintiff for ice deliveries from a credit in his favor for money he had deposited with the defendant on entering into the contract, it entered judgment for the plaintiff for the balance. Though the judgment was to this extent in his favor, the plaintiff brought this writ of error.

Regarding the judgment as one of non-suit, it was based evidently on the court's opinion that the contract had been terminated either by the action of the United States Food Administrator or of the Ice Comptroller of New York, or by the plaintiff's acceptance of the defendant's ice deliveries on the resumption of operations at a price higher than that named in the contract. We are constrained to find that the court fell into error in holding, as a matter of law, that the contract was ended for any one of these reasons.

[1, 2] The transaction between the defendant and the United States Food Administration concerned the supply of ammonia. Whether the supply of ammonia thus regulated and whether also a claimed shortage of coal—conditions admittedly brought on by war—were such as did not excuse the defendant, or were such as impaired and disarranged, *throughout the term of the contract*, the working schedule of the plant in a manner and to the extent that relieved the defendant of liability for failure to make deliveries, as provided by the sixth paragraph of the contract, were, we think, questions of fact for the jury. If, on the submission of these issues, the finding of the jury had been in favor of the defendant, obviously the contract would have been ended. If, however, its findings had been against the defendant, then the court should have instructed the jury, contingent on such finding, that, as a matter of law, the contract was not terminated by the action of either governmental agency, but that the order of the Ice Comptroller of the State of New York against deliveries of artificial ice in that State operated merely to suspend the contract and that, accordingly, the withdrawal of the order operated to restore it in full force. It follows in such case that the plaintiff would have no valid claim against the defendant for the difference in price which he was compelled to pay during the suspension of the contract, unless, as he claims, the defendant promised to pay it. If there was evidence of such promise based on a valid consideration, this matter also was for the jury.

We come to the transaction of the parties arising early in June immediately after the defendant's resumption of the manufacture of ice and the restoration of the contract.

We gather that the learned trial judge regarded this transaction—embracing correspondence concerning the renewal of artificial ice deliveries, inquiry as to price, information that it would be higher, followed by deliveries—put an end to the contract by mutual consent. But we feel that under the circumstances he should not have determined this as a matter of law, for it involved several tryable questions, namely, whether, in the confusion of price changes arising out of governmental orders, the plaintiff in making the inquiry had in

mind the price of ice under the contract or the price of ice as fixed by the agencies whose actions had but lately controlled him, that is, whether the plaintiff's subsequent hauling of several loads of ice indicated his acquiescence in the newly quoted price and the meeting of his mind with that of the defendant in the annulment of the contract. Still again there was the question, whether the defendant itself had breached the contract, thus revived after its suspension, by quoting another price and declining further to deliver ice at the contract price. On these issues at least, we think the case should have been submitted to the jury under the very positive instruction however, that the plaintiff had no claim for damages sustained during and in consequence of the suspension of the contract, due admittedly to a "condition brought on by war," which did not, within the terms of the contract, merely impair or disarrange the working schedule of the defendant's plant, but stopped it altogether for a time.

Therefore we direct that the judgment below be reversed, and that a new trial be awarded if an amended complaint, eliminating a claim for damages resulting from the compulsory suspension of the defendant's operation, shows damages in a jurisdictional amount.

In re CHARLES T. STORK & CO.

Appeal of LEIDESDORF et al.

(Circuit Court of Appeals, Second Circuit. February 16, 1921.)

No. 155.

Sales ⟸296—Delivery to agent of buyer terminates right of stoppage in transitu.

Bankrupt, which was engaged in the exportation of merchandise, contracted with petitioner for the purchase of mule shoes, to be delivered f. o. b. New York, packed for export shipment. The goods were shipped, freight paid by petitioner, and were received by a forwarding company under instructions from bankrupt to forward them to order to a company at a port in Virgin Islands, and were in possession of the forwarding company at the time of bankruptcy. *Held*, that such company received them as agent for bankrupt, and that on such receipt delivery was complete, and the right of stoppage in transitu by petitioner terminated.

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

In the matter of Charles T. Stork & Co., Incorporated, bankrupt. On appeal by Samuel D. Leidesdorf and Raymond H. Sarfaty, receivers, from an order of the District Court. Reversed.

For opinion below, see 265 Fed. 864.

Prior to October, 1919, the bankrupt corporation transacted business in New York City (inter alia) by buying for resale abroad many articles of merchandise. In August of that year the bankrupt requested the American Horseshoe Company, of Phillipsburg, N. J., to "quote their lowest export price" on a certain quantity of mule shoes. This the American Company did by naming so

much per keg. "f. o. b. New York City * * * terms 60 days, two per cent.—10," which is taken to mean 2 per cent. off for payment in 10 days, bill as rendered due in 60 days.

On August 21st the bankrupt accepted this offer and instructed the American Company to "mark all cases and packages" with certain marks and numbers, stated that the destination of the shoes was the Virgin Islands, repeated the understanding that the price was "f. o. b. New York City securely packed for export shipment," and requested that, "when goods are ready for shipment, kindly advise [us], sending three copies pro forma invoices, packing lists, if possible, and shipping instructions will be sent." On September 3d the American Company advised the bankrupt that they were ready to ship and awaited instructions.

The Trans-Ocean Forwarding Company was and is a concern of New York City in the business of forwarding goods from the interior and from New York to foreign destinations. It maintained no line of steamers, issued no bills of lading, and merely shipped as directed by its own customers. The bankrupt instructed the Trans-Ocean Company to receive these mule shoes and to ship them to "order,"—i. e., the order of bankrupt; but the "West Indian Sugar Company, St. Croix, Virgin Is.," was named as the person for whom the shoes were intended. A fortnight later the Trans-Ocean Company wrote direct to the American Horseshoe Company, stating that Stork's order had not yet been filled, and on (apparently) the same day the American Company did ship the shoes in question by straight uniform bill of lading and by rail to "Charles T. Stork & Co., Inc., 144 Nassau Street, New York, N. Y." The rail freight was prepaid by the American Company and the goods were marked as per original instructions, but not with the purchaser's name and address, which was evidently to be supplied by the Trans-Ocean Company, and was supplied as above noted. It is certain that the only customer known to the American Company, and the party to whom they sold the mule shoes, was the bankrupt, and fairly inferable that the bankrupt had sold or was expecting to sell the same shoes to the West Indian Sugar Company. The Trans-Ocean Company was the forwarding agent for the bankrupt, the bankrupt controlled the Trans-Ocean Company by stock ownership and furnished to it about 80 per cent. of its business.

The shoes arrived in New York and lay subject to the order of the bankrupt in the warehouse of the Trans-Ocean Company until insolvency supervened and receivers in bankruptcy were appointed for Stork & Co.; this occurred on October 16th, and on October 28th the American Company served a notice of stoppage in transitu upon Trans-Ocean Company and filed a petition in the District Court (which had appointed the receivers), praying for the delivery of the merchandise to it. Such delivery was awarded by the order complained of, and the receivers took this appeal.

Robert P. Levis, of New York City, for appellants.

Gilbert H. Montague and Joseph W. Goodwin, both of New York City, for appellee American Co.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). While the Personal Property Law of New York (Consol. Laws, c. 41) doubtless regulates the rights of parties in respect of stoppage in transit, no special reference to that statute is necessary, because it was thought in argument and seems to us to be but declaratory of settled existing law. The right of stoppage exists only while the goods are in transit; i. e. until they have come into the actual or constructive possession of the buyer or of someone lawfully claiming under him. Conyers v. Ennis, 2 Mason, 236, Fed. Cas. No. 3,149. As pointed out by us in Re New York, etc., Co., 169 Fed. 612, 95 C. C. A. 140, the right con-

tinues only while the goods are in the carrier's custody, though that custody may be of a warehouseman; and the carriage may be continuing, though the carrier be but a local delivery concern. In re Burke [D. C.] 140 Fed. 971.

But if the goods have come into the constructive possession of the buyer by delivery to his agent, the transit is ended and the right of stoppage has expired. Mottram v. Heyer, 5 Denio [N. Y.] 629. Indeed, if the consignee, having power to sell the goods, has disposed of them before arrival to a third person unacquainted with any circumstances to taint the fairness of the transaction, the right of stoppage is ended. Per Livingston, J., Spring v. South Carolina, etc., Co., 8 Wheat. 287, 5 L. Ed. 614. We may note that the decisions largely discussed at bar are all considered in our opinion in Re New York, etc., Co., supra. Of the meaning of the letters "f. o. b." we may take judicial notice, for "their meaning in contracts of this sort is plain and well understood. They import that the purchaser shall be free from all expense which may have attended the shipment and transportation to the point named." Sheffield Furnace Co. v. Hull, etc., Co., 101 Ala. 446, 481, 14 South. 672, 681.

Applying these principles to the uncontradicted evidence herein, we hold that the agreement between the American Company and the bankrupt was that the former was to sell to the latter on 60 days' credit certain merchandise; that the f. o. b. portion of the contract was fulfilled by the American Company's payment of the freight from Phillipsburg to New York, followed by delivery at the latter city. The transit of the goods as between buyer and seller was accomplished when the goods arrived and were delivered in New York. By what machinery a consignment to Stork & Co. came into the possession of the Trans-Ocean Company does not appear, but it could only have been by the act of Stork, and when the Trans-Ocean Company received the goods they received them as the agent of Stork, and not otherwise.

That the bankrupt bought these goods for resale abroad was material upon one point only, for it may be assumed (it is not proven) that the American Company offered the goods at a lower price for export than they would have charged for domestic consumption. But the price was fixed, the agreement was not for a sale and delivery abroad by the American Company, but for a sale to Stork & Co. in New York. It follows that the only transit of the goods material to the present case was that from the seller to the buyer, that buyer became a bankrupt, but that transit had been accomplished at least three weeks before petition filed, at which time the goods were and long had been in the possession, not of a carrier, but of a warehousing agent of Stork & Co.

Therefore no right of stoppage existed, and the order complained of is reversed, with costs.

EPSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 127.

1. **Indictment and information ⟸125(1)—"Duplicity" defined.**
"Duplicity" in an indictment consists in the joinder of two or more distinct offenses in one count.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Duplicity.]

2. **Criminal law ⟸901—Motion for directed verdict waived by introduction of evidence.**
Error in overruling a motion to dismiss or direct a verdict at the close of the government's case is waived by introduction of evidence by defendant.

3. **Perjury ⟸36—Corrupt intent question for jury.**
While it is essential to the offense of perjury that the false statement made must have been with corrupt intent, that question is one solely for the jury.

4. **Perjury ⟸11(2)—False testimony held material.**
False testimony given by the president of a bankrupt corporation on his examination, under Bankruptcy Act, § 21a (Comp. St. § 9605a), that he used certain money of the corporation in payment of creditors, *held* material in a prosecution for perjury.

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

Criminal prosecution by the United States against Samuel Epstein. Judgment of conviction, and defendant brings error. Reversed as to one count, and affirmed as to one count.

Epstein was the president and in control of the affairs of the Locust Building Company, Incorporated, and subsequently of the Beta Building Company, both of which concerns were engaged in obtaining land, building thereon, and disposing of the buildings, if they could, in the borough of Queens. The Locust Company went into bankruptcy, and Epstein as its president was summoned, or appeared, to testify in respect of the "acts, conduct, and property" of the bankrupt before a special commissioner of the District Court for the Eastern District, pursuant to section 21a of the Bankruptcy Act (Comp. St. § 9605a). His testimony before such commissioner resulted in an indictment for perjury (United States Criminal Code, § 125 [Comp. St. § 10295]), wherein he was charged as follows:

In count 1, that he had willfully, etc., deposed before said commissioner that the Locust Company was forced to permit the foreclosure of a certain mortgage on property owned by it, because said Locust Company could not use any of the money received from the raising of certain mortgages, viz. $17,500, because the mortgagee did not pay to Epstein any money, but said mortgagee itself paid certain bills with said money.

In count 2, that he in like manner deposed on a subsequent day of hearing that Locust Company had sold to Beta Company certain property belonging to the former, and that said Beta Company had paid to Locust Company, as part of the consideration for such sale, $10,000 in cash.

No complaint is made of the formal parts of the indictment, which in due form charged the matters required by the statute above rererred to. After a protracted trial the jury returned Epstein guilty as charged, whereupon he took this writ.

Austin & McKown, of New York City (Thomas D. Austin, of New York City, of counsel), for plaintiff in error.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (Charles J. Buchner, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It is earnestly argued that this indictment is duplicitous. The word is misused. Duplicity in an indictment consists in the joinder of two or more distinct offenses in one count (Bishop, New Crim. Proc. vol. 1, § 432); and since the two perjuries here alleged are plainly describable as "two or more acts or transactions connected together," the joinder of counts is explicitly permitted by Revised Statutes, § 1024 (Comp. St. § 1690).

[2] It is with equal vigor said that it was error to deny defendant's motion to dismiss or direct at the close of the government's case. What the trial court did was to "reserve decision" on the motion. Whatever this may have been thought to mean, it was in effect a denial of the motion; but the exception is not available, because the defendant proceeded, adduced evidence, and so went into the whole case.

It is elementary that any defendant or accused who desires to rest upon his motion to dismiss or direct at the close of the plaintiff's case or that of the prosecution must himself rest; otherwise he must renew his motion at the close of all the evidence. The motion was renewed in this instance, but by the time all the evidence was in it is sufficient to say that there was a case for the jury.

[3] By common law, as well as by the words of the statute, perjury is committed (so far as it is here necessary to define it) by stating "any material matter which [the accused] does not believe to be true." It is in like manner fundamental that the false statement be made with a corrupt intent; but this question is one solely for the jury. United States v. Smith, 1 Sawy. 277, Fed. Cas. No. 16341. When the evidence was all in, Epstein had admitted that he made the statement which is the subject-matter of the first count. The verdict establishes that he made it corruptly; but it remained for the prosecution to show that the statement, however made, was material.

"Materiality" is a word to be measured by surrounding circumstances. The object of the examination wherein Epstein committed this falsity was to procure information in respect of the "acts, conduct, and property" of the Locust Building Company, Incorporated, a bankrupt. It was therefore material to know what that company had done, what it had, and what had become of its belongings. We are wholly unable to perceive how or why Epstein's reason for permitting the foreclosure of a mortgage (so far as we know of unquestioned validity) was or could be a "material matter" upon this inquiry. Therefore we are of opinion that the prosecution failed to prove the first count of the indictment.

In like manner the untruthfulness of the statement set forth in the second count in the indictment was admitted after it had been fully proven. Without going into the details of evidence we may admit (as claimed by plaintiff in error) that the evidence amounted to this: That Locust Company agreed to exchange a piece of its realty for certain other lots of land owned by Wagner Bros., but that the latter, instead of conveying as agreed to Locust Company, conveyed to Beta Company; but Beta Company, through Epstein as the president of both Beta and Locust, provided $10,000 for the use of Locust Company, as to which $10,000 Epstein testified, "I paid the creditors with it." Whether he did anything of the kind was the ultimate issue litigated before the jury in this case, and the verdict is against Epstein.

[4] We are of opinion that the statement charged in the second count was most material to the matter to be investigated under Bankruptcy Act, § 21a. The false answer was calculated to delude and injure the creditors of Locust Company, and the explanation or excuse, viz. that in substance and effect the creditors of Locust Company got the $10,000, did not, if true, mend the matter, except as it might show to the jury absence of corrupt intent. If false, the attempted excuse was an aggravation of the original falsity.

As to the second count we think there was enough to go to the jury.

Some exceptions were taken to the charge of the court, but the charge must be considered as a whole, and upon the whole it was more favorable to the plaintiff in error than he had any right to expect, inasmuch as the trial judge (as we read the charge) left the jury with the impression that, if the bankruptcy as a whole was an honest one, they ought not to convict Epstein.

Judgment on the second count is affirmed.

RARITAN COPPER WORKS v. ELLIOTT et al.

(Circuit Court of Appeals, Third Circuit. March 1, 1921.)

No. 2653.

Mandamus ⇐4(4)—Not issued to vacate order within appellate jurisdiction.

Mandamus will not be issued to compel the District Judge to vacate an order by which he vacated a previous order dismissing without prejudice a suit for the infringement of a patent, since that suit is one over which the Circuit Court of Appeals has appellate jurisdiction under Judicial Code, § 128 (Comp. St. § 1120), and the legality of the order can be reviewed on appeal from final decree therein, so that mandamus is not necessary to protect the appellate jurisdiction, as it would be if the order complained of had the effect of preventing the exercise of such jurisdiction.

Petition for Mandamus to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Petition by the Raritan Copper Works for writ of mandamus to compel Hon. John Rellstab, United States District Judge, to set aside his

order, vacating a previous order, which dismissed without prejudice the suit for infringement of a patent by Elmer G. Elliott and another against the petitioner. Petition denied.

Cornelius C. Billings, of New York City (Joseph C. Fraley, of Philadelphia, Pa., of counsel), for petitioner.

Joseph E. Stricker, of Perth Amboy, N. J., and Frederick M. P. Pearse, of Newark, N. J., opposed.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns a bill in equity which charged infringement of a patent. The cause was so proceeded in that it was placed on the trial calendar of the court below. No steps being there taken to argue the cause, and no application being made or reason shown for its continuance, that court, on October 1, 1918, entered the following order:

"The above-stated cause having been on the equity calendar of this court and not having been moved for trial, it is on this 1st day of October, 1918, ordered that the above-stated cause be dropped from the trial calendar, under rule 57 [198 Fed. xxxiv, 115 C. C. A. xxxiv]."

No subsequent steps having been taken in the cause, the court, on June 14, 1920, entered the following order:

"The above cause having been dropped by order of the court, and neither party having reinstated the cause within one year, as required by rule 57, it is on this 14th day of June, 1920, ordered that the above cause be and the same is hereby dismissed, without prejudice, and without costs to either party as against the other."

These orders were made in conformity with the provisions of Equity Rule 57 quoted in the margin.[1]

On July 6, 1920, which was still within the term in which the order of June 14, 1920, was made, the court granted a rule to show cause why the order dismissing the cause should not be set aside, and on November 22, 1920, after hearing arguments and affidavits, and against objections by defendant, entered orders setting aside its previous order dismissing the cause, and on November 22, 1920, reinstated the cause.

Thereupon the defendant petitioned this court for a writ of mandamus upon the judges of the court below, directing him to vacate the order of November 22, 1920, by which he had vacated the order of dismissal and reinstated the cause. As, for reasons which we discuss

[1] "After a cause shall be placed on the trial calendar it may be passed over to another day of the same term, by consent of counsel or order of the court, but shall not be continued beyond the term save in exceptional cases by order of the court upon good cause shown by affidavit and upon such terms as the court shall in its discretion impose. Continuances beyond the term by consent of the parties shall be allowed on condition only that a stipulation be signed by counsel for all the parties and that all costs incurred theretofore be paid. Thereupon an order shall be entered dropping the case from the trial calendar, subject to reinstatement within one year upon application to the court by either party, in which event it shall be heard at the earliest convenient day. If not so reinstated within the year, the suit shall be dismissed without prejudice to a new one."

later, we dismiss this petition on the ground that this court is without power to issue the writ of mandamus prayed for, we here note that the power of the court below and its exercise of that power in making the order complained of have not been considered by this court and are not involved in this decision, and on these questions we will be free to pass judgment should such questions be raised on appeal to this court in the subsequent disposition of the cause, and the present decision is made without prejudice to the right of the defendant to hereafter and in due course raise the question of the power and jurisdiction of the court below to enter the order here complained of.

Turning, then, to the subject of the appellate jurisdiction of this court, we note that the case below, "arising under the patent laws," the provisions of section 128 of the Judicial Code (Comp. St. § 1120) apply and the cause is therefore one wherein "the Circuit Courts of Appeals shall exercise jurisdiction to review by appeal or writ of error final decisions in the District Courts." It therefore follows that when, and if, this cause is finally brought before this court "to exercise appellate jurisdiction to review by appeal," as provided by that section, the question of the power and jurisdiction of the court below to vacate its order of dismissal and its reinstatement of the case can be reviewed by this court. It will thus be seen that the action of the court below in reinstating the case was not one which deprived this court of appellate jurisdiction, as was the case in McClellan v. Carland, 217 U. S. 280, 30 Sup. Ct. 501, 54 L. Ed. 762; but, on the contrary, so to speak, by reinstating in the court below an appealable case, it thereby again brought the case within this court's appellate jurisdiction. And it is this feature of conferring, as contrasted with impairing, appellate jurisdiction, which makes the present case differ from the McClellan Case. In that case the action of the court below was unauthorized, because it deprived the Circuit Court of Appeals of appellate jurisdiction in a cause over which it had appellate jurisdiction under section 128. It was accordingly held:

"That where a case is within the appellate jurisdiction of the higher court, a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

But in the present case the order complained of, whether right or wrong, in no way affected the appellate jurisdiction of this court over this cause as one "arising under the patent laws," and which this court has appellate jurisdiction "to review by appeal * * * from final decisions." Such being the case, the appellate jurisdiction of this court over this cause not being affected by the order complained of, this court has neither need nor power to grant a writ of mandamus to preserve its appellate jurisdiction. This conclusion has support in Muir v. Chatfield, 255 Fed. 24, 166 C. C. A. 352.

The petition for writ of prohibition is denied without prejudice to the petitioner's right to hereafter raise before this court, in the exercise of its appellate jurisdiction over this cause, the legality of the orders of the court below now complained of.

AMERICAN RY. EXPRESS CO. v. CRABTREE.

CRABTREE v. AMERICAN RY. EXPRESS CO.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1921.)

Nos. 3407, 3436.

1. **Negligence ⟸23(1)—Wheel held dangerous attraction to children.**
The jury could find it was negligent for an express company to leave on its platform outside its warehouse a heavy wheel tilted against the wall in such a way that children could set it on edge and play therewith, so that the express company could be held liable for the death of a child occasioned by such play, though it would not be if the wheel had been tilted so far that it could have been straightened up only by an adult.

2. **Appeal and error ⟸930(2), 1068(1)—Erroneous submission of contributory negligence cured by verdict for plaintiff; presumed that jury followed instructions.**
Error, if any, in submitting the issue of contributory negligence, does not require a reversal, where the jury found for the plaintiff, though for only a small amount, since such verdict amounts to a finding against contributory negligence, and the court will not assume that the jury disobeyed instructions by compromising on the amount of the verdict because of that issue.

3. **Death ⟸98—$1,000 for death of eight year old girl not so inadequate that an appellate court may set aside.**
Under Ky. St. § 6, authorizing the recovery of damages suffered by the estate of the deceased, the Circuit Court of Appeals cannot, in view of the contingencies which affect the future life of an eight year old girl, so as to determine the pecuniary value of her life to her estate, set aside as too small a verdict for $1,000.

In Error to the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Action by John P. Crabtree against the American Railway Express Company. Judgment for plaintiff, and both parties bring error. Affirmed on each writ of error.

Edward C. O'Rear, of Frankfort, Ky. (Overton S. Hogan, of Frankfort, Ky., and A. T. Stewart, of Stanton, Ky., of counsel), for plaintiff.

John D. Atkinson, of Stanton, Ky., for defendant.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DENISON, Circuit Judge. The Express Company maintained an office at a small station in Kentucky, and its agent received from the railroad, consigned to an oil company in the vicinity, an iron wheel 42 inches in diameter, and with a rim 10 inches wide, and weighing about 200 pounds. The Express Company's agent, instead of putting this in the warehouse until it should be called for, left it standing on the cinder platform, tilted over against the loading platform. The children of the town were in the habit of playing about the station building and grounds. On Sunday afternoon two boys tilted the wheel back to its upright position and rolled it up and down

the cinder platform. After they had tired of this, and had left it standing on the rim at some distance from its original position, two little girls came along and probably undertook to roll it. It fell over upon and killed the youngest one, eight years old. Her administrator, who was also the father, brought this action under the Kentucky statute and recovered a judgment for $1,000 damages. The defendant brings error, claiming that there was no evidence of negligence, and the plaintiff brings error, urging that contributory negligence was improperly made an issue in the trial, and that, if the plaintiff is entitled to recover, the law requires a larger verdict.

[1] We think there was substantial evidence tending to show negligence by defendant, and no complaint is made of the manner in which this issue was submitted to the jury, if it could be submitted at all. There was a place where the wheel could have been stored, and where it would have been entirely safe. If it had been left standing on edge, it would be clear that it had taken the character of an attractive nuisance. The event proves that it was not tilted over so far, but that it could be easily restored to its dangerous position, and this by the efforts of children, whose natural and ordinary conduct in respect thereto defendant was bound to anticipate. If it had been laid down in a horizontal position, or leaned over far enough so that it would have been beyond the power of boys to set it upright, there would be a different question. In these respects the jury had a right to conclude that the case differed from Kasey's Adm'r v. Railway Co. (Ky.) 124 S. W. 380, the decision chiefly relied on by defendants. The facts are very similar, but the wheel in that case either was tilted over enough further or was enough heavier so that to restore it to upright position furnished a matching test of strength between two strong men, and the defendant was not bound to anticipate an interference by adults. The principles which justify submission to the jury are illustrated by Railroad v. Stout, 84 U. S. (17 Wall.) 657, 662, 21 L. Ed. 745; Union Pac. Co. v. McDonald, 152 U. S. 262, 275, 14 Sup. Ct. 619, 38 L. Ed. 434; Escanaba Co. v. O'Donnell (C. C. A. 6) 212 Fed. 648, 129 C. C. A. 184, and cases cited 212 Fed. 650, 129 C. C. A. 186.

[2] The trial judge submitted the issue of negligence by the child and by her parents. It is said that it was error, because there was no evidence of this as to the parents, and because a child of that age is not chargeable with her own carelessness. We cannot see that either of these questions is open. The jury found for the plaintiff, and, since contributory negligence in this action would be a bar, this verdict amounts to a finding that there was none. While conceding this inference to be technically correct, counsel urge that the error was prejudicial, because the courts ought to notice the fact, which it is said all experienced persons know, that where contributory negligence is an issue it makes the basis for a compromise among the jury and practically operates to reduce the verdict. To assume this is to assume that the jury disobeyed instructions; and we are not at liberty to draw any such inference. If there is an existing evil in this respect, the remedy is legislative.

[3] The Kentucky statute (Ky. St. § 6) contemplates recovery of the damages suffered by "the estate of the deceased." The Kentucky courts have not worked out any definite rule of damages under the statute, where the deceased is a small child. The contingencies which affect the future life of a little girl eight years old, so as to determine the pecuniary value of her life to her estate, are beyond definite measurement. In a vast number of cases it turns out that the net pecuniary value of the life is very small, and we cannot safely say that a verdict of only $1,000 necessarily implies perversity on the part of the jury. The District Judge denied a motion for new trial on this ground, among others, and thereby expressed his conclusion that there was nothing in the peculiar facts of this case indicating passion or prejudice. In some states a measure has been fixed by law as the value of the life of a child, but Kentucky has seen fit to leave the decision to a jury without definite guide, and we think we cannot set aside such a verdict as this upon the sole ground that it is too small.

On each writ of error, the judgment is affirmed.

COGSWELL et al. v. DRENNEN.

(Circuit Court of Appeals, Fifth Circuit. February 1, 1921.)

No. 3593.

1. **Appeal and error ⟸1097(1)—Questions decided not re-examined on subsequent appeal.**
   Questions which have been decided on first appeal will not be re-examined on a subsequent appeal of the same suit.

2. **Appeal and error ⟸1099(7)—Former decision that evidence was sufficient to sustain recovery followed.**
   Where, on former appeal, a decree dismissing the bill was reversed, because there was evidence which, if believed by the District Judge was sufficient to sustain recovery, and District Judge at second trial, at which the evidence was substantially the same, rendered decree for complainants, thereby indicating that he believed such evidence, the sufficiency of the evidence will not be re-examined on a subsequent appeal.

Walker, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Suit by Felix M. Drennen, as receiver for the American Mortgage & Loan Company, against Sumter Cogswell and others. From a decree for complainant, defendants appeal. Affirmed.

See, also, 252 Fed. 776, 164 C. C. A. 616.

E. H. Cabaniss, of Birmingham, Ala., Forney Johnston, of Washington, D. C., and W. R. C. Cocke, John S. Stone, and Griffin Lamkin, all of Birmingham, Ala., for appellants.

J. L. Drennen, of Birmingham, Ala., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This suit was brought by appellee as receiver of the American Mortgage & Loan Company (herein called the American Company) against the Southern States Fire Insurance Company (herein called the Insurance Company) and seven of its stockholders, and is based upon a fraudulent conspiracy by the individual appellants to sell the stock of the Insurance Company to the American Company at an excessive price, as a result of which the American Company lost practically all of its assets. The bill seeks to recover the amount of such loss.

Evidence was taken, and upon final hearing the District Court dismissed the bill, upon the ground that the evidence, taken most favorably to appellee, disclosed no right to the relief sought. On appeal, this court held that the evidence, if believed by the District Judge to be true, was sufficient to sustain the averments of the bill. The case was therefore reversed and remanded. Drennen v. Southern States Fire Insurance Co. et al., 252 Fed. 776, 164 C. C. A. 616. After receipt of the mandate of this court, and upon a further hearing, the District Court entered a decree in favor of appellee against the individual appellants jointly for the amount found to represent the difference between the book value of the stock and the price at which it was sold by them to the American Company, and from that decree the individual appellants have taken the present appeal.

February 2, 1914, appellants, while all of them were stockholders, and six of the seven of them were directors, of the Insurance Company, sold 4,647 shares of its capital stock, each of them owning a part of it, of the par value of $5 each, to the American Company at $10 per share. Three of the appellants who were directors of the Insurance Company were also at the same time directors of the American Company. The American Company, not having funds to purchase this stock, borrowed a portion of the purchase price from a bank of which Enslen, one of the appellants and a director in both the Insurance Company and the American Company, was president, and executed its notes to the individual appellants for the balance of the purchase price. The money borrowed from the bank and the notes to the individual appellants were finally paid off with money borrowed by the American Company from the Insurance Company, secured by the stock purchased in the first instance from appellants by the American Company. The theory of appellee is that appellants were making fraudulent use of the American Company for their own profit, benefit and advantage, and that they palmed off on the American Company their stock at about twice its value, and in doing so depleted the assets of that company to the extent of the difference between the real value and the fictitious value of the stock, which difference appellants received and divided up among themselves in proportion to their individual holdings of said stock. The averments of the bill and the evidence in support of it are set forth in much detail in the opinions of this court on the former appeal.

[1] The case is here upon practically the same evidence as before. It is not seriously contended that the additional testimony taken after the case was remanded is of such character as to overcome the

evidence which has already been held sufficient to constitute a fraudulent conspiracy. There was no substantial additional evidence. This appeal is at last but an effort to secure a rehearing of the case upon practically the same record. It is well settled that questions which have been decided on one appeal will not be re-examined on a subsequent appeal of the same suit. Supervisors v. Kennicott, 94 U. S. 498, 24 L. Ed. 260; United States v. Camou, 184 U. S. 572, 22 Sup. Ct. 505, 46 L. Ed. 694; Souer v. De Bary, 105 Fed. 293, 44 C. C. A. 484.

[2] Appellants recognize this well-established rule, but seek to avoid its application. It is argued that what was held by the majority of this court on the former appeal should not be taken as the expression of an opinion upon the merits. It may very well be, if the District Judge had found for appellants upon the evidence, that a decree dismissing the bill would not have been reversed. Yet the fact remains, and must not be lost sight of, that a majority of this court held on the former appeal that the evidence, if believed by the District Judge to be true, was sufficient to prove the conspiracy charged. That the District Judge did believe such evidence to be true, we are bound by the decree to assume.

The decree is affirmed.

WALKER, Circuit Judge, dissents.

DEGNAN v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 40.

1. **Criminal law ⟸1159(2)—Weight of evidence cannot be reviewed.**
   On writ of error in a criminal cause, or in an action at common law, it is beyond the power of the appellate court of the United States to review the weight of the evidence.
2. **Criminal law ⟸1129(1)—Unassigned error reviewed only to prevent plain injustice.**
   The power of the court to notice plain error not assigned in criminal cases is not to be exercised as a matter of right, but is used only to prevent plain injustice.
3. **Criminal law ⟸508(3), 1137(5)—Defense by blaming others not subject to objections as accomplice testimony.**
   In a prosecution for receiving goods stolen from a railway car, where each of the three defendants took the stand and attempted to show the guilt of the others, no defendant can complain that the aggregate of their efforts benefited only the prosecutor, and their testimony was not open to the objection usually made to that of accomplices.
4. **Criminal law ⟸370, 371(2)—Receipt of other stolen goods admissible to show intent and knowledge.**
   In a prosecution for receiving goods shipped in interstate commerce which had been stolen from a railway car, evidence that accused had been concerned in handling for profit other shoes proved to have been also stolen from cars at the same place and about the same time was competent for the purpose of showing intent and guilty knowledge.

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

5. Receiving stolen goods ⟸3, 8(4)—Guilty knowledge an element and may be proved by circumstantial evidence.

The essence of the crime of receiving goods shipped in interstate commerce which had been stolen from a railway car is guilty knowledge that they were so stolen, and such knowledge by accused must be shown by competent, though perhaps by circumstantial, evidence.

6. Criminal law ⟸822(1)—Charge construed as a whole.

The charge of the court in a criminal prosecution is to be taken as a whole, especially in the absence of any exception to such parts of it as might be construed as bearing too hardly on defendant.

7. Criminal law ⟸823(9)—Charge knowledge that goods were stolen was presumed from possession held cured by other statements.

In a prosecution for receiving goods shipped in interstate commerce which had been stolen from a railway car, a statement in the charge that possession of the stolen property recently after the theft justified the inference of guilty possession, which might, in the absence of explanation, authorize an inference of criminal connection with its acquisition, to which no exception was taken, does not require reversal, where the court elsewhere explicitly charged that the mere possession was not enough to establish guilty knowledge.

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

Richard Degnan was convicted of receiving property shipped in interstate commerce which had been stolen from a railway car, and he brings error. Affirmed.

Degnan and two others were jointly indicted, in that knowingly, etc., they did "buy, receive, conceal, and have in their possession" certain cases of shoes shipped in interstate commerce from Missouri to Ross & Co., of Rochester, N. Y., which shoes had been stolen from a railway car at Suspension Bridge, N. Y. The three defendants were tried together, and all convicted. Degnan alone took this writ.

Bart J. Shanahan, of Buffalo, N. Y. (S. Wallace Dempsey, of Niagara Falls, N. Y., of counsel), for plaintiff in error.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (John T. Walsh, Sp. Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. The record contains almost no exceptions, and no objection whatever was made to any portion of the charge of the court.

[1] By assignments of error we are asked to review the weight of evidence—something so plainly beyond the power of an appellate court of the United States in a criminal cause, or in an action at common law, that citation has long been superfluous.

[2, 3] While we have often exercised the power to notice plain error not assigned in criminal matters, the exercise of that power is not a matter of right and is to be used only to prevent plain injustice. Gruher v. United States, 255 Fed. 478, 166 C. C. A. 550. In the case at bar the evidence was ample, and if (as was the fact) each defendant took the witness stand and devoted himself largely to de-

fending by showing the guilt of one or more of his codefendants—no defendant can complain that the aggregate of effort benefited no one but the prosecutor. Such testimony is not open to the objections usually made to that of accomplices; none of it was offered by the government and none of it was vitally necessary to conviction.

[4] We shall notice but two points: It is asserted to be error that when the indictment charged possession of Wolf's shoes only, evidence was received showing that plaintiff in error was concerned in handling for profit other shoes which were proven to have been also stolen from cars at Suspension Bridge and at about the same time as the Wolf consignment. For the purpose of showing intent and guilty knowledge this was proper, as has been definitely held in this court. Sapir v. United States, 174 Fed. 219, 98 C. C. A. 227.

It is also asserted as error that the trial judge, in charging the jury, applied to this case of having in possession stolen articles the same rule as would have been applicable if the charge had been larceny, viz. that possession of stolen property or other fruits of crime recently after its commission justifies the inference that the possession is guilty possession, and this (though only prima facie evidence of guilt) may in the absence of explanation authorize an inference of criminal connection with its acquisition. Wilson v. United States, 162 U. S. 619, 16 Sup. Ct. 895, 40 L. Ed. 1090; People v. Weldon, 111 N. Y. 576, 19 N. E. 279.

[5] It is true that the essence of the crime whereof this plaintiff in error was charged is guilty knowledge, and that such knowledge must be brought home to the accused by competent, though perhaps circumstantial, evidence. We think the law on this subject was fully and correctly stated in Kasle v. United States, 233 Fed. 878, and especially pages 888–890, 147 C. C. A. 552.

[6, 7] It is also true that the court below in discussing the law called attention to the rule as it has been repeatedly stated (ut supra) in larceny prosecutions. But the charge is to be taken as a whole, especially in the absence of any exception to such parts of it as might have been regarded as bearing too hardly on the defendants; and the court explicitly charged that—

"The mere possession or custody of the shoes in question in either of the defendants, or in their joint possession and custody, is not enough to establish that they knew the shoes were actually stolen. There must be some evidence, [some] facts and circumstances, tending to show guilty knowledge beyond the mere possession; and if you conclude that the defendants merely had possession of the property and that they received it in the ordinary source of business, even though it was alleged to have been stolen, it would not be sufficient to convict them of this crime."

This was all that any defendant could expect.

Finding no error in the record, the judgment is affirmed.

SOBLOWSKI et al. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 144.

1. **Criminal law ⊂=1159(2)—Weight of evidence cannot be reviewed.**
In a criminal prosecution, the Circuit Court of Appeals cannot review the weight of the evidence.

2. **Criminal law ⊂=1148—Denial of separate trial reviewable only for abuse of discretion.**
The refusal of the trial judge to grant a separate trial to two of the three defendants is a matter of discretion, reviewable only where abuse of such discretion is shown.

3. **Criminal law ⊂=622(2)—Objection to atmosphere created by codefendant does not entitle to separate trial.**
The fact that two defendants asking a separate trial did not like the atmosphere created by the presence of the third defendant before the jury does not authorize reversal of conviction for refusal of the separation.

4. **Criminal law ⊂=656(8)—Court's comment in denying directed verdict held not expression of opinion on facts.**
Statements by the court, during a discussion with counsel on the motion to direct an acquittal, that there were other circumstances pointing to the asserted guilty knowledge of defendants, is not such an expression of the opinion on the facts as requires a reversal of the conviction.

5. **Criminal law ⊂=673(4)—Evidence may be admitted as against certain defendants only.**
In a prosecution against three defendants, it was not error for the trial court to admit evidence only as against certain of the defendants, and not as against the others.

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

Louis Soblowski and another were convicted of receiving goods shipped in interstate commerce which had been stolen from a railway car, and they bring error. Affirmed.

The Soblowskis are the other defendants under the indictment considered in Degnan v. United States, 271 Fed. 291, opinion filed herewith. They took this separate writ. In other respects the records of the two cases are substantially identical.

Louis E. Fuller, of Rochester, N. Y., for plaintiffs in error.

Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y. (John T. Walsh, Sp. Asst. U. S. Atty., of Buffalo, N. Y., of counsel), for the United States.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. This record is open to the criticisms made by us in the Degnan opinion; they need not be here repeated.

[1] We are again asked to hold (in the language of the brief) that "as matter of fact the evidence was not sufficient to sustain the conviction" of the plaintiffs in error. That in proceedings at law before a jury reviewable by writ of error this court is not empowered to consider the weight of the evidence is a matter so plain that since Crowley

v. Clark (C. C. A.) 263 Fed. 58, we have pointedly refused even to cite authority therefor. That there was no evidence tending to support the conviction of the Soblowskis is not true, and is not, we think, seriously asserted.

[2, 3] It is insisted that the refusal of the trial judge to grant to the Soblowskis a separate trial was error. We have held, in cases not referred to in the briefs, that this is a matter of discretion, reviewable only where abuse of discretion is exhibited. Lee Dock v. United States, 224 Fed. 431, 140 C. C. A. 125; Schwartzberg v. United States, 241 Fed., 348, 352, 154 C. C. A. 228. No abuse of discretion is even suggested; the real point is that these defendants did not like the "atmosphere" created by the presence of Degnan before the jury. This is very far from enough to require reversal.

[4] Much complaint is made of comment by the court upon the evidence not only nor especially in his colloquial charge, but during a discussion with counsel on the motion to direct a verdict of acquittal. It would serve no good purpose to recite the language complained of. Suffice it to say that when the court said, after a protracted trial, that "there are other circumstances, other indicia, other facts pointing to the asserted guilty knowledge with which these shoes were possessed," the words were fully justified by the testimony given before the jury, and it disposes of the matter to say that language far more direct and more expressive of an opinion on the facts than anything shown by this record has recently been justified in Horning v. District of Columbia, 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed. ——.

[5] It is also seriously urged that in numerous instances the learned court below admitted evidence only as against certain of the defendants and not against others. This matter we explicitly covered in Radford v. United States, 129 Fed. 49, 66 C. C. A. 491.

The other matters touched on in argument are not grounded upon due objection and exception, and their discussion is not necessary to prevent plain injustice. Gruher v. United States, 255 Fed. 478, 166 C. C. A. 550.

The judgment is affirmed.

GENERAL SECURITIES CO., Inc., v. DRISCOLL.

(Circuit Court of Appeals, Fifth Circuit. March 17, 1921.)

No. 3648.

Bankruptcy ⊜184(1)—Chattel mortgage on automobile kept by mortgagor for sale void against his trustee.

Under the law of Florida that a chattel mortgage on merchandise, though recorded, is void as against creditors of the mortgagor, if he is authorized by agreement or understanding with the mortgagee to retain possession of and sell the mortgaged property, a mortgage on an automobile, given by a dealer, who by permission of the mortgagee kept it in his salesroom for sale until his bankruptcy, *held* void as against his trustee, under Bankruptcy Act, § 47a (Comp. St. § 9631).

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

Petition to Superintend and Revise from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

In the matter of A. L. Hallbauer, bankrupt; P. W. Driscoll, trustee. On petition of the General Securities Company, Incorporated, to revise order of District Court. Affirmed.

James J. A. Fortier and Abraham Goldberg, both of New Orleans, La., for petitioner.

William H. Jackson and Martin B. Withers, both of Tampa, Fla., for respondent.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. The petitioner claimed a described automobile under a mortgage made to it on January 20, 1920, and recorded on January 24, 1920. The mortgagor, A. L. Hallbauer, was adjudged bankrupt in an involuntary proceeding commenced on May 8, 1920, and the mortgaged automobile, which had remained in the possession of the bankrupt in his salesroom, went into the possession of the respondent, the trustee in bankruptcy. The court's ruling against the claim asserted by the petitioner was based upon a finding that petitioner, with full knowledge of the facts, permitted the mortgagor, who was a dealer in automobiles, doing business in the city of Tampa, to remain in the possession of the mortgaged automobile, to offer it for sale in his salesroom, where such automobiles were exhibited for sale, and deal with it as his property, which he had full right and power to sell.

The rule prevails in Florida that a mortgage of the whole or a part of a stock of merchandise is rendered fraudulent and void as to creditors of the mortgagor by an agreement or understanding between the mortgagor and the mortgagee, whether expressed in the mortgage or not, that the former retain possession and sell the mortgaged property at discretion, or in the usual course of business. First National Bank of Pensacola v. Wittich, 33 Fla. 681, 15 South. 552. The existence of such agreement or understanding, and conduct in pursuance thereof, are inconsistent with the mortgage being effective as against those having dealings with the mortgagor, and to give effect to the mortgage under such circumstances would enable the mortgagor to defraud third persons—his creditors or purchasers from him. Boice v. Finance & Guaranty Corporation (Va.) 102 S. E. 591. The harmful consequences to third persons of so conferring on the possessor apparent ownership and right of disposition are not obviated by a record of the mortgage.

The claim of the petitioner was not made a valid one by the circumstance that the mortgage was recorded, as the reason for giving the invalidating effect to the permitted retention of possession by the mortgagor, for the purpose mentioned, existed, notwithstanding the recording of the instrument. There is nothing in the record tc indicate that it was part of the agreement or understanding between the mortgagor and the mortgagee that, in the event of a sale of the automobile by the former, the proceeds of the sale would be applied on the mortgage debt.

The question whether a stipulation to that effect would have made the transaction valid as against the mortgagor's creditors is not presented.

The trustee acquired the status of a lien creditor as of the time when the petition in bankruptcy was filed. Bankruptcy Act, § 47a (Comp. St. § 9631); Bailey v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275. The retention up to that time of possession by the mortgagor under the circumstances above stated kept the mortgage from being valid as against the bankrupt's creditors. As conditions existing up to the time the petition was filed were such as to deprive the mortgagee of a claim valid as against the mortgagor's creditors, the right conferred on the petitioner by the mortgage was subordinate, not paramount, to that acquired by the mortgagor's trustee in bankruptcy. American Bridge Co., v. Heidelbach, 94 U. S. 798, 24 L. Ed. 144; Freedman's Savings & Trust Co. v. Earle, 110 U. S. 710, 4 Sup. Ct. 226, 28 L. Ed. 301.

The conclusion is that the court properly ruled against the claim asserted by the petitioner.

The petition is denied.

BARNES v. RED BAYOU OIL CO., Inc.

(Circuit Court of Appeals, Fifth Circuit. February 2, 1921.)

No. 3570.

1. **Corporations ⟸406(1)—Joint agent is not authorized to act alone, after other disposes of interest.**
   Authority by directors to several parties to contract for the corporation does not authorize one of them, acting alone, to bind the corporation, in the event of the others disposing of their interest in the corporation, so that he and the directors were the only stockholders.
2. **Corporations ⟸426(11)—Approval of directors held necessary, notwithstanding agent's authority to bind corporation.**
   Though an agent is given by directors authority to bind a corporation, it is not bound by contract entered into by him which expressly states that approval of directors is necessary to make it binding, and which is not shown to have been approved.

Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge.

Suit for specific performance by J. William Barnes against the Red Bayou Oil Company, Incorporated. From a decree dismissing the bill, complainant appeals. Affirmed.

J. D. Wilkinson, of Shreveport, La. (Wilkinson, Lewis & Wilkinson, of Shreveport, La., on the brief), for appellant.

T. H. McGregor, of Shreveport, La., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. This was a suit by appellant, J. William Barnes, against the appellee, the Red Bayou Oil Company, a pri-

vate corporation, to enforce the specific performance by the latter of a sale provided for by a written instrument signed in its name by its attorney, Huey P. Long. That instrument, which was signed by the appellant, also provided for the granting by the appellee to the appellant of an exclusive right to purchase at a stated price, payable in installments, a mineral, oil, and gas lease, owned by the appellee on a described tract of land, and certain properties, equipment, and appurtenances belonging to the appellee, including two wells drilled on the land covered by the lease. The concluding paragraph of the instrument mentioned was the following:

"It is agreed that this act, in order to be fully binding, shall have the approval of the board of directors of the Red Bayou Oil Company."

The bill as amended showed that prior to the making and signing of the instrument mentioned the following letter was sent to the person addressed; the signers constituting a majority of the appellee's board of directors:

"April 12, 1920. Huey P. Long, 318 Merchants' Building, Shreveport, La. Any deal you and the Thompsons make for the Red Bayou Oil Co. will be satisfactory with us. R. H. Fletcher, John F. Calhoun, O. K. Allen, W. A. Wright, Directors of Red Bayou Oil Co., Inc."

It was not shown that "the Thompsons" participated in the transaction evidenced by the instrument, unless the following averment so shows:

"The said parties mentioned in paragraph 4 of this bill [who were the persons whose names appear in the above set out letter], together with the said Thompsons, constituted all of the stockholders of the said Red Bayou Oil Company, Incorporated, and that by some sort of deed or arrangement, the details of which he is unable to learn, the interest of the said Thompsons had been disposed of, or at least that they were satisfied with the said contract made by the said Long attached to the original bill, and that the same was made with their full knowledge, acquiescence, and consent, and that they concurred in said deal made by the said Long with your orator."

[1, 2] It would seem that by reason of the alternative feature of the last quoted averment it could be sustained by evidence that "the interest of said Thompsons had been disposed of." That fact would not have given to the above set out letter to Long the effect of authorizing him alone to make a deal for the appellee. But it may be assumed that the appellee corporation would have been bound by a contract purporting to bind it, which might have been made by Long alone. It was not shown that any such contract was attempted to be made. By the express terms of the instrument signed and relied on, a contract pursuant to its terms was not to come into existence or be binding until it was approved, ratified, and sanctioned by the appellee's board of directors. Favorable action by the appellee's governing board subsequent to the signing of the instrument was made a condition precedent to the coming into being of a contract binding upon it. Such action was not averred. The fact that an agent who signs an instrument in the name of his principal is authorized to bind the latter does not have the effect of making such instrument a contract

before that is done which the terms of the instrument itself require to be done before it is to be binding on any one. The averments of the bill as amended do not show that in any way the appellee had become obligated to make the sale sought to be specifically enforced.

The decree dismissing the amended bill was proper, and it is affirmed.

CHARLES R. McCORMACK & CO. v. KEEVENY.

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

No. 149.

Brokers ⇐66—Agreement to share commission with firm of which purchaser was a member held not to affect right to agreed commission.

A broker *held* not deprived of the right to his agreed commission for the sale of a ship, where he procured a purchaser who was accepted by his principal, because such purchaser was a member of a firm with which he had agreed to divide the commission, where the transaction was in good faith and the facts were known to the principal.

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

Action at law by Eugene D. Keeveny against Charles R. McCormack & Co. Judgment for plaintiff, and defendant brings error. Affirmed.

This case is here again after the retrial directed in Keeveny v. McCormack, in 266 Fed. 314. All of the facts stated in that report were again (in substance) proved. It now appears that by bill of particulars the plaintiff Keeveny specifically alleged that the ready, able, and willing purchaser by him procured was Theodore Dougherty.

There was evidence at this retrial tending to show that Dougherty was purchasing the vessel for himself and was able by the assistance of or through his firm of J. F. Whitney & Co. to procure the full purchase price of $460,000 when and as it became due. The court charged the jury in substance that it was for them to say whether, "when Dougherty's name was submitted by Whitney & Co. to [defendants below] they accepted him as the purchaser of this ship, and were willing to deal with him as being a man ready, willing, and able to perform the contract."

The jury by their verdict found in effect that defendants below had accepted Dougherty as such purchaser. There being a general verdict for plaintiff for the commissions claimed under the second cause of action (see 266 Fed. 315), judgment was entered accordingly, and McCormack & Co. brought this writ.

Wherry & Mygatt, of New York City (Frederick E. Mygatt and William M. Wherry, Jr., both of New York City, of counsel), for plaintiff in error.

John M. Gardner, of New York City, for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). At the last trial Keeveny gave evidence tending to prove that he had produced in the person of Dougherty, an American citizen who was ready, willing and able to pay defendant's price of $460,000, for the motor

ship City of St. Helens, and the jury so found. The foregoing would dispose of this writ, but for a point now first advanced in this court. Dougherty was admittedly a member of the firm of Whitney & Co., which firm, by an arrangement with Keeveny, was to get $10,000 out of the latter's commissions.

The fact appears to be that Keeveny procured the assistance of Whitney & Co. in his quest for a purchaser, and they charged him for the service, but that such charge was to be made was plainly well known to McCormack before Dougherty was offered, and no objection thereto was ever made. It is now said that this transaction made Whitney & Co., and therefore Dougherty, as much brokers for McCormack as was Keeveny; wherefore, when Keeveny produced Dougherty as the purchaser, the latter, by reason of his partnership in Whitney & Co., was prevented by law from qualifying as such.

When plaintiff rested, and again at the close of evidence, defendant moved for dismissal or direction on the ground that—

"When defendant found that his purchaser was his own broker, he was entitled to repudiate or refuse to carry out any negotiations on any prior offer which had been made."

This motion was denied over due exception and objection. The defense cannot prevail for several reasons.

First. Defendant never pleaded that Whitney & Co. were their brokers in whole or part. Keeveny's employment, and the production of any able, ready, and willing purchaser were fully denied; but we fail to discover any plea which said or suggested that Whitney & Co. had employment, express or implied, from McCormack.

Second. A broker may employ subagents or associate brokers, to whom he is pecuniarily responsible, and recover for what they accomplish, if good faith is present. Canadian Improvement Co. v. Cooper, 161 Fed. 279, 88 C. C. A. 325.

Third. Defendants did not prove that in respect of the Dougherty sale (as distinguished from the earlier attempt to sell to a French-controlled corporation) Whitney & Co., or any member of that firm, had any relation to defendant or Keeveny, other than that of a purchaser, with whom Keeveny had agreed to split his commission.

This, if done honestly, is lawful, even though the splitting be not disclosed to the principal. Hobart v. Sherburne, 66 Minn. 171, 68 N. W. 841, and other cases cited; 9 Corp. Jur. 571. In the present instance all was known to defendant below, and (disregarding all defects of pleading) we discover in the evidence nothing to cause even suspicion of wrong in act or intent.

Judgment affirmed, with costs.

HOWARD et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1921.)

No. 3452.

1. **Criminal law ⇐1159(4)—Credibility of witnesses is for jury.**
A conviction cannot be reversed for the reasons that the testimony of a witness for the government relating to an admission by a defendant was incredible, that numerous witnesses testified the offense was committed by persons other than defendant, and that there was testimony that defendants were of good character, while important witnesses for the government had a bad reputation for truth.

2. **Criminal law ⇐1156(1)—Denial of new trial reviewable only for abuse of discretion.**
The ruling on motion for new trial cannot be reviewed, in the absence of a clear showing that discretion was abused.

3. **Criminal law ⇐1159(2)—Appellate court cannot weigh testimony.**
A conviction will not be reversed for insufficiency of the evidence, where there is substantial evidence tending to sustain the conviction.

4. **Internal revenue ⇐2—Volstead Act did not impliedly repeal revenue laws as to past offenses.**
The National Prohibition Act, which did not expressly repeal the internal revenue laws relating to distilling liquors, did not impliedly repeal them, at least so far as they related to violations already committed.

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Henry Howard and others were convicted of illegally distilling liquor contrary to the statutes relating to internal revenue, and they bring error. Affirmed.

T. A. Lancaster, of Lexington, Tenn. (W. H. Lancaster, of Lexington, Tenn., on the brief), for plaintiffs in error.

Wm. D. Kyser, U. S. Atty., of Memphis, Tenn.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. Plaintiffs in error were charged with so-called "moonshining," under an indictment containing seven counts, based upon sections 3257, 3258, 3260, 3279, and 3296 of the Revised Statutes of the United States (Comp. St. §§ 5993, 5994, 5997, 6019, 6038), which relate to internal revenue. Bird was convicted upon the fifth count only. Howard and Stanford were convicted upon each of the seven counts, but their respective sentences were no greater than might have been imposed on one only of the counts. It is enough, as to them that the conviction be good as to either of the counts. Abrams v. United States, 250 U. S. 616, 619, 40 Sup. Ct. 17, 63 L. Ed. 1173.

There was no motion to direct verdict, and no exception was taken to the charge of the court. The error here complained of is addressed to the refusal of the court below to grant a new trial, by reason of alleged insufficiency of evidence to support the conviction.

[1] There was substantial and direct testimony tending to show the defendants guilty. The contention made here is that the conviction

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

should not be allowed to stand for the reasons: (a) That the testimony of a witness for the government, relating to an admission by one of the defendants, should be regarded as incredible; (b) that it was shown by numerous witnesses that the still was operated by other persons named, and not by defendants; and (c) that there was considerable testimony that defendants were of good character and that two of the important witnesses for the government were of bad reputation for truth. Questions of credibility of witnesses are peculiarly for the jury. Rochford v. Pennsylvania Co. (C. C. A. 6) 174 Fed. 81, 98 C. C. A. 105; Byers v. Carnegie Co. (C. C. A. 6) 159 Fed. 347, 86 C. C. A. 347, 16 L. R. A. (N. S.) 214.

[2, 3] The motion for new trial was addressed to the sound discretion of the trial judge, and cannot be reviewed, in the absence of clear showing that such discretion was abused. Robinson v. Van Hooser (C. C. A. 6) 196 Fed. 620, 627, 116 C. C. A. 294. There is no ground for the claim that this discretion was abused. It is enough that there was substantial evidence tending to sustain the conviction. We cannot weigh the testimony. West v. United States (C. C. A. 6) 258 Fed. 413, 421, 169 C. C. A. 429.

[4] There is no merit in the contention (made for the first time in this court) that the indictment and the proceedings thereunder are void, from the fact that the indictment was not found until after the taking effect of the National Prohibition Act (chapter 83, Sixty-Sixth Congress, 1st Session, p. 305). The alleged violation of the revenue act occurred long previous to the passage of the Volstead Act, which contains no express repeal of the revenue sections in question, and there is certainly no implied repeal of these sections, so far as relates to violations already committed. We must not be understood as intimating an opinion that the revenue sections in question were impliedly repealed as to future acts.

The judgments of the District Court are affirmed.

WEIDEMAN v. NEWTON ARMS CO., Inc. (MANUFACTURERS' & TRADERS' NAT. BANK OF BUFFALO et al., Interveners).

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

No. 103.

Receivers ⇐152—Trust funds must be traced into hands of receiver to give right of priority.

Persons who sent orders with money to a corporation which went into the hands of a receiver, the orders not having been filled, in order to establish a trust relation which entitles their claims to priority of payment on the ground of false representations by the corporation, must (1) show that such representations were relied on and (2) trace their money into some particular property or fund which came into the hands of the receiver, and it is not sufficient to show that it was used by the corporation generally in its business.

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

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

Suit in equity by Carl J. Weideman against the Newton Arms Company, Incorporated. Appeal by The Manufacturers' & Traders' National Bank of Buffalo and another intervened. From an order of the District Court, interveners appeal. Reversed.

See, also (D. C.) 260 Fed. 348.

Defendant corporation, being insolvent in the sense of inability to pay its current obligations as they matured, passed into the hands of a receiver appointed under a creditors' conservation bill. The receiver has liquidated the assets of the corporation; no other form of conservation having been found possible. The business of the company was the manufacture, sale, and repair of rifles. It circulated advertising matter setting forth how many rifles it could presently make and what its capacity would be in the near future, and of course solicited business. We assume that these representations of capacity were untrue. More orders for rifles, or for the repair of rifles, were received than could be filled, and many of such customers forwarded the money for what they wanted at the time of giving their orders.

Failure occurred with a large number of such orders unfilled. The money sent in by those giving the orders had been used in conducting the business of the concern. There was substantially no money on hand as cash at the time of receiver appointed. Uncontradicted testimony is that when such appointment occurred the "liabilities were about $400,000, the cash on hand was very slight, fluctuating from day to day from zero up to $300 or $400 a week." As a going concern the business might be valued at about $300,000, but if it were "wound up and scrapped it would be worth about $50,000 or $60,000." The receiver has wound up the business and "scrapped" it, and has produced thereby a sum far less than that required to pay all creditors in full.

By the order complained of the District Court granted a preference over all other creditors to those customers who had ordered goods from the company, forwarded their money with their orders, and never received what they ordered. Thereupon the holders of receiver's certificates took this appeal.

J. Edmund Kelly and Locke, Babcock, Spratt & Hollister, all of Buffalo, N. Y., for appellants.

Charles Newton, of Buffalo, N. Y., for preferred claimants.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). The basis of the lower court's holding is that the moneys sent to the insolvent company constituted "a trust estate in the custody of the receiver, who occupies the same position in respect to such moneys" as did the corporation itself. The foundation, however, on which such trust estate must stand, is the fraud of the corporation, which in this case could only have been the fraudulent representations of the advertising matter above referred to.

But in order to establish such a trust on the part of a wrongdoer it is necessary to show that the fraudulent representations were relied upon, so that it may fairly be said that the cestuis qui trustent, in this case the ready money customers, lost their money by relying upon the representations. There is absolutely no proof on this point in the record before us, and accordingly the basis of fact implied in the cases cited below (American Sugar Refining Co. v. Fancher, 145 N. Y. 552,

40 N. E. 206, 27 L. R. A. 757; Jaffe v. Weld, 208 N. Y. 593, 102 N. E. 1104), does not exist.

But even if the trust relation be established, if the trustee is in bankruptcy or insolvency, it is absolutely necessary to trace the money covered by the trust into some particular property or fund. It is just as necessary to trace as it is to prove the trust relation. There is no pretense of tracing this money into the receiver's hands in any other sense than that the money was spent in carrying on a business or procuring certain articles of machinery and the like, which ultimately passed into the receiver's hands. This is not enough; cash is never traced merely by showing that it went into a general estate. This subject we have recently treated in Re Bolognesi, 254 Fed. 770, 166 C. C. A. 216, Re Matthews, 238 Fed. 785, 151 C. C. A. 635, and Re Jarmulowsky, 261 Fed. 779.

Inasmuch, therefore, as the creditors preferred below have (1) failed to prove in point of fact a trust relation, and (2) have (assuming such relation) failed to trace their money, the order under review is reversed, because the appellees are not entitled to any preference over other and general creditors.

RADCLIFF v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1800.

Death ⇐103(2)—Nonsuit held proper in action for death of soldier, struck by train while on sentry duty.

In an action for the death of a national guardsman, found dead near a railroad bridge where he had been doing sentry duty for a week or ten days, and presumably struck by a train, a nonsuit was properly granted, where there was no evidence that trains were operated any different on the night he was killed from their usual and normal operation; the only reasonable inference being that his death was due to his own negligence in failing to keep a sharp lookout as his duties required.

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

Action by J. H. Radcliff, as administrator of Gilliam Hall, deceased, against the Atlantic Coast Line Railroad Company. Judgment for defendant, and plaintiff brings error. Affirmed.

E. O. De Pass and Alfred Wallace, Jr., both of Columbia, S. C., for plaintiff in error.

Douglas McKay, of Columbia, S. C. (Barron, McKay, Frierson & McCants, of Columbia, S. C., P. A. Willcox, of Florence, S. C., and Lucian W. McLemore, of Sumter, S. C., on the brief), for defendant in error.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

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

KNAPP, Circuit Judge. In this action of negligence the trial court on plaintiff's proofs ordered a nonsuit, and error is assigned. These facts appear:

Gilliam Hall, plaintiff's intestate, a private in the National Guard of South Carolina, was one of a squad assigned to guard defendant's bridge across the Black river near Kingstree in that state. At midnight of May 7, 1917, he was posted as sentinel about 150 or 200 yards from the end of the span over the river, north of the trestle and on the west side of the track. Four hours later, when the guard was changed, and just where the trestle and embankment came together, he was found dead beside the track, lying on his back, his feet nearly touching the steel rail, his right foot cut and the left side of his head crushed in, his broken rifle underneath him. At the place where he was stationed the space between the ends of the ties and slope of the bank was rather narrow. The night was windy and cool, and he had built a fire, as was allowed, which was still smouldering when his body was discovered. The wind "made a roaring in the tree tops," as one witness says, and there was the noise of the running river.

During the four hours after Hall was posted some six trains passed, in one or the other direction, running fast, according to the testimony, and giving no signals as they came to the bridge. But it does not appear that trains were accustomed to reduce speed in crossing this bridge, or to give any signals as they approached it. In short, there is no proof which shows or suggests that the operation of these trains that night was in any respect different from their usual and normal operation at that point; and with this Hall was quite familiar, for he had been doing sentry duty there for a week or ten days before he met his death.

In our judgment the mere statement of what was shown decides the case without the need of argument. Assuming that Hall was killed by a passing train, as is no doubt the fact, there is nothing to indicate that defendant failed in any duty owed to him, or to warrant the inference of negligence on its part. On the other hand, the conclusion seems irresistible that he must have been the victim of his own carelessness. Stationed there to guard the bridge, directed to "keep a sharp lookout," under obligation to be constantly alert, in full possession of his faculties, with nothing for a long distance either way to obstruct his view of an approaching train, and easily able to place himself in a position of safety when a train passed, it is impossible to believe that he could be run down and killed, unless for some reason he was utterly inattentive to the situation. The only reasonable inference from the testimony imputes his death to his own negligence. It is not necessary to cite authority in support of the ruling below, but reference is made to the case of Hearell v. Ill. Cent. R. R. Co. (Ky.) 213 S. W. 561, which discusses at length a strikingly similar state of facts.

The trial court was clearly right in ordering a nonsuit, and the judgment will be affirmed.

STEVENS v. CUNARD S. S. CO., Limited.

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

No. 117.

Shipping ⇐140—Liability for loss of cargo limited by bill of lading.

A provision of a bill of lading that it is mutually agreed that the value of each package does not exceed £20, on which basis the freight is adjusted, and that the vessel's liability shall not exceed such sum, unless a value in excess is specially declared on in a shipping note, and extra freight paid as agreed on, *held* to govern, and limit the carrier's liability in all cases where the shipper, on shipment, has not declared the value of the goods, to the exclusion of all other provisions for ascertaining the value of goods lost or damaged.

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

Suit in admiralty by William Stevens against the Cunard Steamship Company, Limited. From the decree, libelant appeals. Affirmed.

For opinion below, see 265 Fed. 871.

Theodore L. Bailey, of New York City (C. V. Parsell, of New York City, of counsel), for appellant.

Lord, Day & Lord, of New York City (A. B. Bradley, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This libel was filed to recover for the loss of a bale of woolens shipped at Liverpool on the steamer Caronia and not delivered at New York, no value having been declared in the shipping note upon shipment.

Three clauses in the bill of lading, interspersed in a long paragraph of fine print and separated by provisions in many cases not relating to the amount recoverable in case of loss or injury, are as follows:

"It is also mutually agreed that the value of each package shipped hereunder does not exceed £20 (or its equivalent in American currency), or relatively for any proportion thereof, on which basis the freight is adjusted, and the company's liability shall in no case exceed that sum unless a value in excess thereof is specially declared on the shipping note accompanying the goods and stated therein, and extra freight as may be agreed on paid."

"The shipowner is not liable * * * in any case for more than the declared or invoice value of the goods, whichever shall be least."

"In the event of claims for short delivery when the ship reaches her destination, the price shall be the market price at the port of destination on the day of the ship's entry at the custom house, less all charges saved."

The libelant claimed to recover $943.31 under the third clause, while the respondent claimed that its liability was for $95.20 under the first clause. Judge Mayer entered a decree for $95.20, from which this appeal is taken.

We think these clauses divide all shipments into two classes:

A. Where the shipper upon shipment has not declared the value of the goods.

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

B. Where he has declared their value upon shipment.

The first of the above clauses (A) completely regulates the first class of shipments, and under it the owner has agreed that he may in no case recover more than £20 per package, or, if the value is less, only that value.

(B) covers: (a) The second clause, arrived goods, as to which the owner shall recover in case of total or partial damage the declared or invoice value, whichever shall be least. (b) The third clause applies to goods not arrived, and as to them the owner shall recover their market value on the day of the ship's entry at custom house, less charges saved.

This seems to us a consistent and reasonable construction of the three clauses. When the owner declares no value, and pays a minimum rate of freight, he should not recover more than the value agreed upon in the bill of lading; that is, not in excess of £20 per package, or the real value, if less than that sum, the rate of freight being adjusted upon that agreed value. When he has declared the value of the goods on shipment, and they are delivered, he will ordinarily be made whole for any loss if he receive the value which he has declared, or for which he has invoiced them, whichever is least.

But when the carrier fails to deliver at all it should put the owner in the position he would have been in had the shipment been delivered in good order, viz. their market value at destination, which is ordinarily more than their value at port of shipment.

For these reasons the decree is affirmed.

TREAT v. REDTOP ELECTRIC CO., Inc.*

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

No. 114.

Patents ⇐328—1,188,024, for electrical attachment plug, void for lack of invention.

The Treat patent, No. 1,188,024, for an electrical attachment plug, *held* void for lack of invention.

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

Suit in equity by Clifford E. Treat against the Redtop Electric Company, Incorporated. Decree for complainant, and defendant appeals. Reversed.

Henry J. Lucke, of New York City, for appellant.

Cornelius C. Billings, of New York City (L. S. Lyon, and Frederick S. Lyon, both of Los Angeles, Cal., of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order holding United States letters patent 1,188,024, granted June 20, 1916, to Clif-

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 537, 65 L. Ed. —.

ford E. Treat, for an electrical attachment plug, valid and infringed, and granting an interlocutory injunction.

Of late years there has been a great and increasing demand for electrically heated household appliances, such as griddles, toasters, curling irons, and particularly sadirons. This has been met by inserting in a plug at the end of a flexible cord contact members fixed on the appliance which complete the circuit and carry the current. Manufacturers of such appliances have generally adopted either round posts or a flat knife as contact members to be inserted in the plug, and they supply plugs to fit their own styles of terminal. Dealers in these appliances had to keep on hand stocks of plugs to replace plugs injured or used up, round post terminals for the product of one manufacturer and flat knife for that of another.

The idea occurred to Treat to devise a plug which would take either, and this was a novel and useful idea; but invention is not involved in a mere idea. The question always is whether the article devised to carry out the idea involves invention or only ordinary mechanical skill. The difficulty arises in applying a perfectly well-established principle to the particular facts of each case. There was no need long felt which this article supplied, nor did it increase the power or efficiency of electrical attachment plugs. It was an advance step in the art, making one plug take the place of two.

Treat carried out his idea by inserting in the socket of the plug a strip of sheet metal bent over on itself, the upper and lower jaws being concave in the center and flat along the edges. Into the round or oval opening in the center a round post could be inserted for the purpose of contact or between the flat edges a flat knife. It is true that no such article is to be found in the prior art, but we think that the moment the idea was presented no more than ordinary mechanical skill was needed to carry it out. See our decision as to a very similar claim in connection with an electrical plug in Bryant Electric Co. v. Hubbell (C. C. A.) 267 Fed. 572; also the decision of the Supreme Court of the United States lately handed down in Berlin Mills Co. v. Proctor & Gamble, 254 U. S. 156, 41 Sup. Ct. 75, 65 L. Ed. ——.

The order is reversed.

DONOVAN et al. v. NEW YORK TRAP ROCK CO.

(Circuit Court of Appeals, Second Circuit. February 16, 1921.)

No. 163.

Admiralty ⇐118—Findings on oral testimony binding on review of cause of injury to scow.

A finding by a trial court, on oral testimony of witnesses in open court, that injury to libelant's scow, chartered with its master to respondent, was due to the negligence of the master in failing to breast the scow out from a wharf where it lay, which allowed it to settle on an uneven bottom, will not be disturbed by an appellate court.

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

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

Suit in admiralty by Timothy Donovan and John Doolan against the New York Trap Rock Company. Decree for respondent, and libelants appeal. Affirmed.

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

Frederick W. Park, of New York City, for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge. Libelants own a scow, which (with their own master aboard) they chartered to respondent for so much per day for boat and men. Agreement was to return the boat at end of chartered period in good order, reasonable wear and tear excepted; it was returned with an injured bottom.

Charterers sent the scow to a wharf on the Hackensack river, where, in order to lie safely at low tide, such boats as libelants' had to breast off from the wharf with shores; if they did not, the sharply sloping and uneven bottom near the wharf side would inflict injury. Such injury this boat received.

At trial the case became (as was proper under Dailey v. Carroll, 248 Fed. 466, 160 C. C. A. 476) an inquiry whether the libelants' scow master displayed the reasonable care and skill of his calling in fixing and maintaining these shores. After hearing in open court much contradictory and irreconcilable evidence from eight witnesses, the District Judge held this employee of libelants negligent, and such negligence the proximate cause of disaster.

No litigation has been presented of late more plainly requiring application of the rule laid down from The Albany, 81 Fed. at page 968, 27 C. C. A. 28, to The Bern (C. C. A.) 261 Fed. 995, to the effect that, where a narrow issue of fact was presented by the oral testimony of men whose mien and bearing justly had weight with the judge who saw them, we will not disturb the result, even though the printed page alone might lead us to a different conclusion.

Decree affirmed, with costs.

BATSON v. ROSOFA et al.

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

No. 95.

Appeal and error ⇐999(1)—Construction of writing by jury not reviewable.
Where a writing might have either of two meanings, its construction by the jury under fair instructions is not reviewable.

In Error to 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

Action at law by Roland R. Batson against Juan Bianchi Rosofa and others. Judgment for defendants, and plaintiff brings error. Affirmed.

For opinion on former appeal, see 261 Fed. 874.

Koenig, Sittenfield & Aranow, of New York City, for plaintiff in error.

Bouvier & Beale, of New York City, for defendants in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. The plaintiff contended that he earned his commission of 2 per cent. upon the whole issue of West Porto Rico Sugar Company stock upon getting Toole Henry & Co. to sign Exhibit C. The defendants, on the other hand, contended that he could only earn a commission on performance by underwriters of their subscriptions.

Exhibit C might be construed to be only a form of syndicate agreement to be thereafter signed by the underwriters, Toole Henry & Co. only agreeing to act as syndicate managers. On the other hand, it might be construed as an underwriting of the whole issue by Toole Henry & Co., they also to act as syndicate managers.

In this connection must be considered the defendants' letter of March 25, 1918, in which they agreed to pay the commissions if any member or members of the syndicate failed to perform because of any acts of omission or commission on their part, but that no commission was to be paid if they refused to carry out the agreement. There was no evidence that the defendants prevented any underwriter or underwriters from carrying out their agreement.

Judge Knox submitted the question fairly to the jury. Their verdict in favor of the defendants must be taken as adopting the defendants' construction. None of the assignments of error justifies reversing the judgment, and it is therefore affirmed.

DOWNS v. GEORGIA CASUALTY CO.

(District Court, D. New Jersey. March 14, 1921.)

1. Insurance ⇐435—Policy required by statute from auto bus owner limited to car described.

Under Act N. J. March 17, 1916 (P. L. 283), providing that no auto bus shall be operated in the streets of a city until the owner shall obtain a license therefor from the city authorities, which shall be issued only on the filing by such owner of an insurance policy covering legal liability for any injury or death caused by the use of such auto bus both the license and the insurance policy are limited to the particular car named therein and the insurer cannot be held liable for an injury caused by a different car operated by the same owner.

2. Insurance ⇐175—Antedating transfer of policy to different subject held not to create liability for previous loss.

The indorsement, by an agent on a policy insuring against liability on account of injuries caused by an automobile, of its transfer to a different

car, and the dating of the transfer back to a prior date, at request of the owner, *held* not to impose liability on the insurer for an injury caused by such substituted car previous to the actual transfer and not then known to either the company or its agent.

At Law. Action by Edward Downs against the Georgia Casualty Company. Trial to court. Judgment for defendant.

James Mercer Davis, of Camden, N. J., for plaintiff.
Edward L. Katzenbach, of Trenton, N. J., for defendant.

RELLSTAB, District Judge. Edward Downs, having recovered a judgment in the New Jersey courts against Henry Levin, the owner of a Packard automobile, for bodily injuries inflicted upon him on December 1, 1917, by that automobile while operated by Levin, brought this suit against the defendant, Georgia Casualty Company, to recover the amount of the judgment and costs.

[1] His suit here is based on a policy of insurance issued by the defendant to Levin, pursuant to the provisions of the act of the New Jersey Legislature entitled "An act concerning auto busses, commonly called jitneys, and their operation in cities," approved March 17, 1916 (P. L. N. J. 283). Section 1 of this act defines an auto bus as including—

"any automobile or motor bus, commonly called jitney, engaged in the business of carrying passengers for hire."

Section 2 provides that no such auto bus—

"shall be operated wholly or partly along any street in any city until the owner or owners thereof shall obtain the consent of the board or body having control of public streets in such city for the operation of such auto bus and the use of any street or streets of said city; and no such consent shall become effective and no such operation shall be permitted until the owner of such auto bus * * * shall have filed with the chief fiscal officer of the city in which said auto bus shall be licensed and operated an insurance policy * * * in the sum of five thousand dollars ($5,000) against loss from the liability imposed by law upon the auto bus owner for damages on account of bodily injury or death suffered by any person or persons as a result of an accident occurring by reason of the ownership, maintenance or use of such auto bus upon the public streets of such city, and such consent shall continue effective and such operation be permitted only so long as such insurance shall remain in force; such insurance policy shall provide for the payment of any final judgment recovered by any person on account of the ownership, maintenance and use of such auto bus or any fault in respect thereto and shall be for the benefit of every person suffering loss, damage or injury as aforesaid."

Section 4 provides:

"Nothing herein contained shall exempt any person owning or operating any auto bus from complying with existing statutes relating to the ownership, registration and operation of automobiles in this state."

And section 5 provides:

"Any person operating an auto bus in any of the streets of any city in this state at any time, after sixty days from the time when this act shall take effect, without complying with the provisions of this act, shall be deemed guilty of a misdemeanor and subject to the penalties therefor provided by law."

At the time of the issuance of the policy in question—i. e., October 16, 1917—Levin was the owner of a Ford touring car, and the policy referred to such car by name, number, and year of manufacture. It was filed with the chief fiscal officer of the city of Trenton on October 17, 1917, and the certificate of the officer shows that the consent was limited to the car named in such policy. The policy (unaltered) was in force on the date of the accident.

The plaintiff's first contention is that under the act the insurer's liability is not limited to the particular car mentioned in the policy, but extends to any car that the person named in the municipal consent may operate while the policy is in force. The title of the act is general, but the word "operation," found therein, validly comprehends so much of the enactment as requires the filing with the municipal authorities of an accident insurance policy for the protection of the traveling public, as a condition precedent to licensing an auto bus to use the streets of a given city. Gillard v. Manufacturers' Insurance Co. of Philadelphia, 93 N. J. Law, 215, 107 Atl. 446. The licensing of an automobile, or a person to run or operate it, is not authorized by this act; the power to grant such a license is made the subject of another statute and is delegated, not to a municipal body, but to a state officer.

The municipal consent authorized by the auto bus act presupposes that both the car and the operator are licensed by state authority, and the whole purpose of such added consent spends itself on the car to be operated. As the consent is limited to a particular car, it follows that only the car or cars named therein can be operated thereunder, and as the consent is conditioned upon the filing of a policy of insurance with the municipal officer issuing the consent, it further follows that the obligation of the insurer is limited to the car named in the policy, and, without its consent cannot be extended to cover another car. The penalty denounced by the act, for operating an auto bus without complying with its provisions, while applicable only to the operators of the cars, is for the purpose of preventing the operation of unlicensed cars. The indemnity secured by the insurance policies required by the act covers only losses sustained through the operation of a licensed auto bus.

[2] However, it is said that the defendant agreed that its policy should cover the Packard in place of the Ford car, or that it is estopped from denying liability. These contentions require the stating of the following additional facts: On December 5, 1917, the general agents of the defendant, on an application received by them on December 3, 1917, indorsed the policy so that it ceased to cover the Ford car and covered a Packard car, as of 12 o'clock noon, December 1, 1917; that neither the defendant nor such general agents knew of the accident on any of said dates; that in the litigation between Downs and Levin in the state courts, resulting in the judgment hereinbefore referred to, the defendant managed and controlled Levin's defense, under an agreement between them (to which, however, Downs was not a party); that the defendant "reserved the right to disclaim liability under the aforesaid policy of the said Henry Levin"; that after the conclusion of such

litigation, the defendant advised Levin "that it disclaimed any liability whatsoever under its policy of insurance, for the reason that, as it claimed, no insurance had ever been issued by it upon said Packard car, or was in effect at the time of the accident referred to." The policy contains no provision giving the right to the assured, on mere request, to substitute another car for the one named therein.

Little more than a recital of these facts is necessary to show the untenableness of these contentions. The record does not disclose whether the defendant's agents had authority to antedate the consent to a substitution of cars. However, it does show that at the time of indorsing the policy, neither they nor the defendant knew that the consent would cover an accident which had already occurred.

In such circumstances, there is an absence of that meeting of minds which is the vital principle in all enforceable contracts. Never having knowingly agreed to cover an accident which had already taken place when the consent to a substitution of cars was actually given, the defendant had the legal right to repudiate any liability based thereon.

The taking over by defendant of Levin's defense in Downs' suit against him was not in itself a ratification of such indorsement, and, as such undertaking was accompanied with the express right to disclaim liability under the policy, the defendant is not estopped from denying liability in the present suit.

The record discloses nothing done by the defendant, after it learned of the accident, which in any way prejudiced the plaintiff's rights as fixed at the time of his injury, or which accrued to him subsequently.

The defendant is entitled to, and may enter, a judgment of no cause of action.

INTERNATIONAL RY. CO. v. DAVIDSON, Collector of Customs.

(District Court, W. D. New York. December 2, 1920.)

1. Customs duties ⇐92—Carrier of passengers must pay for examination of baggage on Sundays and holidays.

Rev. St. § 3100 (Comp. St. § 5812), as to inspection, and Act Feb. 13, 1911, § 5 (Comp. St. § 5571), as amended by Act Feb. 7, 1920, permitting a vessel to unload on Sundays and holidays on payment of extra compensation to the customs inspectors, applies to a carrier of passengers by trolley car, so that the customs collector can refuse to inspect the baggage of such passengers on Sundays and holidays, unless compensation for the inspectors is paid, and can impound such baggage for inspection on the next working day.

2. Customs duties ⇐53—Rule regulating baggage inspection on Sundays held reasonable.

The ruling of the Treasury Department requiring baggage brought in by trolley car passengers on Sundays and holidays to be impounded for inspection on the next working day, unless the trolley company pays the extra compensation for inspection under the provision of Rev. St. § 3100 (Comp. St. § 5812), and Act Feb. 13, 1911, § 5 (Comp. St. § 5571), as amended by Act Feb. 7, 1920, is a reasonable exercise of the department's power to make regulations for the enforcement of that section, and the court cannot substitute its judgment for that of the department.

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

3. Customs duties ⇐92—Advance notice of arrival not essential to duty to pay for extra services of inspectors.

Under Act Feb. 13, 1911, § 5 (Comp. St. § 5571), as amended by Act Feb. 7, 1920, authorizing the unloading of a vessel on Sundays and holidays, if advance notice is given the customs collector and extra compensation paid to the inspector, which has been amended to apply to all conveyances, the collector can require a trolley company to pay the extra expense of inspecting the baggage of passengers brought in on Sundays and holidays, though it cannot give advance notice of the arrival.

In Equity. Suit by the International Railway Company against George G. Davidson, Jr., Collector of Customs. On motion for injunction. Injunction denied.

Signor & Signor, of Albion, N. Y. (Charles G. Signor, of Albion, N. Y., of counsel), for the motion.

John T. Walsh, Sp. Asst. U. S. Atty., of Buffalo, N. Y., opposed.

HAZEL, District Judge. Motion to enjoin the collector of customs of the port of Buffalo from closing international toll bridges over Niagara river at Niagara Falls, N. Y., on Sundays and holidays, on the ground that the plaintiff owner declines to pay for extra services performed by inspectors of customs on such days at a double-time rate. According to the affidavit of the collector, he does not intend to close the toll bridges to traffic on Sundays and holidays, but in the performance of his duties he has promulgated certain rules relating to the inspection of baggage of passengers arriving on defendant's trolley cars from Canada and to other vehicles using the toll bridges for entering the United States from Canada, and to baggage carried by trolley cars or other conveyances, and inspecting the baggage of pedestrians, requiring its surrender to the collector, for the purpose of examining it on the day succeeding a Sunday or holiday, unless the plaintiff complies with section 5 of the act of February 15, 1920, requiring payment of it of such extra services performed on Sundays and holidays by the customs inspectors.

[1] Plaintiffs challenge the right of the collector to enforce any such rules or to require payment by them for any such services. Upon reading the various statutes relating to the subject-matter, to wit, section 3100, R. S. (Comp. St. § 5812), section 5 of the Act of February 13, 1911 (Comp. St. § 5571), and the amendatory act of February 7, 1920 (41 Stat. 402), I have become satisfied that any vessel, car, or other conveyance arriving from a foreign country, and articles imported therefrom in such conveyances, must be unladen in the presence of a customs inspector to determine the dutiability of the merchandise; that the Secretary of the Treasury is authorized to prescribe regulations relating to the arrival of conveyances from a foreign country other than a vessel, and application for a special license to lade or unlade any conveyance at night or on Sunday and holidays shall be made and good and sufficient bond executed as a condition of receiving a permit for immediate lading or unlading; that the Secretary of the Treasury is required to fix a reasonable rate of extra compensation for overtime service by inspectors who are on duty at night or on

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

Sundays or holidays performing such services; and that such extra compensation shall be paid by the master owner, or consignee of the vessel or other conveyance "whenever such a special license or permit for lading or unlading shall be granted."

Plaintiff insists that such provisions are limited to vessels or other conveyances carrying cargoes or freight, and do not include passengers' baggage since the baggage carried is merely an incident of the transportation of the person. No doubt the earlier statute was intended to apply to vessels and their cargoes, but inclusion by the amendatory act of 1911 of the words "other conveyances," and the later inclusion by the act of 1920, section 5, of the words "receiving or examination of passengers' baggage," would seem to imply extra compensation for immediate examination of passengers' baggage. A reasonable construction of the act requires, I think, that the plaintiff apply for a permit for immediate examination of baggage and unlading on the specified days, if it desires a continuance of such service.

[2] The rules suggested or promulgated by the collector relating to the surrender and examination of baggage carried by trolley passengers or by other vehicular passengers on Sundays or holidays on the next secular day, and the requirements that plaintiff use reasonable means to advise persons using the toll bridges that no examination of passengers' baggage and vehicles would be made by the inspectors until the day succeeding a Sunday or holiday, were not in my opinion unreasonable or unconstitutional. The collector, I think, acted within his jurisdiction, and the rights of the plaintiff are not in any way impaired, since it has the right to a special license or permit and to the service of an inspector for immediate examination of the baggage of its arriving passengers and conveyances using the bridge. It is true that there is no specific authority for licensing a toll bridge (obviously not a conveyance) for lading or unlading, yet since plaintiff concededly is owner of the bridges and trolley cars carrying the baggage of its passengers for hire and using the bridges for transportation, and collecting tolls, the provisions of the statute apply to it.

[3] It is also argued that since the statute requires advance reports or arrivals of vessels or other conveyances, i. e., freight cars, for example, the contended limitation to such instrumentalities is clear since bridge companies and conveyances like automobiles could not report their arrival in advance. I think, however, a fair and proper construction of the act of 1920, read in connection with the act of 1911, does not require any such limitation, but rather implies that as to the term "any other conveyances," which I think includes trolley cars or other vehicles, the Secretary of the Treasury or the collector of the port may prescribe such suitable rules as in their judgment may be necessary, and in that regard this court cannot substitute its judgment for theirs.

The injunction prayed for is denied. Two days' notice of entry of order to plaintiff.

NIAGARA FALLS INTERNATIONAL BRIDGE CO. et al. v. DAVIDSON, Collector of Customs.

(District Court, W. D. New York. December 27, 1920.)

Customs duties ⇐92—Can impound baggage carried by vehicles and foot passengers on Sundays and holidays.

Act Feb. 13, 1911, § 5 (Comp. St. § 5571), as amended by Act Feb. 7, 1920, authorizes the collector of customs to establish a rule impounding baggage brought in by foot passengers and drivers of vehicles on Sundays and holidays for inspection on the next working day, unless the toll bridge companies over whose bridges the passengers and vehicles arrived pay extra compensation for the services of the inspectors on Sundays and holidays.

In Equity. Suit by the Niagara Falls International Bridge Company and another against George D. Davidson, Jr., Collector of Customs. On motion for injunction. Injunction denied.

Basil Robillard (of Cohn, Chormann & Franchot), of Niagara Falls, for the motion.

John T. Walsh, Sp. Asst. U. S. Atty., of Buffalo, N. Y., opposed.

HAZEL, District Judge. In this case, unlike the conceded facts in International Railway Co. v. Davidson (D. C.) 271 Fed. 313, opinion filed this day, it appears that no cars or conveyances owned by plaintiff are used over its bridges across Niagara river into Canada, and that vehicles owned by others and foot passengers only use them, paying tolls or charges to the plaintiff for such use. It is not intended by defendant to close the bridges or directly interfere with traffic. The simple question is whether section 5 of the Act of February 7, 1920 (41 Stat. 402), properly construed, includes conveyances, automobiles, and vehicles, regardless of their ownership, coming from a foreign place across the bridges into the United States, and whether, as to them, the Secretary of the Treasury has the right to regulate their arrival, and the examination of vehicles and of their baggage and articles carried.

All merchandise, including vehicles and baggage carried in conveyances or by persons entering the United States, is concededly subject to inspection and examination by inspectors who perform their duties during the hours fixed by the Secretary of the Treasury. There is no provision of law requiring the inspection and examination of the conveyances or merchandise or baggage after the inspectors cease working for the day. The Act of February, 1911 (Comp. St. § 5571), amended the existing law relating to unlading of vessels arriving from a foreign port at night so as to include other conveyances. The term "other conveyances" was no doubt used in a restricted sense to conveyances such as freight trains importing merchandise into the United States, and a special permit was granted to transporting companies upon their paying the customs inspectors for overtime to work and giving the bond required by law. No provision was made for examining the baggage of persons coming into the United States from contiguous territory over a bridge on Sundays or holidays and nights, and the collector could, I think, have refused to perform such service.

He nevertheless required the inspectors to give such extra services on Sundays and holidays. In February, 1920, however, Congress again amended the statute, and by section 5 provided that extra compensation should be paid the inspectors for working overtime and on Sundays and holidays, the rate of compensation to be fixed by the Secretary of the Treasury for services rendered "in connection with the unlading, receiving, or examination of passengers' baggage," and the act required payment for such services to be made by the master, owner, agent, or consignee of "such vessel or other conveyance whenever such special license or permit for immediate lading or unlading, or for lading or unlading at night, shall be granted to the collector of customs."

The collector is not required to provide inspectors at the bridges to examine baggage or merchandise arriving on holidays and Sundays; and in my estimation it would not be an unreasonable rule to refuse such examination on those days, and require the impounding of baggage and merchandise until the next day. True, as contended, there is no provision for licensing the plaintiff, and thus compelling the collector to have baggage, pedestrians, and merchandise examined on Sundays and holidays; but it must not be overlooked that the Secretary of the Treasury has the right under the statute to prescribe reasonable regulations for such inspection, examination, and collection of duties. The instructions to the collector from the Secretary of the Treasury with reference to foot passengers using plaintiff's bridges expressly permit them to enter, and only when the examination of their baggage consumes too much time on Sundays and holidays will it be detained until the following day. As stated in the opinion in the International Railway Co. Case, the Secretary of the Treasury has the lawful right to enact such reasonable rules as in his judgment may be necessary for properly carrying out the provisions of the statute and with reference thereto this court cannot interfere.

Other points argued have been considered, but they do not persuade me that the injunction should be continued during the pendency of the action. Two days' notice of entry of vacating order should be given the plaintiff.

NIELSEN et al. v. LIBBY, McNEILL & LIBBY.

(District Court, N. D. Illinois, E. D. December 15, 1920.)

No. 1108.

Patents ⊂328—1,268,601, claims 6, 7, 12–15, and 1,268,602, for improvement in agitating means, held invalid.

The Nielsen patents, No. 1,268,601, claims 6, 7, 12–15, and No. 1,268,602, for improvements in means for agitating the contents of a tank by an agitator resembling an ordinary screw propeller, *held* invalid, considering the state of the prior art.

In Equity. Suit by Niels D. Nielsen and another against Libby, McNeill & Libby for infringement of patents. Decree rendered for defendants.

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

F. O. Richey, of Elyria, Ohio, and Brown, Boettcher & Dienner, of Chicago, Ill., for plaintiffs.

Church & Rich, of Rochester, N. Y., and Banning & Banning, of Chicago, Ill., for defendant.

CARPENTER, District Judge. Suit in equity for infringement of letters patent No. 1,268,601 and No. 1,268,602, granted June 4, 1918, to Niels D. Nielsen for improvements in "agitating means." The subject-matter of both patents briefly is a means for agitating the contents of a tank, and specifically a vertical, cylindrical tank, by means of an agitator, preferably in the form of a wheel, resembling an ordinary screw propeller such as is used in driving boats, arranged upon the inner end of a shaft extending through the side of the vessel near its bottom.

The first patent shows a tank having the central portion of its bottom convex; the second patent shows a tank or vat with a concave bottom. Both patents in suit show tanks provided with jackets, into which a heating or cooling medium may be introduced to vary the temperature; but this feature is not mentioned in any of the claims in issue.

Infringement is charged of claims 6, 7, 12, 13, 14, and 15 of the first patent, and each of the six claims of the second patent. I am of opinion that both patents are invalid, considering the state of the prior art. British patent to Bolt, No. 21,912, 1900; Marchand patent, No. 273,569; Mauldin patent, No. 1,057,567. The language of the Supreme Court in Marchand v. Emken, 132 U. S. 195, 10 Sup. Ct. 65, 33 L. Ed. 332, in passing upon a decree holding Marchand patent, No. 273,569, invalid, is singularly appropriate:

"The pretense that the complainant had discovered some occult and wonder-working power in the motion of a screw revolving in the bottom of a tub is not sustained by the proof. Whether the contents of the tub be oxygenated water, or soap, or lye, or tartaric acid, the action will be the same. That rotary, eddying motions in liquid will result from the revolving screw, that the liquid will rise highest at the periphery of the tub, and thus have the tendency, at the top, to fall towards the center, were well-understood operations of centrifugal force. As every device, apparatus, formula, law of nature, motion, and ingredient adopted by the complainant was old, the patent must be held invalid, unless it can be said that giving to oxygenated water a well-known rotary motion springs 'from that intuitive faculty of the mind put forth in the search for new results or new methods, creating what had not before existed, or bringing to light what lay hidden from vision.' Hollister v. Benedict Manufacturing Co., 113 U. S. 59, 72. No such faculty has been tasked in giving form to this patent. There is here no sufficient foundation upon which to rest a claim which, if construed as broadly as the complainant insists it should be, practically makes all pay tribute who stir the mixture in question by machinery, and by hand also, provided substantially the same movement can be produced by hand stirring, and this seems to be a disputed question upon the proof. The complainant's claim to be enrolled upon the list of inventors is based upon propositions too theoretical and visionary for acceptance."

A decree may be prepared, finding both patents invalid as to the claims relied upon.

MICHIGAN CENT. R. CO. v. MICHIGAN PUBLIC UTILITIES COMMISSION et al.

(District Court, E. D. Michigan, S. D. January 24, 1921.)

1. **Courts ⇐102—Application for preliminary injunction on ground that state statute conflicts with federal statute must be heard by three judges.**
A suit to enjoin enforcement of a state statute, on the ground that it is in conflict with a valid federal statute, is based on its unconstitutionality, within the meaning of Judicial Code, § 266 (Comp. St. § 1243), requiring an application for preliminary injunction in such cases to be heard by three judges.

2. **Railroads ⇐5½, New, vol. 6A Key-No. Series—Intrastate rates continued in effect by federal Transportation Act until thereafter changed.**
By Transportation Act Feb. 28, 1920, § 208a, providing that rates in effect on February 29, 1920, should continue in force "until thereafter changed by state or federal authority, respectively, or pursuant to authority of law," it was clearly intended that state statutes or regulations fixing intrastate rates, which were suspended during federal control, should not automatically again go into effect on the cessation of such control, but that, in view of the recognized large increase in cost of operation during such control, which would render such pre-control rates confiscatory, the rates then in effect, both interstate and intrastate, should continue in force until thereafter changed by competent authority to reasonably conform to changed conditions.

3. **Statutes ⇐217—Construction may be aided by reference to legislative committee reports.**
Reference to committee reports, and to what is said by the chairman of the committee in explaining the meaning of a bill, is proper in ascertaining the meaning of the statute.

4. **Railroads ⇐5½, New, vol. 6A Key-No. Series—State legislation held not a "change of rates," under federal Transportation Act.**
Pub. Acts Mich. 1919, No. 382, prescribing maximum passenger rates, though passed during federal control and by its terms to take effect only on termination of such control, *held* not a change of rates in conformity with Transportation Act Feb. 28, 1920, § 208a, providing that rates then in effect should remain in force until "thereafter changed."

5. **Railroads ⇐5½, New, vol. 6A Key-No. Series—Rate provision of federal Transportation Act valid.**
Transportation Act Feb. 28, 1920, § 208a, providing that rates in effect February 29, 1920, at the termination of federal control, should continue in force "until thereafter changed by state or federal authority, respectively, or pursuant to authority of law," as applied to intrastate rates, *held* valid as an exercise of the war powers of Congress, incidental to federal control of the railroads and their return to their owners under vitally changed conditions created during such control.

6. **Public service commissions ⇐24—Undertaking to refund excess charges required.**
While a bond will not necessarily be required from a plaintiff who seeks an injunction to enforce the dominance of a federal statute, yet such a plaintiff must undertake to submit to the final decree for refunding any excess payments it receives by aid of the injunction.

In Equity. Suit by the Michigan Central Railroad Company against the Michigan Public Utilities Commission, Merlin Wiley, Attorney General of Michigan, and others. On motion for preliminary injunction. Granted.

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

Frank E. Robson, J. W. Dohany, and John C. Bills, all of Detroit, Mich., Alex. L. Smith, of Toledo, Ohio, A. A. McLaughlin, of Evanston, Ill., and W. K. Williams, of Detroit, Mich. (A. E. Miller, of Marquette, Mich., Carl R. Henry, of Alpena, Mich., E. M. Davis, of Grand Rapids, Mich., A. H. Lossow, of Minneapolis, Minn., O. W. Dynes, of Chicago, Ill., F. W. Sargent, of Des Moines, Iowa, Bertrand Walker, of Chicago, Ill., and Stanley W. Merrell, of Cincinnati, Ohio, of counsel), for plaintiff.

Before DENISON, Circuit Judge, and KILLITS and TUTTLE, District Judges.

PER CURIAM. This is an application for a preliminary injunction, heard before three judges pursuant to section 266 of the Judicial Code (Comp. St. § 1243).

For several years before 1919, the Michigan statute had fixed the rate for intrastate railroad passenger transportation (with exceptions not now material) at the sum of 2 cents per mile. Act No. 382 of the Public Acts of 1919, approved May 13, 1919, fixed it at 2½ cents per mile (with similar exceptions), but contained this proviso:

"This act shall not apply to any railroad, the control of which has been taken over by the federal government, while under such federal control."

The Michigan Central Railroad, and each of the 12 other railroads whose similar applications are heard with this, had passed into and remained under federal control, pursuant to the act of Congress approved March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), and the presidential proclamations thereunder. During this period of federal control, the passenger rate for intrastate transportation had been fixed at 3 cents per mile, and this was the rate on February 29, 1920. On February 28, 1920, the act of Congress known as the Transportation Act (41 Stat. p. 456), was approved. It was thereby provided that the railroads should be returned to their owners and federal control should cease on February 29 (March 1), 1920, but that, until September 1, 1920, the government would guarantee the railroads a certain prescribed net return. Section 208a of the Transportation Act is as follows:

"All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares, or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by state or federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or charge is approved by the commission."

Upon the theory that federal control, within the meaning of the Michigan act of 1919, would terminate, at the latest, on September 1, 1920, the Michigan Public Utilities Commission gave notice to the railroads that on and after that date the fare must be reduced to 2½

cents. The bills in these cases were filed against the commission and the Attorney General and one of the prosecuting attorneys, to enjoin proceedings to enforce the Michigan act. The jurisdiction of this court is invoked, because the case arises under the laws of the United States, and because the 2½-cent rate would be confiscatory, and because the severity of the penalites would deprive the railroad of the equal protection of the laws. Upon the hearing of this motion, sole reliance is placed upon the effect of the Transportation Act.

[1] No question has been raised about the propriety of constituting a court pursuant to section 266; but we do not overlook some possible uncertainty in this matter. This injunction is not sought "upon the ground of the unconstitutionality of such statute," in the more common sense in which we speak of unconstitutionality. That there is a conflict between state and federal law does not always bring to mind the issue of the unconstitutionality of the former; yet it is prescribed by the federal Constitution that it and the laws and the treaties made in pursuance thereof shall be the supreme law of the land, and it seems to follow that a state statute which is in conflict with a federal statute, when the latter is pursuant to and within the power given by the federal Constitution, is, in a very fair sense, unconstitutional. We think the present situation is fully within the spirit and fairly within the letter of section 266, and that the court, as now constituted, has power to hear and determine the application. Even if otherwise, the District Judge, in whom the power would rest if the special court were not required, joins in this opinion and in directing the entry of the order thereon.

[2] Prior to the taking over of federal control, a complete system of intrastate rates existed in many or all of the states, and these rates were fixed, sometimes directly by statute, and sometimes by regulatory bodies. It was recognized that these intrastate rates were within the state jurisdiction, and were not a matter of federal control, save to a degree and in contingencies not here important. Undoubtedly all these various state laws and regulations were suspended by the operation of the Federal Control Act, and, having been thus merely suspended, and not repealed, they would automatically take effect again at the end of the suspension; that is, at the termination of the federal control. Tua v. Carriere, 117 U. S. 201, 209, 6 Sup. Ct. 565, 29 L. Ed. 855. If Congress, in passing the Transportation Act, intended that this automatic reversion should occur, that is the end of the matter, and the commission was right in proposing to enforce the Michigan act after September 1st; but, if Congress intended otherwise, we come to further questions. The congressional intent must, therefore, be ascertained.

To us the intent seems very clear upon the face of the statute. We take notice of the orders of the Director General and of the Interstate Commerce Commission under which, during the period between March 21, 1918, and February 29, 1920, the cost of railroad operations had enormously increased and the rates had been advanced in an effort to provide the increased cost. We take notice, also, of the general

change in conditions, such that, in February, 1920, perhaps no one could have been found who would contend that it would be fair or reasonable to reduce the railroad rates to the figures prevailing before the war and leave the roads subject to the permanently fixed and greatly increased costs of operation. It would seem most natural and reasonable that the rates, both interstate and intrastate, should remain at the figures then existing until the proper authority, federal with reference to one and state with reference to the other, should have opportunity to investigate the situation as it might then exist, and determine whether or not any change should occur. In apparent execution of this natural intent, we find the statute saying that the rates in effect on February 29, 1920, shall continue in force, "until thereafter changed by state or federal authority, respectively, or pursuant to authority of law," and then providing that in no event shall the rates be reduced before September 1, 1920, unless with the approval of the Interstate Commerce Commission. It would be a strained construction of language to say that the mere automatic reversion to the pre-control status, which would have occurred on February 29, if the Transportation Act had made no inconsistent provision, is that change, subsequent to February 29, which the act contemplates when it speaks of "thereafter changed." Not only is it plain to us, by the words of the law, that Congress intended the then existing rates to continue until the regulating authority should, by due action thereafter taken and in view of the new situation, make a change; but, if there were doubt about it, the proceedings in Congress would remove the doubt.

It will be observed that there is no distinction in section 208a between freight and passenger rates, nor between interstate and intrastate rates. The latter were, at this time, within the power of Congress, and the intent to reach them is clear from the reference to changes made by state authority, because such changes could refer to nothing else. The question whether automatic return to pre-control rates was desired would be the same as to interstate and intrastate, freight and passenger, matters. The bill, which later became the Transportation Act, was reported by the House committee on interstate commerce November 10, 1919. Report 456, 66th Congress. In this report, the committee refers to this clause, which then contained only the words, "until thereafter changed by or pursuant to authority of law," and points out that without such a provision all the rates would immediately revert to their pre-control status, and continues:

"In view of the enormous increase in operating costs of carriers, due to increased wages and cost of materials, restoration to former level would result in such enormous decrease in revenues as would render it utterly impossible, even for the stronger railroads, to meet operating expenses. By the insertion of the above section, the existing rates, fares, charges, etc., are to continue in force and effect until changed by or pursuant to authority of law; that is, until changed by the appropriate regulatory body."

The chairman of the House committee, in presenting this bill (Congressional Record, Nov. 11, 1919, p. 8314), in speaking of this provision for continuing the rates in effect, said:

"It is apparent that, unless we put in a provision of this kind, then, as soon as the federal control ended, all the rates made under federal control would cease, and the rates would revert to their pre-control status—both interstate and intrastate. It is clear to all that that would be calamitous. If the rates of the federal railroads now existing, as fixed by the Director General, should suddenly be brought to a pre-control level, there would be scarcely a railroad in the United States that could begin to pay operating expenses. * * * If control ceases without this section in the bill, the rates would be dropped 25 per cent. on freight and 50 per cent. on passengers, with the consequences I have already stated."

Later the section was amended by inserting the words "state or federal authority, respectively," so that it took the form in which it passed. The member of the House committee who then seemed to be in charge of the bill had pointed out that this language was intended to reach both the state authority and the federal authority, each within its proper regulatory scope, when a member proposed to amend by inserting:

"Provided, that nothing in this section shall be construed to include intrastate shipments."

The member in charge of the bill replied:

"That is not the intention. They are continued until the proper state authorities can pass upon them. Otherwise, they would come back to pre-war rates." Congressional Record, p. 8451.

The proposed amendment then seems to have been abandoned.

[3] Reference to committee reports, and to what is said by the chairman of the committee in explaining the meaning of the bill, is proper in ascertaining its intent (Duplex Co. v. Deering [U. S. S. C., Jan. 3, 1921] 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. ——), and these references seem to us to demonstrate that Congress intended to prevent the automatic reapplication of the superseded pre-control rates, either state or federal.

[4] It is true that the Michigan commission does not propose to revive any pre-control rate, since the Michigan act in question was not passed until May, 1919; but, while this distinction gives color of difference, we think there is none in principle. All pre-control state regulations and statutes were suspended during the period of federal control by the application of the familiar rule of law upon that subject. The Michigan statute of 1919 was suspended during the same period of federal control, but by its express words. The Transportation Act speaks as of February 29, 1920, and its insistence upon a change "thereafter" made is no better satisfied by a state statute passed in 1919, and suspended by its terms during federal control, than by one passed in 1917 and suspended during the same period by operation of law. The best that can be said is that the reasons of Congress for not permitting the Michigan act of 1919 to come into automatic effect would not have been quite so strong as the same reasons were which applied to older regulations; but the language used does not permit of any distinction. Indeed, it might be said—though we are not very strongly impressed with the suggestion—that since the Transportation

Act expressly declares that federal control of existing state rates does not cease until the state thereafter takes affirmative action, the very period of suspension provided by the words of the Michigan statute has not yet expired.

[5] Being satisfied as to congressional intent, the remaining question is one of power. It is urged on behalf of the railroads that under the terms of other portions of the Transportation Act it has come about that the fixing of an intrastate rate has such a direct effect upon the interstate rates as to justify Congress in taking over absolutely and permanently the whole matter of intrastate rates, and that Congress has done so. The contrary is forcefully argued, on behalf of the state. We find it unnecessary to consider these contentions, because we think the congressional right to effectuate the intent which we have found in section 208a is sufficiently based on the war power. The right to fix intrastate rates during federal control and as incidental to the war power is settled. Northern Pac. Co. v. North Dakota, 250 U. S. 135, 148, 39 Sup. Ct. 502, 63 L. Ed. 897. It is also beyond dispute —indeed, it is not denied by the Attorney General here—that the same power would extend to and cover federal regulation of state rates for a reasonable transition period (Stewart v. Kahn, 78 U. S. [11 Wall.] 493, 506, 20 L. Ed. 176), as incidental to the return of the railroads to their owners, covered by a shield which should prevent their immediate destruction; but it is claimed that the six months from March 1st to September 1st, during which the federal guaranty continued, exhausts such transitional or twilight period, and it is pointed out—as is true—that the effect of the construction which we give to this statute and of holding it valid to that extent is not merely to embarrass temporarily the state jurisdictions, but is really to abrogate the entire structure of rates, charges, etc., as made by statute or by commission, in every state of the Union where such structures existed. Every such state must begin again.

On the other hand, while there is, for the time being, a complete abrogation, yet this is only during the acquiescence and approval of the states. They may, so far as this question is concerned, restore their pre-control structures at any time by a statute or an order of ten words. It also may be noted that section 210 of the Transportation Act specifies two years as a reasonable transition period for the retention of certain collateral federal powers, and this period has not yet expired.

We cannot think that Congress exceeded its war powers in this particular. It was delivering back the railroads to their owners, saddled with burdens which made the rates of a year or two earlier quite impossible. In making this return, it was certainly proper for Congress to fix conditions which should preserve the property temporarily from the immediate destruction that would otherwise surely result; and Congress, in effect, declared that these existing rates, which had proved to be necessary during the war, were also necessary until the still existing war conditions should be materially modified. It turned over the property to the owners, and (as we are now assuming) it returned to the states the power of regulatory control, saying only that this control

must not be exercised without a fresh consideration of what would be right and proper. We are content to rest our conclusion upon this construction of the war power.

We have been compelled to consider these questions practically as matters of first impressions. We are informed that a similar court in the Second Circuit has reached the contrary conclusion, Circuit Judge Ward and District Judge Cooper concurring, and Circuit Judge Hough dissenting, and that three judges in the Eighth Circuit, Circuit Judge Sanborn, and District Judges Wade and Woodrough, have reached the same conclusion we do; but in neither case is there more than a bare announcement of the result.

The temporary injunction should issue as prayed for. We are informed that a proceeding has been commenced in one of the state courts to prevent the application to intrastate transportation of rates fixed by the Interstate Commerce Commission under the claimed authority of the Transportation Act. No conflict between the jurisdiction acquired by this court upon the filing of the bills in these cases and the jurisdiction asserted by the state court in that matter has been pointed out, and all counsel disclaim the existence of any such conflict. The injunction to be issued is not intended to affect or embarass the progress of that litigation; although, if any conflict of jurisdiction should hereafter be claimed to exist or develop, the subject will be open for further consideration.

[6] There is precedent in this circuit which suggests the requirement of a bond or some other security from the railroad company that it will refund to the passengers one-half cent per mile in case the 2½-cent fare shall eventually be held lawful; but this precedent is in a case where plaintiff's right depended upon establishing the fact of confiscation, and where it was evident that there would be long delay. Here the Attorney General has not asked for a bond or other security, the controlling question is one of law, and does not seem to us doubtful, and there is no reason to anticipate long delay in getting the opinion of the Supreme Court upon one of the earlier cases, if not upon this. Under such circumstances, we do not think it necessary to order security. If any of these conditions change, an application will be entertained at any time.

However, in view of the suggestion in Minneapolis Co. v. Washburn Co. (U. S. S. C., Dec. 20, 1920) 254 U. S. 370, 41 Sup. Ct. 140, 65 L. Ed. ——, each railroad, as a condition of getting its injunction issued, should file herein its consent and undertaking, in form and details approved by the judge of the district, that in case it shall finally be adjudged that 2½ cents has been the lawful fare, an accounting may be had at the foot of the decree in this case in which judgment may be rendered against the railroad in favor of each passenger for the excess fare wrongfully collected, and that, in such accounting, the excess payments may be established by such convenient method of informal proof as the court may direct.

In re VASICEK.

(District Court, E. D. Missouri, E. D. March 12, 1921.)

1. **Aliens ⟸68—Petitioner for naturalization has burden to meet all statutory requirements.**

The burden of proof rests on a petitioner for naturalization affirmatively to establish by relevant, material, competent, positive, and direct evidence that he has fully met the requirements of the statute.

2. **Aliens ⟸62—Naturalization applicant must show understanding of petition.**

A petitioner for naturalization cannot be held "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same," where, though alleging in his petition that he is "not a disbeliever in or opposed to organized government," or affiliated with any organization opposed to organized government and "not a polygamist nor a believer in polygamy," he testifies that he does not know the meaning of the words "anarchist" or "polygamy."

In the matter of the petition for naturalization of Frantisek Vasicek. Petition denied.

M. R. Bevington, of St. Louis, Mo., for the United States.

DYER, District Judge. The candidate, Frantisek Vasicek, during the final hearing on his petition for naturalization, testified that he did not know the meaning of the words "anarchy" or "polygamy." Thereupon the government prayed the denial of his application. Pertinent portions of the petition filed in this cause by said candidate follow:

"I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government. I am not a polygamist nor a believer of polygamy."

The fourth subdivision of section 4 of the Act of June 29, 1906, 34 Stat. 596 (Comp. St. § 4352), prescribes that before admitting any alien to citizenship the court concerned shall be satisfied the candidate is in truth and in fact "attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same." It is self-evident from the candidate's own testimony that that portion of his petition in which he solemnly declares he is not an anarchist or polygamist, etc., is meaningless to him. The question is accordingly at once raised: What does the Naturalization Act require of an applicant in the way of proof of the averments contained in his petition?

[1] Turning to the authorities, we find the law declared to be that the burden of proof rests on a petitioner for naturalization affirmatively to establish by relevant, material, competent, positive, and direct evidence that he has fully met the requirements of the statute. In re Kornstein (D. C.) 268 Fed. 174; Johannessen v. United States, 225 U. S. 240, 32 Sup. Ct. 613, 56 L. Ed. 1066, and United States v. Ginsberg, 243 U. S. 474, 475, 37 Sup. Ct. 422, 61 L. Ed. 853. As illustrating this rule, it has been held that the candidate must establish that his verifying witnesses are citizens of the United States (In re

Aprea [C. C.] 158 Fed. 702; United States v. Martorana, 171 Fed. 397, 96 C. C. A. 353, reversing In re Martorana [D. C.] 159 Fed. 1010, and In re Welch et al. [C. C.] 159 Fed. 1016; In re Wolf [C. C.] 188 Fed. 519); that such witnesses must possess personal knowledge of the facts testified to (In re Kornstein, supra); that they must have known the petitioner for the statutory period (In re Toomey [Sup.] 111 N. Y. Supp. 600; In re Manning [D. C.] 209 Fed. 499; United States v. Gulliksen, 244 Fed. 727, 157 C. C. A. 175), that they are credible (In re Kornstein, supra); that they actually possessed personal knowledge of the facts testified to (In re Kornstein, supra); that the petitioner is attached to the principles of the Constitution (In re Meakins [D. C.] 164 Fed. 334; In re Bear Goldberg [D. C.] 269 Fed. 392); that he has not evaded military service through pleading his alienage (In re Loen [D. C.] 262 Fed. 166; In re Silberschutz [D. C.] 269 Fed. 398; In re Sebastiano Tomarchio [D. C.] 269 Fed. 400); that his family is actually in the United States (In re Sigelman [D. C.] 268 Fed. 217; In re Rustigan [C. C.] 165 Fed. 980); that he has not deserted from the army (In re Albert Ernest Julius Gnadt [D. C.] 269 Fed. 189); that he has not, after taking steps to acquire citizenship, claimed the protection of the country of his nativity (In re Francesco Aldani [D. C.] 269 Fed. 193); that at the time of petitioning he had attained his majority (In re Cardaro [D. C.] 246 Fed. 735); that he is in truth and in fact a man of good moral character (In re Di Clerico [D. C.] 158 Fed. 905; In re Ross [C. C.] 188 Fed. 685; In re Talarico [D. C.] 197 Fed. 1019; In re Trum [D. C.] 199 Fed. 361; In re Centi [D. C.] 211 Fed. 559; In re Addis [D. C.] 252 Fed. 887; In re Kornstein [D. C.] 268 Fed. 172–173); that he intends to permanently reside in the United States (In re Naturalization of Aliens [D. C.] 250 Fed. 316); that all provisions of the Naturalization Act have been fully met (United States v. Nisbet [D. C.] 168 Fed. 1005; United States v. Mansour [D. C.] 170 Fed. 671; United States v. Spohrer [C. C.] 175 Fed. 440; United States v. Rodgers, 185 Fed. 334, 107 C. C. A. 452; United States v. Plaistow [D. C.] 189 Fed. 1006; United States v. Kolodner, 204 Fed. 240, 24 C. C. A. 1, reversing [D. C.] 190 Fed. 809; United States v. Albertini [D. C.] 206 Fed. 133; In re Schrape [D. C.] 217 Fed. 142; United States v. Nopoulos [D. C.] 225 Fed. 656; United States v. Leles [D. C.] 227 Fed. 189, and [D. C.] 236 Fed. 784; In re Mondelli [D. C.] 228 Fed. 920; In re Markun [D. C.] 232 Fed. 1018; In re Horecsny [D. C.] 238 Fed. 448, and cases there collected; In re Mallari [D. C.] 239 Fed. 416; United States v. Morena, 247 Fed. 484, 159 C. C. A. 538; United States v. Ginsberg, 247 Fed. 1006, 159 C. C. A. 665; United States v. Kramer [C. C. A.] 262 Fed. 395; Gerrard v. United States, 43 Ct. Cl. 67 [note that the stream of crime flowing from any relaxation of this rule is well illustrated by the cases of Levin v. United States, 138 Fed. 826, 63 C. C. A. 476, Dolan v. United States, 133 Fed. 440, 69 C. C. A. 274, Holmgren v. United States. 156 Fed. 439, 88 C. C. A. 301, Id., 217 U. S. 509, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778, United States v. Dupont (C. C.) 176 Fed. 824, United States v. Bressi (D. C.) 208 Fed. 369, and Gregorat v. United States, 249 Fed. 470, 161 C.

C. A. 428]); that legal notice has been given of the date of final hearing (United States v. Peterson, 182 Fed. 289, 104 C. C. A. 571; In re O'Dea [C. C.] 158 Fed. 703; United States v. Daly, 32 App. D. C. 525; In re Giaquinto [D. C.] 230 Fed. 1004); that the petitioner labors under no legal disability in seeking citizenship (In re Rionda [D. C.] 164 Fed. 368; United States v. Cohen, 179 Fed. 834, 103 C. C. A. 28, 29 L. R. A. [N. S.] 829; Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. 297, Ann. Cas. 1916E, 645); that he actually resided, where petition is filed in a state court, in the county in which the court concerned sits (United States v. Schurr [D. C.] 163 Fed. 648; United States v. Wayer [D. C.] 163 Fed. 650; United States v. Johnson [D. C.] 181 Fed. 429; Petition of Briese [D. C.] 267 Fed. 600 [see In re Pearlman (D. C.) 226 Fed. 60, for rule when application is filed in federal court]); that he is not a radical (United States v. Olsson [D. C.] 196 Fed. 562; United States v. Swelgin [D. C.] 254 Fed. 884); that he is an alien, and not theretofore naturalized (In re Buck [D. C.] 204 Fed. 701); that proper proof had been made concerning his entry in the United States (In re Kestelman [C. C.] 165 Fed. 265; In re Liberman [D. C.] 193 Fed. 301; In re Hollo [D. C.] 206 Fed. 852; In re Elliott [D. C.] 263 Fed. 143; United States v. Ness, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 321, reversing [D. C.] 217 Fed. 169, and 230 Fed. 950, 145 C. C. A. 144, Ann. Cas. 1917C, 41; Ex parte Joseph Eberhardt [D. C.] 270 Fed. 334); that he has not been debarred from naturalization by a prior adjudication (In re Centi [D. C.] 217 Fed. 833; In re Hartman [D. C.] 232 Fed. 797; In re Norman [D. C.] 256 Fed. 543; In re Kornstein, supra, and cases there collected); that he is not an inadmissible enemy alien (Grahl v. United States [C. C. A.] 261 Fed. 487; In re Pfleiger [D. C.] 254 Fed. 511; United States v. Kamm [D. C.] 247 Fed. 968; In re Lindner [D. C.] 247 Fed. 138; In re Duus [D. C.] 245 Fed. 813; Ex parte Bourchardt [D. C.] 242 Fed. 1006; In re Naturalization of Subjects of Germany [D. C.] 242 Fed. 971; In re Hass [D. C.] 242 Fed. 739; In re Jonasson [D. C.] 241 Fed. 723; Ex parte Overington, 5 Bin. [Pa.] 371; Ex parte Newman, 2 Gall. 11, Fed. Cas. No. 10,174); that he has been an actual physical resident of the United States for the jurisdictional period, constructive residence being excluded by the spirit of the Naturalization Act (United States v. Ginsberg [D. C.] 244 Fed. 214, and cases there cited [see, also, Ex parte Walton, 1 Cranch, C. C. 186, Fed. Cas. No. 17,127; Ex parte Saunderson, 1 Cranch, C. C. 219, Fed. Cas. No. 12,378; In re Hawley, 1 Daly (N. Y.) 531; Ex parte Paul, 7 Hill (N. Y.) 56; Ex parte Merry, 14 Phila. (Pa.) 212; United States v. Simon (C. C.) 170 Fed. 680; United States v. Aakervik (D. C.) 180 Fed. 137; United States v. Ellis (D. C.) 185 Fed. 546; Luria v. United States, 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101, affirming (D. C.) 184 Fed. 643; United States v. Cantini, 212 Fed. 925, reversing (D. C.) 199 Fed. 857; United States v. Mulvey, 232 Fed. 513, 146 C. C. A. 471; In re Brash (D. C.) 235 Fed. 1003; United States v. Grimminger (D. C.) 236 Fed. 285; In re Cook (D. C.) 239 Fed. 782; In re Di Giovine (D. C.) 242 Fed. 741; United States v. Bragg (D. C.) 257 Fed.

588]); that renunciation of allegiance has been made to the proper sovereign (United States v. Vogel [C. C. A.] 262 Fed. 262); that the petitioner is a "white person" (In re Saito [C. C.] 62 Fed. 126; In re San C. Po, 7 Misc. Rep. 471, 28 N. Y. Supp. 383; In re Kanaka Nian, 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726; In re Burton, 1 Alaska, 111; In re Camille [C. C.] 6 Sawy. 341, 6 Fed. 256; In re Buntaro Kumagai [D. C.] 163 Fed. 924, and cases there cited; In re Knight [D. C.] 171 Fed. 299; Bessho v. United States, 178 Fed. 245, 101 C. C. A. 605; United States v. Gardner [D. C.] 189 Fed. 690; In re Young, [D. C.] 198 Fed. 715, and 195 Fed. 645; In re Lampitoe [D. C.] 232 Fed. 382; In re Rallos [D. C.] 241 Fed. 686; In re Singh [D. C.] 246 Fed. 496 [see, also, Ex parte Shahid (D. C.) 205 Fed. 812; Ex parte Dow (D. C.) 211 Fed. 486; In re Dow (D. C.) 213 Fed. 355; Dow v. United States, 226 Fed. 145, 140 C. C. A. 549; In re Halladjian (C. C.) 174 Fed. 834]); that his declaration of intention has not been altered, amended, or corrected (United States v. Vogel, supra); that his declaration of intention has matured (United States v. Van Der Molen [D. C.] 163 Fed. 650); that he actually possessed a valid declaration of intention (In re Spitzer [C. C.] 160 Fed. 138; United States v. Rodiek, 162 Fed. 469, 89 C. C. A. 389; In re Cameron [D. C.] 165 Fed. 112; In re Poirot [D. C.] 168 Fed. 456; In re Lewkowicz [D. C.] 169 Fed. 927; United States v. Meyer [D. C.] 170 Fed. 983; Ex parte Lange [D. C.] 197 Fed. 769; In re Stack [D. C.] 200 Fed. 331; In re Friedl, 202 Fed. 300; In re Yunghauss [D. C.] 210 Fed. 545; In re Goldstein [D. C.] 211 Fed. 164; In re Brefo [D. C.] 217 Fed. 131; Yunghauss v. United States, 218 Fed. 168, 134 C. C. A. 67; Harmon v. United States, 223 Fed. 425, 139 C. C. A. 19; In re Schwartz [D. C.] 236 Fed. 146; In re Lee [D. C.] 236 Fed. 987; In re Britton [D. C.] 248 Fed. 607, and United States v. Morena, 245 U. S. 392, 38 Sup. Ct. 151, 62 L. Ed. 359); that his declaration of intention was executed in the regularly established office of the clerk of court, or in open court (People v. Sweetman, 3 Park. Cr. R. [N. Y.] 358; Santo Scola's Case, 8 Pa. Co. Ct. 344; Butterworth's Case, 1 Woodb. & M. 323, 4 Fed. Cas. No. 2,251; In re Langtry [C. C.] 31 Fed. 879); that his petition was signed in his own handwriting (In re Martinovsky [D. C.] 171 Fed. 601); and that his mental attitude at the time of naturalization, prior thereto, and thereafter, was what it should have been (Schurman v. United States [C. C. A.] 264 Fed. 920, and cases there cited).

While Congress, in dealing with the naturalization problem, recognized it to be impolitic to perpetuate the character of alien longer than was absolutely necessary, the law-making body still recognized that a reasonable probationary term should be prescribed to enable candidates to get rid of foreign and to acquire American attachments, to learn the principles and imbibe the spirit of our government, and to admit of a probability, at least, of their feeling a real interest in our affairs. A residence of not less than five years was, therefore, required of an alien before he might petition for citizenship, this to conciliate the feelings of the candidate to the manners, laws, and government of this country.

[2] Vasicek resided within the United States for the jurisdictional period, prior to executing his application, and in this particular fully met the requirements of the statute. But has he in this period of time divorced himself from the foreign attachments and ideas of government brought with him? As established by the authorities cited herein, there are no presumptions in his favor to be indulged in. He is put to strict proof of the averments contained in his petition. His inability to define "anarchy" and "polygamy," and his lack of knowledge of the meaning of these words, must be held to be such a failure to meet the requirements prescribed in naturalization cases, as to necessitate the sustaining of the government's motion to dismiss, as it cannot be said in such a case as this that the candidate is in truth and in fact "attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same."

The petition for naturalization of the candidate will accordingly be denied.

SHEPHERDSON v. UNITED STATES.

(District Court, E. D. Pennsylvania. March 21, 1921.)

No. 6468.

1. **Army and navy ⇐51½, New, vol. 12A Key-No. Series—Notice by insured of change of beneficiary effective in war risk insurance.**
Where a soldier, holding a certificate of war risk insurance, payable to his minor son as beneficiary, on his remarriage had a letter written, signed by him, but written and witnessed by his superior officer, stating the fact of his marriage and that he desired the insurance changed, so that $6,000 should be payable to his wife and $4,000 to his son, which letter was forwarded in accordance with military requirements through the commanding officer to the Bureau of War Risk Insurance, there being at that time no regulations or forms prescribed for changing a beneficiary, such action *held* effective to change beneficiaries under War Risk Insurance Act, § 402, added by Act Oct. 6, 1917, § 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu), though the letter could not be found and the change of beneficiary was not recorded in the bureau.

2. **Army and navy ⇐51½, New, vol. 12A Key-No. Series—Procedure to determine beneficiary of war risk insurance.**
A suit to determine the right to war risk insurance, authorized by War Risk Insurance Act, § 13, as added by Act Oct. 6, 1917, § 2 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514kk), *held* properly brought in conformity with Tucker Act, §§ 5, 6 (Comp. St. §§ 1575, 1576).

At Law. Action by Mary R. Shepherdson against the United States. Judgment for plaintiff.

J. G. Roper, and W. H. Caldwell, both of Philadelphia, Pa., for plaintiff.

Chas. D. McAvoy, U. S. Atty., of Philadelphia, Pa.

DICKINSON, District Judge. We have been obliged to dispose of this case wholly upon information gathered from the paper books and

without access to either the legislation or the pleadings. If any question is raised in respect to either, the cause may be set down for reargument.

[1] The following findings are made, classified as not in controversy and as controverted:

Fact Findings.

The undisputed facts are:

(1) A certificate of war insurance, or what may be called a policy of insurance, was issued to George R. Shepherdson about December 1, 1917, in the sum of $10,000, with George R. Shepherdson, Jr., a son of the insured, named as beneficiary.

(2) The insured was at the time a widower, who subsequently, on December 22, 1917, was lawfully married to the plaintiff, Mary R. Shepherdson.

(3) The insured died in France on May 4, 1918. He was at the time of his death in active service, and a certificate of insurance was then in force.

(4) The Bureau of War Risk Insurance does not have on file any writings changing the beneficiary, and no such writings can be found, although diligent search has been made for them.

The sole fact in controversy is whether the insured changed the beneficiary named in the certificate. The finding made is as follows:

(5) The insured made and executed a writing, duly witnessed, addressed to the authorities in charge of the War Risk Insurance, directing a change to be made in the beneficiary of the certificate or policy, so that, instead of George R. Shepherdson, Jr., being named as the sole beneficiary, the beneficiaries named in the policy should be his then wife, Mary R. Shepherdson, in the sum and to the extent of $6,000, and his son, George R. Shepherdson, Jr., in the sum and to the extent of $4,000. This written change of beneficiary was received by the authorities in charge of the Bureau of War Risk Insurance not later than February 1, 1918. The particular and evidentiary facts upon which this ultimate fact finding of the receipt of the written paper making the change is made are found and set forth herein under the heading "Discussion," and are made part of this finding.

The conclusions of law reached are as follows:

Conclusions of Law.

(1) Mary R. Shepherdson is the legal beneficiary in said certificate of policy of insurance, in the sum and to the extent of $6,000 and said sum is properly payable to her.

(2) George R. Shepherdson, Jr., is the beneficiary in said certificate or policy of insurance in the sum and to the extent of $4,000, which said sum is properly payable to him, or his guardian, or other legal representative.

(3) Mary R. Shepherdson is entitled to judgment in the sum of $6,000.

The reasons which have led us to the conclusions indicated are set forth under the head "Discussion," and are made part of these findings or conclusions of law.

Discussion.

A Bureau of War Risk Insurance was established by an act of Congress (Comp. St. §§ 514a–514j). No question is raised or controversy exists in respect to the moneys due thereunder to the proper beneficiary. The United States as a party defendant or respondent admits this sum to be in its hands awaiting determination of the question to whom it is payable, and the United States has expressed its willingness to make payment when this question has been determined in such manner as that it will be protected by any payment made. The United States is to all intents and purposes a mere stakeholder asking for protection as such, but asserting on its own behalf no other rights.

Notice to the beneficiary originally named in the certificate of this action has been given, and the beneficiary has asked leave to intervene as a party defendant by his guardian, and has so intervened, and was represented by counsel at the trial. The formal, technical questions which may suggest themselves as thus arising are hereafter discussed and disposed of. This feature of the case is alluded to now merely for the purpose of clearing the way to a discussion of the main and real questions involved in the cause.

Starting with the certificate or policy of insurance, we have the fact presented that by it no contractual relations are established between the widow, Mary R. Shepherdson, and the United States, as insurer. On the face of this instrument George R. Shepherdson, Jr., alone sustains this contractual relation, and he alone, or some one on his behalf, as his guardian or otherwise, he being a minor, possesses the right to present any claim for payment.

The act of Congress permits the insured to name any one (so far as affects the question before us) as beneficiary, and the insurance money then becomes payable to the beneficiary named. The act further provides, however, that—

"Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries." Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu.

The act also provides:

"That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this act, and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the act, except as otherwise provided in section 5.

"Wherever under any provision or provisions of the act regulations are directed or authorized to be made, such regulations, unless the context otherwise requires, shall or may be made by the director, subject to the general direction of the Secretary of the Treasury. The director shall adopt reasonable and proper rules to govern the procedure of the divisions and to regulate and provide for the nature and extent of the proofs and evidence and the

method of taking and furnishing the same in order to establish the right to benefits of allowance, allotment, compensation, or insurance provided for in this act, the forms of application of those claiming to be entitled to such benefits, the methods of making investigations and medical examinations," etc. Section 514kk.

Under the authority thus conferred the following regulation relative to making a change of beneficiary was issued in the form of Treasury Decision No. 25:

"Every change of beneficiary should be made in writing, and shall be signed by the insured and witnessed by one person. No change of beneficiary shall be valid unless and until it is recorded in the Bureau of War Risk Insurance. A change of beneficiary shall, wherever practicable, be made upon blanks prescribed by the Bureau."

There is a further provision:

"That in the event of disagreement as to a claim under the contract of insurance between the Bureau and any beneficiary or beneficiaries thereunder an action on the claim may be brought against the United States in the District Court of the United States in and for the district in which such beneficiaries or any one of them resides, and that whenever judgment shall be rendered in an action brought pursuant to this provision the court, as part of its judgment, shall determine and allow such reasonable attorney's fees, not to exceed five per centum of the amount recovered, to be paid by the claimant in behalf of whom such proceedings were instituted to his attorney, said fee to be paid out of the payments to be made to the beneficiary under the judgment rendered at a rate not exceeding one-tenth of each of such payments until paid." Section 514kk.

The reference before made to section 5 (section 514e) of the act relates to disputes between beneficiaries. At the time the change of beneficiary was made by the insured in this case no regulations had up to that time been adopted. The regulations above quoted were subsequently made. The change of beneficiary in this policy so as to name Mary R. Shepherdson a beneficiary was made in writing, was signed by the insured, and witnessed by at least one person. No prescribed form of blanks for such purposes had up to that time been issued or were obtainable. There is no record in the Bureau of War Risk Insurance evidencing that the change had been there recorded.

The specific facts bearing upon this change are that on December 27, 1917, the insured wrote a letter to the War Risk Insurance to the effect that—

"I wish to change the policy of $10,000, which was made beneficiary to George, Jr. I wish to have it changed from $10,000, making my wife, Mrs. Mary R. Shepherdson, beneficiary for $6,000, and George, Jr., four."

The letter was inclosed in an envelope and addressed to the War Risk Insurance at Washington. It had a return address on it, and was duly stamped and mailed on that date. Shortly after the marriage of the insured he told Sergt. (afterwards Capt.) Samuel G. Stem, who was his superior officer, that he wished to change his insurance, so that his wife would have part of it. In the latter part of December or early in January the officer wrote for him a letter stating:

"That he had been married; that he had previously had $10,000 of insurance in favor of his son, George, Jr.; that he had been married on a certain date; that he desired to change that so that $6,000 should be payable to his wife and $4,000 to his son."

The insured signed the letter, which the officer witnessed, and it was forwarded through military channels to the Bureau of War Risk Insurance. The soldier's record was changed, so as to conform to this change in the beneficiary of the policy. The forms used for the purpose were used so far as up to that time they had been supplied. The letter was sent, in accordance with the military requirements, through the commanding officer. The soldier's record was also forwarded. The writing changing the beneficiary was mailed to the Bureau of War Risk Insurance. It was sent as official business, and was in an official envelope, unstamped as official mail. A copy was kept of the letter and filed with the official records. This copy, along with the soldier's record, was sent to the sick bay, U. S. Army Transport No. 22, who sent it to the Camp Hospital at Brest. Neither the original nor the copy can be found, although a very thorough search has been made.

The evidence fully justifies the finding made that the insured had a well-defined intention to make the indicated change of beneficiary; that he carried this intention into effect by making the change in writing, signing and having it witnessed; and that it was sent to the Bureau of War Risk Insurance for filing, and was there received. A copy was filed with the service record papers of the insured, and these papers were at the hospital base in Brest, France, where the soldier was stationed, and where he died. There is also evidence to compel the finding that the present records of the Bureau of War Risk Insurance do not show the filing or recording of any such change of beneficiary. The further fact finding is made that the records showing the change of beneficiary and the copy of the paper making the change have been lost or destroyed.

The foregoing findings resolve the questions involved in this case to two. One is the substantive question of whether the existence of a record with the Bureau of War Risk Insurance is essential to a change of beneficiary. The other is the procedural question of how the rights of the beneficiary are to be enforced.

Without entering into any lengthy discussion, we content ourselves with the expression of opinion that the change of beneficiary as found to have been made was effective. The act of Congress gives the right to the insured to change the beneficiary, without further limitation of the right than that it shall be effectuated in accordance with regulations. There were at the time no regulations controlling it, so that the right was an absolute one. If the question now presented involved the protection of the United States in a payment made in accordance with the records, it would be one of more importance than it now presents as a question wholly between contesting beneficiaries. Having the opinion, which we have expressed, that the insured had the right to make the change, this carries with it the vested right of the beneficiary in the policy as soon as the change was in fact made. The beneficiary

having this right, we are of the further opinion that it is not lost to her because the official records of the transaction have been mislaid or destroyed. The written paper, if in existence, or the official record of it, would be merely the evidence that the change had been made. This evidence we do not have, but we do have the legal equivalent of it.

Since the trial there have been found papers relating to allotments of the soldier's pay. By stipulation these have been made parts of the notes of trial. The significance they are supposed to have is that the finding of papers relating to an allotment of pay negatives the finding which otherwise might be made from the other evidence in the case of a change in the beneficiary. We are unable to give this stipulated evidence that effect.

The finding of one set of papers does not negative the existence of papers not found. There is a presumption of regularity and of faithfulness with respect to official records which makes them evidentiary. The nonexistence of a record required to be kept is evidence on the question of the existence of a paper which regularly would have been recorded. It has therefore the significance of such evidence, but is in no sense conclusive, nor is it necessarily persuasive. The fact that the insured made the found change of beneficiary is found as a fact, notwithstanding the two other facts, which are also found, that no record of this change appears where such record should be, and that a record of a change in the allotments of pay does so appear.

There is a possible point to be made, which has not been made, based upon the distinction between a man expressing a wish, desire, or intention to make a change, or indeed effort to have such change made, in the name of such a beneficiary and the actual making of the change. We have used the words which we have employed advisedly. This is because one of the letters written by the soldier on the subject makes use of the word "wish," another of the letters uses the word "desire," and there can be no doubt that the soldier intended to make the change and made an effort to have it made.

We have made the finding that the change was made. We have done this because the act of Congress, in the absence of any forms prescribed by rules and regulations adopted, requires no form in which the change shall be expressed. It may in consequence take the form of a letter. The form of expression used in a letter is a mere choice of words. It is what is done, and not the words which express what is the thing, of which we are in search. It is not an uncommon thing for the writer of a letter, written to express a request or direction, to phrase it in a form in which the request or direction is indirect. A common form is, "May I be permitted," etc., or "I would like you, if you will, to do" certain things. This is in literal terms merely a request not a direction, but that is in real substance what it is. In like manner, looking to the substance of what the soldier did, we have made the finding that he actually made a change in the beneficiary, and that, although he literally expressed merely a wish, desire, or intention, or made an effort so to do.

[2] There only remains the procedural question. The consideration of this starts with the observation that the United States cannot be made the defendant in an adverse proceeding, except with its consent, evidenced by an act of Congress. We have an expression of this consent in this very act, and the jurisdiction conferred, and indeed the duty imposed, upon this court to determine the question here raised. This reduces the whole inquiry into one of the proper formal method of procedure. The present proceeding follows the procedure under the Tucker Act (24 Stat. 505). This method has had judicial sanction in Cassarello v. United States (D. C.) 265 Fed. 326.

There is still to be determined the form of judgment which should be rendered. In order that we may have the benefit of the views of counsel, and to give definiteness of date to the entry of the judgment, no formal judgment is now entered; but counsel have leave to move for judgment in such form as they may deem to be in accordance with the law, including disposition to be made of counsel fees and costs.

WHITE v. GOODRICH-LENHART MFG. CO.

(District Court, E. D. Pennsylvania. April 4, 1921.)

No. 1883.

Patents ⇐328—1,176,413, for electric terminal, held valid, but not infringed.

Patent No. 1,176,413 for an improvement in terminals for electric wires, *held* valid when restricted to a construction having a preformed notch or recess, which served the double purpose of effecting a tight connection and permitting more compact construction, but, as so restricted, *held* not infringed by defendant's device, in which the recess was formed only by tightening the nut on plastic metal.

In Equity. Suit for infringement of a patent by Jessee Mercer White against the Goodrich-Lenhart Manufacturing Company. Sur trial hearing on bill, answer, and proofs. Bill dismissed.

Samuel Owen Edmonds, of New York City, for plaintiff.

Synnestvedt, Bradley, Lechner & Fowkes, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This cause concerns itself with letters patent No. 1,176,413, issued March 21, 1916, for improvement in terminals for electric wires. The formal issues are validity (more particularly affecting the scope of the claims) and infringement. Two fact features of the background of the controversy throw some light on what has caused it, if not its merits. One is the large number of Ford cars in use, and the consequent value of the control of the trade in re-equipment accessories needed by Ford car users; the other, the fact that a former associate or employee of the plaintiff, who thereby came to learn of the business which could be done in devices, such as those in litigation, is now associated with defendant. This gives to the case something of the atmosphere of unfair competition.

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

The case is easily disposed of by going part way with each litigant. Validity may be found by limiting the claims to a terminal having what may be called a preformed gripping feature. Defendant does not strenuously oppose this, because it carries with it a finding of noninfringement. The real question is whether plaintiff's rights extend beyond this. Counsel for plaintiff insists with earnestness that the patent covers a notch formed by the act of the attachment of the wire to the post, and supports this position by a clear-cut and forcible argument.

It is natural for any one who creates a market to lay claim to it. There is the same sense of rightful proprietorship there is to a patentable invention. The maker of a car in large demand thinks he should have the exclusive right to the trade in accessories and supplies of which the car users are in need. Those who supply the trade by an arrangement with the maker feel that they have succeeded to his rights. Any one from the outside who seeks this trade is regarded as an intruder.

The plaintiff's device is well adapted to the needs of Ford car owners. It has been accepted (with some modifications) by the manufacturer, and has been made a part of the equipment of a Ford car. When replacement is required, this is the trade which the plaintiff looks upon as his own. This contractual relation with the car manufacturer has some bearing upon the commercial success features of the case. When plaintiff's device was thus accepted and largely used on the Ford car, the number becomes impressive from this alone. It would thus have a large sale, whether it had merit or not. The user is likely to replace a terminal with its like. The trade in them is thus also at once large.

Utility is thus argued, but there is little need of it, where infringement exists, as no infringer can very well deny merit to what he has imitated. The real question is one of invention, or rather wherein invention consists. The original application claimed for the terminal a form of construction which economized space and that it was thereby "securely gripped to the conductor or wire."

This language and the further reference to efficiency is to be interpreted in the light of the fact that the requirements of a good terminal are that it shall not, either in its passage through the factory or after being put in use, become detached from the wire, and that when in use there should be a secured connection, both physically and electrically, with the post to which it is attached, and of the further fact that this security of connection was in the prior art attained by soldering. In the patented terminal this security is afforded by a notch being forcibly formed of a portion of the metal plate used, which pressed into the insulating covering of the wire, thus giving the terminal a strong holding attachment to the wire. Inasmuch as there is no mention of solder, which is admitted to give a good holding attachment, as well as electrical connection of terminal with the wire, and as economy cost is also claimed, this must mean that the improvement was in dispensing with solder.

There is a further merit claimed for this notch that it permitted the use of a nut in small space. Just what was meant by this is not clear,

unless it meant that in forming the notch a depression in circular outline extending toward the wire was produced in the plate and of a size to accommodate a nut.

Three claims were made for this invention: (1) Of a terminal possessing this notch or recess formed in the part of the plate between the hole which received the post and the part which enclosed the wire; (2) of the combination of such a terminal with an insulated electric wire; and (3) another combination having the added element of the naked end of the conductor wire "projected through a slit in the plate."

These claims were all rejected by the Patent Office; the Fitzgerald, Ball, and Briggs patents being cited as references. Claims 1 and 2 were flatly rejected as included in the Ball invention, and claim 3 as a mere assemblage of expedients of the prior art producing no new function. Just what meaning was given to the claims thus rejected is not stated. An amendment, however, was allowed, which withdrew the three claims made, and substituted the two on which the patent issued. These new claims are interpreted by ascribing invention to the advance upon the prior art, in that this curved depression in the upper plate performs the double function of giving a grip upon the conductor, thus securing it to the terminal, and also affords a seat for the nut. The merit of economy in metal and space is ascribed to this latter feature.

The advantages of a small terminal are clear enough; but as this terminal is made in practice, and in view of the charge of contributory infringement made against the defendant, how the recess reduces the required size of the terminal is not so clear. The comment relates evidently to a preformed recess or depression. This is made sure by the comment which follows. If the plates were of rigid metal, space economy would result from the presence of the recess; but if the metal be so plastic that the ordinary pressure of a nut would form the recess in attaching the terminal to the post, then there would be no need of increased size to accommodate the nut, when there was no preformed recess. The significance of this becomes apparent when we take up the question of infringement.

Defendant's terminal has no notch, recess, or bite, and of course no resulting attachment of terminal with wire. The attachment is due to solder. There is further no economy of space or metal produced by the presence of any preformed seat for a nut. It follows that there is no direct infringement. If, however, the notch of the patent is not a preformed notch when the nut comes to be applied, the effect is, as the metal is plastic, that the nut forms the very notch or bite described in the patent. This is the expected result. Again, it follows that, as the defendant made for an expected and intended use that which could only be used by being first made into the terminal of the patent, the defendant would be guilty of contributory infringement.

Some question is raised of the fact of the notch being made by the pressure of the nut in fastening the terminal. Whether it is so formed or not depends, of course, upon the pressure applied and the plasticity of the metal of which the ears of the terminal are made. We make the fact finding that it is so formed in practice, and that the terminal is

made as it is made with the knowledge on the part of the defendant of its intended use, and that this use will result in the formation of the notch.

We refuse to find, however, that the defendant intended this result in the sense of having the notch function operate. We so find, because it had no motive for so intending, as it was indifferent whether the notch was formed or not. We say this in view of both branches of the double function which the Patent Office found. The attachment feature was of no value, because solder answered to this purpose. The recess feature was of no patentable value of itself, because there would be no invention in doing what could not be avoided. A man might, in the discover or observe sense of the word "invention," learn that such a notch was formed, and appreciate its functioning value; but this would not be invention in its patentable sense. In its etymological sense invention means a coming upon or finding; but, as used in the patent laws, it carries the sense of a creation, or, at least, of an original discovery, in the sense of something not before observed by any one. If, for illustration, terminals, such as these, had been in use, and these notches had been formed by their use, and the defendant had been the first to appreciate that the notch performed the function of either tying the wire to the terminal or making a terminal of less size available or both, he would have made a discovery but he would have invented nothing. If he had thought of using (what had not before been used) a metal so plastic as to form the notch then he might lay claim to an invention.

To justify claim to a monopoly the plaintiff must make two showings: He must have invented something, and he must have received a patent for his invention. The letters, it is true, are evidence of both, but give him no greater right than they grant, even if he had invented more, and was entitled under the law to a patent for more. The file wrapper makes it clear that the grant was only of a terminal with a preformed notch. The denial of the first claim means this, without the explanatory memorandum. The history of the art discloses the why of the ruling made by the Patent Office. Terminals of this general kind were old. The use of solder was, however, necessary, and they must be of a size to admit of the use of a nut. If solder was not used, the terminal would become detached in passing through the processes of manufacture, or even in transportation, as well as when put in use. By preforming the notch there was no need of solder. It also provided a seat for the nut, thus doing away with the need of forming a seat in the act of use or of larger plates.

A terminal with a preformed notch was in consequence patentable. The invention was not in the functioning, but in the construction which exhibited these functions. If the notch was not preformed, it had no function until formed by the nut. All functioning value before this was absent, and, as the notch could not be avoided being formed, there was no invention in forming it, as there was no new element of construction provided in order to form it. Invention is therefore confined to the preformed notch. The consequence, as before stated, is that the defendant's terminal does not infringe, as it has no such preformed notch. It may

be further stated, for whatever it may be worth, that the motive of the patented invention was to dispense with the solder. Not only does the defendant use it, but the chief user of plaintiff's terminal also uses solder. The practical consequence has been that numbers of plaintiff's terminals are put out without notches being preformed in them.

The bill of complaint may be dismissed, with costs, on the finding of noninfringement. A formal decree to this effect may be submitted. No decree is now made.

THE PEHR UGLAND.

(District Court, E. D. Virginia. February 25, 1921.)

No. 2370.

1. **Shipping ⊂⊃102—Contract governed by law of place of performance.**
A contract made in London for the carriage by a Danish ship of a cargo of coal from Norfolk, Va., to Buenos Aires, under which the cargo was loaded, bill of lading issued, and advance freight paid at Norfolk, and the voyage frustrated in the waters of the United States, *held* governed by the law of the United States.

2. **Shipping ⊂⊃152—Prepaid freight recoverable on frustration of voyage.**
Under the law of the United States, in the absence of stipulation to the contrary, a shipper may recover prepaid freight money on failure to transport and deliver the cargo, regardless of the reasons therefor.

3. **Shipping ⊂⊃152—Vessel liable to charterer for prepaid freight.**
A ship chartered to carry a cargo of coal from a United States to a South American port, which loaded the cargo, issued a bill of lading, and was paid the freight in advance, but which on proceeding to sea proved unseaworthy and abandoned the voyage, *held* liable to the charterer for the freight prepaid.

4. **Shipping ⊂⊃137—Obligation of owner to furnish seaworthy ship.**
The Harter Act (Comp. St. § 8031) does not relieve a shipowner from his obligation to furnish a seaworthy vessel, nor can he avoid liability for failure to do so by the exercise merely of due diligence to perform his obligations in that respect.

5. **Shipping ⊂⊃125—Vessel liable for loss of cargo.**
A ship loaded with coal at Norfolk did not proceed on her voyage until more than four months thereafter, when, a leak being discovered, she returned to port, when it was found that the coal was on fire, and it was unloaded with large loss. A part of the time her detention was due to a cause excepted in the charter, but this ceased to exist some six weeks before she sailed. *Held*, on the evidence, that the fire was not due to the condition of the coal when loaded, but to some cause occurring during the long delay, and that she was liable for loss of the cargo.

In Admiralty. Suit by the Buenos Aires Great Southern Railway Company, Limited, against the bark Pehr Ugland. Decree for libelant.

Hughes, Vandeventer & Eggleston, of Norfolk, Va., for libelant.

Herbert K. Stockton, of New York City, and Hughes, Little & Seawell, of Norfolk, Va., for respondent.

WADDILL, District Judge. This libel is brought to recover certain prepaid freight money and damages, for the failure of the re-

spondent to carry out its contract to transport a cargo of 2,054¼ tons of coal, delivered to it by the Berwind-White Coal-Mining Company in the port of Norfolk, Va., on or about the 27th day of September, 1917, to be carried to the libelant at Buenos Aires, pursuant to the terms of the bill of lading issued therefor at Norfolk, Va., by the master of the respondent. The freight money on said cargo amounting to $49,308, was advanced by the libelant to the bark and her owners, though not earned, and the said bill of lading and all rights of the Berwind-White Coal-Mining Company therein were assigned and negotiated to libelant, the present owner thereof, as well as of said advanced freight money. The bark, thus loaded, should have proceeded to sea immediately on her voyage—that is, within 48 hours—under the terms of the charter party, but failed and neglected to do so, and remained in the harbor of Norfolk because of alleged inability to secure from her home government permission to return to the United States, instead of to Denmark, as required by the latter government, until about the middle of December, 1917, a period of some 3 months, when she was still further delayed on account of the failure to secure the necessary supply license and a sufficient crew, losing some 15 days thereby, and until the 27th of December, when weather and ice conditions caused her to drag her anchor and go adrift, and to collide with another vessel at anchor in the harbor, resulting in very much loss of time, until the 29th day of January, 1918, and from the last-named date to the 4th of February because of inability to secure advances with which to pay bills, and from the 4th of February she was detained by wind and weather conditions until the 9th of February. On the last-named date she proceeded on her voyage, and when some 25 miles out of Cape Henry a leak was discovered in her forepeak, which caused her to return to Hampton Roads, arriving in Norfolk February 12th, when her cargo was found to be afire, and was not extinguished until February 18th. The cargo was ordered discharged from the vessel, which was completed on the 9th of March, and upon a survey of the same, made on March 20th, it was found to be unfit for reloading, and it was retained in the possession of and sold by the respondents. Libelant offered the owners of the ship to substitute a cargo to proceed to destination, which respondent refused to carry, except at an additional bonus of $25,000, and likewise refused to take the reconditioned cargo after the fire.

The libelant charges that the respondent was responsible for this entire loss of time, and particularly that the failure to carry the cargo safely was caused by the unseaworthiness of the vessel existing at the time of entering into the charter party, and during the entire period of the life thereof, above mentioned, and, moreover, that the damage to the cargo arose from the failure of the respondent to properly protect the same from spontaneous combustion, during the period that the same was on board, as aforesaid.

The respondent admits the receipt of the cargo, and payment of advance freight money, and the issuance of the bill of lading, as claimed by the libelant, but says that the Pehr Ugland was a Danish vessel,

subject to Danish laws, and to the control of the Danish government, and that that government prevented and restrained the bark from chartering herself, and proceeding on voyages, until the Danish government had approved the use of the vessel and given permission for her chartering; that in May, 1917, the Danish government, after application by the respondent therefor, granted permission for her charter for a voyage from North America to Buenos Aires and the River Plate, on condition that, after discharging her cargo at Buenos Aires, the vessel should take a cargo and transport it to Denmark. The vessel arrived at Norfolk and received her cargo, and when ready to sail on the 27th of September, 1917, her master applied at the custom house in Norfolk, Va., to obtain clearance papers, which were refused, unless her master guaranteed the return of the vessel from Buenos Aires to a United States port. Respondent promptly requested the Danish government for permission to give the guaranty required by the United States government, which was refused, and permission was not actually obtained until December 18, 1917, during all of which time respondent insists she was restrained and arrested at Norfolk and unable to proceed on her voyage; that she was again restrained and arrested from the 18th to the 27th of December, 1917, and clearance withheld for failure to procure license from the United States government to export her cargo; that meantime her crew had deserted, and on account of the weather she was fast in the ice, and was not ready to sail again until January 29, 1918; she was further delayed by wind and weather until February 9th, and she had only proceeded a distance of some 25 miles from the Capes when a leak in the forepeak was discovered; she returned to Hampton Roads on February 12th, when her cargo was found to be on fire, and after the fire was put out the cargo was removed from the vessel by order of the surveyors, and respondent claimed frustration of the voyage and the charter party at an end; that the frustration of the voyage was without any negligence or default on the part of the respondent, and was caused by spontaneous ignition of the cargo, one of the excepted perils of the charter of affreightment, viz. "fire"; and that the alleged unseaworthiness of the ship, assuming the same to have existed, in no manner affected or caused the conflagration, and virtual destruction of the cargo.

The more important facts in this case are not seriously disputed, namely, that the delay occurred after the cargo was taken on board, and between the ship's readiness for departure on the 27th of September, 1917, and the 9th of February, 1918; that the cargo was not unloaded and surveyed until the 20th of March, and the ship repaired until about a month later; that the cargo proved well-nigh a total loss, the same salving for some $18,000; that the freight money was paid in full, and the vessel proved to be unseaworthy.

Upon this statement of the case, certain legal questions arise as to upon whom the loss of the cargo should fall, and whether the prepaid freight money can be recovered, which involves likewise the determination of whether the charter party should be construed under English or American law; if under English law, whether prepaid

freight money can be recovered at all; and if under American law, if prepaid freight money can be recovered upon the mere frustration of the voyage. These will be considered in the order named.

[1] 1. In determining the law properly applicable, reference should be had to the character of the contract, the parties thereto, and where entered into. This contract was made in London, between an English corporation, the libelant here, and a Dutch corporation, owners of the Pehr Ugland, to charter the vessel to transport coal from Norfolk, Va., to Buenos Aires, and the causes resulting in this litigation took place after the contract was entered upon and partly performed at Norfolk. Recognizing fully that contracts are usually construed under the laws of the place where made, still there are exceptions to this rule, one of which is that the place where the contract is to be performed may be preferred. Here, after the signing of the contract in London, the same was completed by the acceptance of the cargo, issuance of the bill of lading, payment of freight money in large part, and the commencement of the voyage, and final frustration thereof, all in Norfolk, in the waters of the United States; and, manifestly, the construction of the contract is governed by the latter rule, with the result, in this instance, that the law of this country, and not that of Great Britain, should prevail.

In 12 Corpus Juris, p. 450, § 51, the doctrine exception is aptly stated as follows:

"Where the contract is to be performed at a place other than at which it is made, the parties, according to the general trend of American authorities, are presumed to adopt the law of the place of performance as the law of the contract"—citing in note 73 a long list of cases supporting the text, and including in the number Hall v. Cordell, 142 U. S. 116, 12 Sup. Ct. 154, 35 L. Ed. 956; Pritchard v. Norton, 106 U. S. 124, 1 Sup. Ct. 102, 27 L. Ed. 104; Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61.

In the last-named case, Mr. Chief Justice Taney, speaking for the Supreme Court, at page 78 of 13 Pet. (10 L. Ed. 61), said:

"The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance."

And in the more recent case of London Assurance v. Companhia de Moagens do Barreiro, 167 U. S. 149, 160, 17 Sup. Ct. 785, 789 (42 L. Ed. 113), Mr. Justice Peckham, citing Andrews v. Pond, 13 Pet. 65, 10 L. Ed. 61, supra, said:

"Generally speaking, the law of the place where the contract is to be performed is the law which governs as to its validity and interpretation. Story in his work on Conflict of Laws, § 280, says: 'But where the contract is, either expressly or tacitly, to be performed in any other place where the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice.'"

This same subject was considered by the Supreme Court in Liverpool & G. W. S. Co. v. Phenix Insurance Co., 129 U. S. 397, 9 Sup. Ct. 469, 32 L. Ed. 788, where Mr. Justice Gray, speaking for the court,

reviewed generally the authorities. In that case, the contract the subject of the litigation, was one partly to be, and was actually, performed at the place of its making, and hence the law of the place of the making of the contract, as well as of its performance in part, was held properly to control in the matter of its validity and interpretation.

2. It seems a concessuum in this case that, under the laws of Great Britain, prepaid freight cannot generally be recovered, certainly in cases where the damages arise as the result of a peril excepted in the charter party, though a different rule doubtless would prevail where it arises from the breach of the contract or charter party. This element becomes immaterial here, assuming the court is right, and that the English law does not control.

[2] 3. That the American law regarding the right to recover for prepaid freight is different from that prevailing in Great Britain, is well settled, and prepaid freight can be recovered in case of frustration of the voyage, and no right of recovery exists on the part of the ship against the cargo owner for such freight, when not paid. In the recent case of National Steam Nav. Co. v. International Paper Co., 241 Fed. 861, 154 C. C. A. 563, Judge Ward, speaking for the Circuit Court of Appeals for the Second Circuit, aptly stated the law on the subject (241 Fed. at page 862, 154 C. C. A. 564) as follows:

"The English cases on the subject of prepaid freight do not express the law of this country. Here prepaid freight, in the absence of an agreement to the contrary, must be returned to the shipper, if the goods do not arrive, and in such case the shipowner cannot recover it of the shipper, if not actually prepaid. For this we have the high authority of Chancellor Kent in Watson v. Duykinck, 3 Johns. (N. Y.) 335 (1808); Griggs v. Austin, 3 Pick. (Mass.) 20, 15 Am. Dec. 175 (1825); Pitman v. Hooper, Fed. Cas. No. 11,185 (1837); Phelps v. Williamson, 5 Sandf. (N. Y.) 578 (1852); Benner v. Insurance Co., 6 Allen (Mass.) 222 (1863); of the Supreme Court in The Kimball, 3 Wall. 37, 18 L. Ed. 50 (1865); and finally of our own decision in Burn Line, Ltd., v. Steamship Co., 162 Fed. 298, 89 C. C. A. 278. To the same effect is the law of the continent."

From a careful review of the authorities it will be found that under American law, in the absence of stipulation to the contrary, a shipper may recover prepaid freight money, from the mere failure to transport and deliver the cargo, regardless of the reasons therefor; whereas, under the English law, he cannot so recover, save in cases arising from breach of contract on the part of the shipowner.

[3] 4. This brings us to the consideration of the facts of the case, and the obligations and rights of the parties litigant, and incidentally, it may be said, that the right to recover for the prepaid freight money sued for, may depend upon and be controlled by different conditions from those affecting the loss of the cargo.

The contract between the parties, and under which their rights arise, was a charter party, a contract of affreightment, whereby the owners of the ship, on the one hand, undertook, for a named consideration, to transport a cargo of coal from a port in the United States, to a port in South America; the cargo owner agreeing to pay in advance for safe delivery of the same at its place of destination. The freight money was fully and promptly paid, and the cargo though promptly

placed on the ship, was neither transported nor delivered; but, on the contrary, the voyage was actually abandoned, and the ship, when subjected to the test and strain of the open sea, proved unseaworthy, and wholly unfit for the safe carriage of its cargo. That the ship was seaworthy, tight, staunch, and in every way fitted for the service undertaken, both as to structure and equipment, even as respects latent defects, was just what the shipowner contracted for, and specifically warranted, and every consideration looking to the proper, safe, and successful handling of the country's commerce by water, requires that this warranty shall be rigidly and strictly enforced. Hughes on Admiralty, §§ 73, 85; The Northern Belle, 76 U. S. (9 Wall.) 526, 19 L. Ed. 746; The Northern Belle v. Robson, 154 U. S. 571, 14 Sup. Ct. 1166, 19 L. Ed. 748; The Caledonia, 157 U. S. 124, 15 Sup. Ct. 537, 39 L. Ed. 644; The Lockport (D. C.) 197 Fed. 213; Steel v. State Line Steamship Co., 3 Appeal Cases (L. R.) 72.

Had there been no specific warranty of seaworthiness, the law would have implied a warranty that the ship was seaworthy, and fitted for the service in hand, and for the faithful performance of which it contracted and accepted compensation. The Director (D. C.) 34 Fed. 57, 65; Pacific Coast v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135; The Nellie Floyd (D. C.) 116 Fed. 80, affirmed 122 Fed. 617, 60 C. C. A. 175; The Dana (D. C.) 190 Fed. 650; Benner Line v. Pendleton. 217 Fed. 497, 133 C. C. A. 349.

[4] The provisions of the Harter Act (section 8031, Comp. Stat. 1916) cannot be relied upon to relieve the shipowner from the obligation to furnish a seaworthy vessel, or to escape from responsibility for failure so to do; and especially is this true when the unseaworthiness existed at the time the charter party was entered into. Nor can the owner escape liability by the exercise merely of due diligence to perform his obligations in this respect. His duty was to furnish a seaworthy vessel, and by frequent examinations and thorough inspection to see that it was so maintained, having regard to the service to be performed (The Northern Belle, 76 U. S. [9 Wall.] 526, 19 L. Ed. 746, and 154 U. S. 571, 14 Sup. Ct. 1166, 19 L. Ed. 748, supra); and this obligation becomes the more imperative where an old and not thoroughly strong and well-equipped vessel is in use (Wuppermann v. Carib Prince, 170 U. S. 655, 18 Sup. Ct. 753, 42 L. Ed. 1181; The Aggi, 107 Fed. 300, 302, 46 C. C. A. 276; The Ninfa [D. C.] 156 Fed. 512; The Indrapura [D. C.] 178 Fed. 591, and 190 Fed. 711, 112 C. C. A. 351; Benner Line v. Pendleton, 217 Fed. 497, 133 C. C. A. 349; The Jeannie [D. C.] 225 Fed. 178). The evidence in the case is quite conclusive that the ship was in an unseaworthy condition, as well at the time of the breach of the contract as at the time of entering into the same, and during the entire life thereof, and that fact either was or should have been known to the vessel owner, also that this cause was the real, or at least a contributory and sufficient, cause for the failure to deliver the cargo in question, and hence that the right of recovery for the prepaid freight money is unquestioned, alike under the laws of the United States as under those of Great Britain.

[5] Considering the question of liability for loss of the cargo, different considerations arise from those properly controlling in respect to the right to recover prepaid freight money. Here the ship, in addition to the general denial of liability arising from loss of time between the 27th of September, 1917, when the cargo was loaded, and the 9th of February, 1918, when the ship actually put to sea, insists that, because of the restraint of princes clause and the loss from fire clause, she is not responsible for the delay, nor the loss by fire sustained, and says that the fire was caused by the combustible character of the coal loaded, for which the libelant was responsible, and that the unseaworthiness of the ship in no manner entered into the occurrence. The questions thus presented are not free from difficulty. If the combustible character of the coal caused the fire, and that was the only cause, there could be no recovery for the loss; and, of course, if, either under the restraint of princes clause and the loss from fire clause of the charter party, the evidence showed the vessel to be exempt, no recovery can be had for the loss of the coal. But the court does not think that the evidence warrants the relief from responsibility of the vessel, by reason of either one of the excepted or exempted clauses of the contract. Under the restraint of princes clause, much of the time lost after loading the ship and going to sea can be accounted for, but not all of the time, namely, from the 18th to the 27th of December, when she was detained, as claimed, because of the lack of a proper crew, and the failure to secure her supply license before clearance could be obtained.

The ship should have anticipated the necessity for a crew, and the supply license, pending the effort to secure permission from her government to return to the United States, and not have waited until actual authority was granted. The ship's master knew the permit was liable to arrive at any time, and had been fully advised by his own agent, 10 days before its arrival, of the issuance of the permit to sail, and having been detained for approximately 3 months with her cargo on board, he should at least have provided the necessary crew, without waiting, under the circumstances, to cause still further loss of time, with its possible serious consequences, as the result proved. Had the ship been ready to sail on the 17th of December, as she should have been, ample time would have intervened to enable her to make her destination before the breaking out of the fire from the alleged cause of combustion, assuming, of course, the ship to be seaworthy. Moreover, the court does not think that the testimony warrants the conclusion that the fire resulted from the combustible character of the cargo. Had this condition been true, it is hard to believe that the fire would not have developed earlier, between the 27th of September and the 12th of February, when the vessel was subjected to all sorts of weather conditions, including September's heat, and the long freeze during the month of January, and when she was, much of the time, drifting about, with the ice conditions that then prevailed, and herself in collision with another vessel during the same period.

It seems to the court, under all the circumstances, that fire in the cargo would more likely have resulted from lack of proper care

on the part of those handling the ship, during its long and eventful stay, in and around Norfolk, to see especially that the cargo was afforded proper ventilation, and safeguarded from weather conditions that would have caused it to become wet and heated. Liverpool Steam Co. v. Phœnix Ins. Co., 129 U. S. 397, third paragraph of syllabus, 9 Sup. Ct. 469, 32 L. Ed. 788. In this same connection, sight cannot be lost of the fact that certain presumptions unfavorable to the vessel owner necessarily arise from the use of a confessedly unseaworthy vessel. The cargo was delivered in admittedly good condition, and a proper bill of lading so certifying, issued therefor, and with the cargo thus exclusively placed in the ship's control, and the fire arising without apparent cause, the vessel should at least show that her unseaworthy condition did not, and could not, have entered into the cause of fire; and especially is this true if it is sought to escape liability by bringing the case within one of the excepted clauses of the charter party. The Queen (D. C.) 78 Fed. 155; Pacific Coast S. S. Co. v. Bancroft-Whitney Co., 94 Fed. 180, 36 C. C. A. 135, supra; The Lockport (D. C.) 197 Fed. 213; The Jeannie (D. C.) 225 Fed. 178, supra.

What has been said makes it unnecessary for the court to consider the various causes of delay set forth in the proceedings in detail, and whether the respondent was exempt from liability under the restraint of princes clause of the charter party, for loss of time to December 27, 1917, and under other restrictive provisions, from portions of the time thereafter occurring, before starting upon the voyage.

The court's conclusion upon the whole case is that the libelant is entitled to recover for the freight money paid by it, together with the amount paid for the coal, less the net amount realized from its sale, when discharged from the vessel and a decree carrying out these findings will be entered on presentation.

THE SANTA ELENA.

(District Court, S. D. New York. May 10, 1920.)

1. Aliens ⇐58—Evidence held to show alien on passenger list was same as seaman.

On libel by the United States to recover the penalty imposed by Immigration Act Feb. 5, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼ee), from a vessel for permitting an alien passenger to land therefrom, evidence *held* to show that the alien who was carried on the passenger list was the same person as an alien entered on the ship's articles as a seaman under another given name.

2. Aliens ⇐58—Alien formally on ship's articles as "American seaman."

An alien, who had been discharged in a foreign port from an American vessel for illness, and was therefore entitled to the protection of Rev. St. §§ 4577, 4578, 4581, 4804, and 4805 (Comp. St. §§ 8368, 8369, 8372, 9191, 9193), and who was brought to this country at the American consul's request by another vessel, on whose articles he was formally entered as a member of the crew at a wage of 25 cents a month, was, within Immigration Act Feb. 5, 1917, an "American seaman," so that the

ship is liable for a penalty under section 32 of that act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼r), only if there was negligence in permitting him to land.

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

3. Aliens ⇐58—Evidence held not to show negligence in permitting alien seaman to land.

Where an alien seaman on an American vessel, who was sick when the vessel arrived, was subsequently removed by the Marine Hospital Service for hospital treatment, after which he was discharged, the master not having reported such removal to the immigration authorities, nor having received from them any instructions as to the care of the alien, there was no negligence, subjecting the vessel to the penalties prescribed by Immigration Act Feb. 5, 1917, § 32 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼r).

Libel by the United States against the motor vessel Santa Elena. Libel dismissed.

Francis G. Caffey, U. S. Atty., of New York City (J. Joseph Lilly, of New York City, of counsel), for the United States.

James A. Hatch, of New York City (John T. Carpenter, of New York City, of counsel), for claimant.

KNOX, District Judge. Upon August 22, 1918, the motor vessel Santa Elena arrived in New York from Barbadoes. She was boarded by two inspectors from the Bureau of Immigration, who, after an inspection of the ship's company, gave a direction in writing to the master to detain on board one Carl J. Anderson, who was ill. Anderson was a Swede, and his name appeared on the passenger list, and it was assumed by the inspectors that such was his status. If Anderson were a passenger, and not a seaman, his unlawful entry into the United States would subject the ship and the master to the provisions of section 10 of the Immigration Act of February 5, 1917 (Comp. St. 1918, Comp St. Ann. Supp. 1919, § 4289¼ee).

The master made arrangements to furnish Anderson with food and hired a private detective to watch him. Two days later, the master, having heard nothing more from the inspectors, communicated with the Marine Hospital upon Staten Island, and shortly thereafter an ambulance arrived, accompanied by a person wearing a United States Navy uniform. To this person the master told what had been said to him by the inspectors, and the officer from the Marine Hospital then inquired if Anderson's name was upon the ship's articles. Upon receiving an affirmative reply, Anderson was examined by the officer, who remarked:

"If this man is not entitled to hospital treatment, then no man ever will be. I'll take him."

Anderson was placed in the ambulance, which departed. It appears that he remained at the hospital for about eight weeks and was then discharged. Nothing more was heard by the master from the immigration officials, and the matter was apparently forgotten, until steps were taken to impose liability upon the ship for permitting the

alleged unlawful entry of Anderson into the United States; the libel for that purpose being laid under section 10 of the Immigration Act.

The answer to the libel is a general denial, and upon the respondent's case the defense is made that Carl J. Anderson is, as a matter of fact, the same man who, under the name of Edwin Anderson, appears upon the ship's articles, and that therefore the liability, if any, against the ship, is to be measured by the provisions of section 32 of the Immigration Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼r). This section has to do with the unlawful entry into the United States of seamen. Section 1 of the Immigration Act of February 5, 1917 (section 4289¼a), provides:

"That the term 'seaman' as used in this act shall include every person signed on the ship's articles and employed in any capacity on board any vessel arriving in the United States from any foreign port or place."

The primary question, therefore, is to determine if the passenger, Carl J. Anderson, and the seaman, Edwin J. Anderson, are one and the same. Upon July 10, 1918, seven seamen, among them E. Anderson, were discharged from the American schooner Lizzie M. Parsons, at Barbadoes. Among the names of the persons so discharged, I find, in addition to that of Anderson, J. Van der Pol, C. Griis, and W. J. Arnst.

The master testifies that at no time while the Santa Elena was under his command did she carry passengers in the ordinary acceptation of the term. He also deposes that while at Barbadoes the American consul informed him that he had at that port several seamen who had been paid off the Lizzie M. Parsons; that seamen were needed in the United States, and the captain was urged to bring the men to this port. It would seem from sections 4577, 4578, 4581, 4804, 4805, of the Revised Statutes (Comp. St. §§ 8368, 8369, 8372, 9191, 9193), and Executive Order of October 21, 1915, that even aliens employed as seamen on vessels of American registry are entitled to certain very definite privileges, one of which is that of being returned to the United States when discharged in a foreign port on account of injury or illness, or when they become destitute under certain circumstances in foreign countries. Upon their arrival within the United States such seamen are subject to special rules that are not applicable to aliens who are not what may be termed "American seamen."

The master of the Santa Elena, having little alternative to do otherwise, assented to the consul's request and accordingly signed on, as members of his ship's company, four men as follows: C. Griis, E. Anderson, W. J. Arnst, and J. Van der Pol, corresponding, as is seen, with the names of the men discharged from the Parsons. Anderson's wages were to be 25 cents a month. He was sick when discharged from the Parsons, he was sick when he arrived in New York, and his position as a seaman on board the Santa Elena was doubtless nothing more than formal.

[1] The names of Griis, Arnst, Anderson, and one Oscar J. Levy were for some reason entered by the purser upon the ship's passenger list. This would be of small concern, were it not that Anderson's name was entered as "Anderson, Carl J.," and from this the confusion

of identity has arisen. However, the matter is considerably simplified when recourse is had to the crew list of the Lizzie M. Parsons, whereon it appears that the Edwin Anderson, whose name appears thereon, gave as his next of kin his father, C. J. Anderson. The description of Edwin Anderson and the so-called Carl J. Anderson, passenger on the Santa Elena, correspond in almost exact terms, and I have no hesitancy in finding that the so-called passenger, Carl J. Anderson, was the same person as seaman, Edwin Anderson. There was simply a mistake in the entry of Anderson's Christian name, or it is possible that, in addition to the name Edwin, Anderson also had Carl J. as a part of his name.

[2] Now, being on the ship's articles, even though formally, Anderson was, for the purposes of the Immigration Act, a seaman. Indeed, under Judge Foster's decision in Laura M. Lunt (D. C.) 170 Fed. 204, he was an "American seaman," and under no possible construction, I think, can the ship be held to an accountability more strict than that set forth in section 32. The measure of that accountability is negligence, and this I am unable to find.

[3] Upon arrival at New York, Anderson was entitled to receive medical treatment, and to receive it at the Marine Hospital. This was not accorded him through the immigration officials, and in pursuance of a humane instinct the master took steps to secure for Anderson that which was his due. While Anderson's detention at the hospital continued, the master and the ship were relieved from responsibility for safe-keeping. Section 15 of the Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 4289¼hh).

It would have been better, of course, had the master, in view of the notice he received from the inspectors who boarded his ship, notified the immigration officials of what had happened; but he also had, I think, the right to expect that he would himself receive some further word from the inspectors as to the course he should pursue with respect to Anderson.

I fail to find a degree of negligence sufficient to sustain the libel, and it is accordingly dismissed.

HESS-BRIGHT MFG. CO. v. BEARINGS CO. OF PENNSYLVANIA et al.

(District Court, E. D. Pennsylvania. March 10, 1921.)

No. 1799.

Patents ⊂=328—822,723, for ball bearings, not infringed.

The Conrad patent, No. 822,723, for improvement in ball bearings, *held* not anticipated and valid, but not infringed by the regrinding of the grooves of old bearings, and, where required, substituting new balls to fit the grooves enlarged by the regrinding, which is within the right to make repairs.

In Equity. Suit by the Hess-Bright Manufacturing Company against the Bearings Company of Pennsylvania and Herman P. Schade. Decree for defendants.

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

Rogers, Kennedy & Campbell, of New York City, for plaintiff.
J. Bonsall Taylor and E. H. Fairbanks, both of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. This case concerns patent No. 822,723, issued June 5, 1906, to Robert Conrad, for an improvement in ball bearings. The prayers are the usual ones, and the defenses the like usual ones of a denial of validity and of infringement. We will, so far as concerns this court, dispose of the issues raised in the order named.

Respecting the question of validity of the letters patent, we have for our guidance, in addition to adjudications in other circuits, rulings by the courts of this circuit, not once or twice, but thrice, establishing validity. These cases are found reported in Hess-Bright Mfg. Co. v. Standard Roller-Bearing Co. (C. C.) 177 Fed. 435, Same v. Fichtell (D. C.) 209 Fed. 867, and Id., 219 Fed. 723, 135 C. C. A. 421. The justification for a renewed attack upon this patent is that counsel for defendant confidently rely upon the German patent, No. 49,071, as an anticipation. In none of the other litigation was this German patent in evidence. In view of the fact, however, that its existence was called to the attention of the Circuit Court of Appeals on a motion for a reargument, although perhaps for a different purpose than the use now made of it, we do not feel at liberty to reinquire into the subject of validity and, in consequence make a formal finding of validity on the authority of the cited cases.

This leaves for consideration only the question of infringement. The discussion of the second branch of the defense has been made very interesting because of the notable ability displayed in the argument. The subject-matter of this invention plays an important part in industrial activities. This patent is in capable and strong hands. The showing made of commercial recognition of the utility of the invention shows in turn the control which plaintiff has of the trade.

In the view of the defendant they seek now to extend this control over the making of all repairs to worn bearings, or to force the sale of a new bearing, by denying the right of the owner to repair an old one. The monopoly which the law has granted to the plaintiff has proven itself to be one of great value. The law gave the exclusive right to make and vend, but, when once a sale was made, the right (so far as concerned the bearing sold) had been exhausted by its exercise, and all right of ownership passed by the sale, as fully as if no patent had ever issued, except that the vendee had no more right than before to make, use, or sell another bearing like it. The vendee had the right to its full, untrammelled use, and the right to keep it in repair fitted to use. This included, also, the right to have repairs made by others. The control of this right of repair is sought by plaintiff more for the purpose of asserting control of the trade than for the direct gain from the repairs made. The motive avowed is to protect the reputation of the patented bearings, which the performances of a repaired bearing might injure.

Counsel for plaintiff does not, of course, formulate the claim of right as defendant states it. He does not deny to the vendee of plaintiff the

right to repair. What he does deny is any right, by using plaintiff's bearing as a model, to make a new bearing from the raw material of an old one. It is obvious that all this is nothing more than opposing statements of the effect of what the defendant has done. The defendant calls it the repair of old bearings. The plaintiff calls it new construction or reconstruction. Omitting the name properly to be applied to what was done, the fact finding is made that what was done was the regrinding of the grooves of old bearings, and, where required, the substitution of new balls to fit the grooves enlarged by the regrinding.

The dividing line between repairs and a making over cannot be verbally located. What has been done can with more or less confidence be pronounced to be one or the other, but neither the one nor the other can be defined. The judgment pronounced must in consequence partake of the ipse dixit or rescript character. A further consequence is that the adjudged cases provide us with little for our guidance. With no thought of finding a better mode of expression for the clearly presented views of counsel for plaintiff, it may be premised that a feature of the patented bearing is the metallic pathway provided in the form of a groove, which calls for the use of balls of a certain size. The nicety of adjustment required can be most emphatically expressed by the statement that the unit of measurement employed is the ten-thousandth part of an inch. This groove may, from use or abuse, be in need of being remade by regrinding. The lightest repolishing, almost, is such.

The argument that this is not repair, but a new construction, may be thus expressed: A bearing with a groove of a certain depth, with balls exactly fitting it, is sold by the plaintiff to A. Another bearing, with a different groove, calling for the next larger sized balls, is sold to B. The first vendee smooths up the groove in his bearing, thus adapting it to the next larger size of balls. By so doing he has not repaired the bearing sold to him, but out of the material in this old bearing he has made a new one, which is not his old bearing, but a different bearing of the B. type. In other words, the old A. bearing has lost its identity by destruction, and a new bearing, B., has been made. In a sense this is, of course, true; but it is only true in a sense. Identity is not lost by a mere change in size. The rule of which we are in search is a practical rule, for the guidance of practical men in practical business. What the patentee sells is a concrete thing. It is a bearing. As long as it remains the bearing of the patent, it is what the patentee sold. The moment it becomes something else, the patentee is not concerned with it. The groove of the patent is still the groove of the patent, although enlarged. It no more loses its identity by enlargement than a river does by the change of volume, due to the flow and ebb of the tide, or by the shoaling or deepening of its channel by the wash of its current.

The balls are no part of the groove, but something used with it. There is no thought of denying the right of a vendee to replace balls. His right is not limited to any size of ball. The balls may be replaced without thought of infringement of any patent right. To deny vendee the right to smooth up a groove is to deny him all right to make repairs

to the patented features of what was sold to him. The right cannot be limited to the use of the same balls as before. The only limitation is that he may repair, but cannot make a new bearing out of the material of the old. What is the one and what the other the facts of each case must determine. The line, as before observed, is most difficult to draw in words of description; it is by no means so difficult to draw in fact.

In the instant case our fact finding is that what defendant has done is to make repairs, and that it has not infringed upon the patent rights of plaintiff. The name given to anything is not necessarily indicative of what the thing is. A fact upon which defendant lays much stress has some interest as a coincidence, but no other value. The fact referred to is that the plaintiff itself did what the defendant has done, and the department in charge of such work was called by plaintiff its "Repair Department." We attach as little importance to the distinction between repairing and selling secondhand bearings after they have been repaired.

The cases on the subject of repairs and reconstruction have been fully and almost completely listed by counsel. We have carefully considered the cases to which we have been referred. We find none of them to conflict with the finding made. Among those cited are Wilson v. Simpson, 50 U. S. (9 How.) 109, 13 L. Ed. 66; American v. Simmons, 106 U. S. 89, 1 Sup. Ct. 52, 27 L. Ed. 79; Morgan v. Paper Co., 152 U. S. 425, 14 Sup. Ct. 627, 38 L. Ed. 500; Leeds v. Victor, 213 U. S. 325, 29 Sup. Ct. 503, 53 L. Ed. 816; Davis Co. v. Edison, 60 Fed. 276, 8 C. C. A. 615; Goodyear v. Jackson, 112 Fed. 146, 50 C. C. A. 159, 55 L. R. A. 692; Keeler v. Standard, 157 U. S. 659, 15 Sup. Ct. 738, 39 L. Ed. 848; Bauer v. O'Donnell, 229 U. S. 18, 33 Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. A. (N. S.) 1185, Ann. Cas. 1915A, 150.

The plaintiff's bill is dismissed, with costs, for want of equity.

UNITED STATES v. EMAN MFG. CO.

(District Court, D. Colorado. August 23, 1920.)

Criminal law ⇐37—Violation of statute induced by government agent not ground for conviction.

A manufacturer of a medicinal preparation *held* not chargeable with violation of Food and Drugs Act, § 2 (Comp. St. § 8718), and section 8 as amended by Act Aug. 23, 1912, and Act March 3, 1913 (Comp. St. § 8724), by the shipment of a misbranded article in interstate commerce, where the only shipment of such character shown was on an order sent from another state, for the purpose of entrapment by a government agent, who had no reason to suppose that defendant had ever previously made such a shipment.

Criminal prosecution by the United States against the Eman Manufacturing Company. Trial to court by stipulation. Defendant discharged.

At the November, 1919, term of the District Court of the United States for the District of Colorado, the United States attorney for said district, acting upon a report by the Secretary of Agriculture, filed in the District Court aforesaid an information against the Eman Manufacturing Company, a corporation, Denver, Colo., alleging shipment by said defendant, in violation of Food and Drugs Act, § 8 (34 Stat. 771), as amended by Act Aug. 23, 1912, c. 352, and Act March 3, 1913, c. 117 (Comp. St. § 8724) on or about April 14, 1919, from the state of Colorado into the state of California, of a quantity of an article, labeled in part: "'Sulfox,' A Medicinal Water Artifically Prepared. Sole Owners and Manufacturers, The Eman Mfg. Co. Incorporated. Main office: 1426 Curtis Street, Denver, Colo."—which was alleged to be misbranded.

Analysis of a sample of the article by the Bureau of Chemistry of this department showed that it was an aqueous solution, consisting essentially of sulphuric acid and traces of calcium sulphate, with a very faint trace of sulphur dioxid. It was alleged in substance in the information that the article was misbranded, for the reason that certain statements included in the circulars accompanying the article falsely and fraudulently represented it to be effective as a preventive, treatment, remedy, and cure for rheumatism, catarrh, la grippe, kidney and stomach trouble, hay fever, bronchitis, sugar diabetes, paralysis, St. Vitus' dance, indigestion, pyorrhea and other blood infections, lupus, cancer, gangrene, blood poisoning, dropsy, neuritis, piles, ulcers, eczema, erysipelas, tuberculosis, and germ propagation in the intestines, when, in truth and in fact it was not.

On June 5 1920, an agreed statement of facts was filed by the plaintiff and defendant, whereby, among other things, trial by jury was expressly waived, and it was agreed that the court should hear and determine the cause upon the stipulation and agreement of facts and the laws applicable thereto. On August 23, 1920, the cause having been tried upon the agreed statement of facts, the defendant was found not guilty and discharged, as will more fully appear from the decision of the court.

John A. Gordon, Asst. U. S. Dist. Atty., of Denver, Colo.
Clarence R. Anderson, of Denver, Colo., for defendant.

LEWIS, District Judge. The defendant prepares and offers for sale a fluid under the trade-mark "Sulfox," and the information charges that in April, 1919, it shipped from Denver to San Francisco, in interstate commerce, a number of bottles of the preparation which were misbranded as to its therapeutic and curative effects. When defendant was brought in to plead there was a statement of facts by counsel which raised a doubt as to whether the Food and Drugs Act had been violated as charged. Thereupon the district attorney and counsel for defendant filed a stipulation waiving a jury and setting out the facts in the case, from which it appears that one Elgar O. Eaton, one of plaintiff's agents, whose duty it was to investigate violations of the act, wrote and mailed to defendant the following letter:

"San Francisco, April 9, 1919. Eman Co., Denver, Colo. Dear Sirs: I have heard of your treatment called 'Sulfox.' I want to try it and I am sending $3.00 for a case of it. Send to my room at 972 Sutter Street, room 806. Ed. Eaton."

Eaton, before ordering the shipment, went to a druggist at San Francisco and asked for "Sulfox." The druggist had none. Eaton asked the druggist to order some for him. The druggist did so, but defendant refused to fill the order of the druggist. Eaton then ordered the shipment direct to himself by means of the foregoing letter. The

defendant did not know at the time it made the shipment that Eaton was an employee of the United States government and supposed the shipment was being made to one intending to use it for medicinal purposes as a remedy for some of the diseases for which it was recommended by the circulars accompanying it. The stipulation further recites: "That in making said order and inducing said shipment it was not the intention of the said Eaton to use said 'Sulfox' as a medicine or as a treatment for the cure, mitigation, or prevention of disease, but the shipment was procured by him for the sole purpose of analyzing the substance and of procuring evidence against the shipper of a violation of the Food and Drugs Act.

The district attorney relies upon Grimm v. United States, 156 U. S. 604, 15 Sup. Ct. 470, 39 L. Ed. 550, and cases which follow it, in urging that a plea of guilty be entered and a fine imposed, and of course if the facts here bring the case within the rule there announced that must be done, notwithstanding a majority of the state courts appear to hold a contrary view. When the Grimm Case was considered below Judge Thayer held that the facts established guilt because the government agent who induced the defendant to write the nonmailable letter did not request the defendant to put the letter in the mail, but left the means of transmission wholly to the defendant's selection. He said:

"If such act is done voluntarily and intentionally—that is to say, if the nonmailable letter is deposited in the mail by the accused without solicitation on the part of the officer that the mail be used to convey such intelligence—the weight of judicial opinion seems to be that the act does not lose its criminal character, though the offense may have been committed in responding to an inquiry from a person in the government service which was made under an assumed name for the purpose of concealing his identity. * * * In the case at bar the evidence did not show that the accused was solicited to commit the offense charged in the indictment. The selection of the public mail as the medium for giving information where the most lewd and indecent pictures could be obtained was the voluntary act of the defendant, and he is criminally responsible therefor." (D. C.) 50 Fed. 528.

I can conceive of no way in which the defendant could have transmitted "Sulfox" to Eaton as requested in his letter that would not have been an interstate shipment. However, the Supreme Court, in considering Grimm's Case on error, made no mention of the position taken by Judge Thayer, but rested its affirmance on other ground. Mr. Justice Brewer, speaking for the court in that case, says:

"It does not appear that it was the purpose of the post-office inspector to induce or solicit the commission of a crime, but it was to ascertain whether the defendant was engaged in an unlawful business."

This language is a clear indication of the importance of the purpose of the government agent, that is, as to whether the act which he requests the citizen to do is for the purpose of inducing him to violate the statute. That this is so is more definitely stated in Price v. United States, 165 U. S. 311, at page 315, 17 Sup. Ct. 366, 368 (41 L. Ed. 727):

"It appears from the bill of exceptions that the government inspector who instigated the prosecution in this case had been informed that the statute

was being violated, and for the purpose of discovering the fact whether or not the plaintiff in error was engaged in such violation, the inspector wrote several communications of the nature of decoy letters, which are set forth in the record, asking the plaintiff in error to send him through the mail certain books of the character covered by the statute, which the plaintiff in error did, as is alleged by the prosecution, and as has been found by the verdict of the jury. This has been held to constitute no valid ground of objection."

The excerpt from the Grimm Case is repeated in Andrews v. United States, 162 U. S. 420, 16 Sup. Ct. 798, 40 L. Ed. 1023. The stipulation does not disclose that the defendant here has ever sent "Sulfox" in interstate shipment other than the two bottles to Eaton in response to his letter. Eaton's failure to induce the defendant to violate the statute by shipping to the druggist, his letter to the defendant, the absence of facts as a basis from which he could believe or suspect that the defendant had on other occasions violated the statute, and the stipulation causes me to reach the conclusion that he wrote the letter to the defendant, not for the purpose of discovering violations but with the intention and purpose of inducing the defendant to violate the statute, and that on these facts Grimm's Case is not an authority in support of the prosecution, and that in the interests of a sound public policy the defendant should be found not guilty and discharged. Woo Wai v. U. S., 223 Fed. 412, 137 C. C. A. 604; Sam Yick v. U. S., 240 Fed. 60, 153 C. C. A. 96.

THE DANA.

(District Court, E. D. New York. February 21, 1921.)

Maritime liens ⊜28—Right to lien for coal furnished on order of charterer.

Libelant, who furnished coal to a steam lighter under charter requiring her return free from any liens accruing during the charter period, on orders from one representing both charterer and owner, who told him of the charter, *held* entitled to a lien under Act June 23, 1910, §§ 1, 3 (Comp. St. §§ 7783, 7785).

In Admiralty. Suit by B. F. Guinan, Incorporated against the steam lighter Dana. Decree for libelant.

Foley & Martin and James A. Martin, all of New York City, for libelant.

Gilroy & Townsend and Richard Townsend, all of New York City, for claimant.

CHATFIELD, District Judge. The libelant supplied coal to the Dana, which was owned by the Weehawken Dry Dock Company, and which had been chartered to the Atlantic Ship Salvage Corporation for certain work off the coast of Long Island during the summer of 1919. The manager of the claimant's lighterage department was acting under temporary employment as purchasing agent or manager for the Salvage Corporation, and ordered the coal in question. In so doing he had conversations with the vice president of the libelant, in which

evidently the fact of a charter of the boat by the Salvage Corporation must have been discussed or understood, and the credit of the Salvage Corporation considered.

The claimant shows that the charter contained the customary provision that the charterer was to return the boat in the same condition as received, free from all claims and liens which may accrue during said charter period. The charterer was not only an owner pro hac vice during this period, but evidently the officer ordering the coal represented the charterer as well as the claimant, and therefore is within the class of persons who may, like the master, order necessaries and supplies for the benefit of the vessel, and whose act will bind the vessel, unless, under section 3 of this statute (Comp. St. § 7785), the person furnishing the credit is shown to have known, or could by reasonable inquiry have ascertained, that the person ordering the supplies did not have authority to bind the vessel. Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 41 Sup. Ct. 1, 65 L. Ed. ——, decided in the Supreme Court of the United States October 11, 1920; The Hatteras, 255 Fed. 518, 166 C. C. A. 586.

In the case of the South Coast, 251 U. S. 519, 40 Sup. Ct. 233, 64 L. Ed. 386, it was held that a charter party, requiring the charterer to pay all expenses and save the owner harmless from liens, presumed authority of the charterer to bind the vessel for necessary supplies, and that denials and warnings from the owner could not defeat a lien, if the supplies were furnished to the vessel upon the vessel's credit when ordered by the master or charterer.

If the supplies were not ordered by the master, but by a person who represented the charterer, and who also in warning the customer as to the solvency of the charterer was attempting to safeguard the interests of the owner, there would be nothing from which the materialman, supplying coal, would have reason to infer that supplies sold to the vessel would not be a lien upon the vessel. In fact, the very warning against selling goods directly on the credit of the charterer would lead the materialman to depend upon his lien, and to sell the goods solely on the credit of the vessel, rather than upon the credit of the person whose solvency was questioned. The South Coast, supra.

The facts in the present case do not show any reliance upon nor personal credit given to the charterer. The circumstances were all those which had existed when supplies had been ordered for various vessels owned by the Weehawken Dry Dock Company, and nothing would rebut the presumption and the positive evidence that credit was given to the vessel, unless definite language had been proven, indicating that an express agreement by the charterer to pay the bill was entered into, and that no lien was to be sought. In fact, a lien might have existed, even though an additional contract in the nature of a guaranty was made. The Piedmont Coal Co. Case, supra; The Bronx, 246 Fed. 809, 159 C. C. A. 111. In the Hatteras, 255 Fed. 518, 166 C. C. A. 586, the Circuit Court of Appeals for this circuit has stated that the presumption established by the statute of June 23, 1910 (Comp St. §§ 7783–7787), may be rebutted, unless the supplies be ordered by the ves-

sel's master, ship's husband, or other person in charge of the vessel at some place where the owner is not present. But such rebuttal must show facts from which it can be inferred or by which it is proven that credit was not given to the vessel, or that the charter of the vessel, like a time charter (Curacao Trading Co. v. Bjorge [C. C. A.] 263 Fed. 693), does not make the charterer the owner pro hac vice, and that the charterer has no authority, in the absence of the ordering of supplies by the master, to bind the vessel's credit.

The libelant may have a decree.

THE WALTER ADAMS.

(District Court, D. Rhode Island. March 9, 1921.)

No. 1359.

Admiralty ⇐126—Premium on appeal bond taxable as costs.

The amount paid as premium on an appeal bond, required by rule 13 of the Circuit Court of Appeals, First Circuit (150 Fed. xxxix, 79 C. C. A. xxxix), is taxable as costs, where appellant prevails on the appeal and is awarded costs.

In Admiralty. Suit by the Piedmont & Georges Creek Coal Company against the fishing steamer Walter Adams. On libelant's objection to clerk's taxation of costs. Overruled.

Frank Healy, of Providence, R. I., for libelant.

Charles R. Haslam, of Providence, R. I., for claimant.

BROWN, District Judge. The libelant objects to the clerk's taxation as costs of an item of $120 paid for premiums on appeal bonds. These were required by rule 13 of the Circuit Court of Appeals (150 Fed. xxxix, 79 C. C. A. xxxix). The claimant, who prevailed upon appeal, was put to this expense in order to comply with a rule of court. The Gov. Ames, 187 Fed. 40, 48, 49, 109 C. C. A. 94, and The Reliance (D. C.) 189 Fed. 416, related to premiums on bonds given to release a vessel, and may be thus distinguished from the present case.

The question of the allowance of costs in the federal courts was considered by the Supreme Court in Re Peterson (June 1, 1920) 253 U. S. 300, 40 Sup. Ct. 543, 64 L. Ed. 919, in which was cited the decisions in the First Circuit, Primrose v. Fenno (C. C.) 113 Fed. 375, Fenno v. Primrose, 119 Fed. 801, 56 C. C. A. 313, and Houlihan v. Corporation of St. Anthony (C. C.) 173 Fed. 496; Id., 184 Fed. 252, 106 C. C. A. 394.

Chapter 226, § 2, of the General Laws of Rhode Island, is as follows:

"Sec. 2. Any court or officer whose duty it is to pass upon the account of any person or corporation required by law to give bond may, whenever such person or corporation has given any such surety company as surety upon said bond, allow in the settlement of such account a reasonable sum for the expense of procuring such surety."

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

By rule 7 of the Admiralty Rules of Practice (267 Fed. viii), promulgated by the Supreme Court December 6, 1920, which took effect March 7, 1921, the conflict of decisions has been set at rest. The rule is as follows:

7. "If costs shall be awarded by the court to either or any party then the reasonable premiums or expense paid on all bonds or stipulations or other security given by that party in that suit shall be taxed as part of the costs of that party."

As the decisions in The Gov. Ames and The Reliance, above cited, do not seem conclusive of the present question, I am of the opinion that upon principle, and on what seems the better authority, the clerk's taxation was right. While the taxation was made before the adoption of the new admiralty rule 7, the adoption of that rule supports the reasoning of those authorities which sustain such taxation.

The libelant's exceptions are overruled, and the clerk's taxation is approved and confirmed.

NOTE.—The claimant cites in support of the taxation the following authorities: The Europe, 190 Fed. 475, 111 C. C. A. 307; The Volund, 181 Fed. 643, 104 C. C. A. 373; Jones v. Smith (C. C.) 183 Fed. 990; The Bencliff (D. C.) 158 Fed. 377; The John D. Daily (D. C.) 158 Fed. 642; The Robert Dollar (C. C.) 116 Fed. 79; Edison v. Amer. Mutoscope Co. (C. C.) 117 Fed. 192; The South Portland (D. C.) 95 Fed. 295; Jacobsen v. Lewis Klondike Exp. Co., 112 Fed. 73, 50 C. C. A. 121; The Hurstdale (D. C.) 171 Fed. 607.

Also cases contra: The Texas, 226 Fed. 897, 141 C. C. A. 501; The Governor Ames, 187 Fed. 40, 109 C. C. A. 94; The Reliance (D. C.) 189 Fed. 416; Lee Injector Co. v. Penberthy Co., 109 Fed. 964, 48 C. C. A. 760; The Willowdene (D. C.) 97 Fed. 509; Parkerson v. Borst, 256 Fed. 827, 168 C. C. A. 173.

EMERICK v. OSWEGO FALLS PULP & PAPER CO.

(District Court, N. D. New York. March 12, 1921.)

Receivers ⇐183—Complaint in action by receiver should show facts relating to plaintiff's appointment.

In an action in a federal court by a plaintiff, as receiver, the complaint should show the nature of the action in which the receiver was appointed and the court by which the appointment was made, to the end that his capacity to sue and the jurisdiction of the case by the court may appear.

At Law. Action by Louis W. Emerick, as receiver of the McDermott Contracting Company against the Oswego Falls Pulp & Paper Company. On demurrer to the complaint of the above-named plaintiff, who seeks to recover on a debt owing to the McDermott Contracting Company for work, labor, and materials, and which claim was assigned to said company by the Fulton Contracting Company.

Four grounds of demurrer are interposed, and were brought on for argument on or about May, 1920. Demurrer sustained, with leave to amend.

Claude E. Guile, of Fulton, N. Y., for plaintiff.

Northrup, Tooke, Lynch & Carlson, of Syracuse, N. Y., for defendant.

RAY, District Judge. The demurrer alleges that on the facts stated in the complaint it appears that this court has not "jurisdiction of the subject of the action"; also that plaintiff has no authority to institute the action, nor the legal capacity to maintain the same; also that the plaintiff is not authorized nor can he be authorized by the bankruptcy court to institute or maintain actions for the receiving of property alleged to belong to the bankrupt estate. This is the third ground of demurrer; then:

"Fourth. That it does not appear affirmatively upon the face of the complaint that there is such a diversity of citizenship as will give this court jurisdiction of the cause of action alleged or of the person of the defendant."

There is no allegation in the plaintiff's complaint showing the nature or character of the suit or proceeding in which the plaintiff, Louis W. Emerick, was appointed receiver of the McDermott Contracting Company. Whether he was appointed receiver in an equity action to conserve assets or in some bankruptcy proceeding does not appear, and the court cannot assume that this suit is ancillary to some action properly brought, and in which the court had jurisdiction, and in which the receiver was appointed. I think the complaint is defective in this particular, and that it should show the nature and character of the action in which the receiver was appointed, and if it be a fact that the court appointing a receiver had jurisdiction of the case, then sufficient facts should be alleged to show that this was the case. When a receiver is appointed by the United States District Court in an equity action of which the court has jurisdiction, the receiver may sue as such to recover the property and assets belonging to the estate he represents, and such a suit by the receiver is regarded and treated as ancillary to the main suit; but facts should be stated showing that there was such a main action or suit, of which the court had jurisdiction.

There will be an order sustaining the demurrer, but with leave to the plaintiff to file and serve an amended complaint within 30 days after service of the order sustaining the demurrer to be entered pursuant hereto.

PRELEAU v. UNITED STATES.

(Court of Appeals of District of Columbia. Submitted January 3, 1921. Decided February 7, 1921.)

No. 3400.

1. **Grand jury ⊜8—Jury ⊜33(1)—Negro not entitled to grand and petit juries composed of negroes.**
A negro has no right to have his case considered in the first instance by a grand jury, and later by a trial jury, composed wholly of jurors of his own race.

2. **Criminal law ⊜1134(4)—Denial of new trial is not reviewable.**
The overruling of a motion for a new trial after conviction of a crime is not reviewable on appeal.

Appeal from Supreme Court of the District of Columbia.

Garfield Preleau was convicted of robbery, and he appeals. Affirmed.

Thomas Beckett and A. P. P. Preleau, both of Washington, D. C., for appellant.

John E. Laskey, of Washington, D. C., for the United States.

HITZ, Acting Associate Justice. This is an appeal from a judgment of the Supreme Court of the District of Columbia, based upon a verdict of guilty on the first count of an indictment, and a sentence of imprisonment thereupon. The indictment contained two counts, the first charging robbery, and the second "joy riding," upon which a verdict of not guilty was rendered.

On October 18, 1919, the appellant was arraigned upon the indictment and pleaded not guilty. On January 13, 1920, he filed two motions to quash the indictment; the first setting up that he was denied equal protection and due process of law, in that the grand jury which found and presented the indictment "are not his peers," and that he had reason to believe and did believe that the charge made against him was the result of a conspiracy. The second motion to quash was based upon the contention that the jury by which he was to be tried were not his peers, he being a negro and the jury being white men, for which reason he could not get a fair and impartial trial. The motions were supported by affidavit of the appellant, and for the purpose of their consideration he was allowed to withdraw his former plea of not guilty.

Thereupon, after argument, the trial court overruled the motions, a plea of not guilty was again made, a jury was sworn, and after trial the verdict and judgment above referred to followed. Thereafter a motion in arrest of judgment and one for a new trial were filed, and, these being overruled, the case is here upon the record and a bill of exceptions, which embodies the evidence.

The assignments of error are four in number:

[1] 1. Error of the trial court in overruling the motions to quash. The contentions made by these motions involved the right of the ap-

pellant to have his case considered, in the first instance by a grand jury, and later by a trial jury, composed wholly of jurors of his own race and color. No authorities are cited in support of such propositions, and they may be dismissed, with the observation that the trial court was correct in its disposition of them.

[2] 2. Error of the trial court in overruling the motion for a new trial.

This action is not reviewable here. Hill v. United States, 22 App. D. C. 396.

3. Error in overruling the motion in arrest of judgment.

We find nothing in the record affording any foundation for such a motion, and it was properly disposed of by the trial court.

4. Error in refusing a directed verdict in favor of the appellant.

The evidence, as set forth in the bill of exceptions, makes such a case as was manifestly proper for submission to the jury. No good purpose would be served by a review of the testimony, for, if the jury believed the government witnesses, as they evidently did, having before them the signed confession of the appellant, it is difficult to see how a different verdict could have been reached.

The result is that the judgment appealed from must be affirmed; and it is so ordered.

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.

DIAMOND COAL & COKE CO. OF WYOMING v. PAYNE, Secretary of the Interior, et al.

(Court of Appeals of District of Columbia. Submitted February 10, 1921. Decided March 7, 1921.)

No. 3437.

1. Public lands ⇐120—Equity will not compel restoration of scrip used in fraudulent entry.

In the absence of a statute making it the duty of the Secretary of the Interior to return scrip on which had been based fraudulent entries of public lands, a court of equity will not extend its aid to the fraudulent entryman in procuring a return of such scrip, even if the rule that equity refuses to give the innocent party more than he is entitled to, and therefore compels him to return what he received from the transaction, would apply where the fraud was against the government, and would require the government to return the scrip, if such return had been asked in the suit for cancellation of the patents issued on the fraudulent entries.

2. Constitutional law ⇐312—Public lands ⇐120—Due process does not require injunction to compel return of public land scrip fraudulently used.

The denial by a court of equity of a mandatory injunction compelling the Secretary of the Interior to return to a fraudulent entryman the public land scrip used in making the fraudulent entries, on the ground that equity will not relieve against the consequences of the party's own fraud,

does not deprive the entryman of his property without due process of law, since it does not adjudicate that the Secretary is entitled to retain the scrip.

Appeal from the Supreme Court of the District of Columbia.

Suit for mandatory injunction by the Diamond Coal & Coke Company of Wyoming, a corporation, against John Barton Payne, Secretary of the Interior, and others. From a decree dismissing the bill for want of equity, complainant appeals. Affirmed.

W. P. Fennell and Robert B. Fennell, both of Washington, D. C., for appellant.

C. Edward Wright, C. D. Mahaffie, and W. H. Wahly, all of Washington, D. C., for appellees.

SMYTH, Chief Justice. The appellant, which we shall call the coal company, sought by its bill a mandatory injunction against the Secretary of the Interior and the Commissioner of the General Land Office to compel them to surrender to it certain papers evidencing soldiers' additional rights (section 2306, R. S. [Comp. St. § 4594]), and called "scrip" in the record, valued at $28,400, or, in lieu thereof to give to the coal company a letter recognizing its ownership of the scrip. There were two other defendants, Harrison and Sneddon, but they were merely nominal. They filed a joint answer, confessing all the allegations of the bill. The Secretary and the Commissioner moved to dismiss the bill. The motion was sustained, and, the coal company electing to abide by its bill, a decree was passed, dismissing the bill for want of equity.

It appears from a decision of the Supreme Court of the United States (Diamond Coal & Coke Co. v. United States, 233 U. S. 236, 34 Sup. Ct. 507, 58 L. Ed. 936), made a part of the bill by reference, that Harrison and Sneddon, with money furnished by the coal company, purchased the scrip in question and used it in securing from the government certain of the public lands which they represented to be agricultural lands. Patents, 34 in number and conveying 2,840 acres, were issued to them, and thereafter they conveyed the lands by deed to the coal company. The government, believing that the lands contained coal, and were not agricultural lands within the meaning of the law, instituted a suit in the Circuit Court of the United States against the coal company to recover the title, on the ground that the patents were fraudulently procured. The court ruled against the government. The Circuit Court of Appeals reversed the ruling, holding that the lands contained coal, and that Harrison and Sneddon and the coal company knew it at the time the patents were issued and the title conveyed, and directed that a decree be entered annulling and canceling the patents and the deeds as prayed; hence that the coal company had procured the title through fraud. On appeal to the Supreme Court of the United States the decree was in all things affirmed.

The same opinion also discloses that prior to this entry of the lands the coal company had made an attempt to acquire a part of them by inducing some of its employés and others to make homestead

entries of the lands under an agreement whereby the company was to bear the expense, compensate the entrymen for the exercise of their homestead rights, and receive the title when perfected—an arrangement that was fraudulent and in direct violation of the homestead law. This attempt, however, was abandoned, and resort was had to the scrip which we have just mentioned. Thus it is made clear that the well-considered purpose of the coal company, and of those whom it employed to serve it in connection with procuring the title, was fraudulent. About this there can be no doubt.

In the suit to set aside the patents and deeds, and to restore the title to the government, the coal company made no application to have the scrip returned to it in the event the court found that the title had been illegally procured. An elaborate brief has been filed by the coal company, in which we are invited to consider many questions which, as we view the case, have no relation to the controversy.

[1] Our attention has not been directed to any statute or decision which in so many words or by fair import says it is the duty of the Secretary of the Interior to return the scrip nor have we found any. General principles, then, of equity, must govern. The case as it is before us is this: Should a court of equity issue a mandatory injunction at the prayer of the coal company to rescue it from the plight in which its own dishonesty has placed it? Does the coal company's situation contain any element which appeals to a court of conscience?

It was said a long time ago by Mr. Chief Justice Taney that "conscience, good faith, and reasonable diligence" alone call into action the powers of a court of equity. McKnight v. Taylor, 1 How. 161, 11 L. Ed. 86. The coal company may have on its side the last element of the formula, but certainly it is lacking in the first two. In Dent v. Ferguson, 132 U. S. 50, 65, 10 Sup. Ct. 13, 18 (33 L. Ed. 242) the court said:

"But, if a party seeks relief in equity, he must be able to show that on his part there has been honesty and fair dealing. If he has been engaged in an illegal business and been cheated, equity will not help him."

Mr. Justice Van Devanter, in United States v. Colorado Anthracite Co., 225 U. S. 219, 224, 32 Sup. Ct. 617, 56 L. Ed. 1063 spoke to the same effect. In that case plaintiff had secured a judgment in the Court of Claims for the repayment of the purchase price paid to the government for public lands, the entry of which was subsequently canceled. The learned Justice said, speaking for the court, that if the company was engaged in an effort to acquire the land fraudulently, in contravention of the coal land law, it could not invoke the equitable principle necessary to secure for it from the government a refund of the money which it had paid.

Another case which throws light on the subject is Causey v. United States, 240 U. S. 399, 402, 36 Sup. Ct. 365, 367 (60 L. Ed. 711). It was a suit to cancel a homestead entry fraudulently made by Causey for the benefit of one Bradford. The land was paid for, as here, with scrip. Defendant urged that the bill could not be maintained, because it did not contain an offer to return the scrip received when the entry was made. The court rejected the contention and said:

"When a suit is brought to annul a patent obtained in violation of these restrictions, the purpose is not merely to regain the title, but also to enforce a public statute and maintain the policy underlying it. Such a suit is not within the reason of the ordinary rule that a vendor, suing to annul a sale fraudulently induced, must offer and be ready to return the consideration received. That rule, if applied, would tend to frustrate the policy of the public land laws; and so it is held that the wrongdoer must restore the title unlawfully obtained and abide the judgment of Congress as to whether the consideration paid shall be refunded."

See, also, United States v. Trinidad Coal Company, 137 U. S. 160, 170, 171, 11 Sup. Ct. 57, 34 L. Ed. 640; Heckman v. United States, 224 U. S. 413, 447, 32 Sup. Ct. 424, 56 L. Ed. 820; United States v. Colorado Anthracite Co., supra.

A fortiori he should not be permitted to maintain a separate suit for its recovery where he must plead his own misdeed as the basis for the relief which he seeks. It is said that this decision is bottomed on a statute not applicable in a case like the one before us. The decision does not say so. True, a statute is cited in connection with prior decisions of the court; but the opinion does not rest on the statute, but on a policy which underlies the public land laws. That policy, as we interpret it, is to give no encouragement to one bent on wrongdoing to advance on the theory that if he succeeds he gets the lands, but if he fails he gets his money or his scrip back, and thus loses nothing by the attempt.

Much reliance is placed by the coal company on Stoffela v. Nugent, 217 U. S. 499, 501, 30 Sup. Ct. 600, 54 L. Ed. 856. The defendant in that case acted fraudulently in procuring title to some land and a mortgage. The person defrauded brought suit to set aside the deed and cancel the mortgage. Plaintiff's right to the land was conditioned upon the payment by him to the former owner of $15,700. In the transaction by which the defendant acquired title, he paid $10,000 of this amount and gave the mortgage in question for the balance. Defendant contended that it would be inequitable to cancel the deed and mortgage in favor of the plaintiff, without making provision for the payment by him to the defendant of the amount which the latter had paid. Speaking to this argument the court said of the defendant:

"He may have no standing to rescind his transaction; but, when it is rescinded by one who has the right to do so, the courts will endeavor to do substantial justice so far as is consistent with adherence to law."

That was a suit between private parties, where the public policy mentioned in the Causey Case did not apply. If it were not for this, the case might be an authority for the court in the suit by the government against the coal company to cancel the patents and the deeds, to require the government to surrender the scrip as a condition of the cancellation, but furnishes no warrant for saying that the company has any standing in a suit instituted by itself for the return of the scrip. In other words, in a suit brought by the innocent party, the court, in determining the equity to which he is entitled, should take into account what belongs to the other party, and award it to him. But this is done not for the wrongdoer's sake (Pullman's Car Co. v. Transporta-

tion Co., 171 U. S. 138, 150, 18 Sup. Ct. 808, 43 L. Ed. 108), but because equity refuses to give to the innocent party more than he is entitled to. The rule, however, is different where the guilty one is the plaintiff. There he must found his suit on the fraudulent transaction, and thus run counter to the maxim "Ex dolo malo non oritur actio." The scrip in the case before us was delivered by the company to the government as a part of a fraudulent scheme. It is upon that delivery and the attending circumstances that the coal company rests its present suit.

"No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act." Pullman's Car Co. v. Transportation Co., supra, 171 U. S. 151, 18 Sup. Ct. 813, 43 L. Ed. 108.

[2] It is said that to retain the scrip is to deprive the coal company of its property without due process of law, and therefore that equity should grant the relief desired. This is a non sequitur. We do not pass upon the right of the Secretary of the Interior to retain the scrip. What we do is to refuse the aid of equity to extricate the coal company from the consequences of its own wrongdoing.

There being no error in the record, the decision is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

RYAN v. SECURITY SAVINGS & COMMERCIAL BANK.

(Court of Appeals of District of Columbia. Submitted February 11, 1921. Decided March 7, 1921.)

No. 3449.

1. **Evidence ⟸422—Representation that maker would not be held liable inadmissible, as contradicting note.**
   In an action on a promissory note, a claim by defendant that he was not to be held liable for the note, that it was merely desired by the bank to enable it to pass the examination of the bank examiner, contradicts the terms of the note, which is not permissible.
2. **Bills and notes ⟸452(3)—Nonliability for part of debt held defense pro tanto.**
   A maker of a note, who was liable only for two of the four notes for which the note in suit was given, has a defense against the original payee, for a partial failure of consideration, to the extent of the notes for which he was not liable, under Code of Law 1911, § 1332.
3. **Bills and notes ⟸140, 242, 475—Affidavit held not to show defendant was indorser; indorser for credit, joint maker, not discharged by extension.**
   In an action on a note given to the holder of four other notes, an affidavit of defense which stated that the defendants had signed the other notes as indorser does not show even prima facie that plaintiff was a technical indorser, since, if he signed the notes on the back before they were delivered, or after they were delivered while they were in the hands of

the payee, for the purpose of enhancing the credit of the notes, he is not entitled to the privileges of an indorser, but is liable as a joint maker, and is not released by the extension of the notes without his consent.

4. Bills and notes ⊂=130—Renewal notes are not payment of indorsed notes without agreement.

The taking of renewal notes does not effect a payment of the debt evidenced by existing notes indorsed by defendant under circumstances making him liable as a joint maker, in the absence of an express agreement, or other facts showing that the renewal notes were taken in payment of the debt.

Appeal from the Supreme Court of the District of Columbia.

Action by the Security Savings & Commercial Bank against James T. Ryan. Judgment for plaintiff, and defendant appeals. Affirmed.

J. S. Easby Smith and Ralph B. Fleharty, both of Washington, D. C., for appellant.

Milton W. King, Theodore D. Peiper, and L. Koenigsberger, all of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellee, which we shall call the bank, brought suit against Ryan on a promissory note, and filed an affidavit of merit under the seventy-third rule of the trial court. Ryan pleaded in bar, and in due time filed an affidavit of defense, then a substituted one, and finally the one which is now before us. The bank moved for judgment; the court granted the motion on the ground that Ryan's affidavit did not state a defense, and gave judgment for the bank, from which Ryan appeals.

Was Ryan's affidavit sufficient? Since it represents his third attempt, it must be assumed that it says all that can be said in his behalf. From it we gather the following: A corporation known as Ryan's Auto Service was indebted to the bank on four notes, aggregating $7,900, which Ryan "had signed as indorser." Ryan was the chief, if not the sole, stockholder of the corporation. Certain parties purchased the business of the corporation and assumed all its liabilities. Between these parties, the bank, and Ryan there was an agreement by which Ryan was not to further indorse the notes of the corporation. Two of the notes which he had indorsed—one in the sum of $2,300 and another in the sum of $800—became due. Renewal notes for the amounts evidenced by them, and signed by the corporation and third parties, were taken by the bank. Ryan did not indorse them. Later the other two notes, one in the sum of $2,500 and the other in the sum of $1,900, became due, but were not paid; nor were they extended.

About three months after this Ryan was called to the bank and told by the vice president that he must put his notes in bankable shape, and that if he would sign a note for $7,500—the four notes having been curtailed in the sum of $400 at some time not stated—it would be all right. Ryan hesitated, and said he was no longer liable as indorser upon any of those notes; but the vice president insisted that he was, and added that the assets of the corporation were sufficient to pay them; that he needed the $7,500 note only to enable the bank

to pass the examination of the bank examiner, who was then in the bank, and that Ryan would not be called upon to pay it. Relying upon these representations, Ryan signed the note and delivered the same to the vice president. This is the note in suit. The notes for which this note was given were not delivered to Ryan when he executed it, but he does not say they were not surrendered later.

[1] With respect to the claim that the defendant was not to be held liable for the note, for the reason given, it must be put aside at once as devoid of merit. It contradicts the terms of the note, and this is not permissible. Specht v. Howard, 16 Wall. 564, 21 L. Ed. 348; Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; Martin v. Cole, 104 U. S. 30, 36, 26 L. Ed. 647. There is nothing in Bluthenthal & Bickart v. Carson, 37 App. D. C. 118, to the contrary. It was there held that the defendants could show under section 1333 of the Code that they were accommodation indorsers, without consideration, for the benefit and at the request of the plaintiff. Clearly it has no bearing here.

[2] Ryan urges that he was induced to give the note in question upon the representation by the vice president that he was indebted to the bank on the four notes we have mentioned. He says this representation was untrue as to two of the notes; that is, the two for which renewals were taken and which he did not indorse. His argument is in effect that he was only an indorser upon the original notes; that the extension of the time of payment of the debt for which they were given, by the taking of the renewals without his consent, released him, and to that extent there was a partial failure of consideration. If this were true, it would be a defense pro tanto to the note. Code § 1332.

[3] But the argument assumes that he was an indorser within the meaning of the law, and that the affidavit shows it. The allegation relied on is that the bank held a number of the notes of the Auto Service corporation, "which notes the defendant had signed as indorser." The mere fact that he wrote his name on the back of the notes does not show even prima facie that he was a technical indorser. It is important to know when and under what circumstances he wrote his name there. If it was before or near the time the notes were delivered, or after they were delivered, but for the purpose of strengthening the credit of the note, and before the payee had indorsed, he would be a maker, and not entitled to any of the rights or privileges of an indorser.

The affidavit shows that the notes were never transferred from the payee bank, and that it never indorsed them. He was the only indorser. A fair construction of the affidavit warrants the conclusion that he signed the notes at or before the time they were delivered and for the purpose of enhancing their credit. If this were not the fact, it should have been so alleged, clearly and distinctly, as the seventy-third rule requires.

In the leading case of Good v. Martin, 95 U. S. 90, 93, 97 (24 L. Ed. 341) the court said:

"* * * But if any one not the payee of a negotiable note, or, in the case of a note not negotiable, if any party writes his name on the back of the note, at or sufficiently near the time it is made, his signature binds him in the same way as if it was written on the face of the note and below that of the maker; that is to say, he is held as a joint maker, or as a joint and several maker, according to the form of the note."

In the same decision we also read:

"Decided cases almost innumerable affirm the rule that, if one not the promisee indorses his name in blank on a negotiable promissory note before it is indorsed by the payee, and before it is delivered to take effect as a promissory note, the law presumes that he intended to give it credit by becoming liable to pay it either as guarantor or as an original promisor."

To the same effect, see Bendey v. Townsend, 109 U. S. 665, 667, 3 Sup. Ct. 482, 27 L. Ed. 1065; Browns Valley State Bank v. Porter, 232 Fed. 434, 439, 146 C. C. A. 428; Chandler & Taylor Co. v. Norwood, 14 App. D. C. 357, 367; Randle v. Davis Coal Co., 15 App. D. C. 357, 359.

Daniel, in his work on Negotiable Instruments (6th Ed.) § 713, says:

"That a third party whose name is on the back of a note before that of the payee * * * is held by numerous authorities * * * prima facie as a joint maker."

And he cites Good v. Martin, supra, and many other cases in support of his statement. The same authorities hold that as between the original parties to the note it is always open to the defendant to show by parol or otherwise the capacity in which he indorsed. It may be that he was to be held only as an indorser, and, if so, the law will enforce the agreement. The rule we are applying here deals only with the prima facie case made by Ryan's affidavit, which, as we have seen, was against him. If he was a technical indorser on the original notes, it was for him to show it. In this he failed. The taking of the renewal notes did not release him on the theory that he was an indorser.

[4] Nor was he discharged on the assumption that the renewals effected a payment of the old notes. The debt for which Ryan became responsible when he signed those notes was unpaid when the two renewals were taken. The notes were only evidence of debt—not payment of it, unless it was so stipulated. It is well settled that—

"The acceptance of a negotiable note for an antecedent debt will not extinguish such debt, unless it is expressly agreed that it is received as payment." Peter v. Beverly, 10 Pet. 532, 568 (9 L. Ed. 522).

In Downey v. Hicks, 14 How. 240, 249, 14 L. Ed. 404, it was ruled that a "note of the debtor himself, or of a third party, is never considered as a payment of a precedent debt, unless there be a special agreement to that effect." Many decisions are cited. See, also, Maxwell v. Holmesville Mill & Power Co., 231 Fed. 684, 686, 145 C. C. A. 570; Edison Electric Illuminating Co. of Boston v. Tibbetts, 241 Fed. 468, 154 C. C. A. 300; In re Howe (D. C.) 235 Fed. 909.

The affidavit does not set forth any special agreement, nor any other fact to indicate that Ryan was to be released from liability for the

debt evidenced by the original notes by the acceptance of the renewals by the bank.

From the foregoing considerations it is clear the affidavit does not state a defense. The judgment must be, and it is, affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

UNITED STATES ex rel. RUSSELL et al. v. DISTRICT OF COLUMBIA et al.

(Court of Appeals of District of Columbia. Submitted February 7, 1921. Decided March 7, 1921.)

No. 3474.

1. **Mandamus ⇐87—Not issued to control discretion based on substantial evidence, refusing permit for dance hall.**
   In mandamus proceeding to compel the commissioners of the District to issue a permit for a dance hall, the court is limited to the inquiry as to whether there is any substantial testimony to support the findings of the commissioners, since they are permitted to exercise a sound discretion in all matters within their jurisdiction, and the courts will not reverse their decision, unless it can be said they acted arbitrarily or capriciously.
2. **Mandamus ⇐164(4)—Answer held to be taken as true, and to sustain refusal of permit for dance hall.**
   In mandamus to compel the commissioners of the District to issue a permit for a dance hall, facts stated in the answer, which must be taken as true on demurrer thereto, showing that the permit of one relator for operating the hall has been revoked for disturbances, and that he had let the place to the other relator, who applied for the new permit, but that the evidence showed that the location and reputation of the hall were such that a dance hall could not be conducted there without disorder and disturbance, were sufficient to justify the commissioners in refusing the permit.
3. **District of Columbia ⇐19—Police regulation authorizing refusal of dance hall permit held sufficiently definite.**
   Police regulation authorizing refusal of permit to conduct dances in halls whenever such place, from the character of the applicant or the nature and the surroundings, is likely to become the scene of disorder or other violation of the law, establishes a sufficiently definite standard for the refusal of such permits.
4. **District of Columbia ⇐19—Regulation confiding discretion to commissioners to refuse dance hall permits is valid.**
   The fact that a police regulation confides to the judgment of the commissioners of the District the determination of the question whether the nature of the surroundings justified denial of a permit to conduct a dance hall does not render the regulation invalid.

Appeal from the Supreme Court of the District of Columbia.

Petition for mandamus by the United States, on the relation of Eugene R. Russell and another, against the District of Columbia and

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

the Commissioners thereof. From a judgment discharging the rule and dismissing the petition, after demurrer to the answer was overruled, relators appeal. Affirmed.

Charles W. Clagett and A. L. Sinclair, both of Washington, D. C., for appellants.

F. H. Stephens, of Washington, D. C., for appellees.

SMYTH, Chief Justice. The relators, Russell and Nash, petitioned the court below for a mandamus to compel the commissioners of the District to issue to Russell a permit for a public dance hall at 708 O St. N. W., Washington, and to require the inspector of licenses to issue a license to him for the same place. Defendants filed an answer in response to a rule to show cause. This was demurred to by the relators, but the demurrer was overruled. Relators elected to stand on their demurrer, and consequently the court discharged the rule and dismissed the petition. From this action relators appeal.

The answer must be taken as true. From it we gather these facts: Nash is the owner of the hall and let the place to Russell for a consideration of 50 per cent. of the gross receipts. Prior to April 5, 1918, Nash was licensed to operate the place as a public dance hall, but on that day the license was revoked—

"for the reason that the said hall had become the scene of great disorder and repeated violations of law, and that it was the nightly resort of persons of evil life and fame, such as prostitutes and ex-convicts, who engaged in fights and disorders within said hall and upon the street in front of the same and who committed nuisances in the public alleys and private area ways and yards adjoining and near said hall, and so conducted themselves in general as to render the neighborhood of the said hall unsafe for decent people, especially at nighttime during the progress of dances and public entertainments in said hall."

At the public hearing held for the purpose of determining whether or not the permit now in question should issue, it was testified by citizens residing in the vicinity of the hall that the situation was about as the commissioners had found it when they revoked the former license. They further said that after this had been done the entire situation changed, and citizens were able to enjoy their property and move about the immediate vicinity of the hall—

"without fear of assault or bodily harm and that their women folk could pass and repass the said hall without having their sense of decency affronted and their ears filled with vile, blasphemous and profane language."

They also testified:

"That, from their long residence in the vicinity and their knowledge of the situation, they were sure no dance hall or place of public amusement could be, by any one, properly and decently conducted in this location inasmuch as it was such a location and had such a reputation as such dance hall as not to be attractive to decent people."

It also appears that Russell is an old man, and not able, by reason of his age, to quell disorder among the persons most likely to resort to the hall.

Acting on this testimony the commissioners found that the operation of a dance hall on the premises would be likely to become the cause of disorder and other violations of law, and hence they refused the permit.

Relators say that the things for which Nash's permit was revoked arose out of war conditions then prevailing in that part of Washington, and they insist that there has been a change in that respect since then. They also say that there is nothing in the record to the contrary but the mere opinion of witnesses. It is true that opinions were expressed by those who testified, but they also gave the facts on which they based them, and those facts, set out above, amply justified the conclusions drawn from them.

[1, 2] The court is limited in this proceeding to the inquiry as to whether or not there is any substantial testimony to support the findings of the commissioners. They are administrative officers and are permitted to exercise a sound discretion in all matters which come within their jurisdiction. Unless it can be said that they acted arbitrarily or capriciously, the courts will not reverse their decisions. The problem is not whether they erred in the determination of a question of fact, but rather whether there was sufficient evidence to warrant the exercise of their judgment and discretion. We think there was, and where that is so "the responsibility is theirs and not ours." Richards v. Davison, 45 App. D. C. 395, 401, citing United States ex rel. Ness v. Fisher, 223 U. S. 683, 32 Sup. Ct. 356, 56 L. Ed. 610.

[3] But relators assert that section 25 of the Police Regulations, under which the commissioners acted, is void for indefiniteness. It provides that—

> "Permits to conduct dances or entertainments of any kind in halls or other places may be refused by the commissioners of the District of Columbia whenever such place, from the character of the applicant or the nature of the surroundings, is likely to become the scene of disorder or other violation of law. * * * Any person protesting * * * shall be entitled to a public hearing before the assessor who shall ascertain and report the facts together with his advice thereon to the commissioners."

They say this does not furnish any uniform standard by which the meaning of the term "nature of the surroundings" can be ascertained; that the whole matter is left to the opinion of the commissioners, and hence the rights of the citizen are subject to the "absolute, uncontrolled, and arbitrary action" of the commissioners. The criticism is not valid.

The standard is: Do the character of the applicant and the nature of the surroundings show that the place would likely become the scene of disorder or other violation of law if the permit were issued? We think it is definite and easily understood. The question calls for a determination of fact which is to be made by the triers of fact—the commissioners—after a public hearing. The norm is certainly as definite as where the question of negligence is involved in a law action. In such a case the court defines negligence as the failure to do that which a reasonably prudent man would do under similar circum-

stances. What would he do? The jury must answer, and then determine whether the evidence discloses that the person's conduct which is under analysis conforms to the answer. So here the commissioners must determine from the evidence whether or not the place in question would likely become the scene of unlawfulness if a permit were granted. The standard in the one case is just as definite as in the other.

[4] Complaint is made because the determination of the nature of the surroundings and the likelihood that the place would become the scene of disorder is confided to the judgment of the commissioners. Every question of fact in the administration of justice, as well as in the executive department of the government, must be resolved in harmony with the judgment of some one. If the fact that it must be is a fatal objection to our procedural law, we have been wrong for many years. But it is not.

The judgment of the commissioners, however, cannot be capricious or arbitrary. There must be, as we have seen, some competent evidence to support it. Richards v. Davison, supra; Roberts v. United States, 176 U. S. 221, 20 Sup. Ct. 376, 44 L. Ed. 443; Lane v. Hoglund, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066; United States ex rel. Wattis v. Lane, 49 App. D. C. 385, 266 Fed. 1005.

In addition it is said that no one can safely use his property for a public dance hall, because he is unable to determine what is the "nature of the surroundings" which will render his hall unfit for that purpose. As well may a person say he could not use his property for an industrial plant, because he could not tell what a jury might hold to be negligence on his part in case of injury to his employés. But reasonable men, we think, would have no difficulty in determining whether or not the surroundings of a given place were likely to lead to disorder.

Chevy Chase Sanatorium v. District of Columbia, 46 App. D. C. 558, 571, does not support relators' contentions, although it is relied upon by them. The commissioners found that the sanatorium was a nuisance. The court held that there was no authority for this, saying:

"There is neither a statute nor a regulation specifying what acts or omissions on the part of such an institution will constitute it a nuisance."

Here we have a valid regulation specifying what would justify the refusal of a permit. The other decisions cited by relators, when properly understood, are equally inapposite.

The court below was right in overruling the demurrer, and its judgment is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

DISTRICT OF COLUMBIA v. CRANFORD PAVING CO.

(Court of Appeals of District of Columbia. Submitted February 9, 1920. Decided March 7, 1921.)

No. 3423.

1. **District of Columbia ⟸14—Liable for breach of authorized contract for which there was an appropriation.**
   The District of Columbia is liable to a contractor for his loss of profits resulting from the District's breach of its contract to employ the contractor for street repairs, where the contract was originally authorized by an act of Congress, and there was an appropriation by Congress sufficient to have covered the work.
2. **District of Columbia ⟸14—Provision for orders by engineer does not authorize refusal of contracted work.**
   In a contract whereby the District gave to a contractor the work of repairing its streets, a provision that such work should be done subject to orders from the engineer commissioner does not relieve the District from liability for breach of the contract, though the engineer gave no orders for the work which was done by the District itself, since the provision merely gave the District the right to keep a reasonable control over the work, and was not intended as a door by which it could escape from its obligation.
3. **District of Columbia ⟸14—Breach of street contract for economy is not an exercise of police power.**
   Where the District of Columbia chose to do its own street repair work in violation of a contract giving such work to a contractor, on the ground of economy, it cannot avoid liability on the claim that the contract was subject to supervising control of Congress in the exercise of the police power.
4. **District of Columbia ⟸14—Breach of contract for street repair held not directed by Congress.**
   An act of Congress authorizing the District to do its own street repair work was not a direction by Congress to the District to violate its contract giving such work to a contractor, so that the District cannot defend an action by the contractor on the ground that Congress can enact a law impairing the obligation of the contract.
5. **District of Columbia ⟸14—Breach of contract during additional year held not waived.**
   Where the District had entered into a contract with the company for the latter to do certain street work, including repair work, for two years, with an option to the District to renew the contract for another year, and the District before the end of the two years breached the contract by doing its own repair work, and thereafter exercised its option to extend the contract for the additional year, to which the company replied it would insist on having repair work or damages for not being allowed to do it, the company did not waive its right to damages for loss of profits on the repair work during the extended term by performing the other part of the contract during that term.

Appeal from the Supreme Court of the District of Columbia.

Action by the Cranford Paving Company against the District of Columbia. Judgment for plaintiff, and the District of Columbia appeals. Affirmed.

F. H. Stephens, of Washington, D. C., for appellant.

A. A. Hoehling, Jr., S. C. Peelle, and C. F. R. Ogilby, all of Washington, D. C., for appellee.

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

STAFFORD, Acting Associate Justice. This is a case between the District of Columbia, hereafter referred to as the District, and the Cranford Paving Company, hereafter referred to as the Company. The Company is seeking damages from the District, because the District would not allow it to do certain work by way of repairing streets, from the doing of which it would have derived a profit, and for the doing of which, it is claimed, the District had contracted with the Company.

The District, under authority of Congress, entered into a two-year contract with the Company for the latter to do certain work upon the streets, including repair work; and the contract contained an option to the District to renew it for another year. Before the end of the two years, Congress authorized the District to purchase a portable plant and do its own repairing, if it found it could do so at a saving, and the District bought a plant and did a part of the repairing specified in the contract, against the objection of the Company. After all this, and still before the end of the two years, the District notified the Company that the District availed itself of the option to renew the contract, and ordered the Company to carry on the work for another year. The Company replied that it would do so, but would insist upon having the repair work, or else damages for not being allowed to do it. To this the District made no rejoinder, except to acknowledge receipt of the letter containing the notice and to promise to give it due consideration; but it accepted and approved the Company's bond reciting that the Company had been ordered to go on with the work provided for in the original contract and conditioned for the performance of all such work during the whole of the additional year. The court below had before it the report of the auditor, finding the amount of the profits lost to the Company during the two-year period and also the amount lost during the one-year period, and gave judgment in its favor for both sums. The case is here upon appeal from that judgment.

[1] 1. The District suggests, rather than argues, that "the work, being dependent upon annual appropriations made and to be made by Congress, and upon annual appropriations for repairs to streets, is payable out of a particular fund, within the meaning of that rule of law which precludes a recovery in such a case," and cites cases in which it was held, under leases providing that no rent should be paid until appropriation therefor had been made, that there could be no recovery beyond the amount appropriated. Bradley v. U. S., 98 U. S. 104, 113, 25 L. Ed. 105; Hooe v. U. S., 218 U. S. 322, 31 Sup. Ct. 85, 54 L. Ed. 1055. But we think this case is unlike those. Here the contract was entered into under the authority of Congress and in the manner directed. Moreover, the appropriation by Congress was sufficient to have covered this work.

[2] 2. In much the same way the point is made that as the contract provides that the repair work shall be done subject to orders from the engineer commissioner, and as he never gave any orders for this work, there can be no liability. It is enough to say that the contract gives the Company the right to do this work, and that the contract was broken when, instead of giving it to the Company to do, the Dis-

trict did it itself. The provision referred to merely gave the District a right to point out the work and keep a reasonable control over it. It was a bar for the protection of the District, not a door by which to escape from its obligation. United States v. Purcell Envelope Co., 249 U. S. 313, 39 Sup. Ct. 300, 63 L. Ed. 620.

[3] 3. Somewhat more earnestly it is submitted that the District should be excused from liability on this ground: That such a contract as this is subject to the supervising control of Congress in its exercise of the police power. What the police power has to do with the situation presented here is not perceived. It is merely the case of a contract broken for the sake of economy.

[4] 4. Then it is set up that the breach of the contract was the act of Congress, and therefore that the constitutional question is raised whether Congress might not at its will pass a law impairing the obligation of the contract. But such a question is a long way off. Congress did not direct the District to break its contract. It only authorized it to buy a portable plant and use it in repairing streets, if it found it economical to do so—a very different thing.

[5] 5. However, as to the damages arising during the additional year, it is seriously and earnestly insisted that no recovery can be had, because, when the Company obeyed orders and went on and did the work it was allowed to do, it knew well enough that it would not be permitted to do any repair work, and great reliance is placed upon Bowers Hydraulic Co. v. U. S., 211 U. S. 176, 184, 29 Sup. Ct. 77, 53 L. Ed. 136, wherein it was held that, under a dredging contract containing an ambiguous phrase descriptive of the material to be removed by the contractor, the contractor, when he renewed the contract, was bound by the construction which he knew the government had placed and would place upon the language. But that is not this case at all. Here there was no ambiguity in the language of the contract. The contractor, the Company, did indeed know that the District had been breaking its contract during the previous period, and so it notified the District that if it continued to break the contract it would be asked to pay damages. And even if the subject had been dropped there, it might well have been said that the District had assented to the notice thus given by the Company. But the Company's position is greatly strengthened by the fact that even after that notice from the Company the District accepted the Company's bond covering the contract in its old terms. In such circumstances, how can the District be heard to say that the extension did not cover the repair work?

We think there was no error in the judgment, and it is therefore affirmed.

Affirmed.

Mr. Justice STAFFORD, 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.

DISTRICT OF COLUMBIA v. PEARSON.

(Court of Appeals of District of Columbia. Submitted February 7, 1921. Decided March 7, 1921.)

No. 3484.

1. **Food ⟸3—Druggist required to pay license for soda fountain.**
Within Act July 1, 1902, § 7, par. 19, requiring owners of restaurants, ice cream parlors, or eating houses, by whatever name, where food or refreshments are served to be eaten on the premises where sold, to pay a license tax, the words "where food * * * or refreshments are served * * * to be eaten on the premises," is not merely descriptive of the places theretofore named, but were intended to include all places within that description, so that a druggist must pay the license for the privilege of conducting his soda fountain in the ordinary way, though it is not within the term "ice cream parlor."

2. **Statutes ⟸219—Nonenforcement against druggists held not construction of refreshment license act.**
The fact that druggists had not before been compelled to pay the license tax imposed by Act July 1, 1902, § 7, par. 19, on owners of places where refreshments are sold to be eaten on the premises, is not an administrative construction of the act, which should be followed, since it merely establishes an omission to enforce the act against them, not a deliberate construction of the act.

In Error to the Police Court of the District of Columbia.

Paul Pearson was charged by information with selling refreshments without having obtained a license so to do, and, after the court granted his motion to quash the information on an agreed statement of facts, the District of Columbia brings error. Reversed.

F. H. Stephens and F. W. Hill, Jr., both of Washington, D. C., for the District of Columbia.

Conrad H. Syme, of Washington, D. C., for defendant in error.

STAFFORD, Acting Associate Justice. The act approved July 1, 1902, in section 7, par. 19, provides:

"That victualers, owners of restaurants, oyster houses, cookshops, ice cream parlors, dairy lunches, or eating houses, by whatsoever name designated, where food, meals, or refreshments are served to transient customers, to be eaten on the premises where sold, shall pay a license tax of eighteen dollars per annum: Provided, that this paragraph shall not apply to the proprietors of hotels nor to private boarding houses where board and lodging are provided by the week or month." 32 Stat. 625.

The defendant was informed against in the police court under this paragraph, charged with selling an ice cream sundae, a glass of mineral water, a glass of malted milk, and a glass of soda water to patrons, which were served and eaten at the soda fountain of the defendant, as is more specifically set out in an agreed statement of facts attached to the information, he not being then and there a proprietor of a hotel and not being then and there conducting a private boarding house, without having obtained a license so to do, contrary, etc.

The agreed statement is as follows:

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

"The defendant is a duly licensed druggist and has been for 25 years, and made a sale of one ice cream sundae, one glass of soda water, one glass of malted milk, one glass of mineral water to patrons on the 20th day of October, 1920, which were served and consumed at the soda fountain of the defendant.

"The defendant is the proprietor of a typical drug store located at Eighteenth and U Streets, Northwest, in the city of Washington, District of Columbia, and has operated said drug store since the 15th day of July, 1902, and is now operating the same; that the equipment of said drug store consists of the usual supply of drugs of a typical drug store, patent medicines, toilet articles, stationery and such other articles of merchandise as are usually and ordinarily carried in drug stores, and a soda water fountain; that his soda fountain business represents about 15 per cent. of his total business and that the ice cream he sells at his soda fountain amounts to about 25 per cent. of his total sales at said fountain; that soda water, mineral waters, malted milk and ice cream are dispensed at the soda fountain by a clerk who, while not serving the fountain, assists generally in the other business of the store; that ice cream is served with soda water when it is so ordered in a drink known as ice cream soda; and is otherwise served at a counter the same place where the drinks are served, usually in the form of ice cream sundaes; that persons ordering ice cream generally in the form of sundaes are served at the fountain by the same clerk, or attendant, and in the same manner that persons ordering soda water or mineral waters are served; that the defendant has no regular table for the accommodation of patrons who are thus served, but there is near the fountain a small table for children which they sometimes use as a matter of convenience; that he serves no coffee or cake, or other eatables that usually go with ice cream in regular ice cream establishments and has no service for ice cream except the general soda fountain service above set forth; that ice cream parlors, such as existed at the time of the passage of the act of 1902, were establishments where ice cream, tea, coffee, cake, pies, and confections, and frequently hot rolls and butter were served to customers, were equipped with tables and the service was by regular waiters and the patrons ordered from the tables and ate their ice cream, etc., at said tables, and there was no counter for service such as characterizes the ordinary soda fountain; that said ice cream parlors were establishments separate from any other business and were conducted as ice cream parlors and so generally known. It is also agreed that druggists have never heretofore been compelled to take out a license under paragraph 19, Act July 1, 1902."

The court granted a motion to quash the information. Exceptions were taken by the District, a bill thereof duly signed and filed, and the cause is here in answer to a writ of error from this court.

[1] The argument for the defendant is based upon a reading of the paragraph in question after this fashion. It is that license fees are required only of the keepers of victualing shops, restaurants, oyster houses, cookshops, ice cream parlors, dairy lunches or eating houses, and that the words "by whatsoever name designated" have no effect, except to make the act apply to those very places as previously conducted and understood, although bearing perhaps a different name; and the words of general description next following, viz. "where food, meals, or refreshments are served to transient customers, to be eaten on the premises where sold," do not constitute a definition of what the Congress meant by the places named, and therefore do not broaden the words "restaurants, oyster houses," etc., at all, but only refer to such previously named places. But if this were so there would be no use or purpose in adding the words, for certainly the Legislature knew that food or refreshments were sold at each one of those places. But if Congress meant to say that any other place at which food, meals

or refreshments were served to transient persons to be eaten on the premises was to be considered exactly the same as a restaurant, etc., by whatsoever name it might be designated, then the words did serve some purpose. We cannot think they were employed without any purpose, and we are satisfied that they were employed for the purposes stated. That being so, there can be no question that the defendant's premises came within the class described, for malted milk and ice cream are certainly food, and mineral water and soda water are certainly refreshments; indeed, they are all refreshments, and they were certainly served on the premises where they were sold, and were to be eaten there.

[2] Stress is laid upon the admitted fact that heretofore druggists have not been compelled to pay a license fee in such cases, because, it is said, the construction so long given the act ought to be followed as being the administrative interpretation given to language which, to say the least, was not unambiguous. But we are only told that the authorities have omitted to enforce the act in such cases, not that there has ever been a deliberate construction of the act by the proper administrative officers. Moreover, we do not know what reason may have existed for such omission, if it was deliberate. It may have been because the extent to which soda fountains dispensed ice cream and malted milk was formerly very small compared to the extent to which they have come to dispense them of late, and the facts may have called the matter more strikingly to their attention in recent months. At all events we see nothing in the suggestion to require us to shut our eyes to what seems to us the necessary meaning of the statute.

It follows that the judgment of the police court must be reversed, with costs to appellees, to be proceeded with in conformity herewith.

Reversed.

Mr. Justice STAFFORD, 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.

CROWLEY et al. v. O'NEIL.

(Court of Appeals of District of Columbia. Submitted February 15, 1921. Decided March 7, 1921.)

No. 3458.

1. Judicial sales ⇐27(1)—Purchaser not required to take title based in part on adverse possession.

Where the auctioneer appointed by the trial court to sell real estate cried a good record title as to each piece of property described in the offer of sale, a title to a portion of one of the tracts, not good of record, but sound through the operation of adverse possession, is not the title which was paid for by the purchaser.

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

2. **Vendor and purchaser ⇐130(2)—Purchaser not required to take risk of title litigation.**
A purchaser is not bound to accept the risk of litigation with respect to a title which was represented to him as free from flaw.

3. **Judicial sales ⇐27(1)—Purchaser relieved from bid or doubt as to title to portion.**
The purchaser will be released from a bid made at a sale conducted by an auctioneer appointed by the court, where there was substantial doubt as to the title to a portion of the property for which the bid was made, the court, in proceedings to compel him to take the property, not undertaking to determine the validity of such a title.

Appeal from the Supreme Court of the District of Columbia.

Proceeding by Margaret A. Crowley and others against Frank O'Neil to compel the latter to complete his purchase of property sold at public auction by an auctioneer appointed by the trial court. From a decree releasing the purchaser from his bid, the property owners appeal. Affirmed.

J. E. Padgett, of Washington, D. C., for appellants.

Chapin Brown and C. B. Bauman, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. William H. Manogue was appointed by the trial court to sell at public auction two pieces of real estate located in old Georgetown. The property was bid in by Frank A. O'Neil, the appellee, who refused to complete the purchase, claiming that the title was defective. After a hearing the court sustained his contention and released him from his bid. The owners of the property appealed.

The description of the property as given in the record is long. We do not think it necessary to copy it here. It is sufficient to say that one piece faces on Thirty-Sixth street and the other on Wisconsin avenue.

The auctioneer cried a good record title as to each piece. The Thirty-Sixth street property was described in the offer of sale as having a frontage of 35 feet. According to the evidence there is serious doubt as to whether it contains a frontage of more than 32 feet. Appellants insist that it does, but the appellee denies it, and there is support in the record for his denial.

[1] As to the Wisconsin avenue property appellants admit that the title to the west 3 feet is not good of record, but insist that it is sound through the operation of adverse possession. This, however, is not the kind of title which was offered for sale and which was bid for by O'Neil.

[2] It may be that appellants can establish that they have a good title to both of the pieces in dispute; but a lawsuit, in which all the parties interested in the land would be before the court, is necessary to determine that. Such a suit might result in a holding against the sellers—that somebody else owned the land. A purchaser is not bound to accept the risk of litigation with respect to a title which was represented to him as free from flaw. McCaffrey v. Little, 20 App. D. C.

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

116, 121, and cases there cited. To compel him to do so would be to require him, in the language of the Supreme Court of the United States, "to take a lawsuit, instead of the land for which he contracted." Bank of Columbia v. Hagner, 1 Pet. 455, 468 (7 L. Ed. 219).

[3] A long time ago it was the practice in chancery in a proceeding like this to decide either for or against the validity of the title, and either to compel the purchaser to take it as good or to dismiss the bill on the score of its being bad. Fry on Specific Performance (3d Ed.) § 860 et seq. But that is no longer the rule. Now the practice is to release the purchaser from his bid, where, as here, there is a substantial doubt concerning the validity of the title. Butts v. Andrews, 136 Mass. 221; Spring v. Sandford, 7 Paige (N. Y.) ch. 550; Hepburn v. Auld, 5 Cranch, 262, 3 L. Ed. 96; Bank of Columbia v. Hagner, supra.

For the reasons given, the decree of the lower court is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

COLUMBIA AID ASS'N et al. v. SPRAGUE.

(Court of Appeals of District of Columbia. Submitted March 7, 1921. Decided March 7, 1921.)

No. 3426.

1. Appeal and error ⟸999(1)—Jury findings on properly submitted questions are conclusive.

Where the trial court properly submitted to the jury the only two questions which the parties claimed were to be determined by them, and no exception was taken to the instruction, the jury's finding on those questions is not open for review.

Appeal and error ⟸175—Question not presented to trial court cannot be raised.

Where the appellant stated at the trial that there were only two questions for the jury, both of which were properly submitted by instructions to which no exception was taken, he cannot urge on appeal that there was another question in the case, since the appellate court sits to correct errors of the trial court and the trial court cannot be said to have erred with respect to a matter not brought to its attention.

Appeal from the Supreme Court of the District of Columbia.

Action by Allen B. Sprague against the Columbia Aid Association and another. Judgment for plaintiff, and defendants appeal. Affirmed.

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

S. L. McLaurin and William H. Richards, both of Washington, D. C., for appellants.

Edmund Carrington and Irving Williamson, both of Washington, D. C., for appellee.

SMYTH, Chief Justice. The appellant is a corporation engaged in this District in extending aid to its members and their beneficiaries under certain circumstances. Its constitution provides that upon the death of a member it will pay to his widow or legal representative $150 unless he leaves a will, in which event it will pay as the will directs. The constitution also says that "when there is no wife or legal representative and no special instruction left by the deceased, this association shall" use the funds to "properly bury the deceased." A blank form for designation of a beneficiary is issued to each member and he is urged to sign it and then lodge it with the association.

Owen C. Sprague and his brother, Allen B., the appellee, were members of the association. Owen died in 1916. Some six months before his death, and while he was a resident of Richmond, Va., his brother Allen, having received some of the blank forms, sent him two to be filled out and signed. After they had been filled out Owen returned both to his brother, and requested him to have them properly witnessed. About six months thereafter Owen returned to Washington, where he died.

There is testimony tending to show that the forms were filled out by Owen in his own handwriting and signed by him, and that subsequently they were witnessed by three persons, who wrote their names on the forms as witnesses, and then delivered to the appellee with the full knowledge and consent of Owen. There is also testimony to the effect that some 25 days before the death of Owen one of the forms, filled out, signed, and witnessed as we have just stated, was delivered to the association at a regular meeting thereof.

[1] At the close of all the testimony the court said to the parties: "There is but one fact in this case for the jury to find: Did Owen C. Sprague sign the paper in question?" To this counsel for the association responded: "If your honor please, there are two facts: Did decedent execute the special instruction? And did he deliver it?" "Yes," said the court, "did he execute the paper and did he deliver it." These two questions were properly submitted to the jury. No exception was taken by the association to the instruction submitting them. The jury found against the association, and that closed the question. It is not open for review by us. This statement of the law needs no citation of authorities to support it.

[2] But it is now urged that there is another question in the case, namely, that the form or paper under consideration was in effect a will; that it was not executed in conformity with the law applicable to wills, and is therefore void. Appellant has no right to raise this question. We sit to correct errors of the trial court. It cannot be said that the court erred with respect to a matter not brought to its attention, and upon which it neither ruled nor was asked to rule. In-

deed, it was told inferentially by the association that it was not in the case.

The judgment of the lower court is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

DISTRICT OF COLUMBIA, to Use of LANGELLOTTI, v. FIDELITY & DEPOSIT CO. OF MARYLAND.

(Court of Appeals of District of Columbia. Submitted February 11, 1921. Decided March 7, 1921.)

No. 3370.

District of Columbia ⟸7—Individual cannot sue on officer's bond, without statutory authority and consent of District of Columbia.

An individual cannot sue, in the name of the District of Columbia, to his use, the surety on an official bond running to the District of Columbia, where there was no statute giving third parties the right to bring action thereon, and the consent of the District to the bringing of the action was not obtained.

Appeal from the Supreme Court of the District of Columbia.

Action by the District of Columbia, to the use of Frank Langellotti, against the Fidelity & Deposit Company of Maryland, a corporation. Judgment for defendant on a directed verdict, and plaintiff appeals. Affirmed.

George W. Offutt, Jr., and C. V. Imlay, both of Washington, D. C., for appellant.

P. H. Marshall, of Washington, D. C., for appellee.

STAFFORD, Acting Associate Justice. The defendant was sued by the plaintiff, to the use of an individual, as surety upon an official bond running in terms to the District of Columbia, and there was no statute giving third parties the right to bring an action thereon, neither was the consent of the obligee procured to the bringing of the action. The court of first instance directed a verdict for the defendant, and the appeal involves, among other possible questions, the validity of that action. If the use plaintiff had no right to bring the suit, the action of the court was correct, without reference to other questions.

In 1825 the Supreme Court of the United States, speaking by Chief Justice Marshall, with respect to an action upon a bond running to the Corporation of Washington, said:

"No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the Legislature; and no person

can be authorized to use the name of another without his assent, given in fact or by legal intendment." Corporation of Washington v. Young, 10 Wheat. 406, 409 (6 L. Ed. 352).

So far as we know, this has remained the view of that court as to sealed instruments. Hendrick v. Lindsay, 93 U. S. 143, 149, 23 L. Ed. 855. Congress has proceeded upon the same supposition. Formerly the warden of the jail here was required to give a bond to the United States (31 Stat. 1378), and another statute provides expressly that upon such a bond any person aggrieved by a breach of its condition may maintain an action. D. C. Code, § 481. But by an act later than these (36 Stat. 1003) the office of warden was abolished and a new office created, viz. the office of superintendent of the Washington asylum and jail, under appointment by the commissioners of the District, and such officer's bond was required to be given to the District of Columbia. Touching this bond there is no statutory provision that allows action thereon to be brought by a third party.

We are cited to South v. Maryland, 18 How. 396, 15 L. Ed. 433, and have read the case carefully. The opinion is not addressed to the question before us, and we do not know the exact facts that would have borne upon it, had the question been raised and presented. We see nothing there to indicate that the court had receded from the law of the Young Case. We are cited, also, to U. S. v. Hine, 3 MacArthur, 27. But a careful reading of that case fails to show that the mind of the court was addressed to this question. The most that can be said is that the right of a third person to sue on the official bond there involved was not drawn in question. Whatever may be the rule elsewhere, therefore, we think it settled for this jurisdiction that the plaintiff had no right to maintain this action, and accordingly the judgment is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

MILLER et al. v. C. C. HARTWELL CO., Limited, et al.

In re COLLINS.

(Circuit Court of Appeals, Fifth Circuit. February 14, 1921. Rehearing Denied March 18, 1921.)

No. 3614.

1. **Mechanics' liens ⇐313—Priority as against assignee of mechanic's lien.**
Where a building contractor executed a bond with surety for the payment for all labor and material under Acts La. 1906, No. 134, which provides that such bond shall be "for the protection of all parties interested in the contract as their interests may appear and which said surety is to stand in the place and stead of a defaulting undertaker, contractor," etc., such bond inures to the benefit of a mortgagee of the property, and though the mortgagee, by failure to institute proceedings citing lien claimants and the surety in concursus, left such lien claimants with the right to enforce their liens in priority to the mortgage, such priority cannot be asserted by the surety in the bond as to lien claims of which it has become owner.

2. **Costs ⇐266—Award of appeal costs not affected by subsequent appeal.**
A judgment of the appellate court awarding costs of appeal to the prevailing party *held* not affected by the fact that such party was defeated on a subsequent appeal in the same case involving different issues.

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

In the matter of one Collins, bankrupt. Mrs. Isabel Danziger Miller and others appeal from an order in favor of C. C. Hartwell Company, Limited, and others. Reversed.

See, also, 241 Fed. 636, 154 C. C. A. 394; 256 Fed. 273, 167 C. C. A. 445.

Walker B. Spencer, Charles P. Fenner, Philip S. Gidiere, Esmond Phelps, and A. D. Danziger, all of New Orleans, La., for appellants.

William B. Grant, of New Orleans, La., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. This is the third appearance of this cause in this court. 241 Fed. 636, 154 C. C. A. 394; 256 Fed. 273, 167 C. C. A. 445. It is a contest between the holders of mechanics' liens and a mortgage for priority in the distribution of the proceeds of certain realty, upon which both attached, and which was sold, in the bankruptcy proceedings, at public outcry, free from all liens or claims, which were transferred to the fund.

The property was owned by Collins, the bankrupt. He was a building contractor, and undertook to build, for himself, six cottages on the property. When the cottages were nearly finished, he found it necessary to borrow money to complete the work, and sought to do so on mortgage of the premises. The proposing lender, in order to prevent any laborers' or mechanics' claims from asserting liens prior to the mortgage offered, required Collins to give a bond as provided by Acts of Louisiana of 1906, No. 134, which provides for a contractor giving

a bond with surety for the faithful performance of the work and the payment for all labor and material furnished on the work contracted for.

The National Surety Company was procured to go on such bond as surety, but as Collins was both owner and contractor it was urged he could not properly take such bond as owner. To obviate this difficulty, at the suggestion of the surety company's agent, Collins conveyed the property to Isadore Singer for an agreed price, receiving in part payment three notes made by Singer, aggregating $6,600, secured by a vendor's lien and mortgage on the property. He entered into a building contract with Singer as owner to complete said houses, and Collins, as principal, and National Surety Company, as surety, gave a bond binding themselves to Singer, as owner, and to all subcontractors, workmen, laborers, mechanics, and furnishers of material as their interest may appear, for the true and faithful performance of said contract, and for the payment of said subcontractors and others, above specified, up to the sum of $6,600, "it being the purpose of this bond to protect all parties interested in said contract, as their interest may appear, the said surety standing in the place of defaulting undertakers, contractors, master mechanics, or engineers, as provided by Act 134 of the General Assembly of the state of Louisiana, approved July 10, 1906."

The notes given by Singer to Collins secured by this mortgage were transferred to one Dreyfous, who advanced the sum of $3,083 thereon. This mortgage debt is now held by the appellant, Mrs. Miller. In the previous steps of this litigation it has been ruled that, while the ostensible sale from Collins to Singer was for no other purpose than to create a situation where the contractor's bond, with surety, could be given, it did not invalidate the mortgage held by Mrs. Miller as transferee, and that it was enforceable for the amount advanced thereon. 241 Fed. 636, 154 C. C. A. 394.

During the further progress of the case the holders of mechanics' and material men's liens were, however, held not to have lost their right to assert such liens in priority to said mortgage, because it was shown that a petition had not been filed in a court of competent jurisdiction, citing all claimants and the surety on the bond for the assertion of all claims in concursus, with the right on the part of claimants to object to the sufficiency of the surety, and that no equivalent proceeding had been filed by the trustee in bankruptcy, and that therefore the right of the lienors to prime the mortgage in the distribution of the proceeds of the sale of the mortgaged property was not cut off by the giving of the bond. So much of the claims of the lienors as represented work and labor furnished after February 26, 1912, were held entitled to priority, and the case remanded for an inquiry as to the amount of said claims. 256 Fed. 273, 167 C. C. A. 445.

The case had been previously referred to a master, and after the second appeal to this court was again referred to him. On the hearing before the master the point was urged that a number of said lien claims had been bought up by and transferred to the National Surety Company, the surety on such bond, and that it, being obligated thereon to pay said

claims on the default of the contractor, could not set them up in priority to the mortgage in the distribution of the fund derived from the sale of the property.

The master ruled in regard to this contention that the investigation before him was restricted to the question as to whether the parties furnished labor and material used in the construction of the buildings under the contract of February 26, 1912, on or subsequent to said date, and declined to pass upon the question whether any of said claims had been purchased by the National Surety Company and were now being held by it, and, if so, whether such claims would not be entitled to prime the mortgage.

The mortgagee excepted to the master's report on four grounds:

First. That the claimants specified in the first exception had failed to produce sufficient evidence to support the allowance of their claims to priority, and that the master erred in holding as a matter of law that the filing of such proofs of such claim duly verified established a prima facie proof of the correctness and validity of their priority as furnishers of labor and material alleged to have entered into the construction of the building on the property covered by said mortgage.

Second. That the master should have found that the claim of the Panama Sash & Door Company had been by agreement subordinated to the claim of said mortgage.

Third. That the claims named in said third exception had all been acquired by the National Surety Company, and are represented and being urged by said surety company as assignee, and that the same in the hands of such assignee were not subject to priority over said mortgage.

Fourth. In holding that the costs advanced by Messrs. Grant & Grant, attorneys for the aforesaid lienholders, should be paid in priority to said mortgage.

The District Court overruled the exceptions to the master's report and entered a decree awarding priority to all of the claims reported as entitled thereto by the master, no ruling being made upon the point whether such claims were entitled to such priority if held by the National Surety Company, the surety on said bond.

The mortgagee assigned error on the part of the court in overruling the exceptions to the master's report and in decreeing (1) that the claims enumerated in exception third be paid in priority to the mortgage; (2) that the sum of $519.60 costs on the first appeal be paid to Messrs. Grant & Grant in priority to said mortgage.

As to the first exception to the master's report, while it is true that the master holds that the affidavit propounding such claims are prima facie proof of the facts therein stated, we do not think that the master based his finding alone upon the alleged prima facie proof of correctness and validity of the facts showing priority as appearing from these sworn claims. On the contrary, as to all of the claims mentioned in said first exception, the report takes them up seriatim and finds specifically from the evidence adduced the facts necessary to show that they were

for labor and material furnished after February 26, 1912. We find no error in the ruling on this point.

As to the second exception, we find no assignment of error upon the question of whether by agreement the Panama Sash & Door Company had waived its claim to prime the mortgage of appellant. We also do not find any evidence of any agreement between the mortgagee and said Panama Sash & Door Company, but at most, an understanding between that company and its assignee, which would not confer any right on Mrs. Miller, the mortgagee.

Whether the master should have considered if the claims mentioned in exception three were purchased by the National Surety Company or on its behalf depends upon whether or not such question had been cut off, by not having been ruled upon in the former hearing before the District Court or were concluded by the previous decisions rendered by this court in this case.

On the first reference to the master he held the mortgage in favor of Mrs. Miller prior in lien to any of the other claims, whether transferred or not, and that it should be first paid out of the fund realized from the sale of the property. He did not, therefore, have occasion to rule on the effect of a purchase of any of them by the surety company.

On exceptions the District Court entirely disallowed the mortgage. The sale from Collins to Miller and the contract in which the bond was given was held to be simulated, and the lien of the mortgage to be null and void, and Mrs. Miller's claim ordered to be expunged and rejected. This was the sole question brought to this court and passed on in the case of Miller et al. v. C. C. Hartwell Co., Ltd., et al., 241 Fed. 636, 154 C. C. A. 394, in which this ruling was reversed.

On the second hearing before the District Court the mortgage was awarded priority, and the lien creditors held to have had their liens divested by the giving of the bond with the National Surety Company as surety. This rendered any ruling on the effect of a purchase of any claim by the surety company unnecessary, and none was made.

[1] On appeal from this decree the question ruled in regard to the liens which were allowed was that the requisite petition citing all claimants and the surety on the bond for the assertion of the claims in concursus had not been filed, that no equivalent proceeding had taken place in the bankruptcy proceeding, and that these claimants were entitled to assert their liens against the fund. On neither appeal was the question raised, or properly before this court, as to the effect of a purchase of any claim entitled to prime the mortgage by the surety on the bond, of which this court had held:

"The existence of it inures also to the benefit of a mortgagee of the land upon which the building or improvement contracted for is erected, in that it provides a means of bringing about the satisfaction of claims of laborers and materialmen against the contractor."

The statute under which the—

"bond was given states its purpose to be 'to require owners to secure bond with solvent and sufficient surety from the undertaker, contractor, master mechanic, or engineer for the protection of all parties interested in the contract, as

their interest may appear, and which said surety is to stand in the place and stead of a defaulting undertaker, contractor, master mechanic or engineer.'" Miller v. Hartwell Co., 241 Fed. 636, 638, 154 C. C. A. 394, 397.

The very purpose of the arrangement between Collins and Singer, which was suggested by the agent of the surety company, was to give this bond as a means to protecting the loan secured by this mortgage against these claims. The former decision in the case did not involve or pass upon the effect of a purchase of any of said claims by the surety on said bond, or whether the claims in its hands, or in the hands of one holding for it, would be entitled to prime said mortgage.

We do not see wherein the surety on said bond would be entitled to set up any of said claims as against said mortgage as entitled to priority over the mortgage. The protection of Singer and "all persons interested in said contract as their interest may appear" was the purpose of the bond; the said surety standing in the place of Collins, by the express terms of said bond, in regard to all other persons. We are therefore of the opinion that the master should have passed upon such question as to whether any of said claims had been purchased by, or were owned in behalf of, said National Surety Company, and that such claims are not entitled to prime the mortgage.

A number of said debts appear to have been purchased by and directly assigned to the National Surety Company; others, to William K. Dart. The evidence in said case shows that the claims were not purchased by said Dart for himself, but with money furnished him by Mr. Grant, on whose account Mr. Dart was unable to state. Mr. Grant did not claim that he purchased said claims on his own account, but declined to state for whom on the ground of professional privilege. The evidence shows that Mr. Grant was at the time representing the National Surety Company and did represent them in the acquisition of several of said claims directly by the National Surety Company. The National Surety Company appears as the only person in the record interested in purchasing said claims, and in the absence of any further showing this would be sufficient to sustain a finding that the claims assigned to Dart were assigned to him in the interest of the National Surety Company.

[2] The last assignment of error challenges the awarding of priority of the claim of Messrs. Grant & Grant for the sum of $519.60, being the amount of costs paid by them to the attorneys for the mortgage creditor, covering the costs of appeal paid by Mrs. Miller on the first appeal, in which she prevailed. The judgment of the Circuit Court of Appeals awarded judgment in her favor for said $519.60 costs of said cause in this court. This gave the mortgagee the right to recover said costs out of and from the lien creditors. That the mortgagee did not prevail upon the rehearing of the case in the contention that these claims could not prime her mortgage would not in any way affect the costs of this court awarded her on her successful appeal and the payment of said sum to her by the attorneys for the lien claimants would not entitle them to have this sum repaid out of the fund in court, where

such payment will reduce the amount which her mortgage would collect therefrom.

The effect of this judgment, therefore, awarding the full amounts of these claims to the claimants, and then awarding judgment to Messrs. Grant & Grant, attorneys for these claimants, for the amount of these costs paid on the first appeal, had the effect of requiring the repayment out of the fund payable to the mortgagee of the amount she had recovered for costs against these claimants on the first appeal, which we think was error. Jennings et al. v. Burton (C. C.) 177 Fed. 603.

The judgment of the District Court is therefore reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed and remanded.

On Petition for Rehearing.

In this case the District Court at first held that the sale from Collins to Singer, and the purchase-money notes, vendor's lien, and mortgage were invalid, and that the notes, in the hands of Mrs. Miller, could not be proved as a debt in this bankruptcy proceeding. This court reversed this ruling and held that the notes, transferred to Mrs. Miller, gave her a lien or privilege for the amount actually and in good faith advanced on the security of the mortgage notes held by her. It also found that the transfer of the title to Singer, and the giving of these notes and mortgage, were in order for Collins to procure this loan and to create a situation in which a bond could be given, pursuant to the Louisiana statute, to secure the faithful performance of the building contract and the payment by the contractor of amounts owing for labor and material for the protection, among others, of the mortgagee. The National Surety Company gave this bond with full knowledge of the above purposes.

If the purchase by Singer had been made in order to acquire the property for himself, and if he had given these notes secured by mortgage, which were transferred for value to Mrs. Miller, and if the money derived from the sale of the realty was being distributed to pay the mortgage and the mechanics' and material lien debts, the surplus, if any, to go to Singer, the direct obligee of the Surety Company's bond, it is clear that a lien debt which had been purchased by the surety company, and against which its bond obligated it to hold Singer harmless, would not be permitted to take the proceeds of the sale of the realty from Singer. The mortgage created by Singer in the act of sale was not only in favor of the vendor but "of any subsequent holder or holders of said notes," which notes were drawn by the purchaser Singer to his order and indorsed by him, and the bond of the National Surety Company "inures also to the benefit of a mortgagee of the land on which the building or improvement * * * is erected," etc. Miller v. C. C. Hartwell Co., 241 Fed. 636, 639, 154 C. C. A. 394, 397.

It has been sufficiently shown that the question of priority between the mortgagee and National Surety Company as assignee of these lien debts arising out of its contract on its bond has not been passed on in the previous decisions of this court. Carroll v. Carroll, 16 How. 287, 14 L. Ed. 936. We think, if these debts are now payable to the Na-

tional Surety Company, they should not be decreed to withdraw this money, the proceeds of the mortgaged property, from the mortgage.

As to any of the claims, except those enumerated in exception 3 to the master's report, the opinion heretofore filed sustains the finding of the master. It is only as to the claims therein stated, and the claim of Messrs. Grant & Grant for $519.60, that the decree is reversed; as to all other claims it is affirmed. The cost of appeal will be paid, one-half by appellant and one-half by the appellees named in exception 3 to the master's report. Let the judgment of this court be so framed.

The petition for rehearing is thereupon denied.

MANTON-GAULIN MFG. CO. v. WRIGHT-ZIEGLER CO. et al.

(Circuit Court of Appeals, First Circuit. March 15, 1921.)

No. 1495.

1. **Patents ⟸297(1)—Validity assumed, when other claims have been upheld.**
In a suit for infringement of one claim of a patent, when another claim has been held valid in other courts, it will be assumed for the purposes of the case that the apparatus shown in the specification discloses inventive thought, and is a proper subject for a patent.

2. **Patents ⟸167(1)—Specification held to limit patentee to particular form of device.**
Where the specification of a patent for an apparatus for mixing milk and other similar liquids clearly disclosed that the novel and essential feature was that the adjustable surfaces were yielding surfaces, and that it was because of the elastic or yielding adjustment of the surfaces that the desired result was accomplished, and stated that the passage of the liquid through invariable orifices only gave an incomplete incorporation, a claim could not be upheld, if it called for fixed surfaces, necessitating an invariable orifice.

3. **Patents ⟸328—756,953, for homogenizing device, claim 7, held valid, but not infringed.**
The Gaulin patent, No. 756,953, claim 7, for an apparatus for intimately mixing milk and other liquids, consisting of an element having a reentrant conical surface, a complementary conical element, and means to force milk between them, *held* not invalid as unsupported by the specification, but also *held* not infringed.

Aldrich, District Judge, dissenting in part.

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

Suit by the Manton-Gaulin Manufacturing Company against the Wright-Ziegler Company and others. From a decree for defendants, plaintiff appeals. Affirmed.

J. Lewis Stackpole and Frederick P. Fish, both of Boston, Mass. (H. M. Holmes, of Boston, Mass., on the brief), for appellant.

Fred L. Chappell, of Kalamazoo, Mich. (Chappell & Earle, of Kalamazoo, Mich., and Samuel D. Elmore, of Boston, Mass., on the brief), for appellees.

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

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

BINGHAM, Circuit Judge. The plaintiff is the owner of United States letters patent No. 756,953, issued April 12, 1904, to Auguste Gaulin, and complains of its infringement by the Wright-Ziegler Company, because of its selling a homogenizing machine made by the Union Steam Pump Company, which intervened as a defendant.

The patent is for an—

"improved apparatus for intimately mixing milk and other liquids more or less resembling it by means of the action produced by the passage of liquids more or less heterogeneous under considerable pressure through very small orifices."

The claim in issue is No. 7 and reads as follows:

"In a machine of the class described, an element having a re-entrant conical surface, a complementary conical element to fit the same, and means to force milk between them, substantially as described."

The defenses are invalidity, noninfringement, and res judicata.

The patent has been twice passed upon in the District Court for Connecticut (Manton-Gaulin Mfg. Co. v. Dairy Machinery Co., 203 Fed. 516; Manton-Gaulin Mfg. Co. v. Dairy Machinery & C. Co., Inc., 238 Fed. 210); once in the District Court for the Eastern District of Michigan, and by the Circuit Court of Appeals for the Second Circuit (Manton-Goulin Mfg. Co. v. Dairy Machinery & C. Co., 247 Fed. 317, 159 C. C. A. 411). Claim 2 was in issue in those cases and reads as follows:

"(2) In a machine of the class described, co-operating elements having squeezing surfaces, means to yieldingly hold the elements in contact, and means to force the milk between the surfaces, substantially as described."

[1] In all the cases the validity of the patent and of the claim then in issue was upheld. It will therefore be assumed for the purposes of this case that the approved apparatus shown in the specification discloses inventive thought and is a proper subject for a patent. The question then is whether the claim in issue is valid, and, if valid, whether it is infringed by the defendants' device.

[2] The plaintiff contends that, although a re-entrant conical valve is old, the combination is new and the claim valid, even though it does not state whether the surfaces of the conical valve, when in operation, yield one to the other, rendering the orifice of the valve variable, or whether the surfaces are rigidly fixed, rendering the orifice invariable, and that the plaintiff is at liberty, for the purpose of making the combination workable, to employ such means as may be disclosed in the specification for holding and adjusting the surfaces, or any suitable means that is common and well known in the art.

The defendants say, if the claim is valid, its language must be interpreted to mean that the conical surfaces are yielding and thus afford a variable orifice; that if the surfaces are nonyielding, so that the orifice, when the device is in operation, is fixed or invariable, as the plaintiff says the claim should be interpreted, the claim would not

be based upon the invention which Gaulin conceived, but upon a device the principle of which he disclaimed in his specification.

In our opinion the defendant's contention must be sustained. The specification discloses in no uncertain manner that the novel and essential feature in Gaulin's homogenizing device is that the adjustable surfaces, whether in the shape of a cone or otherwise, are yielding surfaces pressed elastically one against the other, and that it is because of the elastic or yielding adjustment of these surfaces between which the liquid is forced that he is enabled to reduce the size of the fatty globules in the liquid to the degree desired and accomplish the intermixture of the parts composing it. In his specification he states that—

"The passage of the liquid alone through invariable orifices, however fine they may be, only gives an incomplete incorporation."

And after setting forth the constructional arrangements entering into his specific device he says:

"But although these constructional arrangements above described are advantageous for the regular and perfect operation of the device, I reserve the right to modify them as circumstances may require, as long as the device remains in its essential characteristics of my invention—that is to say, the employment of surfaces for mixing pressed elastically one against the other, whatsoever be their forms or dimensions, and whatsoever their actuation with regard to the other parts. I may even suppress, in case it be required, any capillary portion with fixed channels."

Believing, as we do, that the specification shows that the gist of Gaulin's invention was the variable orifice due to the yielding surfaces, we are of the opinion that, if the claim must be read as calling for fixed surfaces necessitating an invariable orifice, it is not valid as it is not based upon the invention disclosed in the specification. If the combination of claim 7 is novel, and could be said to include a conical valve with fixed surfaces necessitating an invariable orifice, and the patentee had disclosed the elements composing this combination in his specification, he properly could have claimed it. But as he did not disclose a conical valve with nonyielding surfaces as a part of his device, but disclaimed it, he is not entitled to a claim based upon such a structure. Hide-ite Leather Co. v. Fiber Products Co., 226 Fed. 34, 36, 37, 141 C. C. A. 142; Northrop v. Draper Co., 239 Fed. 719, 723, 724, 152 C. C. A. 553.

[3] We are of the opinion, however, that the claim is valid; that, read in the light of the specification, the language of the claim, where the conical surfaces are spoken of and are required to fit one with another, and between which the milk is to be "forced, substantially as described," means that the milk is to be forced between surfaces which fit closely one to the other and permit the liquid to be forced through because of their yielding quality.

As thus construed, the defendants do not infringe the claim, for the conical surfaces of the defendants' device are not yielding, but fixed, and the orifice is invariable.

This result renders it unnecessary to consider the other questions presented by the assignments of error.

The decree of the court below should be affirmed, not because claim 7 is invalid, as there held, but for the reason that it is not infringed.

The decree of the District Court is affirmed, with costs in this court to the appellee.

ALDRICH, District Judge (dissenting in part). I concur with the majority in holding claim 7 valid, but disagree upon the question of infringement.

At the arguments in this case I was strongly impressed with the idea that Gaulin's conception was not only original, but meritorious, and while the conception was not pioneer, in the sense that it concerned a device which was to be first in the field with reference to mixing milk and other liquids, that it was pioneer in the sense that Gaulin originated the idea of forcing milk and cream, and other liquids, under high pressure, between very closely adjacent surfaces, under such circumstances as to successfully break down fatty globules contained in heterogeneous liquid, like milk or cream; and that the merit of the means which he described for doing it was such as to make the device a commercial success.

Further examination of the case confirms me in such views.

The fact that the mechanical structure made in accordance with Gaulin's original conception was the first to do such work successfully is sufficient to put it into the field of rules which govern pioneer patents, and therefore entitles the claim in question to a liberal construction, with the view of protecting the substantial features of the invention.

Judges in other circuits, in cases before them upon different claims of the Gaulin patent, have held to this view as to the character of the invention, and it seems to me to be the right one. A conception so far original and so meritorious as that of Gaulin should not lose protection as against a party who adopts the Gaulin idea and changes a little the mechanical means described.

It seems to me that the alleged infringing machine has the substantial characteristics of the Gaulin invention, and that the case should not be turned against the Gaulin conception because the alleged infringing machine is mechanically different in the particular pointed out in the majority opinion.

It would seem that Gaulin did not have in mind much elasticity, but, in the practical sense, rigidity, because he says in his specification that the flow was to be—

"between adjustable surfaces so arranged as to be adaptable exactly one against the other and maintained pressed elastically and strongly one against the other."

Thus the liquid was to be forced between surfaces, which were to be adapted exactly and pressed strongly one against the other.

Under that view, it does not seem that claim 7 should be so narrowly construed as to exempt a party from its operation—who has, in all essential respects, adopted the Gaulin conception as to high velocity and high pressure in the direction of surfaces closely adjacent one to the other, as well as the general ideas of construction and of means

as pointed out by Gaulin—because he has made the surfaces through which the liquid passes, and the orifice, mechanically, a little more rigid, or even altogether rigid.

Of course, if the Gaulin conception were a narrow one, and the circumstances were such as to require a literal construction in respect to precise mechanical means, the alleged infringing machine might, perhaps, be differentiated. But that is not the rule of construction which should be applied to an invention involving the merit that this one does.

Under the rule of construction which the circumstances of this case would seem to require, I cannot do otherwise than view the alleged infringing machine as one which differs only in mechanical detail from that covered by claim 7 of the Gaulin patent, because, aside from the mechanical detail referred to, the scheme is substantially that of Gaulin.

For these reasons I think the defendant's device is one which infringes the plaintiff's rights.

W. & H. WALKER, Inc., et al. v. WALKER BROS. CO. *

(Circuit Court of Appeals, First Circuit. March 15, 1921.)

No. 1481.

1. **Trade-marks and trade-names ⟸73(2)—Expansion of retail business into wholesale business not unfair competition with wholesaler of similar name.**
   It is not unfair competition for a retail dealer of certain commodities, incorporated under the name of its owners, to expand into a wholesale business and invade the territory of another wholesale dealer in the same commodity having the same name; there being, however, no similarity in the marking on the labels.

2. **Trade-marks and trade-names ⟸93(3)—Attempt of single salesman to substitute goods does not establish "unfair competition."**
   Unfair competition is not established by the fact that a single salesman sought to palm off the product of one dealer for that of another, but results from actual misdoings, or from an assembly of circumstances which are calculated in and of themselves to mislead the public or the average trade.

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

3. **Trade-marks and trade-names ⟸75—Test of "unfair competition" is cheating of public.**
   In some cases of unfair competition, the question depends on the purpose or on the good or bad faith of the dealers, while in others the question is whether the situation in and of itself, without regard to good or bad faith, is calculated to deceive the public; but the test is always whether trade is being unfairly interfered with, and whether the public is being cheated into buying or paying for something which it is not in fact getting.

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

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 623, 65 L. Ed. —.

Suit in equity for alleged unfair trade competition by the Walker Bros. Company against W. & H. Walker, Incorporated, and others. Decree for plaintiff, and defendants appeal. Reversed and remanded, with directions to dismiss the bill.

George R. Nutter, of Boston, Mass. (Jacob J. Kaplan, Greta C. Coleman, and Dunbar, Nutter & McClennen, all of Boston, Mass., on the brief), for appellants.

Charles D. Woodberry and Robert Cushman, both of Boston, Mass. (Isaac E. Simons and Roberts, Roberts & Cushman, all of Boston, Mass., on the brief), for appellee.

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

ALDRICH, District Judge. Fortunately, we have no occasion to consider the merits or the demerits of the product in which the two Walker concerns are dealing.

This is an alleged unfair trade competition case.

It is not one, however, in which either of the parties resorted to similitude of names for unfair purposes, or of similitude of labels, or markings. This is so, because the Pennsylvania Walkers founded a business in 1837 under the name of William & Hay Walker, who were succeeded by their sons William and Hay Walker, Jr., and the business went on as W. & H. Walker, until 1919 (if the date is right), when they were incorporated under the same name.

The Boston Walkers' business was under the name of Walker Bros. Company of Boston.

Each party carried on its business with the name of Walker, or Walkers, in the field of commerce, without knowing of the existence of the other—and, as the District Court says, without any fraud, intentional or unintentional, upon each other, and without any substantial confusion or misleading of the consuming public—until quite recently, when the Boston Walkers discovered that the Pennsylvania Walkers were introducing their goods through jobbers and wholesale dealers.

The defendants used the Kay Chemical Company's label on some of their extracts, and for a time as to products the word "Kay," etc., was chiefly put upon soaps, and to some extent upon extracts, and it is true in shipping some of the extracts to the New England trade, that the Pennsylvania Company used products which had been made ready for the Kay company by pasting the Walker label over the Kay label. We do not think, however, that this cuts any figure in the case.

Speaking generally, for a long period the Pennsylvania company has carried the name of Walker on its extract packages.

It is not suggested that the names of the Pennsylvania labels were materially changed on their products—at least the evidence does not show that they were—except that on the Pennsylvania Walkers' product were superimposed, through the instrumentality of an attractive design, the words:

"Sewickley Home for Crippled Children. W. & H. Walker, Authorized Makers and Distributors."

This, of course, was to attract attention to their product through connecting it with the idea of a charitable purpose; but we see nothing vicious in that feature, because it was a worthy charity, and because it is quite common—and probably permissible—in modern trade to offer inducements to members of the public, through coupons, prizes, and trading stamps, to be handed out upon certain conditions in respect to purchasers.

As to the Walker names, which were the proper, or original, names of the Walkers interested in both instances, such adoption was quite natural and reasonable, and the Pennsylvania Walkers were in the field of commerce a number of years earlier than the Boston Walkers; the Pennsylvania Walkers having started their business in 1904, while the Boston Walkers started theirs in 1915.

[1] The position of the Boston Walkers is that under the circumstances they are entitled to the wholesale field in a particular locality, because they were first in that field under the Walker name, and that the entrance of the Pennsylvania Walkers into the wholesale field, though under a name which they have been rightfully using for a long period in the retail business, is unfair competition, because the Boston concern says, in effect, that their wholesale business should not be interfered with under the circumstances which we have described.

We look upon that view as unsound, because we think that it would interfere with the fundamental rights of reasonable trade competition, and with reasonable and commendable purposes of trade enterprise through expansion. Of course, it is quite true that business enterprises and expansions, through instrumentalities in the wholesale and jobbing fields, might be under such circumstances of bad faith, with or without involving deceptive devices, as to make the competition unfair; but we see nothing in this case to support any such idea as that.

[2] Unfair competition cannot be said to result from the idea that a single salesman sought to palm off one Walker product for another Walker product; and this would be so, whether it was in the wholesale or retail trade.

Unfair competition in commerce results from actual misdoings, or from an assembly of circumstances, which are calculated, in and of themselves, to mislead the public, or, as it is sometimes expressed, "the average trade."

We fail to see anything unreasonable in the efforts of a business concern to expand its enterprise by carrying it into broader fields and into larger and broader ways of doing business. We cannot avoid the view that restraints upon business expansion would be an unreasonable restraint, and an unreasonable hamper, not only of the natural trade ambition, but of the broad right of opening free competition.

[3] It is quite true, in cases of unfair competition, in the usual phase, that the question depends upon the purpose, or upon the question of good or bad faith, while upon another phase the question would be whether a situation, in and of itself, without regard to the

question of good or bad faith; the ways and means are, in and of themselves, calculated to deceive members of the public into buying one thing when they think they are getting another. The questions always are whether trade is being unfairly interfered with, and whether the public is being cheated into buying and paying for something which it is not, in fact, getting. It is true that the defendants' goods as well as the plaintiffs', carried the name "Walker"; but that was a rightful name which they had used for many years. It cannot be seen that this involves deceitful similitude, because it was their own name, and because the goods bore distinctive descriptions and designations of the product of the Philadelphia Walkers.

The learned Circuit Judge sitting in the District Court, conceding that the problem involved in this case has not been exactly covered by any authoritative cases, seeks to support his position through the logic of two cases, one that of the Hanover Case (240 U. S. 403, 36 Sup. Ct. 357, 60 L. Ed. 713), and the other that of the Rectanus Case (248 U. S. 90, 39 Sup. Ct. 48, 63 L. Ed. 141).

The first of these cases was a question of trade-marks, and a question of territory, rather than a question of expansion from retail to wholesale, or to wholesale instrumentalities, in a given territory.

The other case, as well, had reference to trade-marks, similitude of names, and to territory. Therefore it does not seem that the logic of the reasoning of those cases is decisive of the situation here.

In this case, the different Walkers were, and are, putting out their products under their own rightful names, properly and innocently adopted, and with labels which indicate the producer, and, generally speaking, the location of the product, or the place where it is put up for the trade.

The case of Cohen v. Nagel, 190 Mass. 4, 76 N. E. 276, 2 L. R. A. (N. S.) 964, 5 Ann. Cas. 553, was one of trade-names, and the question was whether one might adopt the word "Keystone" as the name of his cigar, as against another who had established an extensive cigar business under the trade-name of "Keystone Cigars," and therefore can have no possible bearing upon the question of expansion, as we view it, from retail to wholesale, or wholesale instrumentalities, under a concern's own proper name and markings.

If the California case (Nolan Brothers, 131 Cal. 271, 63 Pac. 480, 53 L. R. A. 384, 82 Am. St. Rep. 346) means that a concern may not extend its business, under its own name, from retail to wholesale, we should not be disposed to follow it. But, whether that case is unsound or not, it had reference to a wholesale business which had been suspended, and where a name was sought to be established in respect to a new and another kind of business.

Now, as to the Regent Shoe Mfg. Case, 75 Neb. 426, 106 N. W. 595, 4 L. R. A. (N. S.) 447. There the question turned upon a wrongful use of a trade-name of similar import to one acquired in a particular locality.

It is apparent that that case turned upon the question of the wrongful adoption of a name of the same, or one of a similar import, and

it was a case involving a territorial question, as well as the wrongful use of the name in similitude in the same line of business.

Therefore it is difficult to see that it applies to the situation before us, which is one of expansion under a concern's own proper name, with undeceiving labels and advertisements, as to retail and wholesale.

We think the decree below should be reversed, and that the complaint should be dismissed.

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

TRAYLOR ENGINEERING & MFG. CO. v. LEDERER, Collector of Internal Revenue.

(Circuit Court of Appeals, Third Circuit. March 14, 1921.)

No. 2612.

1. **Internal revenue ⟸9—Association to grubstake corporation in securing munitions contract held not taxable "person."**
   A corporation and two individuals, who had advanced money to it to apply on the expenses of a trip by its president to England to secure a munitions contract, and who gave the bond required to secure the contract, under an agreement whereby they were to receive a proportion of the profits of the corporation received from the manufacture of munitions under the contract, but who had no control over such manufacture, merely agreed to grubstake the corporation and did not form a partnership with it in the manufacture, so that the corporation, and not the association of the three, was the taxable person, within munition manufacturer's tax provision of Act Sept. 8, 1916, § 300, which defines "person" as including partnerships, corporations, and associations.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

2. **Internal revenue ⟸9—Corporation liable for munitions tax, regardless of disposition made of profits.**
   A corporation manufacturing munitions is liable for the munition manufacturer's tax on all profits realized by the manufacture and sale of such munitions, even though, in pursuance of a previous agreement, it distributed a portion of such profits to two individuals, who had advanced money to enable it to secure the contract.

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

Action by the Traylor Engineering & Manufacturing Company against Ephraim Lederer, Collector of Internal Revenue for the First Collection District of Pennsylvania. Judgment for defendant (266 Fed. 583), and plaintiff brings error. Affirmed.

F. B. Bracken, of Philadelphia, Pa., for plaintiff in error.

Charles D. McAvoy, U. S. Atty., and Robert J. Sterrett, Sp. Asst. U. S. Atty., both of Philadelphia, Pa., and Carl Mapes, of Washington, D. C., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

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

WOOLLEY, Circuit Judge. The plaintiff corporation brought this action to recover from the defendant, Collector of Internal Revenue, a sum it had paid as an excise tax assessed against it as a munitions manufacturer, under the Act of Congress of September 8, 1916 (39 Stat. 756).

As the controversy is quite unusual, we shall make a preliminary statement of the case, omitting for the moment one or two important features but presenting enough to show the question involved, the law out of which it arose, the contentions of the parties, the judgment of the court, and the reasoning that moved it to its conclusion.

The plaintiff corporation was engaged in the business of manufacturing machinery at Allentown, Pennsylvania. Late in 1914, S. W. Traylor, its president, indicated to Harry C. Trexler of Allentown, and James Phillips, Jr., of New York, his intention of going abroad in search of munitions contracts for his company. Trexler contributed about $600 and Phillips about $400 to the expenses of the trip upon an oral understanding that in the event a contract were secured and from it profits were earned, they should share in the profits in the proportion their contributions should bear to the expenses of the trip, estimated at about $2,000. In addition Phillips gave Traylor a letter of introduction to a man of position in London, which Traylor used in gaining access to the British War Office.

Traylor was successful, and in January, 1915, the plaintiff entered into a contract with the Government of Great Britain for the manufacture of shells.

The contract provided for payment by the British Government to the plaintiff of $1,000,000 in advance of shell deliveries, on condition, however, that the plaintiff furnish a bond in the same amount to insure the return of the money in the event of the plaintiff's failure to make deliveries in accordance with the terms of the contract. Satisfactory bonds were furnished by surety companies on the strength of indemnity agreements entered into by the plaintiff with Trexler and Phillips, both men of influence and wealth.

Up to this time the relations of the parties, in so far as they were contractual, were wholly informal. After these transactions had been concluded,—that is, after the contract had been procured, the requisite indemnity bonds furnished, and an initial payment of $1,000,000 had been or was ready to be made,—the plaintiff corporation and Trexler and Phillips entered into their first writing. This was an agreement dated February 17, 1915, wherein the parties recited the transactions done and completed, including Traylor's trip abroad, Trexler's and Phillips' contribution to the expenses thereof, the contract with the Government of Great Britain secured by the plaintiff, the joinder of Trexler and Phillips with the plaintiff in the execution of bonds in connection with the contract, and their agreement with reference to a division of profits when earned. This contract contained, so far as we can discern, no new undertaking on the part of Trexler and Phillips or anything more definite than that they should "give such further assistance by their advice, credit and influence as

may be in their power to the end that the contract may be carried out to the mutual advantage of all concerned." Nor does it contain, so far as we can find, any new obligation on the part of the plaintiff corporation. The purpose of the contract, it seems, was to record past transactions and the understanding of the parties with reference to the ascertainment and division of profits which were expected to grow out of them. To this end it was agreed that the plaintiff corporation should receive its manufacturing cost, plus ten per cent. for its services in the manufacture of the products covered by the contract, to be determined in a manner outlined, and thereafter—

"When the net profits accruing from said contract * * * shall have reached the sum of five hundred thousand dollars ($500,000) and that amount shall be deposited, all profits over and above such sum shall be divided monthly among the parties hereto in the proportions hereinafter specified and upon the completion of the contract and the winding up of the business covered by this agreement, all net profits shall be divided between the parties hereto as follows:

"James Phillips, Jr., twenty-five per cent. (25%); Harry C. Trexler, thirty-three and one-third per cent. (33 1/3%); Traylor Engineering & Manufacturing Company, forty-one and two-thirds per cent. (41 2/3%)."

After entering into this writing, Trexler and Phillips contributed no capital toward the contract and did nothing toward its performance, except in one instance when Trexler obtained from the Bethlehem Steel Company permission to test the shells on its proving grounds.

The contract was fully performed prior to February 16, 1916. On that day the plaintiff made settlement of profits with Trexler and Phillips, substantially as orally agreed upon at the beginning and precisely, we assume, as provided in the written contract later entered into, wherein it paid Trexler $650,000 and Phillips $487,500—something more than $1,000 for each dollar invested—and retained the balance.

On September 8, 1916, the Congress enacted the "Munition Manufacturers' Tax Law." 39 Stat. 780. Those of its provisions pertinent to this case are the following:

"Section 300. That when used in this title—

"The term 'person' includes partnerships, corporations, and associations.

"* * * The first taxable year shall be the twelve months ending December thirty-first, nineteen hundred and sixteen.

"Section 301. That every person manufacturing gunpowder and other explosives * * * shall pay for each taxable year, in addition to the income tax imposed by Title I, *an excise tax* of twelve and one-half per centum *upon the entire net profits actually received or accrued* for said year *from the sale or disposition* of such articles manufactured within the United States.

"Section 302. That in computing *net profits* * * * there shall be allowed as deductions from the gross amount *received or accrued* for the taxable year *from the sale or disposition* of such articles manufactured within the United States, the following items: * * *

"(b) Running expenses including rentals, cost of repairs and maintenance, heat, power, insurance, management, salaries, and wages."

The plaintiff corporation in due course made a return of its profits in the manufacture of munitions for the year 1916, properly omitting, it is conceded, profits on deliveries under the contract made prior to

January 1, 1916. In ascertaining the amount due under the statute, it deducted as "running expenses" of its business the portions of profits earned in 1916 it had paid Trexler and Phillips. It then paid the tax as thus computed.

Subsequently the Commissioner of Internal Revenue, regarding the plaintiff corporation, Trexler and Phillips as copartners in respect to the munitions contract, held that the payments to them were in distribution of partnership profits. He therefore disallowed the plaintiff's deduction of profits paid Trexler and Phillips as "running expenses" and made an additional assessment of $46,706.97. The plaintiff, having paid this sum under protest, and its claim for refund having been rejected, brought this suit to recover the same. Few of the facts being in dispute, a jury was waived and the case was tried to the court.

At the trial the plaintiff took the position that Trexler and Phillips had rendered the plaintiff services in procuring the contract between it and the Government of Great Britain by contributing to the expenses of Traylor's trip abroad and by becoming indemnitors with the plaintiff on the required bond; that compensation to Trexler and Phillips for these services was measured by shares in the profits earned under the contract, and that, being compensation for services rendered, it thereby necessarily became an expense in the manufacture of shells deductible under the statutory heading of "running expenses," conformably with a ruling of the Commissioner of Internal Revenue published February 24, 1917. There the Commissioner said:

> "Commissions or bonuses which were paid prior to January 1, 1916, for obtaining contracts for munitions and which contracts were fulfilled and deliveries made and the munitions paid for after January 1, 1916, would be allowable deductions (in ascertaining net profits for the purpose of the tax) as such necessary expenses as are contemplated by section 302 of the Act referred to."

Amplifying its position a little further, it is to be noted that the plaintiff is not claiming as an allowable deduction the money advanced by Trexler and Phillips in aid of its effort to obtain a munitions contract, but it is claiming as an allowable deduction from gross receipts, in the process of ascertaining taxable net profits, profits made on a munitions contract and distributed to others; this on the theory that "net profits actually received or accrued" from the sale of munitions —intended by the statute as the basis of tax assessment—are not all the profits that grow out of or accrue from the manufacture of munitions by the "person" described in the statute, but are only those profits which are actually received by and which actually accrue to that "person" in his own right; and where, as here, profits are by previous arrangement divided, then only those profits which remain and which constitute the share of the "person manufacturing" are subject to the munitions excise tax.

The defendant, very properly we think, declined to adopt the theory of the Commissioner of Internal Revenue that the three parties—one of whom was a corporation—constituted a partnership within the terms

of the statute, and took the position that it did not matter whether the articles of agreement entered into by the three constituted them a partnership, a corporation, a joint stock company, or any particular kind of association or organization, in view of the found fact that they had joined themselves together in a joint enterprise of manufacturing munitions for their mutual benefit and had thus constituted themselves a taxable "person" within the meaning of the law.

The learned trial judge found as a fact that "the Traylor Company, Phillips and Trexler were associated together in the manufacture of munitions for the Government of Great Britain under the said contract" and, disregarding the theory of partnership or association, found against the plaintiff on the ground that the parties had embarked in a joint adventure in the manufacture of munitions for the Government of Great Britain and that the payments made to Trexler and Phillips were not expenses of the business, deductible as running expenses in ascertaining taxable net profits, but were distributions of profits arising from the adventure among those who had engaged in it. Accordingly judgment was entered for the defendant and the plaintiff sued out this writ of error.

Thus it appears that a correct decision of this case rests on the legal relation of the parties. The question of just what that relation was turns, we think, on a distinction, to be carefully drawn, between the case as pleaded and the case as proved.

The plaintiff in its statement of claim frankly admits that the contract when procured was solely between itself and the Government of Great Britain, and that the contract was wholly performed by it at its own expense. The plaintiff further admits that it procured the contract, but, it maintains, it procured it with the aid of Trexler and Phillips in contributing toward the expenses of the trip abroad and in becoming indemnitors in the requisite surety obligations. It contends, therefore, that this aid constituted "services rendered" by Trexler and Phillips "in connection with the procurement of the said contract by plaintiff" and in consideration of these services the plaintiff agreed with Trexler and Phillips that "they should be paid a certain percentage of the profits, if any, which might be realized by the plaintiff from the performance of the said contract."

The plaintiff made certain the limited character of the services rendered by admitting that

> "The said Trexler and Phillips performed no other services in connection with the procurement or performance of said contract except as herein above stated, did not contribute any sums of money whatever toward the performance of the said contract, and assumed no responsibility whatever in connection therewith except such liability as they incurred in connection with the above-mentioned guarantee."

In conclusion the plaintiff claimed the payment of profits to Trexler and Phillips as valid deductions from gross income for the purpose of determining taxable net income and demanded recovery accordingly.

This was the plaintiff's case as to the relation of the parties made by the pleadings.

The case on the evidence was made from the testimony of Traylor and Trexler. It was in substance as follows:

In December, 1914, Traylor had planned a trip abroad with the object of obtaining for his company a contract with the British Government for the manufacture of munitions. Such contracts were at the time just making their appearance. Traylor knew nothing about the manner of negotiating for them beyond the obvious necessity of being introduced to the proper authorities. With this in mind he asked Phillips for a letter of introduction to some one in England through whom he might reach the British War Office. One day at a railroad station Traylor happened to meet Trexler, a personal friend, and casually referred to his trip abroad and its object. Trexler became interested in the project, not in a business way just then, but merely through friendship with Traylor. Being anxious to go abroad with influence standing behind him and with good names which he could use as references for his corporation, Traylor arranged a meeting between the three and proposed to Trexler and Phillips that they "take a chance" on his expenses to Europe and promised, in return for their "services," that his company, if a contract were obtained, would divide profits, if any were made (after deducting costs, overhead, etc.), in the proportion their contributions bore to the expenses of the trip. This was agreed upon. Traylor went abroad with a letter of introduction from Phillips and, obtaining access to the British War Office, began negotiations. In these negotiations, while using Trexler's name as a reference for his corporation, neither Trexler nor Phillips participated. The contract was obtained, and it was obtained by Traylor alone. Up to this point the transaction was, we think, precisely what Trexler characterized it, namely, a "grubstake."

On the relation of the parties as developed by the testimony the learned trial judge, as we have said, found them engaged in a joint adventure in the manufacture of munitions for the Government of Great Britain. To this finding we subscribe if we may further define the adventure.

[1] In these transactions it is important to note there were two contracts. One was between the plaintiff corporation and the British Government, with which Trexler and Phillips had nothing to do. They did not procure it and they were not called upon to perform it. The other was between Trexler, Phillips and the plaintiff corporation, and was based upon the procuring of a contract by the plaintiff with the British Government and the earning of profits by the plaintiff after such contract had been procured. With this contract the Government of Great Britain had nothing to do. Under one munitions were to be made; under the other profits were to be distributed.

The contract between Trexler, Phillips and the plaintiff therefore had to do essentially with a speculative enterprise of hazard. This is evidenced by the fact that performance of this contract depended solely on the outcome of the other contract. In pursuance of its oral and wholly informal terms, Trexler and Phillips advanced inconsiderable sums of money toward the expenses of the one proposing to negotiate

a contract, and after the contract had been procured, they voluntarily became indemnitors upon the requisite bond. Any money returned to Trexler and Phillips for their advances on account of expenses and for their liability as indemnitors, manifestly was their reward for risking their credit and staking their money, first, on the chance of Traylor getting a contract abroad, and next, on the chance, if a contract were obtained, of the plaintiff making profits out of it. Failing in either, Trexler and Phillips would have wholly lost their stake, hence Trexler's quite accurate characterization of the contract as a "grubstake." Trexler had been engaged in the mining business and well knew the signification of that term. Thus it is evident that the interest of Trexler and Phillips was in the profits of the contract with the British Government, not in the contract itself. For this reason, we think, they and the plaintiff were not in any sense associated together in the manufacture of munitions for the British Government, but that the plaintiff corporation was alone the "person," within the terms of the statute, that was engaged in manufacturing munitions for that Government.

[2] The plaintiff proceeded to manufacture munitions under the contract. On their manufacture profits were made and were received, initially at least, by the plaintiff. What it did with such profits after creating them was its own affair. Fully realizing this, it had made a grubstake contract involving the division of anticipated profits. Upon earning profits, the plaintiff could of course do with them as it chose, and it chose by previous arrangement to give some of them to Trexler and Phillips. It was just between these two contracts—between the conclusion of one and the performance of the other, just after profits had been earned under one and just before they were distributed under the other—that, we think, the Munitions Tax Act entered. Right here the law spoke, saying:

> "Every person manufacturing" munitions (and the only person manufacturing munitions here was the plaintiff corporation) "shall pay * * * an excise tax" (we apprehend for the privilege of engaging in the business of munitions manufacture) "upon the entire net profits actually received or accrued" (not to the "person manufacturing," but) from the sale and distribution of such articles manufactured." Section 301.

While the tax is leveled against the "person manufacturing" munitions, it is assessed against net profits arising "from the sale and distribution" of munitions manufactured, ascertained after allowing certain deductions which cover generally the cost of production, including running expenses.

The plaintiff's contract with the Government of Great Britain was the only one of the two contracts that the Munitions Act was concerned with, for it was only under this contract that munitions were made and profits earned. Of the two parties to that contract the plaintiff was the only one that made and sold munitions—the other bought them. As profits thus made constitute the taxable subject of the Act, evidently the tax is directed against the "person" producing them. If that person chose before creating profits to promise by a side-contract

to give or pay them to others when earned, then he could do so only after the Government had exacted the tax for the privilege of doing the particular business out of which he had made profits of this kind.

This we regard to be the true relation of the parties with its legal consequences, arising from two separate and distinct contracts made with reference to different subjects and for different purposes. As profits distributed under the side-contract in no way entered into the cost of manufacturing munitions under the main contract, we are of opinion that they cannot be regarded as an expense of manufacture deductible from the gross amount received from sales in ascertaining taxable net profits.

The judgment below is affirmed.

THE LEVI W. OSTRANDER.

HIND, ROLPH & CO. et al. v. OSTRANDER.

(Circuit Court of Appeals, Ninth Circuit. July 6, 1920. Rehearing Denied October 18, 1920.)

No. 3426.

1. **Shipping ⇐175—Rule is reasonable diligence by charterer in loading is sufficient.**
   In the absence of a provision fixing lay days, a charterer is required only to load with reasonable diligence, to be determined by the conditions which affect the work of loading; but the rule of reasonable diligence applies only to the actual loading, and does not excuse for failure to have a cargo ready to load.
2. **Shipping ⇐178—Charter; delay in furnishing cargo not excused by strikes.**
   A charterer *held* not excused for failure to furnish a cargo of lumber on time because of a charter provision excepting strikes or any other hindrances beyond the control of either party, where, although there were strikes after the contract was made, they ceased to affect the production of the mills more than a month before the time for loading.
3. **Shipping ⇐175—Demurrage not claimable until ship is at loading place.**
   Before demurrage can be claimed, the ship must be at the place of loading contemplated by the charter party, unless prevented through active fault of the charterer.

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

Suit in admiralty by H. F. Ostrander against Hind, Rolph & Co., a copartnership, and cargo of lumber loaded in the schooner Levi W. Ostrander. Decree for libelant, from which both parties appeal. Affirmed.

On May 15, 1917, the appellee, as agent for the owners of a schooner then building at Tacoma, Wash., entered into a contract of charter party with Hind, Rolph & Co. of San Francisco. The charter party provided that the schooner should proceed from the yard where it was being constructed "direct in ballast to a loading place on Puget Sound to be designated by charterers

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

prior to June 30, 1917, under this charter," and it recited "that said party of the first part [the appellee] agrees on the freighting and chartering of the whole of said vessel * * * (civil commotions, floods, fires, strikes, lockout, accidents on railways, and/or docks and/or wharves, or any other hindrances beyond the control of either party to his agreement, or their agents, always mutually excepted) unto said party of the second part, for a voyage from a usual safe loading place on Puget Sound (Washington), as ordered by charterers or their agents to one port in South Africa. * * * For each and every day's detention by default of said party of the second part, or their agents, two hundred and fifty dollars ($250.00) per day shall be paid day by day, by said party of the second part or their agents, to said party of the first part, or agent. * * * Should vessel not have arrived at port of loading (as above) on or before 12 o'clock, noon, of the 31st day of August, 1917, charterers to have the option of cancelling or maintaining this charter, on arrival of vessel. Lay days not to commence before 1st day of July, 1917, unless at charterers' option."

On July 2, while the schooner was still in course of construction, Hind, Rolph & Co. designated Mukilteo and Port Angeles as loading ports. On August 13 they received from the appellee a dispatch saying, "Schooner will be ready for cargo by August 25." But it was not until October 13 that the vessel left the yards in tow of a tug and proceeded to her loading place at a wharf of the Puget Sound Mill & Timber Company at Port Angeles, where she arrived on October 14. On that day the master gave notice to the mill that the vessel was ready to load. On October 18 loading commenced. The full cargo consisted of 1,750,000 feet. On November 24, the schooner had completed loading. During the period of loading strikes in the logging camps and the mills hindered and delayed the procuring and sawing of lumber. After the vessel was loaded, she was detained by the appellee on account of the refusal of Hind, Rolph & Co. to pay his demurrage bill.

On November 30 the appellee filed a libel for demurrage and attached the cargo. The charterer filed a bond to secure the release of the cargo, but for other reasons the schooner was detained until December 26, when she sailed from Port Angeles. The demurrage claimed by the appellee was $250 per day for four periods: First, from August 25 to October 13, 49 days; second, from October 13 to November 24, 27 days (after deducting 13 lay days); third, for 5 days after November 24; fourth, for each day's detention after November 30, the date of filing the libel. The court below denied demurrage from August 25 to October 13, awarded demurrage from October 15 to December 14, less 14 lay days, not including Sundays, leaving 45 days, at $250 per day, in the total sum of $11,250. The appellants appeal from the award of demurrage and the appellee appeals from the denial of demurrage for the period prior to October 15.

Andros & Hengstler and Louis T. Hengstler, all of San Francisco, Cal., for appellants and cross-appellees.

Chadwick, McMicken, Ramsey & Rupp, of Seattle, Wash., for appellee and cross-appellant.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). We find no ground to disturb the conclusion of the trial court as to the appellee's claim for demurrage from and after October 15. The appellants contend that they should not in any event be charged with lay days before October 18, for the reason that the master was instructed by the appellee not to load before that day. The contention is not sustained by the evidence. On October 14, on the schooner's arrival at Port Angeles, the master delivered to the Puget Sound Mills & Timber Company, the charterers' representative, a letter stating

that the master was ready to receive cargo, and containing notice that demurrage would be claimed for all the time during which the charterers had failed to furnish cargo. The same day the mill company telegraphed the Charles Nelson Company, a San Francisco corporation which controlled the action of the mill company, stating that the master had served notice that lay days would commence August 25, and that the mill company had refused to accept notice or to furnish cargo. On October 15 the Charles Nelson Company answered by telegraph, instructing the mill to advise the master that on account of strike conditions—

"you are short of logs suitable for this cargo, and that you are doing the best you can and will agree to proceed with cargo as rapidly as possible, with specific understanding that no demurrage will be claimed when loading completed."

On October 15 the mill company returned to the master his notice of readiness to receive cargo, saying:

"Notice states lay days will commence from August 25th. You cannot expect us to accept such a notice, when you did not arrive at our dock until October 14, 1917. Further, we will not accept any notice at any time in regard to the commencement of lay days. * * * Should you, however, wish to commence loading, you may do so, providing you waive all claim for demurrage."

The appellee on the same day telegraphed Hind, Rolph & Co. the contents of the mill company's letter, and added:

"Unless cargo furnished without further delay I will consider you to have abandoned charter, and I will employ vessel in other service, and will hold you for demurrage to date."

The same day Hind, Rolph & Co. telegraphed the appellee, saying:

"Mill has part of cargo ready, and will deliver this to master for loading at once; also will deliver balance as fast as strike conditions permit, but mill refuses to recognize your claim for demurrage. * * * We wish it distinctly understood that we are not abandoning charter."

This was received by the appellee on the morning of the 16th. The Charles Nelson Company thereupon wired the mill company, directing it to give the master a letter, stating:

"He may commence loading now, and you will furnish cargo as rapidly as possible under existing conditions; but when he has completed loading you will dispute any claim he may make for demurrage."

The mill company gave the master a letter in compliance with the instructions so given it by the Charles Nelson Company. The master replied on October 16 that he had orders from the owners in Seattle to await instructions before commencing to load. In the afternoon of the same day the appellee instructed the master to notify the mill company:

"That you will now receive cargo as offered, but without prejudice to any claim for demurrage we may have against Hind, Rolph & Co."

At 6 p. m. of the 16th, the appellee wired the master, directing him to point out to the mill company that the charter was with Hind, Rolph & Co., and not with the mill company:

"We will look to the former for demurrage, and therefore cannot discuss the question of demurrage with the mill as principal."

The master on October 17 delivered to the mill company a letter, notifying it that the schooner—

"will be ready to receive cargo today at 1 p. m. I also agree under existing conditions to sign a demurrage release to your mill upon completion of cargo."

This correspondence clearly shows that the master of the schooner gave proper notice on October 14 that he was ready to receive cargo, and that the delay was occasioned by the appellants and their representative, the mill company, in refusing to furnish cargo unless their illegal demand was complied with, and it explains the nature of the master's readiness to sign a demurrage release to the mill upon the completion of the cargo. Such a release, as was pointed out in the correspondence, was not a release of Hind, Rolph & Co. Durchman v. Dunn (D. C.) 101 Fed. 606, affirmed 106 Fed. 950, 46 C. C. A. 62; Holman v. Peruvian Nitrate Co., 5 Sc. Sess. C. 4th Ser. 657. The record shows that shortly thereafter the appellee had a conversation with the manager of the mill company and told him that he would still, as he always had, insist upon demurrage being paid.

The appellants rely on the fact that on October 18 the appellee gave the master instructions not to start loading until further orders. The mill company was responsible for this delay. It had refused to deliver the cargo unless the vessel employed the mill company's stevedores, and paid the company in addition thereto 10 per cent. more than the wages of the stevedores. The charter party had provided: "The stevedores, if any, to be employed by the vessel." Hind, Rolph & Co., on learning the facts, wired the appellee that the position taken by the mill is a "very unjust and high-handed procedure," and they offered to assume the payment of the 10 per cent. if necessary, and the Charles Nelson Company thereupon wired to the mill company that the stand taken by the master was legally correct. "Proceed to give vessel cargo."

It is urged that no legal obligation to begin loading matured before October 18, for the reason that no proper surveyor's certificate was tendered by the appellee. The charter party required the appellee to furnish a certificate from a marine surveyor of the San Francisco Board of Underwriters "that she is in proper condition for the voyage." A certificate, which was dated October 13 and signed by a marine surveyor, was delivered to the mill company on October 14. The marine surveyor had made his inspection of the vessel on August 25, but he issued no report on that date. It is said that the certificate was defective for its failure to show the seaworthiness of the vessel on the date when it was delivered. It is sufficient to point to the fact that the certificate was accepted without objection.

[1] The appellants contend that the act of the parties in deleting from the charter party the usual clause fixing lay days indicated their intention to require only that the charterers perform with diligence the work of loading, and that the diligence was to be measured by the con-

ditions under which the work was done. The only reference to lay days in the charter party is the provision that they shall not commence before July 1, "unless at charterers' option." This is coupled with a provision giving to the charterers the option to cancel the charter in case the vessel did not arrive at port of loading by August 31. It is true that, in the absence of a provision fixing lay days, the charterer is required only to load with due diligence, and that the diligence is to be determined by the conditions which affect the work of loading. For instance, a strike of laborers engaged in loading may be of such a nature as to excuse the charterer for delay. Empire Transp. Co. v. Philadelphia & R. Coal & Iron Co., 77 Fed. 919, 23 C. C. A. 564, 35 L. R. A. 623. But no such conditions attended the work of loading in the present case. There was no strike of stevedores, and no impediment to a diligent delivery of the cargo from the mill. The court below found that the work of loading should have been completed in 14 days, and we find no ground to question that conclusion. The rule of reasonable diligence applies only to the actual loading, and does not excuse for a failure to have a cargo ready to load. Carver on Carriage by Sea (6th Ed.) § 617.

[2] The charterers covenanted to furnish the vessel at a designated loading place a full cargo of sawn lumber. As early as May 26 they had contracted for the purchase of the lumber, and on that date they notified the appellee that, in order to arrange for dispatch in accordance with the charter party, they had been compelled to agree that the vessel would load at two mills. The appellants contend that their delay in furnishing the cargo was excused by the stipulated exceptions, which included strikes, lockouts, accidents on railways, docks, or wharves, "or any other hindrances beyond the control of either party." At the time when the contract was made there were no strikes in logging camps or lumber mills. Such strikes began early in July, and they seriously impeded the production of sawn lumber until after the first week in September, from which date, as the trial court found, the strike did not materially interfere with the output of the mills. These strikes not being in contemplation at the time of making the contract, they did not create a situation which should be deemed to have been taken into consideration by the contracting parties, and the decision in Jones v. Greene, 9 Asp. 600, is not applicable here. The court below properly, we think, held that the exceptions did not relieve the charterers from the obligation to furnish a full cargo. 1,600 Tons Nitrate of Soda v. McLeod, 61 Fed. 849, 10 C. C. A. 115; Schooner Mahukona Co. v. 180,000 Feet of Lumber (D. C.) 142 Fed. 578; Sorensen v. Keyser, 52 Fed. 163, 2 C. C. A. 650; The India, 49 Fed. 76, 1 C. C. A. 174; Nichols v. Tremlett, 1 Sprague, 361, Fed. Cas. No. 10,247; Dampskibsselskabet Danmark v. Paulsen & Co. [1913] Sess. Cas. 1043.

[3] The cross-appeal brings in question the denial of demurrage for the period between August 25 and October 15. The court below ruled that the notice of August 13 that the vessel would be ready August 25 was not sufficient to cause the lay days to begin to run. We think the ruling was clearly correct. The charter party provided

that the vessel, when built, should proceed in ballast to a loading place on Puget Sound to be designated by the charterers. On July 2 the charterers designated a certain mill at Mukilteo and a certain mill at Port Angeles. The notice of August 13, given while the vessel was in course of construction at Tacoma, announced that she would be ready for cargo by August 25. On August 16, 1917, the charterers wrote to the shipowner: "If the vessel insists on going to the mill, she may go to Port Angeles." She did not go to the mill at Port Angeles until October 14. It is contended that her failure to go there sooner was excused by the fact that the charterers had said that no cargo could be furnished in the meantime. But that was no excuse. The rule is well settled that, before demurrage can be claimed, the ship must be at the place of loading contemplated by the charter party. Anderson v. Moore, 179 Fed. 68, 102 C. C. A. 362, and cases there cited; Hutchinson on American Law of Carriers, § 848; W. K. Niver Coal Co. v. Cheronea S. S. Co., 142 Fed. 402, 73 C. C. A. 502, 5 L. R. A. (N. S.) 126. In 36 Cyc. 365, it is said:

"Where it is provided that the vessel shall proceed to a certain specified wharf or jetty, or one to be selected by the charterer, the arrival of the ship at that wharf or jetty is a condition precedent to the commencement of the running of the time, unless she is prevented from reaching the designated place through the active fault of the charterer."

See, also, In re 2,098 Tons of Coal, 135 Fed. 317, 67 C. C. A. 671, and Aktieselskabet Inglewood v. Millar's Karri et al., 9 Asp. 411.

Here there was no active fault on the part of the charterers, and no obstacle was interposed by them to prevent the vessel from proceeding to the designated loading place. There is no more cause for saying that the charterers' statement that they had no cargo ready was a waiver of any provision of the charter party than there is for saying that the shipowner waived his right to demand a cargo by his failure to take his vessel promptly to the place of loading.

The decree is affirmed.

THE W. H. BALDWIN.

KENNY v. CORNELL STEAMBOAT CO.

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

No. 146.

1. **Towage ⇐11(1), 15(2)—Measure of liability for injury to tow.**
A tug is not an insurer of her tow, but bound only to exercise that degree of skill and caution which prudent navigators exercise in performing similar service, and the burden is upon a tow, which alleges a breach of such duty, to show that there has been negligence or unskillfulness in performing the contract, to its injury.

2. **Towage ⇐11(3)—Mistake in judgment does not charge tug with negligence.**
While a tug in her home waters is chargeable with knowledge of the ordinary currents and tides, channels, depth of water, and well-known

obstructions, a mere mistake in judgment with respect to the same is not sufficient to charge her with negligence, but the error must be one that a prudent navigator, under similar circumstances and conditions, would not have made.

3. Towage ⇐11(10)—Tug not liable for injury to tow.

A tug, which left her tow, a barge loaded with sand, at a dock in the same position in which the master had left the same and other barges many times previously without injury, and in which position the bargemaster, who was agent of the owner, acquiesced, after making soundings, *held* not liable for injury to the barge when she settled on the bottom at low tide.

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

Suit in admiralty by William Kenny against the steam tug W. H. Baldwin; the Cornell Steamboat Company, claimant. Decree for libelant, and claimant appeals. Reversed.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (L. De Grove Potter and Theodore M. Hequembourg, both of New York City, of counsel), for appellant.

Macklin, Brown, Purdy & Van Wyck, of New York City (Pierre M. Brown, of New York City, of counsel), for appellee.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The W. H. Baldwin, a steam tug, was employed to tow the barge Kenny Girls, with a cargo of sand, to the Burden Iron Company dock at Troy, N. Y. The barge was about 15 years old, with square ends, 109 feet long, and 28 feet broad, and 14 feet deep. She was loaded with 500 tons of sand and was made up in a tow in New York. At about 10 a. m. on July 26, 1917, she reached a point about 500 feet below the Burden Company's dock, and then the steam tug W. H. Baldwin took her out of the tow, making the barge fast with three lines on the tug's starboard side. This was an hour before high water. She was taken over the flats, and, after proceeding some distance, the bow of the barge grounded on the bottom, and the tug then cast off her lines and pushed her stern in toward the dock. The bargemaster threw two lines to the dock and made them fast to the barge, one at the bow and one at the stern. While the tug stood by, the bargemaster made soundings around the barge with a pike pole, and all present, with the exception of the barge master, say that the barge master announced that "he was all right." By proper inspection with this pole, he should have learned the true condition of the bottom. It was uneven, and slanting toward the channel. Thereafter the tide fell, and the barge twisted and broke one knee and strained another knee. Later, and on the next high tide, by means of a line, she was brought up alongside the dock, where she lay aground on a bottom at a point which was slanting from the bulkhead to the channel. The tug is charged with fault in docking the Kenny Girls in an improper manner and in leaving her in a dangerous and unsafe position.

[1] The decisions of this court have heretofore, in numerous cases,

announced the obligations of a tug performing services such as the Baldwin was at the time in question. The tug is not an insurer of the tow, and the contract of towage requires one undertaking it to exercise that degree of caution, skill, and prudence which prudent navigators exercise in performing similar services. The burden is upon the barge, which alleged a breach of such duty, to show that there has been negligence and unskillfulness in performing the contract undertaken, to its injury. The Clarence L. Blakeslee, 243 Fed. 365, 156 C. C. A. 145; The Winnie, 149 Fed. 725, 79 C. C. A. 431; C. R. Sheffer, 249 Fed. 600, 161 C. C. A. 526.

[2] A tug, in her home waters, is chargeable with knowledge of the ordinary currents and tides, channels, depth of water, and well-known obstructions. The Marie Palmer (D. C.) 191 Fed. 79; The Reichert (D. C.) 258 Fed. 79. The one fact of injury to the tow raises no presumption of fault. The Margaret, 94 U. S. 494, 24 L. Ed. 146; The Battler, 72 Fed. 537, 19 C. C. A. 6. A mere mistake in judgment in respect to the tides or currents, channels, depth of water, or obstructions is not sufficient to charge the tug with negligence, for the error must be one that a prudent navigator, sailing under similar circumstances and conditions, would not have made. The Marie Palmer (D. C.) 191 Fed. 79; Gilchrist Transp. Co. v. Great Lakes Towing Co. (D. C.) 237 Fed. 432. The tug is bound to act and avoid, so far as reasonable care and skill can do it, dangerous points in navigation upon the voyage undertaken, which are known or should have been known to a master in charge of the tug. To do more would be to hold her to that degree of care which would make the tug responsible as an insurer. Navigators are not to be charged with negligence unless they make a decision which nautical experience and good seamanship would condemn as unjustifiable at the time and under the circumstances shown. The Clarence Blakeslee, 243 Fed. 365, 156 C. C. A. 145.

[3] Guided by these rules of law, and examining the testimony in this record, we believe the appellee has failed to support the burden which the law casts upon it in order to support the decree below. There is no proof that there was a rock or obstruction, well known to river navigators or to those in charge of the tug, upon which the barge rested and suffered damage. The bargemaster stated that, when the tug got about 50 feet below the derrick, the barge was moved in toward the derrick until within 40 feet of the dock, when the barge's bow struck a lump, and the stern swung or pushed in as far as it would go. He says he then got two lines on the dock, when the tide fell, and the barge got aground on the slanting bottom, and began to twist and strain, resulting in the breaking of one knee and cracking another.

The libelant's witness, Downs, testified that he made soundings within a space of 400 feet up and down the river and 50 feet out from the dock; that within this space the depth of water ran a minimum of 5 feet 9 or 10 inches, but the shallow place was 40 or 50 feet out from the dock and below the crane. He said: "Outside it was gradually sloping as far as you could tell by sticking the pole down." He found no holes, and it indicated the same general depth of water. Those in

charge of the tug testified that they took the barge on the starboard side, and proceeded a trifle above the derrick, and pushed the barge in toward the dock, until the bow was grounded where she lay and was apparently in a safe position; that the bow was 8 or 10 feet from the dock and the stern a little further up.

The tugmaster pushed the Kenny Girls into this dock many times before. He said it was a soft gravel bottom, and was a dredged deep-water channel for about 80 or 100 feet from the dock. Inside of that there were the flats. He gives the average depth of water as about 8 feet and says there were no lumps on the bottom. The Kenny Girls looked level as he left her there. Another disinterested witness, familiar with the waters of the river at this point, and particularly at the Burden dock, said that the bottom was "gravel, soft gravel and mud," and there were no lumps or rocks of any kind at the place.

We think there was no fault in the navigation in landing the barge at the dock. The master of the tug was a licensed man of 12 years and worked in boating around the upper Hudson for many years. He had placed the same barge in the same way several times before, and testified that barges were usually left grounded at the dock. He said the barge was in line to go into the dock in the best water, and that other boats of the same type had been left there on many occasions before. He knew the bottom to be of soft gravel, fairly level, and with no lumps. He testified:

"Q. Tell us how you placed her there on those occasions? A. The same as this time unless we towed her up from Albany. * * *

"Q. When you finally left her, was she in the same position as this time? A. Many times; yes, sir; on rising water.

"Q. Without any objection from the captain? A. Yes, sir. * * *

"Q. Have you taken any other barges there? A. Yes, sir, sometimes two or three a week when they are running good, over years.

"Q. You have taken them there over a period of years? A. Yes, sir.

"Q. Many years? A. Yes, sir.

"Q. You, therefore, knew when you got this boat in position that she was all right? A. Yes, sir."

"Q. You consider you are doing your duty to leave a boat in a position like that? A. It is customary at that place, as the way they do business."

The witness Gathen testified:

"Q. Have you ever been on a tugboat that has placed any other boats at that dock? A. Yes, sir.

"Q. On several occasions? A. Yes, sir.

"Q. Have you ever been on a tugboat that has placed a box, scow or barge in a similar position? A. Yes, sir.

"Q. Several times? A. Several times."

Another witness, Cooley, testified:

"Q. Have you taken any boats to that dock? A. Yes, sir.

"Q. How many times? Could you state in a general way? A. Well, I would not say how many; a couple a week.

"Q. During a period of years? A. Yes, sir.

"Q. Did you hear the witness for the tugboat describe how they placed the Kenny Girls there on this particular occasion? A. I did.

"Q. Could you state whether you placed many other boats and have seen many other boats placed in the same general way? A. Yes, sir."

The credible testimony in the case indicates that the barge was docked in the usual manner and without complaint on the part of the barge captain. She ought to have been strong enough to withstand injury. The bargemaster was the agent of the owner as far as the care of the barge was concerned. He acquiesced in leaving the barge in the position the tug left her. He threw the lines to the dock and sounded around the barge in attempting to determine the character of the bottom which she would rest upon. He apparently was satisfied with the position in which she was placed. These circumstances indicate that the master, and therefore the owner, took the risk of allowing the barge to remain in the position she was in when the tug had fulfilled its service. Monk v. Cornell S. S. Co., 198 Fed. 473, 117 C. C. A. 232.

Concluding thus, we think the court below erred in holding the tug at fault.

Decree reversed.

CROCKETT v. BRANDT.

(Circuit Court of Appeals, Second Circuit. February 16, 1921.)

No. 137.

1. **Seamen ⟸29(4)—Careless handling of needle by seaman held cause of injury to his eye.**
   Injury to a seaman, caused by his piercing his eye with a needle while mending a sail, *held* on the evidence not due to any fault or negligence which rendered the ship unseaworthy, but to the careless manner in which he handled the needle.
2. **Seamen ⟸29(1)—Owner not liable for injury, through negligence of officers.**
   The owner of a vessel is not liable in damages for injury to a seaman resulting from the manner in which certain work was done, though it was by direction of an officer of the ship.

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

Action at law by Frank Brandt against Walter E. Crockett. Judgment for plaintiff, and defendant brings error. Reversed.

This cause comes here on writ of error to the United States District Court for the Eastern District of New York. The plaintiff in error was the defendant below and is hereinafter referred to as the defendant. The defendant in error was the plaintiff below and is hereinafter referred to as the plaintiff. The case is stated in the opinion.

Bertrand L. Pettigrew, of New York City (Walter L. Glenney, of New York City, of counsel), for plaintiff in error.

Silas B. Axtell, of New York City, for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff is an alien, a subject of Holland and a resident of the state of New York, in the Southern

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

district thereof. He brought this action to recover indemnity for an injury which he sustained while serving as a seaman on the three-mast schooner George D. Edmunds. The defendant is one of the joint owners of the schooner, a citizen of the state of New York and a resident of the Eastern district thereof.

[1] It appears that on May 24, 1918, the plaintiff signed certain shipping articles as an able-bodied seaman on board the schooner at the port of Philadelphia for a voyage to Cuba. The injury occurred on July 16, 1918, while the vessel was in port at Manzanilla, Cuba, and it was caused by running a needle into his eye while he was sewing the mainsail, which he had been ordered by the chief officer of the schooner to mend. The allegation is that while he was mending the sail with the aid of a needle and yarn, and while in the exercise of due and proper care and without any negligence on his part, and by reason of the defective, old, and chafed and rotten condition of said sail, the needle and yarn were caused to go through the sail, striking and penetrating the plaintiff's right eye, necessitating its removal and the consequent loss of vision in the eye.

The plaintiff was an experienced seaman, 32 years of age, and with 16 years' experience as a sailor. He had been sewing sails a good many times during his 16 years at sea, and he had been at work sewing this particular sail for about 8 days prior to the accident. On the way down to Cuba, the schooner ran into a period of rough weather, lasting about three days, during which she was running with only the mainsail and the reefed foresail. This mainsail of the mainmast had been used throughout the voyage from Philadelphia to Manzanillo. When the vessel reached Cuba, the plaintiff and another one of the seamen were set to work putting necessary patches on this mainsail, which had been taken down and was spread out on top of the cabin.

At the moment of the accident the plaintiff was engaged in what was known as roping the mainsail, which consisted of sewing a rope to the edge of the sail, using a needle about 4 or 5 inches in length, with 6 strands of thread or rope, about 5 feet in length, for sewing material. At the time of the accident Brandt had just started with a new needleful, and, after passing the needle through the rope and through the sail, he held the needle in the palm of his hand, with the point sticking out about 2 inches. He pulled the thread through the rope and canvas until the knot pulled tight, and it is claimed that the knot was intended to pass between the strands of the rope until it reached the sail, and then it was supposed to hold tight; but on this particular occasion, when the plaintiff pulled it tight, the knot came through the canvas and the needle stuck into his eye.

The plaintiff's testimony is that ordinarily he would have pulled the thread out away from him; but the other man who was working on the sail was sitting close to him, so that he was afraid of sticking his needle into the other man, and therefore pulled it toward his own face. He was asked and testified as follows:

"Q. How did Hutchinson happen to be near you? A. Because he was mending; he was mending a small hole in the sail.

"Q. He was mending a small hole in the sail and was right near you? A. Yes.

"Q. Could you not have moved, and got around to one side, so as to avoid him? A. No; I couldn't, because the sail was close together; the place that he was sewing was close to me. I couldn't move or pull it away from him."

The plaintiff was removed to the hospital at Manzanillo, and he remained there for three months. The inside of the eye ran out and the eye had to be removed. He was returned to New York by the American consul, as is customary with seamen in our merchant marine. He was paid his wages until he left the ship and went into the hospital.

The complaint states two causes of action. In the first the plaintiff alleges that the vessel was unseaworthy and was not a safe place in which to work, and that he was not furnished with reasonably safe tools and appliances, and he seeks to recover damages in the sum of $10,000 for the loss of his eye. In the second, the plaintiff alleges that he has expended and will have to expend large sums of money for his maintenance, board, and lodging until he is able to perform work, and for that he makes claim in the sum of $500. No claim was made in the case for medical expenses, and none for wages.

At the close of the case counsel for the defendant moved for a nonsuit, and for the direction of a verdict, on the ground that the plaintiff had failed to make out any failure on the part of the owner to perform any duty imposed upon it, and had failed to show that the proximate cause of the plaintiff's injury was any dereliction on the part of the owner. The motion was denied. The case was submitted to a jury, which brought in a verdict in favor of the plaintiff in the sum of $3,000.

The plaintiff urges four claims as to the vessel being unseaworthy:

(1) That there was not an extra new mainsail which could have been put in place of the sail which they were repairing.

(2) That the canvas in the sail was worn and weak, so that the knot on the thread pulled through the canvas.

(3) That the sail was not wide enough to permit doubling over the edge of it, so that the rope could be sewed to a double thickness of canvas, as was the customary manner of doing.

(4) That the mate ordered him to proceed in haste, as the sail had to be bent the next day, and there was no time to sew on a new piece of canvas along the edge of the old sail, so as to make it wide enough to allow the edge to be doubled over.

As respects the first of these grounds it is sufficient to say that the question whether the vessel had or had not an extra sail is not material, because the only importance of an extra sail was that it might be used in case the sail which was actually used blew away. If the ship had become unmanageable as the result of not having a new sail to take the place of one which had blown away, it might be said that the vessel was unseaworthy for want of a substitute sail. But that situation never arose, and the fact that the mainsail was used all the way from Philadelphia to Cuba, and that it withstood three days of heavy weather, shows very clearly that it was not unseaworthy. The plaintiff's

own witness admitted that it must have been in pretty good condition to stand a three days' storm around Cape Hatteras. The sail was only two years old, and the plaintiff's expert testified that a sail that was only two years old was not too old to use. The plaintiff's accident was not due to the failure of any appliance on the ship to perform its proper function.

The testimony shows without contradiction that there were several large rolls of canvas in the locker in the captain's cabin suitable for making patches on sails. The following is an excerpt from the plaintiff's testimony, and it sheds light on the second, third, and fourth grounds assigned for the claim as to the unseaworthiness of the vessel:

"Q. Then you don't claim that there was not canvas enough there, if you had wanted to take the time to fix it. Is that right? A. I think there was enough for that patch.

"Q. So that, if you had taken the time, and if the mate had not told you that you didn't have time to do it, you could have gone to the locker, and got a piece of canvas, and sewed it onto the edge of the sail? A. No; he would have given it to me.

"Q. Well, if he had given it to you, could you have done it? A. Yes; it was not just exactly necessary.

"Q. You say the way that you had it you could not do it safely, because you couldn't turn it over far enough? A. Of course; but you are not so particular with an old sail, though.

"Q. But you say it was not wide enough to turn over in the proper way? A. No; it was not.

"Q. If you had sewed a piece on, it would have been wide enough, would it not? A. Yes; it ought to be then.

"Q. And the only reason you didn't was because the mate told you that they wanted the sail the next day, and you didn't have time? A. Sure thing."

[2] The rules of law which govern the relationship between master and servant on land are not applicable to seamen. From early times they have been considered a peculiar class, and unusual protection has been extended to them. But we know of no rule of the maritime law which imposes upon the owners of a ship liability for an accident such as this. The unfortunate accident of which the plaintiff complains was the result of the plaintiff's own manner of doing his work. If it could in any manner be attributed to the negligence of the mate in improvidently hastening the work, the shipowner would not be liable therefor in a suit to indemnify the seaman for the injury. In Chelentis v. Luckenbach Steamship Co., 247 U. S. 372, 38 Sup. Ct. 501, 62 L. Ed. 1171, the court held that by the general maritime law the vessel owner is liable only for the maintenance, cure, and wages of a seaman injured in the service of his ship by the negligence of a member of the crew whether a superior officer or not; and in the particular case before us the plaintiff had received his wages and his expenses for "maintenance and cure" had been met.

In Erickson v. Roebling (C. C. A.) 261 Fed. 986, this court applied the rule of the Chelentis Case and held that the owners of a ship were not liable in damages for an injury to a seaman through adoption by a master of a dangerous method of discharging cargo. In the argument in this court counsel for the plaintiff sought to distinguish the Erickson Case from this on the ground that in the former case the

vessel was itself seaworthy, while in this the shipowner provided an unseaworthy vessel. But as this court is satisfied that there is no evidence of unseaworthiness of the vessel to be found in this record the distinction does not exist. No dereliction of duty on the part of the shipowner has been shown. Whatever caused the accident was a condition known to the plaintiff, and resulted from his own careless act, and was not due to any negligence or lack of care on the part of the owner in making the vessel or its appliances seaworthy.

Judgment reversed.

NEW YORK, N. H. & H. R. CO. v. FRUCHTER (two cases).

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

Nos. 152, 153

1. **Negligence ⇐23(1)—Attractive "nuisance" doctrine stated.**
The word "nuisance" is inappropriate to the doctrine on which railroads are held liable for injuries to children attracted to play on railroad structures, since a nuisance is that which unlawfully works hurt, inconvenience, or damage, and the attractive device need not be unlawful; but the true doctrine is that any composition of matter which lures or attracts children to their own harm must be safeguarded as circumstances require.

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

2. **Courts ⇐372(3)—State rule as to devices attractive to children not followed.**
The rule holding a railroad liable for maintaining unguarded device which attracts children to their injury is a rule of general law, as to which the decisions of the United States Supreme Court, and not those of the state court, are controlling on the lower federal courts.

3. **Negligence ⇐136(19)—Bridge with electric wire as allurement to children held for jury.**
The question whether a bridge across a railroad track, on the top girder of which was fastened an electric wire belonging to the railroad company, was an allurement to children to play thereon, is a question for the jury, though there was no invitation by the railroad to the children.

4. **Electricity ⇐19(6)—Whether absence of guards around dangerous wire was negligence held for jury.**
Where there was evidence that other boys had climbed to the top of a bridge over railroad tracks, and that the railroad company knew of it, the question whether the railroad was negligent in failing to put a guard around its electric wire on top of the bridge was a question for the jury.

5. **Electricity ⇐17—Ownership of bridge by another does not relieve defendant's duty to guard wire.**
A railroad company, which maintained an electric wire across the top of a bridge spanning its tracks, is not relieved from its duty to guard the wire, for the protection of children attracted to climb on top of the bridge, by the fact that the bridge was not owned by the company, and that it was the bridge, and not the wire, that was the real attraction.

6. **Appeal and error ⇐1046(5)—Remarks of judge as to activities of claim agent held not prejudicial.**
Erroneous remarks by the trial judge regarding the activities of railroad claim agents in attempting to get admissions from an injured boy are not prejudicial, where the court carefully directed the jury to dis-

regard his comments, and where the verdicts awarded by the jury were extremely moderate, since the only injurious effect the remarks could have had would be to aggravate the damages.

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

Separate actions by David Fruchter, an infant, by Jennie Fruchter, his guardian ad litem, and by Sam Fruchter, against the New York, New Haven & Hartford Railroad Company. Judgment for plaintiff in each action, and defendant brings error. Affirmed.

Certiorari granted, 254 U. S. ——, 41 Sup. Ct. 449, 65 L. Ed. ——.

Defendant below (hereinafter called the Railroad Company) maintains a well-known transportation system leading out of New York City, and its lines within the city limits and further are operated by an overhead electrical system. At 149th street is a bridge or viaduct belonging to the city of New York, constructed in 1908, and crossing the sunken tracks of the Railroad Company. It is 270 feet long and 54 feet wide. This city bridge is of standard construction, and is so formed of posts, beams and girders, strengthened and connected by trellis or lattice work, that it is quite possible for active men or boys to climb to the uppermost chords of the bridge some 24 feet above the roadway.

Since 1912 the Railroad Company, with permission from the city, has carried its wires over the bridge resting on porcelain insulators which are fastened to cross-arms, which in turn are attached to an upright structure of steel, itself affixed to the top girders or chords of the bridge. This construction is also standard. On June 9, 1916, David Fruchter was a lad whose eighth birthday would occur in the following month. He lived in the general neighborhood of the bridge, which is a rather crowded region abounding with small boys. He had seen (according to his own statement) other boys playing upon these girders a few days before, and he seems to have been aware that to do likewise within sight of a policeman or railroad worker was not wholly safe. On the day mentioned he found himself unwatched, and climbed to the top girder of the bridge (as he says) to get a pigeon's nest. He then saw a pigeon on one of defendant's wires, and so climbed up the upright structure aforesaid, reached out for the pigeon, and when it flew away brought his hand in contact with the live wire, causing the personal injuries to recover for which he brought suit.

Sam Fruchter is the father of this boy, and his action rests on the same facts and is for loss of services. The cases were tried together before the same jury. The trial court charged the jury that, if the evidence persuaded them that the Railroad Company had "permitted to exist a trellis under this bridge which was capable of enticing childen of immature ages, and that children of immature ages did use it and did ascend into the superstructure of this bridge, and if [the jury believed] that that was a dangerous thing and that it was not the exercise of reasonable care and caution to permit it —and if [the jury believed that the Railroad Company] knew of the use that was being made of it by children of immature ages, indiscreet children, children not capable of appreciating danger, and [the Railroad Company] permitted it, and still allowed it, and did not adopt what ordinarily reasonable and prudent persons would adopt to prevent it, and that as a consequence of that negligence, if it was negligence," the plaintiff received his injuries, he and his father were both entitled to verdicts.

There was evidence that for a long time before this accident boys had been in the habit of climbing to the top of the bridge, that they had been ordered away by policemen and workmen because of the danger not only of climbing to such a height, but of the known danger arising from the Railroad Company's wires on top of the bridge structure.

Over motions duly made to dismiss or direct, the Court thus submitted the matter to the jury. Both plaintiffs had verdicts and the Railroad Company took these writs.

John M. Gibbons, of New York City (James W. Carpenter, of New Haven, Conn., F. J. Rock, of New York City, and H. M. French, of New Haven, Conn., of counsel), for plaintiff in error.

Leon Sanders, of New York City (Harold R. Medina, George M. Curtis, Jr., and Jacob Zelenko, all of New York City, of counsel), for defendants in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). It is too obvious to need comment that the court below treated the claim in suit as covered by what are known as the "attractive nuisance," "lure," or "trap" cases.

[1] Since, so far as the courts of the United States are concerned, these cases are all assumed to rest on Railroad Co. v. Stout, 17 Wall. 657, 21 L. Ed. 745, the word "nuisance" is inappropriate. A nuisance is that which "unlawfully worketh hurt, inconvenience, or damage," and neither the turntable of the Stout Case nor the electric wire here to be considered was a nuisance; both were lawful enough. But many a lawful thing may be so negligently managed, handled, or maintained as to give rise to causes of action in tort. The true doctrine is that any composition of matter which lures or attracts the confiding ignorance of childhood to its own harm must be safeguarded as circumstances require, and of course the circumstances vary in almost every instance.

[2] We are first seriously requested to abandon the doctrine of the Stout Case, because it is said to have been rejected by the courts of the state of New York. The request is a large one, considering how fully, after elaborate investigation, the ruling was restated in Union Pacific, etc., Co. v. McDonald, 152 U. S. 262, 279, 14 Sup. Ct. 619, 38 L. Ed. 434, and our own acknowledgment of its binding effect recently made in Heller v. New York, etc., Co., 265 Fed. 192.

But if we wished to depart from the doctrine in question we could not, for the matter is one of general law, and we are bound (in the absence of any statutory change by competent authority) by the decisions of the Supreme Court as reviewed at some length in Baltimore & Ohio R. R. Co. v. Baugh, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, and very recently restated by Justice Pitney, dissenting, in Southern Pacific v. Jensen, 244 U. S. 249, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C. 451, Ann. Cas. 1917E, 900, the dissent not dealing with this proposition.

[3] It is further asserted that the "lure" cases have no application because "there is nothing alluring about a wire maintained at such a height." The essence of allurement is temptation, and the difference between invitation and temptation is acutely intimated in Erie R. Co. v. Hilt, 247 U. S. 101, 38 Sup. Ct. 435, 62 L. Ed. 1003. Where, for physical convenience or business advantage, men incline to take a pathway across a railway track or the like in order to reach a business place of the owner of the dangerous region traversed, an invitation may be inferred which takes away the sting of trespass. This is no such case.

The question here was whether the bridge, with its apparatus of wires on top, was or was not a temptation to children; that was a question of fact as to which there was evidence from which the jury might find that it had proved such a temptation for a long time.

[4] That it was dangerous was too obvious for argument, and therefore if the danger was known, and the temptation to children also known, and known to the defendant, it was a question for the jury to declare whether the absence of guards either human or mechanical did not constitute negligence. This is the substance of our ruling in the Heller Case, supra, where, as may be noted, the verdict of the jury had negatived negligence.

Whether a jury issue is presented in any given case depends upon a multitude of circumstances; we said in the Heller Case that the plaintiff's "extraordinary act was not one that defendant could be expected to have foreseen and which it could have anticipated." 265 Fed. 199. Considering the evidence in this case we conclude that there was evidence from which the defendant could have foreseen that some boy would in a spirit of bravado do exactly what this boy did, and under the Stout Case just such troublesome boys are entitled to be protected against themselves.

[5] It is noted that the defendant's structure was lawfully placed on top of the city bridge, and that probably the prime temptation for a boy was clambering up the bridge, which did not belong to defendant. But it was perfectly possible to physically protect the wire which did belong to defendant, while leaving the protection of the bridge to its own proprietor. This difference in ownership does not make any difference in the law. Electric, etc., Co. v. Healy, 65 Kan. 798, 70 Pac. 884.

Plaintiff in error complains of certain remarks of the trial court as unduly prejudicing the presentation of its case to the jury. The language complained of is of two kinds—(1) unfavorable comments upon the prolixity of counsel; and (2) statements exhibiting repugnance to the attempts of employees of defendant below to procure a statement regarding the particulars of the accident from the infant plaintiff while he was still in the hospital. Consideration of the record herein leads to the holding that as to the first branch of the court's remarks the judge was entirely within the rights of any trial court, and that the comments were more than justified.

[6] The second series of remarks was calculated to induce belief that defendant's agents were unfairly attempting to secure damaging admissions from so small a boy. They constitute error; but, having regard to the very careful direction of the colloquial charge that the jury should disregard all comments of his own, and to the extreme moderation of the verdicts awarded by the jury, we are unable to perceive that the error was harmful, for the only injurious effect that could have resulted was possibly to aggravate damages through sympathy. Nothing that was said tended to bolster up the plaintiff's cause of action; but the verdicts show that there was no aggravation. Consequently the error was harmless. Austro-American, etc., Co. v. Thomas, 248 Fed. 234, 160 C. C. A. 309, L. R. A. 1918D, 873.

The judgments are affirmed, with costs.

WHITE v. JOHN W. COWPER CO., Inc.

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

No. 140.

1. **Admiralty ⇐18—Has jurisdiction of action for tort on navigable waters.**
Admiralty has jurisdiction of a suit to recover damages for a maritime tort that occurs on the high seas or public navigable water, whether it be a wrongful act or a wrongful omission.

2. **Admiralty ⇐21—May enforce remedy for wrongful death given by state statute.**
In the absence of a federal or state statute giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for death caused by wrongful act or negligence on the high seas or navigable waters; but such a right of action given by a state statute is enforceable in the admiralty courts, if the facts are such as would bring the case within the maritime jurisdiction, if death had not resulted.

3. **Master and servant ⇐120—General rules apply to employment on vessels.**
Persons employing labor on or about vessels are bound to the same rule of care in regard to furnishing their servants with reasonably safe appliances and places for work as other masters, and are liable for injuries caused by negligence in this respect.

4. **Master and servant ⇐129(1)—Drowning of laborer using gangplank for unloading scow held due to employer's negligence.**
Libelant's intestate, with others, was employed by respondent in unloading sand from a scow on the Erie Canal. The scow was some distance from the bank, and the sand was taken in wheelbarrows from the scow over a gangplank 16 feet long to another boat, and from there to the shore. The gangplank was not sufficiently stiffened to prevent it from springing when a load was carried over it, and as the scow was unloaded it rose in the water until the outer end of the plank was some 4½ feet higher than the other end, and in wheeling a load down it libelant's intestate, who was a small man and inexperienced, was unable to hold back the barrow, and was thrown off the plank and drowned. *Held*, that the cause of the death was the unsafe condition of the place where the work was done, resulting from the improper construction of the gangplank and the changing of its position as the work progressed, which unsafe condition was attributable to respondent's negligence.

5. **Master and servant ⇐218(4)—Obvious risk not assumed by inexperienced servant.**
Although a defect is apparent, the servant may not realize the hazard caused thereby, especially where he is without previous experience in the work, and in such case the risk is not assumed.

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

Suit in admiralty by Charles A. White, administrator of the estate of Calogero Falzone, deceased, against the John W. Cowper Company, Incorporated. Decree for libelant, and respondent appeals. Affirmed.

For opinion below, see 260 Fed. 350.

Ulysses S. Thomas, of Buffalo, N. Y. (Ralph W. Dox, of Buffalo, N. Y., of counsel), for appellant.

Lanza, Bell & Montesano, of Buffalo, N. Y., for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. This is a suit to recover damages for the death of the administrator's intestate, Calogero Falzone, whose death

it is alleged was due to the negligence of the respondent. Falzone was on May 24, 1916, and for some time prior thereto, in the employment of the respondent as a laborer assisting in the construction of a building along the Erie Canal, in the city of Buffalo. While so engaged he was required to and did haul, by means of a wheelbarrow, sand or gravel from a scow on the canal to the building then under construction. The sand scow was heavily loaded, and was so low in the water that it was impossible to get it close to the shore. To remedy this situation another boat was anchored between the sand scow and the shore. There was a space of about 12 feet between the sand scow and the smaller inside boat and the shore. It does not appear what the exact distance was between the inside boat and the shore. The testimony was that the inside or construction boat was not right up against the dock on account of the mud and dirt. There appears to have been no sufficient wharf or dock over which the sand could be conveniently unloaded, and gangplanks were laid from the sand scow to the inside boat, and from the inside boat to the shore. On the morning of the accident, May 24, 1916, the two boats were about on a level.

The deceased was set to work with a gang of about 30 others rolling sand in wheelbarrows from the outside sand scow to the inside boat, and thence over other gang planks to the shore. By half past 1 in the afternoon, which was the time the accident happened, the sand scow was more than half unloaded. As the sand was unloaded, the outside boat rose out of the water. About noon heavy pile-driving machinery was loaded upon the inside boat, which caused it to settle in the water. This caused the gangplank, which ran from the inside boat to the outside boat, and which was level with the boats when the work began at 7 o'clock, to become quite uneven. There is disagreement in the testimony as to the extent of the gangplank's incline. The libelant's witnesses put it at between 6 and 7 feet, while the respondent's witnesses state the difference as about 2½ feet. The District Judge thought it not unlikely that the difference was approximately 4½ feet. The gangplank was about 16 feet long and 6 feet and 10 inches wide. It consisted of three planks put close together. They had a 2x6 cleat on the underside to hold them together. They were very springy, and given to an up and down motion when any of the men rolled their loads of sand over them. There were no guard rails, nor was there any stiffening of the gang plank by means of lengthwise timbers. It is agreed that it is not customary to have railings or guards along a gang plank over which merchandise is hauled, although such a custom does exist as respects gangways used for passengers. The deceased's work consisted in wheeling an iron wheelbarrow filled with sand down the gangplank. The following is an excerpt from the testimony of one of the men employed with the deceased upon this work:

"Q. What effect did the change in grade of the gangplank have upon you as you rolled your wheelbarrow of sand across it? A. The effect was that one side of the plank was higher and the other side low, and it ran faster. The wheelbarrow ran faster because it was deeper—steeper. The wheelbarrow had the effect of pulling the person rolling it along.

"Q. And rolling the wheelbarrow over that plank—Describe what the con-

dition of the plank was, as to rigidity or elasticity. A. If you are strong enough to hold the wheelbarrow, it is all right; but if you are not strong enough, it would pull you along. That plank, as I rolled across it, was springing."

The deceased was a young Italian laborer 25 years of age, rather short of stature and slim of body. He was described by one of his coworkers as "very skinny, and much smaller than the others on the job." At the time of the accident he was engaged in rolling a wheelbarrow of sand down the steep incline of this springy gangplank, and he lost control of the wheelbarrow, and fell over into the water, and was drowned.

The respondent owned no boats. Its business was the construction of buildings. The work of unloading this boat was done under the supervision of a foreman, who was without experience in the unloading of boats. The unloading of the scow in this case was the one only job of the kind he had ever had.

[1] The foregoing are the facts as they appear to us in the record. It remains to state the law applicable thereto. In cases of tort, the jurisdiction in admiralty depends entirely on locality, and it is now settled that the admiralty has jurisdiction of a suit to recover damages for a maritime tort that occurs on the high seas or public navigable water, whether it be a wrongful act or a wrongful omission. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 34 Sup. Ct. 733, 58 L. Ed. 1208, 51 L. R. A. (N. S.) 1157; Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. In the first of the above cases it was held that the admiralty has jurisdiction of a suit in personam by an employee of a stevedore against the employer to recover for injuries sustained through the negligence of the latter while engaged in loading a vessel lying at the dock in navigable waters. In the present case the libel is filed to recover for the death of one who was at the time of his death engaged in unloading a boat under the control of the respondent while lying in the navigable waters of the Erie Canal. In The Robert W. Parsons, 191 U. S. 17, 24 Sup. Ct. 8, 48 L. Ed. 73, the court held that, although the Erie Canal is wholly within the state of New York, it connects navigable waters and is a highway of commerce between ports in different states and foreign countries, and is therefore a navigable water of the United States, within the admiralty jurisdiction of the courts of the United States.

[2] In the absence of a federal or a state statute giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for death caused by wrongful act or negligence on the high seas or navigable waters. The Harrisburg, 119 U. S. 199, 7 Sup. Ct. 140, 30 L. Ed. 358; The Albert Dumois, 177 U. S. 240, 258, 259, 20 Sup. Ct. 595, 44 L. Ed. 751. But such a statute exists in the state of New York, and a right of action so given is enforceable in the admiralty courts of the United States, if the facts are such as would bring the case within the maritime jurisdiction if death had not resulted. See La Bourgogne, 210 U.S. 96, 28 Sup. Ct. 664, 52 L. Ed. 973; The Hamilton,

207 U. S. 398, 28 Sup. Ct. 133, 52 L. Ed. 264; The City of Norwalk (D. C.) 55 Fed. 98.

The principal question which this suit presents is not, however, whether in the unloading of the sand scow the deceased was engaged in work of a maritime nature. The serious question is whether he was furnished by the respondent with a safe place in which to work. It is the duty of the master to furnish the servant with reasonably safe instrumentalities wherewith and places wherein to do his work. Armour v. Hahn, 111 U. S. 313, 4 Sup. Ct. 433, 28 L. Ed. 440. This duty is a positive obligation resting upon the master, and he cannot relieve himself from liability by showing that he had delegated to another the responsibility of its performance. Texas, etc., R. Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136.

[3] Where a master furnishes or causes to be built under his direction and control a platform, scaffold, staging, or like structure for the use of his servants in the prosecution of their work, it is his duty to see that it is reasonably safe for the purpose for which it is intended to be used. Beattie v. Edge Moor Bridge Works (C. C.) 109 Fed. 233. And persons employing labor on or about vessels are bound to the same rule of care in regard to furnishing their servants with reasonably safe appliances and places for work as other masters, and are held liable for injuries caused by negligence in this respect. The Westport (D. C.) 131 Fed. 815. The failure to exercise for the protection of another the degree of care which the circumstances justly demand whereby injury results is negligence within the meaning of the law. The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. Dexter v. McCready, 54 Conn. 171, 5 Atl. 855.

[4] In view of the above principles we think the respondent failed to exercise the degree of care which the circumstances required. It did not furnish the decedent with a suitable place in which to do the work at which he was put, or reasonably safe appliances with which to do it. The gangplank was improperly constructed, the cleat on the underside being insufficient to hold the planks together and to prevent their springing. It was an imperfect appliance to begin with, and as the work progressed it became a dangerous one, owing to the incline. A strong and experienced man might perhaps do the work without any great peril to his life. But the deceased was inexperienced in unloading a sand barge over a gangplank extending from one boat to another at a considerable distance apart and at a very considerable incline. As the respondent undertook to unload the gravel boat, not in the usual manner of unloading from the boat to the dock, but in the unusual way of unloading from the boat over an inclined and springy gangplank, 16 feet in length, to a scow, and from the scow to the shore, under a superintendent devoid of experience in such matters, who directed an inexperienced man to wheel an iron wheelbarrow filled with sand along the dangerous gangplank, from which he was precipitated to his death without his fault, it must answer therefor.

It cannot be said that the deceased had assumed the risk of what hap-

pened. When he accepted his employment to unload the boat, he assumed all the ordinary and usual risks and perils incident to such work. But the danger to which he was subsequently exposed was not one of the ordinary and usual risks incident to such work, but was due to the exceptional conditions which subsequently developed, and to the negligence of the master in the improper construction of the gangplank. As was said in Gila Valley Railroad Co. v. Hall, 232 U. S. 94, 34 Sup. Ct. 229, 58 L. Ed. 521:

"An employee 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 employee 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 employee 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 employee with the assumption of a 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."

Again, in Chesapeake & Ohio R. Co. v. De Atley, 241 U. S. 310, 314, 36 Sup. Ct. 564, 566 (60 L. Ed. 1016), the court said:

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

[5] The deceased was an inexperienced man, and we cannot say that the condition was so obviously dangerous that he must have known and appreciated its danger. The conditions under which he worked in the hours of the forenoon had changed when he went to his work after lunch, and after the pile driver had been placed on the construction boat, and it seems probable to us that in the light of his inexperience he was not fully aware of the risk he was running, and that he was in extreme peril of going off the gangplank, unless he had sufficient strength to keep his wheelbarrow on the gangplank, notwithstanding its incline and its treacherous oscillation. Although a defect is apparent, the servant may not realize the hazard caused thereby, especially in a case where he is without previous experience in his work, and in such a case the risk is not assumed. Fitzwater v. Warren, 206 N. Y. 355, 358, 99 N. E. 1042, 42 L. R. A. (N. S.) 1229.

In what has been said we have not been unmindful of the principle that a master's liability does not extend to a case in which the place to work is made unsafe as the necessary and unavoidable consequence of the work which the servant is employed to do. This case does not belong to that class of cases. The springiness of the gangplank was not a necessary consequence of the progress of the work, but is attributable

to the faulty and imperfect construction of the appliance. The dangerous incline of the gangplank is attributable more to the loading of a large and heavy pile driver upon the deck of the construction boat than to the unloading of the sand boat. If the mere unloading of the sand from the scow disturbed the original level of the gangplank, the duty rested on the master to see that it was kept substantially level by the use of blocks or in some other way. It would have been an easy and simple matter to have kept it leveled up. The superintendent of the work on his cross-examination testified as follows:

"Q. Is there any reason that you couldn't build some blocks, or build a trestle to hold the lower end of that gangway, so that it could be substantially level when the two boats changed levels? A. No, sir.

"Q. No reason that you couldn't do it? A. It couldn't be done, because the other fellow was working in there—we all had to work. The fellows loading the pile driver had to work.

"Q. And that was the reason that you couldn't do it? A. No, sir; it couldn't be done anyway. We could not build a trestle under the low end of the gangplanks. During the noon time I was eating around on the job somewhere. I was not on the boat."

The failure to keep the gangplank level with the boats is not to be excused because "the fellows loading the pile driver had to work," or because the superintendent during the noontime "was eating around on the job somewhere."

Decree affirmed.

TWIN FALLS OAKLEY LAND & WATER CO. v. MARTENS et al.*

(Circuit Court of Appeals, Ninth Circuit. March 9, 1921.)

No. 3478.

1. **Waters and water courses ⇐254—Purchaser of water right and stockholder of company held to have acquired right to specified quantity of water.**

A purchaser of a water right from a corporation operating under the Carey Act (Comp. St. § 4685) and the laws of Idaho, accepting it, whose contract entitled him to a stated number of shares in a water company to be formed, which would give him 1½ acre feet of water per acre of land, has a contract right with the construction company to receive the specified quantity of water.

2. **Waters and water courses ⇐254—Company constructing irrigation project under Carey Act held authorized to contract to sell stated quantity of water.**

Comp. Laws Idaho, tit. 26, c. 136 (Comp. St. § 2996 et seq.), accepting the Carey Act (Comp. St. § 4685), and authorizing contracts for the reclamation and settlement of land, authorized a company constructing an irrigation project under that act to make a contract by which it assumed responsibility to the settler to furnish a specific quantity of water.

3. **Waters and water courses ⇐254—Mistake of engineer in approving project does not relieve company from contract to supply water.**

Under Rev. Codes Idaho, § 1618, requiring the state engineer to report on an irrigation project initiated by a proposer, the mistake of the engineer in approving as feasible a project for the irrigation of land under

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

*Rehearing denied June 6, 1921.

the Carey Act (Comp. St. § 4685), when the available water supply was insufficient for the purpose, does not relieve the construction company from its contract to furnish the settlers with the stated quantity of water.

4. **Waters and water courses ⟸222—Patent under Carey Act held not conclusive water supply was ample.**
The decision of the Land Department in issuing a patent to the state under the Carey Act (Comp. St. § 4685), though conclusive for the purpose of the patent that the water supply was ample for the irrigation of the lands patented, is not conclusive in a suit to foreclose the lien for water rights furnished to patented lands, where there were other settlers on unpatented lands holding similar water contracts, whom the company recognized as entitled to the water, so that the patented lands did not receive their full supply, since equity will not deprive the holders of unpatented lands of their rights without a hearing, though under Rev. Codes Idaho, § 1629, the water rights became appurtenant to the land when title passed from the United States to the state.

5. **Waters and water courses ⟸258—Lien for water payments reduced in proportion to reduction of water supply.**
In a suit to foreclose the lien for payments on the contract for the supply of water under the Carey Act (Comp. St. § 4685), where it appeared the company had failed to perform its contract to furnish a specified quantity of water for the lands, but it also appeared that it furnished some water, which the settler accepted and used, though it was insufficient for the proper irrigation of his land, the amount of the lien was properly reduced in proportion to the reduction of the water supplied.

6. **Limitation of actions ⟸51(2)—Does not run from default on installment giving option to declare all due.**
The statute of limitations does not run from the date of default in payment of an installment, but from the date the last installment becomes due, and a provision authorizing the creditor to declare the entire sum due for default in any payment is a mere option, which, unless exercised, does not set the statute in motion.

Appeal from the District Court of the United States for the Southern Division of the District of Idaho; Frank S. Dietrich, Judge.

Suit by the Twin Falls Oakley Land & Water Company, a corporation, against John H. Martens and others, to foreclose a lien. From a decree authorizing sale for a part only of the amount of lien claimed, the complainant appeals, and defendants file cross-appeal. Decree set aside, and case remanded, with directions to enter a new decree, modified in accord with the opinion.

In a suit in foreclosure of a lien against Martens and others the Twin Falls Land & Water Company, a construction company, was awarded a decree giving it a lien under the act of Congress approved August 18, 1894 (28 Stat. 372, 422 [Comp. St. § 4685]), known as the Carey Act, and the acts amendatory thereof, and the laws of Idaho accepting the same and supplementary thereto. The decree authorizes the company to sell under the lien for seven-ninths, instead of the whole, of the deferred payments accrued at the time of the decree on the purchase price for water rights, which the court found the company had agreed to furnish to the appellees to irrigate and reclaim lands. There is also a cross-appeal on the part of the appellees.

The construction company contends that, because of default in making deferred payments on the purchase price of water rights under the terms of the contract, there is a right to declare the entire amount of the purchase price due and payable. The defendants contend that no right of foreclosure existed, and that no lien attached, and no lien could be foreclosed until an ample supply of water was furnished—1½ feet per acre.

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

In September, 1909, Martens filed on 160 acres of the land within a segregated area, and made four contracts with the company for 160 shares of water right of 1½ acre feet per share of water from the system. He was to make an initial payment and pay installments thereafter; but he has failed to make the deferred payments. Martens assigned to the defendant Moyes, and Moyes assigned to the defendant Walker. The contract between Martens and the company, after referring to the fact that authority was given by the state land board to the company to sell water rights, provides in substance as follows:

That in consideration of $120 cash and of other covenants the purchaser shall become entitled to 40 shares of the capital stock of the Oakley Canal Company to be formed, the certificate of ownership in that company to be in the form set forth in the contract. The certificate sets forth that the purchaser is the owner of ——— shares of capital stock in the Oakley Company and is entitled "to a water right of 1½ acre feet of water for each acre" in accordance with the terms of the contract between the state and the Twin Falls Oakley Land & Water Company, dated August 12, 1909, and also entitles the owner to a proportionate interest in the dam, canal works, and water rights, with all the rights and franchises attached thereto, based upon the number of shares finally sold in accordance with the contract between the company and the state. The contract further provides that, in case of default by the purchaser in payment of principal or interest, the company may declare the entire amount of the principal purchase price for the water rights due, "and may proceed either in law or equity to collect the same and to enforce any lien which it may have upon the water rights hereby contracted or upon the lands." It was further provided that, when payment was made to the construction company, that company should have a lien upon any interest the purchaser has or may acquire in the land for the actual cost and necessary expenses of reclamation and reasonable interest thereon. Further provisions are that the agreement is made in accord with the provisions of the contract between the state and the company, which, together with the laws of Idaho, should be regarded as defining the rights of the parties, and should regulate the provisions of the shares of stock to be issued to the purchaser by the Oakley Canal Company.

The contract, dated August 12, 1909, between the state and the company, contains certain relevant features which are summarized as follows:

The company agreed to build a system and to sell shares of water rights therein to persons filing upon the land, and to transfer ownership and control of the irrigation system to the purchasers of shares of water rights; held itself to be the owner of certain water rights, aggregating 80,000 miner's inches, of which water rights the company was to convey to the Oakley Canal Company, to be a holding and operating company, a sufficient quantity so that there might be furnished to the irrigation system, and to the owners of shares therein, to the extent of 1½ acre feet of water during the irrigation season. The Oakley Canal Company was to be organized, with one share in that company for each acre of land, the Oakley Company to have ownership and control in due course; each owner to have shares corresponding to the number of acres of land for which he had water rights. All water rights were to be upon the same footing, without regard to pro rata or purchase or use, but no water rights or shares were to be dedicated or sold beyond the carrying capacity of the canal, or in excess of the appropriation of water as set forth in the water permits mentioned. As per lists attached to the contract the aggregate of lands to be irrigated was about 43,000 acres, including approximately 10,000 acres held in private ownership.

Before the sales, and before the system was built, the company advertised a great Carey Act opening of 38,000 acres, with full water rights, perfect and adequate. Lands with water rights were sold including the contracts under consideration. The total acrea, including patented lands, entitled to water from the project, was about 38,703 acres. But the water supply was entirely inadequate to furnish water at the rate of 1.5 acre feet for so large an area. It appears that upon the run-off of the streams there were extensive private early rights, which existed at the time of the contracts between the

company and the settlers. The result was that what water was left as subject to appropriation by the company was not as great as its record rights. A reduction in the area of the project was considered, and reclamation of more than 29,000 acres of Carey Act lands, for which water rights were contracted, was abandoned, and consideration confined to water rights for the 29,000 acres and the 9,691 acres of patented land.

The District Court found that water was first impounded in the reservoir in 1912 and 1913, and that on May 13, 1913, there was in the reservoir 30,000 acre feet; that on December 30, 1914, the Idaho State Land Board took steps to procure patent for 20,500 acres, and ordered that no further water rights be sold pending investigation into the available water supply. In March, 1918, the State Board authorized application for patent for certain of the Carey Act entries, and selected lands in a compact body, with a view of procuring water supply sufficient for 20,500 acres, and it appears that in December, 1918, since this litigation was commenced, the Secretary of the Interior has issued to the state of Idaho a patent for the lands so selected, including entries of these defendants, aggregating 10,910 acres, which, together with the 9,691 acres held by old settlers, makes a total of approximately 20,600 acres.

It further appears: That the Secretary of the Interior has indicated that upon application by the state patents up to 24,000 acres may issue; that all lands above that amount have been released by the company to the state; that none of the Carey Act lands within the 38,000 acres, within the project, have as yet been restored to public entry. It is to be understood from the record that there are outstanding uncanceled contracts for 26,000 acres, it may be 27,000, and outstanding contracts for 6,000 acres of unpatented Carey Act lands; that of the 6,000 acres of Carey Act lands unpatented, but for which there are outstanding contracts, excluded by the State Land Board from its application for patent, entries aggregating at least 3,700 acres were improved and have been in cultivation for three years, and that all of the 6,000 acres either had certificate of proof of reclamation or were entitled thereto; and the company recognizes the right of these lands to have water. The District Court added the 3,700 improved to the 20,500 acres patented, and, adding also other lands upon which contracts are held, concluded that there were 27,000 acres within the project, upon which the company has contracts, and to which it is under agreement to furnish water.

Samuel H. Hays and Richards & Haga, all of Boise, Idaho, for appellant.

W. L. Dunn, of Oakley, Idaho, for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge (after stating the facts as above). [1] We are of opinion that the defendant acquired a contract right to 1.5 acre feet of water under his contract with the water company. The fact that the right so acquired was specified in the certificate of stock does not lessen the obligation of the company to furnish the defined amount. In the light of the inducements offered to settlers it is evident that the company intended to sell, and must be held to have agreed to sell, the specific amount of water named in the certificate. The act of the company in relinquishing certain lands to the state is evidence, too, that sales made by the company, in excess of the available supply had, were improperly made. Twin Falls Salmon River Land & Water Co. v. Caldwell, 242 Fed. 177, 155 C. C. A. 17.

[2] It is argued that all parts of the contract must be construed together, and that the stock certificate, in so far as it pertained to the extent of ownership, when considered with the terms of the contract,

shows that there was "no deduction for a shortage coming within its terms." It is also said that the rights claimed by the settler are under the Carey Act, and that inasmuch as the act provides that the lands would be patented when an ample supply of water is actually furnished, the matter is placed within the jurisdiction of the Land Department of the United States, and that a contract made for water supply by the state or the settler is not binding, and that the whole question is with the Department of the Interior. But under the act of the Legislature of Idaho accepting the Carey Act (chapter 136, tit. 26, Comp. Laws of Idaho) the state was authorized to make all necessary contracts to cause the lands to be reclaimed, and "to induce their settlement and cultivation in accordance with and subject to the provisions" of the act. Reading the statutes together, it is plain that authority was given to the construction company to make and execute a contract, and to assume a responsibility to the settler under which there could be agreements for deferred payments and under which the company might agree to furnish a specific quantity of water.

[3] Nor is it material that the state engineer, in performing his duties, may have erred in his judgment as to the feasibility of the project. Section 1618 of the Revised Code of Idaho contemplates a report by the state engineer, not upon a proposition of his, but upon one initiated by a proposer. Basinger v. Taylor, 30 Idaho, 289, 164 Pac. 522. It was primarily the Irrigation Company that erred in its judgment. But as it made the contracts with the settlers, who relied upon the ability of the company to live up to its contract, and who have obligated themselves to make deferred payments, results must be reached upon a recognition of the contractual relationship.

The District Court took the data for seven years of the operation of the system, and all the gross run-off, and of the estimated reservoir losses and loss sustained in distribution, and considered what service could be expected of the system for the entire contract entitled to receive water therefrom, and taking the total acreage, and the total amount of water which experience showed may be available from year to year, and considering what had actually been supplied, concluded that the finding substantially as made by the board of the state of Idaho was correct, namely, that the available supply was adequate for only 21,000 acres at the rate of 1.5 acre feet. The estimates and the data upon which the District Court based its conclusions serve to show the difficulty of arriving at perfectly satisfactory results; but our judgment is that the learned judge was fair in his deductions, and that upon the basis he adopted the defendants can only receive for their lands a fraction of the water for which they agreed to pay the amounts named in the contract, provided lands in excess of 21,000 acres are included.

[4] The Land Department in Washington presumably issued its patent upon the assumption that the patented lands will get all the water. Act Cong. June 11, 1896. But there are the unpatented lands, which it is contended the state Land Board and the federal Land Office are not empowered to exclude from the right to receive water;

and, as already stated, the company endeavors to recognize a right of water for these unpatented lands, and continues to deliver water to them, as well as to patented lands. Many entrymen upon those lands have improved them, and, at least until after full opportunity is afforded such entrymen for hearing, we are not ready to say that, where they have complied with the law, they are to be put in a position where all the water must go to patented lands, and that their lands may be rendered useless and their claim of vested rights ignored.

We believe that, in a proceeding to ascertain whether patents should issue, the finding by the Land Department upon the question whether the water supply is ample is conclusive for the purpose of issuing patent; but that is far from ruling that it is conclusive upon the question whether the plaintiff construction company has provided water at the rate of 1.5 acre feet per acre as required by its contract with the settler. That is a matter which the Land Department has not undertaken to pass upon, and could not. The Land Department in Washington never has determined that the water is sufficient for a greater amount of land than approximately 21,000 acres, and the patents issued upon the applications by the state Land Board, representing that there was a sufficient supply of water for the lands to be included in the patent, do not mean that necessarily the United States intended a result that would deprive the excluded lands from their ratable share in the use of water, under the terms of the contract between the company and the settler.

It is correct that, generally, the lien applies only to reclaimed lands, and under Revised Codes Idaho, § 1629, the water rights to all lands acquired shall attach to and become appurtenant to the land as soon as title passed from the United States to the state. But it does not follow that a finding that there is only seven-ninths of 1.5 acre feet per acre, and that such quantity is somewhat less than good husbandry requires, is in such conflict with the decision of the Interior Department that there is an ample supply of water, that a court of equity cannot make a decree, as between the company and the settler, which will have regard for the total acreage of 27,000 acres for which obligations exist. It may be that upon further application the Interior Department will issue patent for more acres; but such possible action is much too speculative a ground upon which, in this suit, to found a decree which will deprive the improved unpatented lands of their share of water.

[5] The sequel of these views is that, while the furnishing company shall have a lien on the water right and land for deferred payments for the water right until the last deferred payment is paid off and satisfied, the lien is expressly founded upon the contract for the water right, and the right of foreclosure upon default must be "according to the terms and conditions of the contract granting and selling to the settler the water right." Section 1629 of the Revised Codes of Idaho. Such is the lien created by the law of the state of Idaho, acting under the authority conferred by the amendment to the Carey Act approved June 11, 1896 (29 Stat. 413–434).

But, as the appellant company failed to deliver a quantity of water sufficient to comply with its contract and to enable the defendant to reclaim his land, it cannot rely upon the contract as ground of foreclosure for the full amount of deferred payments. On the other hand, defendant has had the use of a substantial quantity of water furnished by the company since 1913, and although such quantity is less than he was entitled to have, and less than his land required for good husbandry, still it was furnished to him, and used by him according to the general provisions of the contract, and in view of his default in payments he ought not to be permitted to defeat foreclosure of the lien to an extent commensurate with the quantity of water furnished; hence a decree that, inasmuch as defendant will only receive seven-ninths of the water agreed to be furnished, the lien should be foreclosed accordingly, and that the settler should only be required to pay seven-ninths of the contracted for price is equitable and proper.

[6] We think, however, that the statute of limitations ought not to have been considered as running against any installment. The entire debt was not matured when the suit was filed; the last installment not being due until April, 1922. The statute does not run from the date of a partial default, but rather from the date the last installment becomes due. Dighton v. First Exchange Nat. Bank (Idaho) 192 Pac. 832; McCarty v. Goodsman, 39 N. D. 389, 167 N. W. 503, L. R. A. 1918F, 160; Core v. Smith, 23 Okl. 909, 102 Pac. 114; 13 Am. & Eng. Enc. of Law, 793; 27 Cyc. 1560. The rule of the decisions cited is that a provision such as there is in the contract here involved, which provides that upon default in the payment of any of the payments specified in the contract, or of the interest thereon, the company may declare the entire amount of the principal purchase price for said water rights due and proceed to enforce any lien, is a mere option for the benefit of the mortgagee, which, unless exercised, does not set the statute in motion.

The necessary computations to carry out our views should be made by the District Court, when the case is again in that court. In all material respects, except the application of the statute of limitations, we believe the theory adopted by the District Court as to the ascertainment of sums due and interest allowances was as precise as could be made with regard to the equities of the case.

The order will be that the decree appealed from is set aside, and the case is remanded to the District Court, with directions to enter a new decree, modified in accord with the views of this opinion.

ROSENBLATT et al. v. UNITED STATES. *

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

No. 102.

1. **Larceny ⟸30(1)—Indictment not insufficient for failure to specify number of articles stolen.**
   Counts in an indictment under Act Feb. 13, 1913, § 1 (Comp. St. § 8603), charging defendants with receiving and having in possession a large number of tierces of lard, the exact number being to the grand jurors unknown, which constituted a part of an interstate shipment, knowing that the same had been stolen, *held* not insufficient because they did not specify the number of tierces.
2. **Indictment and information ⟸181—Not valid objection that description of property is broader than proof.**
   It is no valid objection to an indictment that the description of the property in respect of which the offense is charged to have been committed is broad enough to include more than the proof specifically shows.
3. **Criminal law ⟸1056(1)—Instructions not excepted to are not reviewable.**
   Instructions to which no exception is noted are not reviewable, though error is assigned thereon.

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

Criminal prosecution by the United States against Joseph Rosenblatt and Samuel Davidson, who were convicted of knowingly receiving stolen property from an interstate shipment of freight, and also having in their possession such stolen property with knowledge of the theft, and they bring error. Affirmed.

Samuel Hershenstein, of New York City (Edward T. McLaughlin, of New York City, of counsel), for plaintiffs in error.

Francis G. Caffey, U. S. Atty., of New York City (John E. Joyce, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. On May 28, 1919, the Brennan Packing Company shipped from Chicago, Ill., to New York, 800 tierces of choice steam lard by way of the Erie Railroad Company. It was consigned to the order of the Brennan Packing Company, Cunard Line, account of Co-operative Wholesale Society. On June 4, 1919, 100 tierces arrived at Jersey City and were delivered aboard the steamship Mauretania and were transported to Liverpool. The remaining 700 tierces were placed on an Erie barge, No. 341, and remained on this vessel at Jersey City until the night of June 17, 1919. On that night 334 tierces were stolen from barge No. 341, and on June 18, 1919, the balance of the shipment of 700 tierces, with the exception of 3, was delivered aboard the steamship Borenquin, and was subsequently carried to Liverpool. The 334 tierces stolen are the subject of the larceny here in question.

⟸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. —.

The plaintiffs in error, together with Morris Rosenblatt, were the proprietors of a restaurant at 624 Sixth avenue, New York City. Their codefendants, Feuer, Chapman, and Verkayk, were shown to be visitors at this restaurant subsequent to June 17, 1919. On June 16, 1919, Feuer, an acquaintance of Joseph Rosenblatt for about two years, called at the restaurant. One Gold, the manager of the restaurant, was asked if he could find a buyer for the tierces of lard. Later that day, Joseph Rosenblatt promised Gold to obtain samples of the lard to exhibit to prospective buyers, and he did produce such samples. Joseph Rosenblatt, by telephone, offered tierces of lard to persons for sale and the testimony showed that he reported these conversations to the plaintiff in error Davidson. Gold produced one purchaser who bought 100 tierces. This sale was made through the plaintiffs in error on June 20, 1919, and the lard was sold at 29 cents a pound. A check in payment was drawn to the order of Gold, as a deposit, and Gold gave the check to the plaintiff in error Davidson. On June 23 Davidson returned the check to the purchaser, and then a check for $1,000 was drawn by the purchaser to Gold's order, and the reason given therefor was that the purchaser knew Gold, but did not know the plaintiffs in error.

At the request of the plaintiffs in error, this lard was delivered to the Merchants' Refrigerating Company on June 23 by a truckman whose name was given as McDonald. Two of the tierces were delivered at the purchaser's store. The plaintiff in error Davidson accompanied the truckman to the Merchants' Refrigerating Company, and there met the purchaser of the lard, and made a demand for payment of the trucking bill. They went to the purchaser's place of business, and five $1,000 Liberty bonds were given in payment. One of these $1,000 bonds was given to the plaintiff in error Davidson, on account of the purchase price, and he gave the purchaser a receipt. After the lard was weighed and placed in the warehouse, the weights were figured out and returned to the plaintiff in error Davidson by the purchaser, at the restaurant. There the plaintiffs in error and the purchaser figured out the cost, and part payment was made in Liberty bonds, the balance by check on June 25th. The codefendants Feuer and Chapman later met the plaintiffs in error at the restaurant and made a division of the Liberty bonds. Contemporaneously with the sale of the stolen lard, as above narrated, the codefendants Feuer and Chapman made a sale to David C. Link Company of 350 tierces of lard. The same truckman, who used a fictitious name, delivered 78 tierces to the Terminal Warehouses on June 25, 1920, and delivered in all 166 tierces. The balance sold by Feuer and Chapman were never delivered. The Liberty bonds given by the plaintiff in error Davidson to the truckman on June 23 to pay the trucking charges for this sale to the Link Company, is a charge for hauling 78 tierces.

The indictment contained four counts, naming as defendants, in addition to the plaintiffs in error, four others, Isidore Feuer, James Chapman, Albert G. Verkayk, and Morris Rosenblatt. The first count of the indictment charged conspiracy on the part of the six defendants to commit an offense against the United States and in violating the

act of Congress approved January 13, 1913 (37 Stat. 670). It alleged a conspiracy to steal and unlawfully carry away and take a large number of tierces of choice steam lard moving in interstate commerce, and to receive and possess such lard after it had been stolen. The second count charged the same defendants with larceny of the lard on June 17, 1919. The third count accused them of knowingly receiving the stolen lard. The fourth count, that they had possession of the lard with knowledge of the theft.

The verdict of the jury established the guilt of Feuer, Chapman, and Verkayk on the second and third and fourth counts, and of the plaintiffs in error on the third and fourth counts. There was no report as to the guilt or innocence as to any defendants on the first count, nor was a verdict returned as to the plaintiffs in error on the second count. The defendant Morris Rosenblatt was acquitted.

The evidence in the case, some of which is narrated above, required the submission of the question of guilt or innocence of the plaintiffs in error to the jury. After the rendition of the verdict, the District Judge denied the motions of the plaintiffs in error to set aside the verdict. The verdict of guilt as to the plaintiffs in error is fully justified by the evidence, and the judgment below must be affirmed, unless there be error committed in the course of the trial.

[1] There are 15 errors assigned, most of which are not now urged. It is contended that counts 3 and 4 of the indictment are insufficient, but upon reading the indictment it is apparent that the third and fourth counts contain every necessary allegation to acquaint the defendants with the charge they were required to meet. It is charged that on a day certain the defendants had possession of a large number of tierces of choice steam lard and that the same were stolen. It is charged that on the 20th of June, 1919, the defendants unlawfully and willfully received certain goods and chattels, to wit, a large number of tierces of choice steam lard of great value, the exact number of said tierces and value thereof being to the grand jurors unknown, and that the same was part of an interstate shipment of freight, and that the defendants well knew that the same had been stolen, and that the defendants well knew of the theft of the same while it was in the possession and under the control of the Erie Railroad Company.

The fourth count alleges that the same defendants did have in their possession the choice steam lard of great value, and which lard had theretofore been stolen when it was part of an interstate shipment of freight, and that the defendants had such knowledge. The names of the consignor and consignee are alleged in each count. Thus very essential element of the statute defining the defense was pleaded in the indictment. The statute (37 Stat. 670 [Comp. St. § 8603]) makes it unlawful to break the seal of any railroad car containing interstate or foreign shipments of freight or express, or to enter any such car with the intent in either case, to commit larceny therein, and further:

"Whoever shall steal or unlawfully take, carry away or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel or wharf with the attempt to convert to his own use any goods

or chattels moving as, or which are part of, or which constitute, interstate or foreign shipments, freight or express, or shall buy or receive, or have in his possession, any such goods or chattels, knowing the same to have been stolen, shall in each case be fined not more than $5,000 or imprisoned not more than ten years or both."

But the contention is advanced that the third and fourth counts do not specify the number of tierces. The indictment refers to them as "a large number of tierces of choice steam lard," the number being to the grand jurors unknown. We think the indictment sufficiently alleges the offense as proven, and that the failure to specify the quantity was not a defect in the indictment such as to render it invalid. The defendants could, in advance of the trial, have obtained a bill of particulars setting forth the number of tierces stolen. There can be no doubt but that the plaintiffs in error knew exactly what they were charged with having wrongful possession of. The description in the indictment is so precise and full that they could easily use a judgment under this indictment as a bar to any subsequent prosecution.

[2] It is no valid objection to an indictment that the description of the property in respect of which the offense is charged to have been committed is broad enough to include more than the proof specifically shows. Dunbar v. United States, 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390. The circumstances, as disclosed by the evidence here, show that there was but one theft of the lard and one joint possession of the stolen lard. After the government had proven the shipment and the theft of the tierces and the possession of the lard in the plaintiffs in error, they were fully advised of the number of tierces which were the foundation of the substantive counts in the indictment. We find no error in denying the motion to dismiss because of insufficiency of the indictment.

It is further urged that the district judge committed error in not granting a motion to compel the government to state which transaction was meant to be covered by counts 2, 3, and 4 of the indictment—that is, the sale of the lard to Peter; and further error is alleged in permitting the evidence as to the Link transaction to be submitted to the jury without limitation of its relevancy. The record does not disclose an objection to this testimony, nor was a motion or any request made by counsel for the purpose of limiting the testimony of the witnesses Wald and Thomstorff as to the sale of the lard to the Link Company. But this evidence found in the bill of exceptions—and it does not contain all the testimony taken upon the trial—was admissible in determining the guilt or innocence of the defendants as to the third and fourth counts.

There was but one shipment of lard and the evidence shows clearly a theft of 344 tierces. The same truckman hauled all the tierces which were sold and the orders for such trucking came from the plaintiffs in error. The plaintiff in error Davidson paid the truckman the entire trucking charges, and that included the cost of cartage of 102 tierces delivered to Peter and 78 tierces delivered two days later to the Link Company, after the purchase of it through Thomstorff. The indictment charged plaintiffs in error with the receipt and possession of all

of the tierces stolen from the barge of the Erie Railroad Company, and such of the tierces as were delivered to the Link Company were of that cargo. The evidence sufficiently connected the plaintiffs in error with that transaction, so as to require the submission of their guilt or innocence in the receipt and possession of those 78 tierces to the jury.

[3] Error is further assigned to portions of the court's charge as "erroneously given and gravely prejudicial." During the course of the trial, no exception was taken to the alleged errors which we are now asked to consider, nor do the original or amended assignments of error embrace any allegation of error as to the court's instructions. Where no exception is noted to the court's instructions to the jury, we do not consider alleged errors in such instructions. Lewis v. United States, 146 U. S. 370, 13 Sup. Ct. 136, 36 L. Ed. 1011; Hickory v. U. S., 151 U. S. 303, 14 Sup. Ct. 334, 38 L. Ed. 170. And when no error is assigned, and even though error were assigned, it is not a subject of review, if no exception is noted. St. Clair v. United States, 154 U. S. 134, 14 Sup. Ct. 1002, 38 L. Ed. 936.

We are satisfied that the evidence required the submission of the plaintiffs in error's guilt to the jury and they have resolved the questions of fact against the plaintiffs in error and found them guilty. We find no error requiring our disturbing the judgment below in the various suggestions of error called to our attention.

The judgment is affirmed.

BURNS v. FRED L. DAVIS CO.

(Circuit Court of Appeals, First Circuit. February 16, 1921.)

No. 1483.

1. **Exemptions ⊜48(3)—Fishermen's wages not subject to garnishment.**
The provision of Rev. Laws Mass. c. 189, § 31, authorizing seizure under trustee process of wages of fishermen, *held* void, as in contravention of Seamen's Act March 4, 1915, § 12 (Comp. St. § 8325a).

2. **Seamen ⊜24—State attachment not "sufficient cause" for refusal to pay wages.**
Under Seamen's Act March 4, 1915, § 3 (Comp. St. § 8320), providing that every master or owner who refuses or neglects to pay a seaman his wages at the time therein required without sufficient cause shall pay him a sum equal to two days' pay for each and every day during which payment is delayed, and in view of the express provision of section 12 of the act (Comp. St. § 8325a), that seamen's wages shall not be subject to attachment or arrest from any court, the service of trustee process from a state court is not "sufficient cause" for refusal to pay a seaman his wages, and does not protect the owner from liability for the additional payment required by the statute.

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

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Jr., Judge.

Suit in admiralty by Clarence A. Burns against the Fred L. Davis Company. From the decree, libelant appeals. Reversed.

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

Carlton W. Wonson, of Beverly, Mass., for appellant.
Frederick H. Tarr, of Gloucester, Mass., for appellee.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. The libelant brings this proceeding to recover the sum due him for services rendered the libelee down to February 14, 1920, when he was discharged.

On or about December 10, 1919, the libelant shipped on the libelee's schooner Veda M. McKown for a voyage from the port of Gloucester to the Bay of Islands and other ports of Newfoundland and back to said port of Gloucester, for the purpose of obtaining a cargo of herring, and, in addition to his duties as one of the crew in manning the vessel, he was required to assist in handling the cargo and in salting, packing, and storing the same. He was to be paid wages at the rate of $70 a month, and had no share in the profits of the voyage. At the time of his discharge there was due him as wages, after deducting advances, $101.50. Shortly before his discharge the Gorton-Pew Vessels Company, of Gloucester, brought suit against the libelant in a district court of the commonwealth of Massachusetts, in which it trusteed the libelee, seeking to hold whatever sum was due the libelant as wages earned on the voyage. It also appeared that on November 26, 1918, the libelant had made an assignment to one Massell of his wages to the amount of $50, which was duly and seasonably recorded as required by law, and that notice of the assignment was given the libelee and demand made upon it for payment of said sum on the 13th of February, 1920.

The libelee, though requested, declined to pay the libelant his wages, or any part of the same, unless the attachment was discharged and the assignment canceled or released. Immediately after the libel was brought (February 20, 1920), the Gorton-Pew Vessels Company discharged the attachment, but Massell has never canceled or released his assignment.

Upon receiving notice of the discharge of the attachment the libelee offered to pay the libelant his wages, but he declined to accept them, unless certain statutory penalties and the costs of the libel were paid. This the libelee refused to do.

In the District Court it was decreed that the libelant should recover the sum of $101.90, with interest from the 13th of February, 1920, but without costs, and he appealed.

In his assignments of error he complains: (1) That the District Court erred in failing to find whether he served as a seaman or fisherman on the voyage, and that, if he served as a seaman, in failing to rule that there was no statute in Massachusetts authorizing the attachment of his wages; that, if he served as a fisherman, in failing to rule that the Massachusetts statute authorizing the attachment of fishermen's wages was void, and conferred no jurisdiction on the state district court to issue the writ of attachment; that his rights to wages arise out of a maritime contract and are wholly cognizable in the federal courts;

(2) that the court erred in finding that the libelant was not entitled to additional pay and expenses; and (3) that it erred in not awarding him costs.

The case was submitted upon the allegations of the libel, answer, and shipping articles. In the first article of the libel the libelant states that he "agreed to go as a seaman or fisherman on said voyage," but in the shipping articles it appears that he contracted to go "as a seaman or mariner of the crew schooner Veda M. McKown on a herring voyage to Bay of Islands and other port or ports of Newfoundland and back to Gloucester," and that in addition, as a member of the crew, he agreed "to handle all fish and cargo for the benefit of said voyage." In the third article of the libel he alleges that he "served as a seaman and as one of the crew of said vessel on said voyage." The allegation that he "served as a seaman" is not specifically denied in the answer, and the answer nowhere avers that the libelant served as a fisherman, and not as a seaman, or that the voyage was made for the purpose of catching fish. We think that the only reasonable conclusion to be drawn from the evidence is that the libelant served as a seaman and that the wages in controversy are due him as such.

[1] In 1915 Congress repealed section 4536 of the Revised Statutes, and enacted in its stead section 12 (38 Stat. at Large, c. 153, § 12, p. 1169 [Comp. St. § 8325a]), which reads as follows:

"Sec. 12. That no wages due or accruing to any seaman or apprentice shall be subject to attachment or arrestment from any court, and every payment of wages to a seaman or apprentice shall be valid in law, notwithstanding any previous sale or assignment of wages or of any attachment, incumbrance, or arrestment thereon; and no assignment or sale of wages or of salvage made prior to the accruing thereof shall bind the party making the same, except such allotments as are authorized by this title. This section shall apply to fishermen employed on fishing vessels as well as to seamen: Provided, that nothing contained in this or any preceding section shall interfere with the order by any court regarding the payment by any seaman of any part of his wages for the support and maintenance of his wife and minor children. Section forty-five hundred and thirty-six of the Revised Statutes of the United States is hereby repealed."

The language of section 12 is not materially different from that of section 4536 of the Revised Statutes, except that it includes the specific provision that—

"This section shall apply to fishermen employed on fishing vessels as well as to seamen."

But the effect to be given to the language of section 12, as compared with the equivalent language of section 4536, is quite different, for the Act of June 9, 1874 (18 Stat. at Large, c. 260, p. 64 [Comp. St. § 8291]), made section 4536 inapplicable to seamen employed on vessels—

"engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake going trade touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise, or voyage."

By the enactment of section 12, which repealed section 4536 of the Revised Statutes, the limitation placed upon the language of that section by the Act of June 9, 1874, has been removed. Inter-Island Navigation Co. v. Byrne, 239 U. S. 459, 463, 36 Sup. Ct. 132, 60 L. Ed. 382.

In Wilder v. Inter-Island Navigation Co., 211 U. S. 239, 246–249, 29 Sup. Ct. 58, 61 (53 L. Ed. 164, 15 Ann. Cas. 127), Mr. Justice Day considered the language of section 4536 on the assumption that the Act of June 9, 1874, did not change or modify that section, so far as it related to vessels engaged in the coastwise trade, and after stating that "this statute is not to be too narrowly construed, but rather to be liberally interpreted with a view to affecting the protection intended to be extended to a class of persons whose improvidence and prodigality have led to legislative provisions in their favor, and which has made them, as Mr. Justice Story declared, 'the wards of the admiralty,'" and after restating some of the broad provisions of the act, he said:

"Section 4536, therefore, has the effect of not only securing the wages of the seaman from direct attachment or arrestment, but further prevents the assignment or sale of his wages, except in the limited cases we have mentioned, and makes the payment of such wages valid notwithstanding any 'attachment, incumbrance or arrestment thereon.' It seems to be clearly inferable from these provisions that wages which have thus been carefully conserved to the seaman were not intended to be subject to seizure by attachment, either before or after judgment."

And again, after commenting upon certain other provisions of the act, he said:

"We think that these provisions, read in connection with section 4536, necessitate the conclusion that it was intended not only to prevent the seaman from disposing of his wages by assignments or otherwise, but to preclude the right to compel a forced assignment, by garnishee or other similar process, which would interfere with the remedy in admiralty for the recovery of his wages by condemnation of the ship. These provisions would be defeated if the seaman's wages, to be recovered at the end of the voyage, could be at once seized by an execution or attachment. * * * The evident purpose of the federal statutes, that the seaman shall have his remedy in admiralty, would be defeated, and the seaman, in many cases, be turned ashore with nothing in his pocket, because of judgments seizing his wages, rendered it may be, upon improvident contracts, from which it was the design and very purpose of the admiralty law to afford him protection. * * *

"We think that section 4536, construed in the light of the other provisions of the same title, prevents the seizure of the seaman's wages, not only by writs of attachment issued before judgment, but extends the like protection from proceedings in aid of execution, or writs of attachments, such as are authorized by the Hawaiian statutes, after judgment."

The statute (Rev. L. Mass. c. 189, § 31) under which it is sought to justify the process issued from the state court trusteeing the wages in question reads as follows:

"No person shall be adjudged a trustee in the following cases: * * *
"Seventh. By reason of money or credits due or accruing to the defendant as wages or lay as a seaman; but the provisions of this clause shall not apply to the wages or lay due or accruing to a fisherman."

As the wages due the libelant accrued to him as a seaman, and not as a fisherman, the process was not authorized by the state statute, and was a nullity.

But, if it be assumed that the wages due the libelant accrued to him as a fisherman, we do not think that the state statute which purports to authorize such an attachment can be valid. Section 12 (Act of March 4, 1915) expressly states that its provisions shall "apply to fishermen employed on fishing vessels as well as to seamen." The state statute is therefore in open conflict with section 12, and, if valid, would sanction the taking of action in direct contravention with its provisions. Such being the situation, and Congress having the paramount power to fix and determine the maritime laws which shall prevail throughout the country, the state statute must yield if the subject-matter affected by the statute is maritime.

The contract of the libelant, whether seaman or fisherman, was maritime in character (Union Fish Co. v. Erickson, 248 U. S. 308, 39 Sup. Ct. 112, 63 L. Ed. 261), and would be within the power of Congress to regulate and protect as it deemed wise (In re Garnett, 141 U. S. 1, 14, 11 Sup. Ct. 840, 35 L. Ed. 631). Therefore the state statute, being in direct conflict with section 12, would be void, and the process of the state district court would stand the same. Southern Pacific R. R. Co. v. Jensen, 244 U. S. 205, 37 Sup. Ct. 524, 61 L. Ed. 1086, L. R. A. 1918C, 451, Ann. Cas. 1917E, 900; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 Sup. Ct. 438, 64 L. Ed. 834; Patterson v. The Eudora, 190 U. S. 169, 23 Sup. Ct. 821, 47 L. Ed. 1002.

[2] By section 3 of the Act of March 4, 1915 (38 Stat. at Large, c. 153, p. 1164 [Comp. St. § 8320]), section 4529 of the Revised Statutes was amended to read as follows:

"Sec. 4529. The master or owner of any vessel making coasting voyages shall pay to every seaman his wages within two days after the termination of the agreement under which he was shipped, or at the time such seaman is discharged, whichever first happens; and in case of vessels making foreign voyages, or from a port on the Atlantic to a port on the Pacific, or vice versa, within twenty-four hours after the cargo has been discharged, or within four days after the seaman has been discharged, whichever first happens; and in all cases the seaman shall be entitled to be paid at the time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner hereinbefore mentioned without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the court; but this section shall not apply to masters or owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage."

This section, prior to the amendment of 1915, is found in section 4 of the Act of December 21, 1898 (30 Stat. at Large, c. 28, p. 756 [Comp. St. § 8320]), The only change effected by the amendment of 1915 is to require the master or owner, who fails to comply with its provisions, to pay the seaman for "two days," instead of one, for every day he is in default.

By section 26 of the act of 1898 it is provided that section 4 of said act, which amended section 4529, should not apply to fishing or whal-

ing vessels or yachts. In some of the sections amended by the act of 1915 provisions were inserted to the effect that the section should not apply to fishing or whaling vessels or yachts, but such was not the case as to all the sections referred to in section 26. The act of 1915 does not expressly repeal section 26, and it may be doubtful whether, as applied to some of the sections referred to, it is repealed by implication. But, however this may be, we do not regard it essential to the determination of the question whether the libelant in this case can recover the additional pay, as the vessel upon which the wages were earned was making a foreign voyage to obtain a cargo, and not on a fishing trip.

The remaining question under section 3 of the act of 1915, is whether the libelee, in withholding the wages, acted without sufficient cause. He says that he was justified in declining to pay the wages for the reason that he was in duty bound to recognize the authority of the process of the state district court. If his position is right in this respect, then the provisions of the federal law enacted for the benefit of seamen and in the exercise of its maritime power may at any time be set at naught by a state process, and its provisions rendered valueless.

For many years there has been no statute in Massachusetts authorizing the attachment of seamen's wages, and it nowhere appears that the libelee was not fully aware of this, and of the provisions of section 12 of the act of 1915 forbidding the attachment of either seamen's or fishermen's wages on process issued from any court, and protecting him in the payment of such wages, notwithstanding any previous assignment or attachment.

Under the circumstances, we think the conclusion should be that the libelee withheld the wages without sufficient cause, and that the libelant should recover the additional pay contemplated by the statute and his costs.

The decree of the District Court is reversed, and the case is remanded to that court for further proceedings not inconsistent with this opinion, with costs to the appellant in both courts.

KEOGH v. CHICAGO & N. W. RY. CO. et al. *

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

No. 2776.

1. **Monopolies ⇐28—Individual cannot recover under Anti-Trust Act without showing damages.**

Under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), allowing any person injured by anything forbidden by the act to recover threefold damages by him sustained, an individual cannot recover without showing damage to him by defendant's act, though defendants might have been subject to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Interstate Commerce Commission.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 537, 65 L. Ed. —.

2. **Monopolies ⇐28—Damage to individual under Anti-Trust Act cannot be conjectural.**
To recover under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), plaintiff must show damage to him by defendant's illegal acts by facts from which its existence is logically and legally inferable, not by conjectures or estimates.

3. **Monopolies ⇐28—Collection of lawful rates under combination cannot damage shipper.**
A shipper cannot recover treble damages under Sherman Anti-Trust Act, § 7 (Comp. St. § 8829), from railroads which combined to restrain interstate commerce, where the only damage alleged by him was the payment of a rate higher than he would have been compelled to pay, in the absence of such combination, if the rate which he paid had been held reasonable by the Interstate Commerce Commission, so that the railroads were required to collect it and the shipper to pay it.

4. **Commerce ⇐88—Rates established by commission treated as embodied in statute.**
Rates established in tariff schedules filed by railroads, which had been found by the Interstate Commerce Commission to be reasonable, are to be treated as though they were embodied in the statute, binding as such upon both railroads and shipper alike.

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

Action by John W. Keogh against the Chicago & Northwestern Railway Company and others. Judgment for defendants, and plaintiff brings error. Affirmed.

This writ of error was sued out by plaintiff to reverse the judgment in favor of the defendant in the District Court. He brought his action to recover threefold damages under the provisions of the Sherman Anti-Trust Act (Comp. St. § 8820 et seq.). The declaration alleges in substance that on September 1, 1912, and for several years prior, plaintiff was engaged in the business of manufacturing and selling excelsior and tow, with his principal office and place of business in Chicago; from 1909 to the date of the commencement of this suit he owned and operated a mill at St. Paul, Minn., where he manufactured his products and shipped them to various consignees in interstate trade and commerce within the meaning of the Act of Congress of July 2, 1890, entitled, "An act to protect trade and commerce against unlawful restraints and monopolies." The defendant corporations, during the same time, were common carriers, engaged in interstate commerce from St. Paul to various points. The individual defendants are the officers, agents and employees of the defendant corporations. It is charged that after September 1, 1912, plaintiff paid large sums of money to the various carriers for transporting his products from St. Paul; that the defendant corporations, at their expense, maintained an association known as "the Western Trunk Line Committee"; that the members of the association were competing carriers in interstate commerce and the object of the association is to agree upon, fix, maintain, and publish uniform, arbitrary, and noncompetitive freight rates to competing points; that one of the rules of the association requires the unanimous vote of all members to fix or change a freight rate and all members must abide by the decision of the association and maintain the freight rates so fixed. Any member failing to maintain the rates so fixed shall be expelled or suffer other penalties; that the committee met from time to time in Chicago and agreed upon, fixed, maintained, and published freight rates to various points in several states, and the rates so fixed were arbitrary, uniform, unreasonable, and noncompetitive, and not based on what would be a fair remunerative rate to the carriers transporting such freight, and that it maintained and published such rates in violation of the Anti-Trust Act of Congress; that thereby all competition for the transportation of excelsior and

tow from St. Paul was destroyed and the rates agreed upon maintained; that defendants during the period unlawfully conspired to and did restrain trade and commerce among several states, contrary to the statute, and by reason of the conspiracy plaintiff had been injured in his business and property, in that the freight rates which defendants collected for the transportation of excelsior and tow from the plaintiff were greatly increased over the freight rates which would have been charged and collected, if no such conspiracy had been entered into, setting forth a detailed statement of shipments made by the plaintiff from St. Paul to various points between September 1, 1912, and the date of the commencement of this suit; that the defendant corporations embraced all the common carriers running out of St. Paul, and it was necessary for him to patronize all or some of the defendants; that the consequence of the conspiracy was that plaintiff's profits during the time in question were reduced to the extent of the difference between the rate that would have existed, had it not been for the conspiracy and the rates collected as a result thereof.

The second count charges that from September 1, 1912, the defendants carried on their business in accordance with the plans adopted by the Western Trunk Line Committee and all competition as to rates for the transportation of excelsior and tow from St. Paul which had theretofore existed was prevented and destroyed by the fixing of the rates which were greatly in excess of the freight rates which but for the conspiracy would have prevailed; that in 1909 and 1910 plaintiff built a tow and excelsior mill at St. Paul at great expense and prior to September 1, 1912, he had shipped 9,000 tons of his products per year, and that his net profit on Chicago shipments was $1 per ton; that after that date, defendants increased freight rates on his products from St. Paul to Chicago and other points; that the rates were not competitive and were the result of the combination and conspiracy, and all competition on the freight rates was destroyed. By reason of the alleged unlawful rates and in consequence of the conspiracy, the net profits of the plaintiff on excelsior and tow manufactured by him, decreased from $1 per ton to 30 cents per ton; that the contract and combination was in restraint of trade and commerce, contrary to the provisions of the statute.

Defendants filed separate pleas of the general issue and notices of special matters to be shown in defense. The special matters set up in the notices were in substance that the rates complained of in the declaration were those that were subject to the jurisdiction of the Interstate Commerce Commission; that in the months of September, October, November and December, 1912, the defendants filed schedules or tariffs with the Interstate Commerce Commission, which were published as required by law, and carried the rates on excelsior and tow mentioned in the declaration; that the plaintiff had filed his complaint with the Interstate Commerce Commission, which, upon a hearing, held that the rates from St. Paul to Chicago were reasonable, and that the rates from St. Paul to interstate destinations other than Chicago were lawful, in so far as they did not represent advances over previous interstate rates of more than 3½ cents per 100 pounds. Plaintiff filed his application for a rehearing, which was denied; later he filed a second petition to have the case reopened, for the purpose of considering whether carload rates on a 30,000-pound minimum basis on plaintiff's products should be made lower than rates fixed by the Commission upon a 20,000-pound minimum basis. Upon a hearing, the rates, as fixed upon the prior hearing, were permitted to stand by the Commission. Afterwards, defendants filed amended and modified schedules, applying to these products, from St. Paul to St. Louis, Mo., Des Moines, Iowa, and other destinations, which were in accordance with the findings and report of the Commission. All the tariffs and schedules of which the plaintiff complains have been found by the Commission to be reasonable and lawful.

In the progress of the trial in the court below the court intimated that in its judgment the special matters referred to in the notices, if proved, would be a bar to the action. By agreement, the jury was discharged, the special matters set forth in the amended notices were considered as having been well pleaded in one or more special pleas to the declaration, and the reports

and orders of the Interstate Commerce Commission in the tow and excelsior cases should be considered as having been set forth and incorporated in the special pleas; that a general demurrer to each of said special pleas be interposed on the ground that the facts alleged in the said special pleas do not constitute a defense at law. The court thereupon overruled the demurrers. Plaintiff elected to stand by his demurrers, the suit was dismissed, and judgment rendered against the plaintiff for costs.

H. P. Young, of Chicago, Ill., for plaintiff in error.

R. B. Scott and J. C. James, both of Chicago, Ill., for defendants in error.

Before BAKER and ALSCHULER, Circuit Judges, and FITZHENRY, District Judge.

FITZHENRY, District Judge (after stating the facts as above). Plaintiff in error seeks to set aside the judgment of the District Court against him in his action for damages against the defendants under section 7 of the Sherman Anti-Trust Act (Comp. St. § 8829), upon the ground that the trial court erred in holding the fact that the freight rates charged and collected by the defendants had been found to be reasonable by the Interstate Commerce Commission was a defense to the action, and overruled plaintiff's demurrers to the defendants' pleas setting out the proceedings had before the Commission.

[1] If the plaintiff had a remedy in the premises it was by virtue of section 7, supra, which provides:

"Any person *who shall be injured in his business or property* by any other person or corporation by reason of anything forbidden or declared by this act, may sue therefor * * * and shall recover threefold the damages *by him sustained.* * * *" (Italics ours.)

Under this statute those who may sue for threefold damages by virtue of its terms are limited to those "who shall be injured in his business or property," and if a recovery is permitted it must be limited to the damages "by him sustained." Pennsylvania Ry. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315. The mere fact that the defendants might have been subject to a criminal prosecution by the government, or to corrective or coercive proceedings at the instance of the Interstate Commerce Commission is of no avail to a litigant unless it is established that he sustained pecuniary damage. Pennsylvania Ry. Co. v. International Coal Co., supra; Knudsen v. Michigan Central R. R. Co., 148 Fed. 968, 79 C. C. A. 46; Meeker v. Lehigh Valley R. R., 183 Fed. 548, 106 C. C. A. 94; Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244; Motion Picture Patents Co. v. E. Clair Film Co. (D. C.) 208 Fed. 426; Imperial Film Co. v. General Film Co. (D. C.) 244 Fed. 985.

[2] To recover under this statute plaintiff must show, as a result of the defendants' acts, actual damages were sustained. These damages must be proved by facts from which their existence is logically and legally inferable, not by conjecture nor estimates. American Seagreen Slate Co. v. O'Halloran, 229 Fed. 77, 143 C. C. A. 353; Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 49 C. C. A. 244.

[3] Plaintiff in the first count of his declaration very clearly limits his damages due to the alleged conspiracy or combination in restraint of trade to the difference between the rates that were charged by reason thereof and what the rates might have been had the alleged conspiracy not intervened, but described in the second count as having had the effect of reducing plaintiff's profits on his products from $1 to 30 cents per ton. No other element of damage is suggested by the pleadings. The question is squarely presented as to whether or not railroads are culpable in damages for charging and collecting rates which have been found to be reasonable by the Interstate Commerce Commission.

A similar question was before this court in National Pole Co. v. Chicago & North Western Ry. Co., 211 Fed. 65, 127 C. C. A. 561. In that case, upon the authority of Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, we held that the question of the reasonableness of a freight tariff was one which was addressed originally and exclusively under the Act to regulate commerce to the Interstate Commerce Commission; that this must necessarily be true from the nature of the enterprise involved. The fixing of a just rate for a common carrier for the transportation of persons and property in interstate commerce involves the exercise of a legislative discretion. In the National Pole Co. Case, supra, this court said:

"Congress directly and in the first instance might have inquired into the character and value of the particular transportation service now under investigation by the Commission and have named the rate therefor in a statute. But, with the increasing complexities of human activities, it was impossible to cover the details of rate-making (and the same is true of many other subjects) by specific statutes, and so the board or commission form of legislation was used; that is, Congress declared the public policy and fixed the legal principles that were to control, and charged an administrative body with the duty of ascertaining within particular fields from time to time the facts on which the legal principles established by Congress would be brought into play. * * * But since the congressional prohibition of unjust rates cannot, by the terms of the act, be effective against a particular published rate, although unjust, until the Commission has investigated the service in question and has established the standard of justness for all shippers who use that service, the action of the Commission in the regulation of rates is quasi legislative—it converts the actual legislation from a static into a dynamic condition."

And this view has found lodgment in numerous expressions of the Supreme Court upon this same proposition many times since. When plaintiff first felt aggrieved he sought his relief by the proper procedure—by filing his complaint with the Interstate Commerce Commission. Skinner & Eddy Corporation v. United States, 249 U. S. 557, 39 Sup. Ct. 375, 63 L. Ed. 772, and cases cited. And the finding of the Commission upon this subject was conclusive. Skinner & Eddy Corporation v. United States, supra.

Had the schedules filed in 1912 been found by the Commission to carry unreasonable and oppressive rates in violation of law, and the amount of damages sustained by reason of defendants charging and collecting the rates provided in the schedules, a different case would

be presented. In such case a judicial question would be involved which might be adjudicated in a court as well as before the Commission; but inasmuch as the Commission took the contrary view, holding that the rates provided in the schedules and charged by the defendants and collected from the plaintiff for the shipments complained of were reasonable, a different situation arises.

Congress in the passage of the Act to regulate commerce (Comp. St. § 8563 et seq.) having provided the rules of law applicable to freight charges and the administrative board—Interstate Commerce Commission—having determined the rates fixed by the schedules complained of were within the statute, the plaintiff has no other alternative than to regard the rates as reasonable and as having been well established. Interstate Commerce Commission v. Illinois Central R. R. Co., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280; Proctor & Gamble v. United States, 225 U. S. 282, 36 Sup. Ct. 761, 56 L. Ed. 1091; Kansas City Southern Ry. Co. v. United States, 231 U. S. 423, 34 Sup. Ct. 125, 58 L. Ed. 296, 52 L. R. A. (N. S.) 1; Interstate Commerce Commission v. Atchison, Topeka & Santa Fé R. R. Co., 234 U. S. 294, 34 Sup. Ct. 814, 58 L. Ed. 1319.

[4] The rates in defendants' tariff schedules complained of in plaintiff's declaration having been found, by the Interstate Commerce Commission, to be reasonable, are to be treated as though they were embodied in a statute, binding as such upon both defendants and plaintiff alike. Pennsylvania Ry. Co. v. International Coal Co., 230 U. S. 184–196, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315.

The only element of damage alleged in plaintiff's declaration being predicated upon the payment of freight rates which the plaintiff was required by law to pay and the defendants were required by law to collect, it is apparent that the special matter set out in the several pleas did present a complete defense to the action. It was therefore unnecessary to adjudicate the question as to whether or not the defendants were guilty of the crime of conspiracy under the Anti-Trust Law. If no provable damages were sustained by the plaintiff, there can be no recovery.

The demurrers were properly overruled, and the judgment of the District Court will accordingly be affirmed.

SALANT et al. v. FOX et al.

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

No. 2563.

1. Contracts ⟸147(1, 2), 169—Unambiguous contract construed from terms.
The cardinal rule in construing a contract is to ascertain the intention of the parties, and where its terms are clear and unequivocal, the intent must be determined from its contents alone; but where the language is ambiguous, or susceptible of several significations, its meaning may be found in the subject-matter viewed in the light of the circumstances.

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

2. Contracts ⟸143—Terms expressing workable arrangements cannot be added to.

Where the language of a contract expresses a reasonable and workable arrangement, such as men in the respective positions of the parties would enter into with reference to the subject-matter in the light of the circumstances, the court cannot go outside of its terms to find something different or better, which it might think the parties intended, but had not expressed.

3. Contracts ⟸201—Held to require specified deliveries in each month without credit for excess in previous months.

In a contract whereby a shirt manufacturer having a government contract secured the agreement of another to devote his factory exclusively to finishing shirts from material cut by the manufacturer, a provision requiring a stated amount of material to be furnished before the work began, and thereafter an amount to be furnished each month equal to the number of finished shirts received during the preceding month, requires the manufacturer to deliver each month the amount so determined, without crediting on such deliveries the excess of materials previously delivered.

4. Contracts ⟸172—Provision for payments for deficiency in delivery held not to relieve from undertaking to deliver.

In a contract which required plaintiffs to deliver to defendants material to be made into shirts equal in amount to the number of finished shirts shipped by defendant during the preceding month, a provision requiring plaintiffs to pay defendants a stated sum if the material delivered fell below the minimum weekly requirement was a provision for the benefit of defendants, of which they alone could avail themselves, and did not relieve plaintiffs from performance of their obligation to deliver the quantities agreed.

5. Contracts ⟸278(1)—Plaintiff's breach held to justify nonperformance by defendant.

Where plaintiffs failed to deliver to defendants the stipulated quantity of shirt material, to be made into shirts by defendants for plaintiffs, plaintiffs cannot recover for defendants' subsequent refusal to perform the contract, though, under the influence of a rising market, defendants took advantage of the situation to get out of the contract.

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

Action at law by Gabriel Salant and others, trading as Salant & Salant, against Will S. Fox and another, trading as Fox & Moore. Judgment for defendants, and plaintiffs bring error. Affirmed.

Owen J. Roberts, of Philadelphia, Pa., for plaintiffs in error.
Ruby R. Vale, of Philadelphia, Pa., for defendants in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges, and BODINE, District Judge.

WOOLLEY, Circuit Judge. The plaintiffs were clothing manufacturers of New York City under contract with the United States Government for the manufacture of shirts. The defendants were contractors, and owners and operators of a shirt factory in Schuylkill County, Pennsylvania. In August, 1917, the parties entered into a written contract whereby the plaintiffs, shirt cutters, undertook to ship the defendants, shirt finishers, a given number of shirt cuttings by the first of the next month, and monthly thereafter a number of

cuttings equal to the defendants' finishings of the preceding month, and the defendants undertook to make the same into shirts. Both parties duly embarked upon the contract. Later, a rising market and congested freight conditions disturbed its performance. The manufacturers did not furnish cuttings in each month equal to the contractors' finishings of the preceding month, and the contractors did not finish shirts in each month in the number they had agreed to do. Thereupon each charged the other with breach of the contract. The manufacturers sued. On the contract as interpreted by the court, verdict was directed and judgment entered for the defendant contractors. The plaintiffs sued out this writ of error.

The matter under review concerns the interpretation of the contract. Its material clauses—with their controlling provisions italicized by us—are as follows:

"2. The contractor (defendants) *shall devote the factory building* owned by them and the machinery contained therein *exclusively* to the manufacture of shirts *for the manufacturers* (plaintiffs) giving them the *entire* output of said factory, *which shall be not less than* 800 dozen weekly during the period of this agreement. They shall do no work whatsoever for any other concern, nor sell, assign, lease or sublet said factory or any rights that they may have to said factory."

"3. The manufacturers shall ship to the contractor *not less than 3,000 dozen* cut shirting material before the 1st. day of Sept., 1917. After that date they shall make to the contractor shipments of cut material every month in quantity *equal to the amount of finished goods received by them from the contractor during the preceding month.*"

"13. In case the manufacturers ship the contractors less than at the rate of 800 dozen a week, the contractors shall be entitled to receive eight cents per doz. for the deficiency."

[1] In looking for the meaning of this contract we are controlled by no novel rules of interpretation. The cardinal rule in every case is to ascertain the intention of the parties. The law presumes that the parties understood the import of their contract and that they had the intention which its terms express. When a contract is clear and unequivocal its meaning must be determined by its contents alone; another meaning cannot be added by implication or intendment; but where the language is ambiguous or susceptible of several significations, its meaning may be found in the subject matter, viewed in the light of the circumstances under which it was entered into. 6 R. C. L. 834–849; 13 Corpus Juris, 524.

If we had been the first called upon to interpret this contract we should have regarded its language as clear and unambiguous, and have construed it accordingly; but as the contract has been submitted to another court, where, between counsel and the court, it has given rise to three radically different interpretations, we must assume that its language is ambiguous and is susceptible of different meanings.

At the trial the plaintiffs' view of the contract was that after getting under way, their obligation to supply the defendants with cuttings was fixed by the amount of the defendants' finishings of the preceding month, as the contract expressly provided, but that, failing in any month to supply cuttings equal to finishings of the preceding month, they were entitled to credit the deficiency with cuttings supplied in any

previous month in excess of the contract requirement. By this construction the plaintiffs would be exonerated of a breach under the facts which show that their short deliveries for several months would, if credited with the excess of previous deliveries, arise to substantially full deliveries for all months.

The construction urged by the defendants was that the plaintiffs were obligated to make an initial shipment of 3,000 dozen cuttings, and that, thereafter, in addition to making deliveries of cuttings in every month equal to the defendants' finishings of the preceding month as provided by the express terms of the contract, the plaintiffs were required to maintain, either in the defendants' factory or in transit, at all times, a reserve, or, as they termed it, a "water level" of 3,000 dozen cuttings,—the number which the plaintiffs were required to deliver initially.

The court's view of the contract was that there were really two undertakings of the plaintiffs, one including the other.

> "The one, which may be called the master obligation, was to keep the defendants supplied with sufficient material to enable them to meet their obligation to turn out a minimum of 800 dozen shirts per week; their other was subsidiary to this, and intended not to qualify or lessen it but to give practical assurance that it would be met."

We gather that the learned trial judge construed the undertaking of the plaintiffs as an obligation on their part, in consideration of the entire output of the defendants' factory, to keep the defendants supplied with material in any event. That was the master obligation. The subsidiary obligation was that expressed by the terms of the contract as to the method of the performance of this major obligation.

[2] It is to be observed that each of these interpretations was arrived at by implying something which it was thought the parties intended but had not expressed. As we read this contract we think its language expresses a reasonable and workable arrangement, such as men in the respective positions of the parties would enter into with reference to the subject matter in the light of the circumstances. If the writing itself shows a reasonable undertaking of the parties and indicates that it embraces all they intended, that undertaking is the contract. We cannot go outside of its terms to find something different or better.

We are of opinion the contract discloses in its terms all that the parties intended.

In order to carry out their contract with the United States Government for the manufacture of shirts, the plaintiffs cut the material and made sub-contracts for finishing the same with a number of concerns having factories. To this end they contracted with the defendants for the entire output of their factory. From the very nature of the work to be done the defendants could not finish shirts until the plaintiffs had supplied them with material. Therefore it was agreed that before work should start, that is, before the first of September, 1917, the plaintiffs should place with the defendants "not less than 3,000 dozen cut shirting material." This provided for stocking the factory and setting the machinery at work on the twenty-four in-

dividual operations required to make shirts in quantity. This provision we think embodied an independent, initial, pre-work condition, which when performed fulfilled this one of the plaintiffs' contract obligations. It stood by itself, however, and was in no way connected with their obligation to make future deliveries. The plaintiffs performed this obligation—expressed in terms of a minimum delivery—by shipping the defendants not 3,000 dozen but 4,245 dozen. Then the defendants started to work. Obviously their work of finishing shirts could be continued only so long as the plaintiffs delivered cuttings. Fully anticipating this the parties agreed that:

"After that date," (that is, after the date before which the plaintiffs were required to make their initial bulk delivery of material,) the plaintiffs shall "make to the contractor shipment of cut material every month in quantity equal to the amount of finished goods received by them from the contractor during the preceding month."

Just what did the parties mean by this provision? Their meaning, we think, is made clear by the rest of the contract. The defendants had surrendered their entire factory to the work of the plaintiffs under a minimum undertaking on their part to turn out 800 dozen finished shirts per week. Whatever was the maximum output of the factory, this evidently was the defendants' estimate of the minimum capacity at which it would yield a profit, considered with reference to machinery, labor, fuel, and other conditions. The remaining factor was that of materials. This was met and covered by the plaintiffs' two delivery undertakings. Under these, so long as they were performed, the defendants had in their own hands the entire situation as to their factory output. They had 3,000 dozen cuttings initially delivered as a stock of material on which to start, and they had as a factor of safety all cuttings delivered above this minimum. Aside from this the defendants had another factor of safety in the obligation of the plaintiffs to deliver cuttings monthly equal in number to their finishings of the preceding month. They were thus in complete control of their monthly deliveries of finished shirts, if they could depend at all times on the plaintiffs furnishing them with cuttings pursuant to the standard agreed upon. If in any month the defendants' finishings were small (but never less than 800 dozen per week) they could not complain if the plaintiffs' deliveries of cuttings in the next month were correspondingly small. That was their affair. In another month the defendants could, if they chose, speed up and enlarge their output of finishings by using the excess of cuttings previously delivered so long as they could be assured of monthly deliveries of cuttings always equal to their monthly output of finishings.

[3] Constancy in the supply of materials was therefore the essence of the contract. As they had surrendered their factory exclusively to the use of the plaintiffs, the defendants were entitled to and by clear expression had provided for supplies sufficient to keep it running at capacity. To this the plaintiffs agreed. The test of performance of the plaintiffs' obligation therefore was not the delivery of cuttings in excess of the required number in any given month but was the regular delivery of cuttings in each month

equal at least to the defendants' finishings of the preceding month. The contract discloses no purpose of maintaining a water level of reserve material in the hands of the defendants but it does disclose an undertaking on the part of the plaintiffs to maintain an inflow of cuttings equal to the defendants' outflow of finishings. Any excess of deliveries made by the plaintiffs in any month above the required minimum—and it is evident that in drawing this contract both parties were dealing with minima—was optional with the plaintiffs, but the excess when made became a factor of safety enuring to the benefit of the defendants, of which they could take advantage to fill their factory and raise their output. This evidently was what both parties intended, and, as shown by the early months, strove to do. The object of both was to make as many shirts and as much money as possible. Such we think were the intentions of the parties as expressed by the language they used in their written contract without resort to implications.

[4] The thirteenth paragraph of the contract providing for payment to the defendants in case of a deficiency in monthly deliveries of cuttings did not operate to relieve the plaintiffs of their undertaking to make deliveries in the number and at the times specified, nor did it relieve them from liability for breach of that undertaking. It was a provision made for the benefit of the defendants, of which they alone could avail themselves on occasion.

[5] The trouble began when, because of freight conditions, the plaintiffs fell short in monthly deliveries. While, under the influence of a rising market, the defendants took advantage of the situation with ill-concealed anxiety to get out of the contract, we are nevertheless of opinion, that under our interpretation of the contract denying the plaintiffs the right to credit a short delivery in one month with an excess delivery in another, the trial court committed no error in finding that the plaintiffs had breached the contract. Therefore we direct that the judgment below be affirmed.

BOEHM v. UNITED STATES.

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

No. 145.

1. **Larceny ⟸68(3)—Possession four and nine months after stealing held to take case to jury.**

In a prosecution for larceny of property of the United States, proof that defendant was in possession of some of the stolen property four months after the stealing, and of other portions of it nine months thereafter, with evidence of sale of the property by him at less than value, and attempted obliteration of identifying marks, *held* sufficient to require submission to the jury of the recent possession of stolen property as evidence of his guilt.

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

2. Larceny ⊂=51(1)—Possession of stolen property held competent.
The fact that stolen automobile tires were found hidden 150 feet from defendant's home, though he claimed not on his property, was competent to go to the jury, in view of testimony of sale by him of two other tires stolen at the same time.

3. Larceny ⊂=64(3)—Lapse of time since stealing does not deprive defendant's possession of property of probative effect.
Though the presumption of guilt flowing from possession of stolen property grows weaker as the time of possession recedes from the time of the original taking, the lapse of four and nine months, respectively, between the taking and the time defendant's possession was shown, does not deprive the possession of its probative effect.

4. Criminal law ⊂=829(9)—Requested instruction that possession was not such as to require explanation held properly refused.
In a prosecution for larceny of automobile tires, where it was shown defendant had sold two of the stolen tires for less than their value, and that others had been found hidden near his home nine months after the taking, a requested instruction that the possession of the tires found upon the premises was not such as required defendant to give an account thereof was properly refused, where the court charged the jury that it might consider such possession as having some connection with the tires previously sold by defendant.

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

Henry Boehm was convicted of the theft of property of the United States, and he brings error. Affirmed.

Thomas F. Rogers, of Corning, N. Y., for plaintiff in error.

Stephen T. Lockwood, U. S. Atty., and John T. Walsh, Sp. Asst. U. S. Atty., both of Buffalo, N. Y.

Before WARD, HOUGH, and MANTON, Circuit Judges.

MANTON, Circuit Judge. By the indictment in this prosecution the plaintiff in error is charged with—

"on the 22d day of February, 1919, did then and there knowingly, wrongfully, unlawfully and feloniously, steal and purloin certain property and valuable things of the United States with intent to convert the same to his own use, to wit, eight (8) automobile rubber tires which were then and there in the custody and possession and control of the Delaware, Lackawanna & Western Railroad of the United States Railroad Administration, in which tires the United States had a special property as bailee. * * *"

From a judgment of conviction, the plaintiff in error sued out this writ of error.

Stenographic notes of the testimony were not taken. A statement of the facts as testified to was agreed upon, and constitutes the record of the testimony adduced upon the trial. The plaintiff in error did not take the stand, nor did he offer evidence in his own behalf. He was jointly indicted with Theodore Spier, his son-in-law. They were tried together and convicted. The evidence of guilt on the part of Spier was ample. The plaintiff in error, however, contends on this writ that the evidence was insufficient to require the submission of his guilt or innocence to the jury, and that the court committed error in failing to direct a verdict at the end of the proof.

There was evidence from which the jury might find that 8 automobile tires were consigned from Buffalo, N. Y., to a consignee at Coopers Plains, N. Y. The shipper was the B. F. Goodrich Rubber Company, and the tires were transported over the Lackawanna Railroad. A record of the numbers of 12 tires, which were shipped, was taken at the time of the shipment by a shipping clerk. The tires were contained in three bundles of 4 each. Two of these bundles were stolen. Each tire bore a serial number. Three of the bundles were received by the railroad company and put in the car of the Lake Shore & Michigan Southern No. 88018. Upon their arrival at Coopers Plains, N. Y., on February 15, 1918, they were put in the freight house by the railroad agent. Upon his arrival the next morning, he found that a burglary had been committed and 8 of the tires were stolen. An investigation was then instituted by the railroad detectives, and one of the defendants, Spier, was interviewed. He admitted the theft. His confession was reduced to writing and was used against him upon the trial. It involved the plaintiff in error. However, when it was received upon the trial, the jury was cautioned it could only be received against Spier, and could not be used or considered against the plaintiff in error.

It appears that after interviewing the codefendant, Spier, the officers visited the farm of the plaintiff in error and there were shown, by Spier, three of the tires lying some distance from the plaintiff in error's house and near a well. A witness called stated that he purchased a tire from the plaintiff in error similar in size and appearance to the one that was stolen. This tire was sold for $10, very much below the market value. The same witness later bought another tire from the plaintiff in error and gave therefor two pairs of shoes. The sale of these tires was made at plaintiff in error's farm at Hornby, N. Y., where the three tires which were pointed out by Spier to the officers, were found. They were hidden under a pile of brush near a well about 150 feet from the house. The serial number on one of these tires sold by plaintiff in error was completely abraded and on the other partially abraded. They were identified to some extent by an employee of the rubber company, who said that they were of similar kind to the shipment made.

We think this evidence required the submission of the guilt or innocence of the plaintiff in error to the jury. The tires were stolen on the 15th or 16th of February, 1919, and the sale of two by the plaintiff in error was made in June, 1919. Three were found in the lot under the brush in November, 1919. We think that the stolen tires found in the possession of the plaintiff in error, even though that was four months after the date of the theft in the case of the sale, and nine months after the date of the theft in the case of those found in the lot, required the submission of this recent possession of the stolen property to the jury as evidence of guilt on the part of the plaintiff in error.

[1, 2] This evidence of recent possession of the stolen tires, accompanied by the secretion of the property under brush near the well, and the sale of two of the tires, of like size and make by the plaintiff in error at a low price, was a proper subject for the jury's consid-

eration. There is also evidence of the fact that the marks on one tire were obliterated and on the other partially so. Although these tires were found about 150 feet from plaintiff in error's home and are claimed not to have been upon his property, the evidence was competent for the jury's consideration, in view of the testimony of the sale of the two tires, tending to satisfy them of the guilt of the plaintiff in error. Commonwealth v. Montgomery, 11 Metc. (Mass.) 534, 45 Am. Dec. 227.

[3] What may be deemed to be recent possession is a question of fact for the jury. State v. Walker, 41 Iowa, 217. The presumption of guilt flowing from such possession grows weaker as the time of possession recedes from the time of the original taking. The fact itself is one for the consideration of the jury under all the circumstances. People v. Weldon, 111 N. Y. 569, 19 N. E. 279. There is evidence here that, when the tires were found, the marks of identification were abraded, which together with the suspicious circumstance of the plaintiff in error selling two automobile tires much below their market value, strengthens the presumption of guilt arising from recent possession alone. That the tires were stolen was proven. This fact, together with the possession of such stolen property as found to be in the plaintiff in error unexplained, offers presumptive evidence of his guilt. The lapse of time from the theft of the property until the tires were found in the constructive possession of the plaintiff in error, we think, does not deprive such possession of the property of its probative effect, as a fact from which an inference of guilt of the plaintiff in error could be drawn by the jury.

[4] The court was requested to instruct the jury that the mere possession of the tires found upon the premises of the plaintiff in error near the well in November, 1919, which were alleged to have been stolen, was not such possession as required the plaintiff in error to give an account thereof. To this refusal an exception was taken. But the court did say that, since there was testimony to identify such tires, the jury might consider it all had some connection with the tires that had previously been sold by the plaintiff in error, Boehm, if they found that such possession was recent. We said in Rosen v. United States, 271 Fed. 651, decided December 15, 1920:

"The possession of stolen property, standing alone, does not establish guilt; but the possession of property recently stolen raises a presumption of guilt, which in the absence of explanation may authorize a jury to infer a criminal connection with its acquisition. Wilson v. United States, 162 U. S. 613, 620, 16 Sup. Ct. 895, 40 L. Ed. 1090; People v. Weldon, 111 N. Y. 569, 576, 19 N. E. 279. And in the instant case the possession of copper by the defendants required them to make an explanation of their possession, and it was for the jury to say whether their explanation was satisfactory."

We think the facts of this case require the court to refuse the requested instruction.

Judgment affirmed.

THE ORANGE. Petition of RAMSDELL et al. Appeal of HUDSON NAV. CO.

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

No. 139.

Collision ⇐102—Vessels crossing; mutual faults.

A steamer passing up Hudson river *held* in fault for collision with a crossing ferryboat for attempting to cross ahead in violation of the starboard hand rule and a signed agreement, and the ferryboat also *held* in fault for increasing her speed in violation of Inland Rules, art. 21 (Comp. St. § 7895).

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

Petition was filed by Henry Powell Ramsdell and others, executors, etc., as owners of the ferryboat Orange, for limitation of liability of said ferryboat for loss, damage, and injury resulting from a collision between the ferryboat Orange and the steamship Rensselaer. A decree was entered limiting the liability and holding the Rensselaer solely at fault for the collision, and restraining the claimants from further prosecuting such claims against the Orange. The Hudson Navigation Company, owner of the Rensselaer, appeals. Decree modified.

Barry, Wainwright, Thacher & Symmers, of New York City (James K. Symmers and Earle Farwell, both of New York City, of counsel), for appellant.

Duncan & Mount, of New York City (Warner C. Pyne and O. D. Duncan, both of New York City, and Thomas J. Healy, of New York City, of counsel), for appellee.

R. H. Barnett, of Newburgh, N. Y., for claimants Vonyes and Fengar.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The petitioners, as owners of the ferryboat Orange, in this proceeding in admiralty, seek to limit their liability for damages resulting from a collision between the ferryboat Orange and the steamship Rensselaer, owned by the Hudson Navigation Company, which occurred at about 10:40 p. m. on the evening of June 15, 1918, off Fifth street, Newburgh, about 400 feet off the end of the Newburgh piers. The weather was clear, and there was practically no wind; the tide was ebb. At this point the river is about one mile wide. The distance from the Orange's ferry slip at Beacon to Newburgh is a little more than one mile. The Rensselaer is a steamship plying between New York and Albany nightly, and was proceeding on one of her trips at the time. She was proceeding up the river about 800 to 1,000 feet from the Newburgh shore, and when about a mile below the point of collision she observed the ferryboat Orange leaving her slip at Beacon. The ferryboat sounded her slip whistle, and this attracted the attention of the navigator of the Rensselaer. The Rensselaer at the time was proceeding at the rate of

15 miles per hour, and the vessels were then about one mile apart. The Orange, after having left her slip at 10:36 p. m., as she proceeded past the long dock below her slip, sounded a slip whistle. Her navigator saw the Rensselaer after she had reached the end of the long dock, thus having a clear view down the river. The course of the Orange was then laid for a point somewhat above her slip on the Newburgh side, thus to accommodate the ebb tide.

After the Orange proceeded about a quarter of a mile across the river, and the Rensselaer was off Marvel's shipyard, signals were exchanged between both vessels. The Orange blew one whistle, and received a reply of one whistle. The Rensselaer, however, claims that she blew first, sounding a signal of two blasts, which was answered by the Orange with one blast. The Rensselaer is corroborated by the testimony of the personal injury claimants. After the exchange of whistles, the Rensselaer changed her course slightly to port and hauled in toward the Newburgh shore. The Orange rang an extra hook-up bell and increased her speed. When the position of the vessel had changed, so that the Rensselaer was above Broadway, Newburgh, and the ferryboat somewhat beyond mid-river, and about a quarter of a mile from the Newburgh shore, signals were again exchanged; the Rensselaer blowing two whistles and the Orange blowing one whistle. After this alarm whistles were blown by the Rensselaer and she stopped and backed. No alarm whistles were sounded by the ferryboat, but her engines were backed before the collision.

The evidence warrants the assertion that the Rensselaer had overcome her headway at the time of the collision. By her signal of one whistle the Orange indicated that she appreciated and knew the necessity for precaution and that necessitated signalling. Her one whistle meant that she would maintain her course and speed; but she changed her speed after giving a jingle bell, and this change admittedly made her go faster. She proceeded a quarter of a mile from the Beacon slip under ordinary full speed, and then increased her speed when she was about 25 feet away from the Rensselaer under the hook-up signal. The Rensselaer had the right to rely, to some extent, upon the Orange's signal of one whistle after she left the slip. The navigator of the Rensselaer was justified in taking this into his calculations. He then pursued the course with intent to cross the bow of the Orange. He could have, with safety, chosen a course so as to go under the stern of the Orange. But the Rensselaer could not be charged with knowledge of the hook-up bell which was sent down to the engine room of the Orange. For the Orange to increase her speed after the exchange of signals, as she did, contributed to the happening of the collision. She violated a statutory duty (section 7895, U. S. Compiled Statutes) providing that where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed, and thus cast the burden upon her of showing such violations did not and could not have contributed to the collision. The Pennsylvania, 19 Wall. (86 U. S. 125, 22 L. Ed. 148; The Delaware, 161 U. S. 459, 16 Sup. Ct. 516, 40 L. Ed. 771.

The navigator of the Orange says he saw the Rensselaer when she

was 1¼ miles south of him, at which time only her head, staff, and green lights were showing, but no red light, and in response to his first signal the Rensselaer replied with one whistle, which gave notice that the Rensselaer intended to pass under the stern in accordance with the rules of navigation; but when he blew his second whistle to the Rensselaer, he could not see her red light. This was an indication to him that the Rensselaer was not navigating in conformity to the signal, and the navigator admitted that before he blew his second whistle the Rensselaer appeared to be changing her course toward the westward. The captain of the Rensselaer confirmed this change of course, testifying that he steered closer to the Newburgh shore. If the speed of the Orange had not been increased, as it was, the collision might have been avoided. The Orange's navigator, when more than 1,000 feet from the point of collision, must have known that the Rensselaer did not intend to turn to the starboard, but, indeed, was going to port. Thus there was presented to the Orange a vessel which was disregarding signals, whose position and movements were uncertain, and she was bound to conform to the statutory rule. The night was clear, the river was free from other craft, and full opportunity was given to the Orange to navigate accordingly. We think that the Orange contributed to the bringing about of the collision by her navigation.

The court below held the Rensselaer at fault. She was at fault. The Rensselaer was the burdened vessel, and should have passed under the stern of the Orange. Her attempt to cross her bow was negligent. She saw the Orange leave her slip at Beacon, and heard the slip whistle with her pilot handling the wheel. She was going at full speed, or about 15 miles per hour. Thus proceeding up the river off the Newburgh shore, not more than 1,000 feet under full speed, she was obligated to keep out of the way of the Orange. She had been notified by signal that the Orange insisted upon her rights under the rule, and would not give way to her. She starboarded her helm, and drew in closer to Newburgh in her effort to cross the Orange's bow, in violation of the statute. She made no effort to avoid the collision until the alarm was sounded, when she reversed her engines. This conduct condemns her navigation, and makes her responsible in contributing to the collision. The Chicago, 125 Fed. 712, 60 C. C. A. 480; The Cygnus, 142 Fed. 85, 73 C. C. A. 309; The Scranton, 221 Fed. 609, 137 C. C. A. 333.

This was a fault for which there is no justification, even though there was a change in speed on the part of the Orange, as we have found.

The decree is modified, so as to hold both vessels at fault.

THE PLYMOUTH.
THE NORTHLAND.

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

Nos. 78, 79.

1. **Collision ⇐90—Statute limiting rate of "speed" refers to speed over ground.**
Laws N. Y. 1882, c. 410, § 757, providing that steamers shall not be propelled in East River below Corlears Hook at a greater rate of speed than eight miles an hour, means speed over the ground, including the speed of the tide.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Speed.]

2. **Admiralty ⇐109—Vessel cannot rely on fault of another intentionally not assigned.**
Where both vessels violated the statute limiting their speed, but the overtaking vessel deliberately refrained from charging the overtaken vessel with negligence on that ground, and assigned no error in connection with it, she cannot on appeal avail herself of it as a fault.

3. **Collision ⇐94—Overtaking vessel held at fault for speed, for failure to get passing assent, and for crowding.**
A steamship, which undertook to pass another going in the same direction while rounding Corlears Hook, *held* at fault for violating the state statute limiting speed at that point, for attempting to pass the vessel ahead without getting the assent of the other vessel, as required by Inland Regulations, rule 8, and for crowding the overtaken vessel too close to the shore, so as to compel her to reverse, as a result of which she collided with a tug following her.

4. **Collision ⇐94—Overtaken vessel held at fault for not sooner reversing.**
A vessel, which collided with a following tug when she was compelled to reverse suddenly on being crowded too close to the shore by another overtaking steamer, *held* at fault for not sooner reversing when she saw that the other steamship was intending to pass without getting her assent, and knew that the traffic ahead made such an attempt dangerous.

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

In Admiralty. Separate libels by the Erie Railroad Company against the steamer Plymouth, the New England Steamship Company, claimant, in which the steamer Northland, the Eastern Steamship Corporation, claimant, was brought in under the fifty-ninth rule, and by the New England Steamship Company against the steamer Northland, the Eastern Steamship Corporation, claimant, in which the steam tug Albert J. Stone was brought in under the fifty-ninth rule. From decrees against the Northland for the damages, both to the Stone and the Plymouth, the claimant of that vessel appeals. Reversed, with directions.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City (Robert S. Erskine, of New York City, of counsel), for the Northland.

Haight, Sandford, Smith & Griffen, of New York City (John W. Griffen, of New York City, of counsel), for the Plymouth.

Park & Mattison, of New York City (Henry E. Mattison, of New York City, of counsel), for the Albert J. Stone.

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

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. April 15, 1916, at five p. m. the side-wheel passenger steamer Plymouth, about 350 feet long, left her berth at Pier 15, North River, bound on her regular trip to Fall River. At the same time the single screw steamer Northland, 330 feet long, left her berth at Pier 19, North River, some distance higher up, bound on one of her regular trips to Portland.

The Plymouth is a 15-knot and the Northland a 17-knot, boat, and each knew exactly where the other was going, and particularly that each would have to round Corlears Hook on a starboard helm. It was stipulated that the flood tide was running there at 4-knot strength straight along the New York shore over to a point a little below the ferry slips on the Brooklyn side. The vessels reached that point at about 5:20 p. m.

What there happened was that the Northland passed ahead of the Plymouth and then starboarded to go up the river on the Brooklyn side. The master of the Plymouth says he ported to prevent her bow from being carried to port by the suction of the Northland's propeller, and was so crowded over to the Brooklyn shore that he could not turn up the river on a starboard helm, and was only prevented from running into the Brooklyn ferry slips by reversing full speed astern. As she came astern, the Plymouth struck the tug Albert J. Stone, proceeding up the river with a hawser tow, causing considerable damage, to recover which this libel was filed by the Erie Railroad Company, owner of the tug, against the Plymouth, who brought in the Northland under the fifty-ninth rule. The owner of the Plymouth subsequently libeled the Northland, which brought in the tug Stone under the fifty-ninth rule.

As the two steamers were passing between Brooklyn and Manhattan Bridges, they saw the Brooklyn side of the river was quite congested with traffic. A Red Star tug with a hawser tow was going up; a little above and to the starbord of her the libelant's tug Stone, with a hawser tow of three boats abreast, was also going up; a little above and to the port of her the ferryboat Maine was on her way up from the Roosevelt Street ferry on the New York shore to her slip on the Brooklyn shore; to the starboard of the ferryboat, New York & New Haven Transfer No. 11, with a carfloat on each side, was going up; close in to the ferry slips on the Brooklyn side the tug Pioneer was coming down; on the New York side a transfer with two car floats was rounding Corlears Hook.

[1, 2] Section 757 of chapter 410 of the Laws of 1882, the New York City Consolidation Act, provides that steamers shall not be "propelled" in the East River below Corlears Hook at a greater rate of speed than 8 miles an hour. We think such speed means over the ground and includes the tide. Both vessels violated the statute. But as the Northland carefully and deliberately refrained from charging the Plymouth with negligence on this ground, and has assigned no error in connection with it, she cannot avail of it as a fault.

The principal dispute was as to the violation of rule 8 of the Inland

Regulations: First, whether the Northland or the Plymouth was the overtaking vessel, it being admitted that the overtaking vessel did not blow any signal and passed ahead without getting the assent of the overtaken vessel; and, second, whether the Northland crowded the Plymouth into the Brooklyn shore. The trial judge dismissed the libel of the Erie Railroad Company, owner of the tug Stone, against the Plymouth, and entered a decree against the Northland for the damages both of the Stone and the Plymouth.

[3] We adopt the findings of the District Judge that the Northland violated the provisions of the New York Consolidation Act in respect to speed in the East River below Corlears Hook; that she was the overtaking vessel and violated rule 8 by passing the Plymouth without blowing a signal and receiving her assent and in crowding the Plymouth into the Brooklyn shore.

[4] There remains the inquiry whether the Plymouth was free from fault. Her liability depends upon whether she stopped and reversed as seasonably as she should have done under the circumstances, and we are of opinion that she did not. Her log shows that the Northland was seen coming up on her port quarter when she was abreast of Pier 20 below the Brooklyn Bridge. A considerable turn on the starboard helm is necessary in rounding Corlears Hook. The master, knowing that the Northland was a faster boat and was overtaking the Plymouth, and seeing that there was a great congestion of vessels ahead going up the river, ought for the protection of those vessels to have stopped and reversed sooner, notwithstanding that the Northland was violating the overtaking rule in passing without his assent. The engineers of the Plymouth were not called as witnesses. No log showing the orders to the engine room was produced, nor any evidence given that her engines were stopped and reversed before the two steamers reached the point where it was necessary to starboard in order to round the Hook. Had this been seasonably done, the whole mixup would have been avoided.

We discover no fault on the part of the Stone, which, though an overtaking vessel, had no reason to expect that the Plymouth would stop and back into her. With a hawser tow, on a flood tide, she could do little to keep out of the way.

The decrees are reversed, and the court below directed to enter a decree in favor of the Erie Railroad Company, owner of the tug Albert J. Stone, against the steamers Plymouth and Northland, their claimants and stipulators, and in favor of the New England Steamship Company, owner of the steamship Plymouth, for one-half her damages against the steamer Northland, her claimants and stipulators.

GLYNN v. MAY.

(Circuit Court of Appeals, Seventh Circuit. January 4, 1921.)

No. 2791.

1. **Appeal and error ⊂=1002—Verdict supported by contradicted evidence cannot be disturbed.**
   In action for broker's commission, where there was ample evidence to sustain a finding of employment of plaintiff until the consummation of the sale, and that the broker was the procuring cause of the sale, though there was a sharp conflict in the testimony on these two points, a verdict and judgment for plaintiff cannot be disturbed.
2. **Appeal and error ⊂=216(6)—Exception to refusal to charge as requested held necessary to review.**
   Where at the close of the evidence defendant made certain requests for instructions, and at the conclusion of the charge defendant made but one suggestion, which was adopted by the court, and no exception was taken to the charge as given, assignments of error to the court's failure to give instructions first requested cannot be considered.
3. **Brokers ⊂=86(1)—Evidence held to show continuance of employment until sale.**
   In an action for a broker's commission, where the sale was not consummated until more than four years after the original oral employment, evidence that the employment had continued until negotiations with the purchaser were begun, and that the owner had recognized the agency while final negotiations were in progress, *held* to sustain the verdict finding the original employment continued until sale.
4. **Constitutional law ⊂=146—Statute requiring written contract for broker's commission cannot impair existing contracts.**
   Wisconsin Brokerage Law of May 15, 1917, requiring contract to pay a commission to a real estate broker to be in writing, cannot be so construed as to impair the obligations of an oral contract in force between the parties at the time of its enactment, and which continued until the sale was completed.

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

Action by Alexander J. May against Patrick Glynn. Judgment for plaintiff, and defendant brings error. Affirmed.

Joseph Martin and G. F. Clifford, both of Green Bay, Wis., for plaintiff in error.

Francis S. Bradford, of Appleton, Wis., and Henry F. Cochems, of Milwaukee, Wis., for defendant in error.

Before BAKER and ALSCHULER, Circuit Judges, and FITZHENRY, District Judge.

FITZHENRY, District Judge. This is an action to recover a broker's commission for the sale of 13,099 acres of Alabama timber land. Plaintiff in error, Patrick Glynn, denied the employment of defendant in error, Alexander J. May, and contended that he was not the procuring cause of the sale. Upon the issues as joined a jury heard the evidence, found a verdict in favor of defendant in error, upon which the trial court entered judgment, to set aside which this writ of error was sued out.

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

Plaintiff in error assigns improper rulings of the trial court upon the admission and exclusion of testimony, the failure to give certain instructions as to the law to the jury, which were tendered at the conclusion of the testimony and before the arguments of counsel, and that the verdict is contrary to the law and evidence.

[1] Upon a careful examination of the record, it is apparent there was ample evidence to sustain a finding by the jury that Glynn not only employed May in the summer of 1914 to find a buyer for the Alabama timber land, and that it was a continuous, subsisting employment until the consummation of the sale, but also that May was the procuring cause of the sale of the land to W. H. Hatton, for the Ingram-Day Lumber Company of Lima, Miss. There was a sharp conflict in the testimony on these two questions. The jury adopted the view of the evidence favorable to the contention of the plaintiff, the defendant in error here, and, if the case was properly submitted to the jury, the verdict and judgment thereon must be permitted to stand.

The assignments of error based upon rulings of the court upon the admission and exclusion of testimony cannot be sustained. In the rulings complained of the trial court committed no reversible error.

[2] The other assignments urged here are based upon the failure of the court to give instructions requested by the defendant's counsel at the conclusion of the evidence. So far as any of them contained law applicable to this case, they were fully covered by the general charge given by the court. At the conclusion of the instruction of the jury but one suggestion was made by counsel for plaintiff in error, and it was adopted by the court and given to the jury, and no exception was taken to the charge as given. Alleged errors of this character cannot be raised, upon review, for the first time.

The fourteenth assignment of error complained of the refusal of the court to give an instruction that—

"If you find that the contract was so terminated by the failure of the plaintiff to procure a purchaser, ready, willing, and able to purchase within a reasonable time, if any new contract or extension of time was given after May 15, 1917, then such extension of time or new contract would be void as being in violation of the Brokerage Contract Law, which requires such contracts to be in writing."

The Brokerage Law referred to is the Act of May 15, 1917 (Acts 1917, c. 221), being section 2305m of the Revised Statutes of Wisconsin. This statute in effect provides that every contract to pay a commission to a real estate agent or broker or to any person for selling or buying real estate shall be void, unless such contract or some note or memorandum thereof, describing the real estate, expressing the price for which the same may be sold or purchased, the commission to be paid, and the period during which the agent or broker shall procure a buyer or seller, be in writing and be subscribed by the person agreeing to pay such commission.

At the conclusion of the instruction of the jury by the court, counsel for the plaintiff in error suggested that the court should instruct the jury that the burden of the proof is on the plaintiff to show that this contract was in existence, and, further, if it existed, that the burden

of proof is on the plaintiff to show that it continued from 1914 to 1918. It was the theory of the defendant in error throughout the trial that the contract was originally made in 1914, before the enactment of the Wisconsin Brokerage Law, and that it continued up to the time of the sale of the lands. The conversations upon which May relied for the establishment of his contract in 1914 and referring to it in subsequent years were all denied by Glynn. It is also shown by the evidence that after the purchaser had become interested in the deal and while the timber was being rechecked by May, who was living, during the work, with a Mr. Loeper in Washington county, Ala., Glynn appeared at the Loeper home and asked May, "How are you (meaning May and Mitchell, the purchaser's agent) getting along?" To which May replied in substance, Pretty well, and things look pretty good; that Mitchell had him rechecking, and that he came to Loeper's to get his (May's) estimate and seemed to be well satisfied, and that he (May) supposed the deal would go through. Whereupon Glynn stated:

"You will be well paid if it goes through. Keep after it; you will get a handsome commission if it goes through."

[3, 4] After the suggestion of counsel for plaintiff in error the court again instructed the jury that the burden was upon the plaintiff to show that this contract was a subsisting relation between the plaintiff and defendant at or about March, 1918. So there was not only evidence tending to support the plaintiff's contention that there was a subsisting, continuing contract made in 1914 in force in March, 1918, at the time of the making of the sale, but also that there was an express reiteration of it made in Alabama at the time the final negotiations were in progress. If there was a subsisting, continuing contract in force between the parties at the time of the enactment of the Wisconsin Brokerage Law, and the jury so found, of course the statute could not be so construed as to impair the obligations of such contract.

The verdict of the jury is fully sustained by the law and the evidence, and the judgment entered thereon is accordingly,

Affirmed.

In re PERPALL.

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

No. 131.

1. **Bankruptcy ⟸117(2)—Bankrupt may make valid transfer after filing of petition.**

The title to a bankrupt's property remains in him until his adjudication, and a transfer of property by him after filing of the petition, but before adjudication, is not necessarily void.

2. **Bankruptcy ⟸165(3)—Payment by bankrupt for value received at the time not a "preference."**

Where bankrupt, a broker, on the day of the filing of his petition in bankruptcy, obtained delivery of bonds at his office by messenger on promise of cash payment, a check given in part payment on the same day,

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

though after filing of the petition, *held* not a "preference," under Bankruptcy Act, § 60a (Comp. St. § 9644), for preference implies paying or securing a pre-existing debt of a person preferred, and where one gives an insolvent person value for a transfer of property, or where he makes an exchange of property, there is no preference.

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

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

In matter of Clarence C. Perpall, doing business as Clarence C. Perpall & Co., bankrupt, C. E. Welles & Co. appeal from an order of the District Court. Reversed.

See, also, 261 Fed. 858.

Austin, McLanahan & Merritt, of New York City (Scott McLanahan, of New York City, of counsel), for appellant.

Rosenberg & Ball, of New York City (David W. Kahn, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. Clarence C. Perpall, doing business as Clarence C. Perpall & Co., was adjudicated a bankrupt on the 15th of July, 1918, and a trustee in bankruptcy was subsequently appointed. This proceeding was begun by the filing of a petition by the trustee with the referee, praying for an order requiring C. E. Welles & Co., the appellant to pay over to the trustee the sum of $2,064, with interest from July 1, 1918. The members of appellant's firm are and have been members of the New York Stock Exchange, engaged in business as stock brokers, and had business dealings with the bankrupt. On July 1, 1918, the bankrupt owed the appellant $26,741.26 on one account, and $12,279.80 on another or special account. The appellant held, as collateral security, stocks and bonds, including $5,000 of the Chesapeake & Ohio Railroad Company Convertible 5's and $11,000 Southern Railway First Mortgage 5's.

On the morning of the bankruptcy proceedings, at 10 o'clock, the cashier of the bankrupt asked the cashier of the appellant to deliver to the bankrupt the above-mentioned bonds. Later, in compliance with this request, the bonds were delivered to the bankrupt. The messenger testified that he took these bonds and a memorandum to the office of the bankrupt and delivered them there at 10:30 o'clock. He was told to return at 11 o'clock and receive his check. He did so, and was then told to come back an hour later that the bankrupt would give the check in payment for the bonds. This was reported to the appellant, and a member of that firm went to the office of the bankrupt at 1 o'clock and demanded that he pay him $14,000 or return the bonds. It was then stated by the bankrupt's cashier that he could do nothing about the matter then, as he did not have the check or bonds. The member of the appellant's firm then talked with the bankrupt on the telephone and received a promise that he would "fix him up during the day."

At about 3 o'clock, the same member of appellant's firm talked with the bankrupt and was advised that there was a check at the bankrupt's office for him. The amount was not specified, but he immediately went to the office of the bankrupt and was handed a check for $2,064, made to the order of the bankrupt by another brokerage firm. It was not indorsed. It was then taken to the office of the bankrupt's attorney, wnere the bankrupt was, who indorsed it, and the check was then retained by the appellants. At 10 minutes past 3 that same day a petition in bankruptcy was filed. The bonds, after being received by the bankrupt, were immediately handed over to customers of the bankrupt, for whom bonds were bought by the bankrupt some months previous. A petition was filed by the trustee, praying for an order requiring the appellant to pay over to the trustee $2,064, with interest. It has resulted in the order appealed from.

[1] The court below held that the money transferred, having been paid over after the filing of the petition in bankruptcy, is not recoverable by the appellant because the transaction constituted a voidable preference under section 60 of the Bankruptcy Act (Comp. St. § 9644). But a transfer made by a bankrupt subsequent to the filing of the petition, is not necessarily void. It is merely voidable, if made under such circumstances as to constitute such transfer of preference to the transferee within the provisions of section 60a and section 60b of the Bankruptcy Act. In re Zotti, 186 Fed. 84, 108 C. C. A. 196, Ann. Cas. 1914A, 240. Until adjudication in bankruptcy, the title of the bankrupt's property remains in the bankrupt, and a valid transfer can be made by him. Johnson v. Collier, 222 U. S. 538, 32 Sup. Ct. 104, 56 L. Ed. 306; Matter of Mertens, 142 Fed. 445, 73 C. C. A. 561.

[2] Section 60a provides:

"A person shall be deemed to have given a preference if, being insolvent, he has * * * after the filing of the petition and before the adjudication * * * made a transfer of any of his property, and the effect of the enforcement of such * * * 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."

The Bankruptcy Act does not provide that any and all transfers made by the bankrupt subsequent to the filing of the petition and prior to the adjudication are absolutely void. The act provides that transfers may be voided by the trustee if they constitute a preference, and a preference is described by the act. It is only preferential transfers which are voidable. Preference implies paying or securing a preexisting debt of a person preferred. Dean v. Davis, 242 U. S. 438, 37 Sup. Ct. 130, 61 L. Ed. 419. Where one gives an insolvent person value for a transfer of property, where he makes an exchange of property, there is no preference. Ernst v. Bank, 201 Fed. 664, 120 C. C. A. 92.

Payment by the bankrupt on the day of the filing of the petition was, in effect, a cash transaction, and was in return for an adequate consideration received by the bankrupt at the time. The delivery of the stock and the receipt of the check on the same day should be regarded as one transaction. The fact that a few hours transpired, and

they could not be said to be literally contemporaneously made, was because of the nature of the business transacted and the practice that prevailed as the custom of this business. We held In re Perpall (Hammerslough) 256 Fed. 759, 168 C. C. A. 104, that the seller of a bond did not waive payment as a condition precedent to passing title where his messenger delivered a bond to a broker, and another messenger, according to the usual business custom, called to receive payment a few hours later, after allowing time for the broker to make entries, execute a check, and make a record of the transaction.

We there affirmed an order sustaining the finding that the title did not pass until payment. We think that we are controlled by this authority, and on the facts as found in this record the order below was erroneous.

Order reversed.

KIMBALL et al. v. CHICAGO, R. I. & P. RY. CO.

(Circuit Court of Appeals, Eighth Circuit. January 24, 1921. Rehearing Denied April 5, 1921.)

No. 5174.

Carriers ⇐196—Finding as to classification of shipment sustained.

In an action by a railroad company to recover freight on a shipment of granite, the question in issue being whether it should be classified as "monuments—granite, * * *" or at a lesser rate as "* * * granite * * * blocks, slabs or pieces," a finding by the court, to which the case was tried by stipulation, that the shipment should be classified as monuments, *held* sustained by the evidence, where it was billed as monuments, and defendant admitted that it was "in some stage of preparation for monuments," and in the absence of any evidence as to what work had been done on the stone or what remained to be done to complete the monuments.

Stone, Circuit Judge, dissenting.

In Error to the District Court of the United States for the District of Nebraska; Joseph W. Woodrough, Judge.

Action at law by the Chicago, Rock Island & Pacific Railway Company against Fred L. Kimball and others, partners as Kimball Bros. Judgment for plaintiff, and defendants bring error. Affirmed.

James A. Brown and Thomas F. A. Williams, both of Lincoln, Neb. (Lionel C. Burr, of Lincoln, Neb., on the brief), for plaintiffs in error.

E. P. Holmes, of Lincoln, Neb. (J. Lloyd McMaster, of Lincoln, Neb., on the brief), for defendant in error.

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

AMIDON, District Judge. This is an action at law brought by the Chicago, Rock Island & Pacific Railway Company against the defendant, to recover a balance claimed to be due the plaintiff upon shipments

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of granite monuments and dressed granite from the state of Vermont to Lincoln, Neb. At the conclusion of all the evidence motions for a directed verdict were made by both parties. Thereupon, by consent of both parties, the jury was excused and the case submitted to the court. The court directed judgment in favor of the railroad company, to review which defendants sued out the present writ of error.

The case turns upon whether the property shipped belongs in the fifth class, which carries a rate of 51 cents, or in the sixth class, which carries a rate of 41 cents. The schedules filed with the Interstate Commerce Commission describe the material falling within the fifth class as follows:

"Monuments—granite, marble or stone, artificial or natural, and parts thereof."

Material falling in the sixth class is described as follows:

"Marble, granite, jasper, onyx and stone, N. O. S., artificial or natural, blocks, slabs or pieces, polished, crated or boxed, carload, rough quarried, sawed, hammered, chiseled or dressed, not polished."

The language of the two classes is dark. It should have been explained by evidence showing accurately the condition of the granite and marble embraced in the shipments, and also differences between granite intended for building purposes and granite intended to be used in monuments. There should also have been evidence showing clearly the customs existing between the large manufacturers in the East, and the local monument firm as to preparing materials, either for standardizing monuments, or for parts of monuments more individual in their character. As to all these subjects there is no evidence, but the briefs are filled with references to them, apparently oblivious of the fact that we cannot take judicial notice of them. The answer is evasive. It contains this language:

"That some of the granite comes in the rough, some dressed or hammered or axed, and some partly polished, and the defendants allege and show that all said granite was material for use by defendants in the manufacture of tombstones, monuments, markers, or other memorials, and none of said material was *completely* finished for delivery to defendant's customers, but all of the same required work and labor thereon in defendant's said manufactory before it was finished and ready for sale to defendant's customers."

How nearly was this material completed? How much work had to be done upon it? Was it all ready to be placed in the cemetery, with the exception of the chiseling of the name of the deceased, and the date of death, or some other such slight work?

It is further admitted in the answer that all the bills of lading accompanying the shipments here involved described the material as "monuments."

The only evidence offered by plaintiff was the official classification from which we have already made the quotations.

It was then admitted that the rate on class 5 was 51 cents, and on class 6, 41 cents. The pleadings showed that defendants had paid at the lower rate, and the action was brought to recover the difference between 41 cents and 51 cents.

Upon the foregoing evidence and admission plaintiff rested. Both parties then moved the court for a directed verdict. The court then made the following statement:

"If the defendants will agree to it, I will permit a juror to be withdrawn at this time and wait for a brief to be filed; *upon the admission that all this granite was in some stage of preparation for monuments.*"

The bill of exceptions then proceeds as follows:

"The defendants, in line with the suggestion of the court, ask leave at this time to withdraw a juror, and that the case be continued to be taken up at the earliest possible convenience of the court."

This is an acceptance of the admission stated by the court. The court then said:

"The jury is excused, because both sides have asked the court to enter judgment, and I will excuse the jury and take the matter under advisement."

Thereafter the court made a general finding in favor of the plaintiff and entered judgment accordingly.

This record leaves the case in a mere welter of dialectics. None of the facts necessary for its intelligent decision have been shown. The power to produce proof as to the actual quality of the shipments was with the defendants rather than the plaintiff. It may be assumed that the wholesaler would so far co-operate with his customer as to make it difficult for the carrier to show the exact character of the granite.

We think the admission of the answer and the admission at the conclusion of the case which we have italicized, taken with the fact that the bills of lading classified all the shipments as monuments, makes out sufficient evidence to support the judgment. The burden in this court of showing that the judgment is erroneous, is upon the plaintiffs in error, and they have failed to meet that burden. We say this having clearly in mind the rule that a carrier cannot make a different rate for precisely the same article based solely upon the use to which the article is devoted. I. C. C. v. B. & O. R. R. Co., 225 U. S. 326, 32 Sup. Ct. 742, 56 L. Ed. 1107, Ann. Cas. 1914A, 504. It is contended by defendants that granite in various stages of finishing is regularly shipped, when used for building purposes, at 41 cents, and it is then insisted that the granite shipped to defendants does not greatly vary from the granite shipped to the building trade. The trouble with defendants' case is that there is no evidence here to guide us in passing upon any such question.

The judgment is

Affirmed.

STONE, Circuit Judge, dissents.

McCLAY v. FLEMING.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1921.)

No. 5630.

Appeal and error ⇐849(2)—Requests for findings necessary to review in case tried to court by stipulation.

Where an action at law is tried to the court by stipulation under Rev. St. §§ 649, 700 (Comp. St. §§ 1587, 1668), in the absence of any request by the defeated party for findings of fact or law in his favor and rulings thereon, there is no question for review by the appellate court, except as to the admission or rejection of evidence.

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

Action at law by W. S. Fleming against J. O. McClay. Judgment for plaintiff, and defendant brings error. Affirmed.

John A. Blevins, of St. Louis, Mo. (A. M. Keene, of Ft. Scott, Kan., on the brief), for plaintiff in error.

David N. Taylor, of Kansas City, Mo., for defendant in error.

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

CARLAND, Circuit Judge. This was an action at law, commenced by Fleming against McClay to recover the value of a stock of general merchandise delivered to McClay in pursuance of a contract that in consideration for said merchandise McClay would deliver to Fleming 49 shares of the capital stock of the Delphi Oil & Gas Company; Fleming claiming that he was entitled to rescind the contract for the nondelivery of the stock as agreed. A jury was duly waived, and the case tried to the court, which, after a consideration of the evidence, rendered judgment against McClay in the sum of $2,500. Counsel for Fleming has filed a motion to dismiss the writ of error for noncompliance with the rules of this court in regard to the assignments of error. The grounds of the motion are well taken. Rules 11 and 24 of this court (188 Fed. ix, xvi, 109 C. C. A. ix, xvi). The assignments of error present nothing for review.

There is, however, a more serious difficulty with the record because it goes to our jurisdiction to consider the case at all. There was no request by the defendant, before the court below rendered its judgment, to find the facts in his favor, or to declare the law in his favor, and of course no ruling by the court. If counsel would only consult the Revised Statutes of the United States, and the decisions of this court and of the Supreme Court, where the proper procedure to be taken in a trial to the court, where a jury is waived, in order to review alleged errors, is stated, this court would be saved much trouble and annoyance, and counsel could have their cases reviewed; but as long as they insist on ignoring the statutes and decisions there can be but one result. This court has at every term of court practical-

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ly spoken upon the subject. In Mason v. U. S., 219 Fed. 547, 135 C. C. A. 315, the cases both in the Supreme Court and this court are cited. At the present term in U. S. v. A., T. & S. F. Ry., 270 Fed. 1, decided January 12, 1921, the whole matter is discussed and decided in line with our previous decisions.

We think that, instead of dismissing the writ of error, the proper practice would be, upon reviewing the whole record, to affirm the judgment below; and it is so ordered.

BAKER v. BRYANT FERTILIZER CO.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1823.

Bankruptcy ⇐423(2)—Liability for misappropriating proceeds of assigned accounts not released by discharge.

Where plaintiff furnished defendant fertilizer for sale, under an agreement that it was to remain plaintiff's property until sold or settled for, and that all proceeds of sales, including accounts and collections, were to be held for its use and to be its property until all indebtedness was paid, and accounts from sales were assigned to plaintiff, but collected by defendant, defendant's liability, in suit for conversion for misappropriating the proceeds of collections, was not one released by defendant's discharge in bankruptcy.

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

Action by the Bryant Fertilizer Company against C. A. Baker. Judgment for plaintiff, and defendant brings error. Affirmed.

Thomas J. Kirkland and E. D. Blakeney, both of Camden, S. C., for plaintiff in error.

J. M. Lynch, of Florence, S. C. (Willcox & Willcox, of Florence, S. C., on the brief), for defendant in error.

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

KNAPP, Circuit Judge. Baker, plaintiff in error, was a merchant and dealer in fertilizers at Jefferson, S. C. Under contract of November, 1917, the Bryant Fertilizer Company furnished him with a large quantity of fertilizers, which he sold to his customers during the fertilizer season of 1918. The contract provided that until sold or settled for the fertilizers were to remain the property of the company, and that all proceeds of sales, including cash, open accounts, and collections therefrom, were to be kept separate and held for the use of the company and subject to its order, and were to be the property of the company until all indebtedness to it was paid.

In May, 1918, Baker's indebtedness amounted to $15,483.08, for which he gave three equal notes, payable at different dates. Then, on

July 13, he made a list of accounts arising from the sale of the fertilizers and assigned them in writing to the company, as called for by the contract. Afterwards he collected all these accounts, aggregating upwards of $17,000. He paid one of the notes and part of another; the balance of the proceeds he converted to his own use, and without excuse for so doing. The record indicates that he deliberately took the company's money and used it in cotton speculation. Sued for conversion, he sets up in defense that he has been adjudicated bankrupt, and that plaintiff's claim, being provable in bankruptcy, can be prosecuted only in the bankruptcy proceeding. Thus the sole question raised is whether a discharge in bankruptcy would release Baker from liability for the funds of the company which he has misappropriated.

We agree with the learned judge below that this question is answered in the negative by the Supreme Court in McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. 205; and on the authority of that case, which leaves no occasion for comment, the judgment will be affirmed.

THE LAKE MONROE.

MATHESON et al. v. UNITED STATES.

(Circuit Court of Appeals, First Circuit. March 15, 1921.)

No. 1484.

Admiralty ⊜118—Decision of trial court on conflicting oral evidence not reversed, unless clearly wrong.

Where the evidence in a collision case was in hopeless and irreconcilable conflict, and nearly all the testimony was oral, so that the District Judge had an opportunity of judging the credibility and accuracy of the witnesses, the decision of the trial court will not be reversed, unless it is clearly wrong.

Appeal from the District Court of the United States for the District of Massachusetts; James M. Morton, Judge.

Libel by John J. Matheson and others against the steamer Lake Monroe; the United States, claimant. From a decree dismissing the libel (270 Fed. 858), libelants appeal. Affirmed.

Edward E. Blodgett, of Boston, Mass. (Foye M. Murphy and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., on the brief), for appellants.

Louis Goldberg, Sp. Asst. U. S. Atty., of Boston, Mass. (Daniel J. Gallagher, U. S. Atty., of Boston, Mass., on the brief), for the United States.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

PER CURIAM. The evidence in this collision case is in hopeless and irreconcilable conflict. None of the differing accounts of the accident seem intrinsically probable. Nearly all the testimony was oral,

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and the judge of the District Court had the opportunity of judging the credibility and accuracy of the witnesses. It is therefore a case in which to apply the principle that the decision of the trial court should not be reversed, unless it is clearly wrong. The Parthian (C. C.) 48 Fed. 564. We are satisfied with the opinion and the conclusion of the learned District Judge.

The decree of the District Court is affirmed, with costs to the appellee in this court.

ROGERS BROWN & CO. v. TINDEL MORRIS CO.

(District Court, E. D. Pennsylvania. March 28, 1921.)

No. 2093.

1. **Pledges ⟸5, 56(1)—Debtor may pledge own bonds as collateral security for note.**
   A debtor may pledge his own mortgage bond as collateral security for a note executed by him, and the pledgee, having the right to receive and hold such a pledge, with the power to sell, has also the right to exercise the power.

2. **Receivers ⟸77(4)—Receiver of mortgaged property will not restrain sale of mortgage bonds pledged as collateral for debtor's note.**
   In receivership proceedings, a creditor of defendant will not be restrained from selling mortgage bonds of the defendant, pledged as collateral security for a note of the defendant, which bonds had never come into the possession and control of the court, which has possession of the property mortgaged, though it is asserted as a result of the sale, if made considerably below the par value of the bonds, the creditor may realize much more than the amount of the note.

In Equity. Suit by Rogers Brown & Co. against the Tindel Morris Company, in which receivers were appointed. On a motion for a restraining order to prevent the sale of bonds of defendant company, pledged by it to Fidelity Trust Company as collateral security for the defendant's note for a smaller amount. Motion denied.

J. B. Colahan, 3d, of Philadelphia, Pa., for receivers.
M. B. Saul, of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. The question involved in this motion is best presented by a contrast of the forecasted result of its allowance or denial. The pregnant facts are that the Fidelity Trust Company holds the defendant's note for $90,000, with the pledge of its mortgage bonds for $110,000 as collateral. If the collateral had not been sold, and the defendant were making payment, the utmost the creditor could lawfully demand or possibly receive would be $90,000. As, however, the court has taken upon itself the duty of making payment (assuming a sufficiency of assets), the asserted possible result of a sale of the collateral is that the $90,000 creditor may receive $310,000. Add the circumstance that the creditor holds other bonds of the same issue, and the possible demand is further expanded.

How can this financial miracle be wrought? The result is, of

course, dependent upon the sum for which the collateral and the mortgaged premises sell. If they sell for only a nominal sum, the result stated is asserted to be possible; if they sell at what is called par, there could be no such result. The court controls the sale of the mortgaged premises. The question is: Should it not exercise like control over the sale of the bonds? If the bonds were not the bonds of the defendant, but of a third party, it is admitted that the courts cannot, or at least should not, interfere. Why make a difference? The result is the same in kind, although (so far as affects the debtor) differing in degree, as in the latter case the limit of what might be received is $200,000, instead of $310,000. This difference in the figures is due to the circumstance that in the one case the chose in action sold is one against a third party; in the other, it is a chose in action against defendant. Does this make a difference in the legal rights of the creditor? The principle is that, having been given the right to sell, he should be permitted to exercise it. This is accorded him in other cases; why not, also, where a chose in action against the debtor is pledged?

[1] The answer to the question involved in this motion is thus seen to be dependent upon the answer to the other question of whether a debtor may pledge one promise to pay as collateral for another, thereby putting it within the asserted possible power of the creditor to double the indebtedness. In its concrete form, applied to the facts of this case, the question is: May a debtor pledge his own mortgage bond as collateral for his debt? The question has been authoritatively answered in the affirmative. Turner v. Metropolitan Trust Co., 207 Fed. 495, 125 C. C. A. 157. Having the right to receive and hold such a pledge, with the power to sell, the right to exercise the power follows. Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

[2] The argument that, because the mortgaged premises are in the hands of the court, the bonds cannot be sold, does not meet the point. The principle is wholly different. No court would permit its possession and control of property under its care to be disturbed; but, although the court has possession of the mortgaged premises, it has not of the bonds. The control pivots on the possession. The right and title (other than possession) is the same in the one case as in the other, because it is in each case the ownership subject to the pledge. The mortgagee has the power to sell the mortgaged premises, and, as against the owner, has the legal right to exercise the power. When, however, the court takes possession, it takes control, and as against the court the mortgagee cannot assert his rights.

The extension of the doctrine to every case of pledged property is not, however, even asserted. The courts have restricted its application, making possession the dividing line. Business has adapted its transactions to this line. To draw another between choses in action would be an innovation, and a disturbing one. Were it not for this, the thought that the debtor by duplicating his promise does not double his debt might be followed to its logical conclusion. The cases to which we have been referred, holding that the rights of creditors are fixed as of the date the court took control, or on a declaration of insol-

vency, and that a collateral holder may assert ownership, are of no help to us. Merrill v. Bank, 173 U. S. 171, 19 Sup. Ct. 360, 43 L. Ed. 640; Jerome v. McCarter, 94 U. S. 734, 24 L. Ed. 136.

We are not concerned with any question of the marshaling of assets, but with the right of the creditor to realize on his collateral. The sum realized may well depend upon the time when sold. The bonds now might sell for enough to pay the pledge. If sold later, they might bring less or more. The effect of a sale, with respect to the rights of the purchaser and of the creditor, as well as of other creditors on final distribution, must be left to await that event.

The motion for a restraining order is denied.

STARK v. PAYNE, Director General of Railroads.

(District Court, D. Montana. March 7, 1921.)

No. 843.

Railroads ⇐5½, New, vol. 6A Key-No. Series—Action under Transportation Act removable.

An action of tort brought against the Director General of Railroads, or the agent appointed under Transportation Act Feb. 28, 1920, § 206a, based on a cause of action arising out of the operation of a railroad while under federal control, *held* removable as one arising under the laws of the United States.

At Law. Action by Hilda M. Stark, administratrix, against John Barton Payne, Director General of Railroads. On motion to remand to state court. Denied.

C. E. Carlson and Geo. Y. Patten, both of Bozeman, Mont., for plaintiff.

Keister & Bath, of Bozeman, Mont., and Gunn, Rasch & Hall, of Helena, Mont., for defendant.

BOURQUIN, District Judge. Motion to remand, wherein the issue is whether removal can be had of an action for damages for the wrongful death of an employee, upon a railroad in federal control, alleged to be due to the control's negligence. Plaintiff contends that section 10 of the Federal Control Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾j) forbids removal of actions which, if against the carrier and before control, could not be removed; that being the character of this action by reason of the carrier's local incorporation. She further contends that section 206a of the Transportation Act (Act Feb. 28, 1920, c. 91, 41 Stat. 461) also precludes removal, in that it provides that like actions "may * * * be brought in any court which but for federal control would have had jurisdiction * * * against such carrier."

In the beginning Congress authorized the President, in war time and for and in behalf of the United States, to take, control, and utilize the railroads for governmental purposes, and he did so for near three

months prior to the Federal Control Act of March 21, 1918. Nothing therein indicated any change in the law of torts in relation to the United States and its agencies.

If the Federal Control Act accomplishes such change, to the extent that the United States and its agencies or either of them becomes liable for negligence in the operation of the railroads, and to actions sounding in tort, it is believed, with Nash's Case (D. C.) 260 Fed. 280, that it arises out of section 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾*l*), which provides that the moneys derived from operation are property of the United States, and shall be disbursed "in the same manner as before federal control and for such purposes as * * * are chargeable to operating expenses, * * * and for such other purposes in connection with federal control as the President may direct," and other analogous sections, justifying General Order No. 50, and not, as held by Hines' Case (C. C. A.) 267 Fed. 105, out of section 10.

Whether or not Congress had in mind any such change in the law by the Federal Control Act itself, or left the matter to the President's regulation or to future legislation, is difficult to determine. The act is so devoid of clarity, to put it mildly, that in their very real struggle to arrive at congressional intent, the courts are as excusably as hopelessly at variance—a situation that inspires appreciation of the English system, wherein all bills in Parliament are drafted by a permanent commission learned in the law.

It is true section 1 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115¾a) declares the railroads and systems of transportation are in the act called "carriers"; but it is equally true the word "carriers" is therein repeatedly used to denote the corporate or other owner of the railroads, viz.: In section 3 (section 3115¾c), providing for hearings to fix compensation to owners; in section 7 (section 3115¾g), relating to owners' issuance of securities; and in section 10 (section 3115¾j), relating to the President's certification that it is necessary to increase operating expenses to pay owners' compensation. It is also true "carriers" is as often used to denote the physical properties, but not the operator, which is but one, the United States.

Obviously section 10 does not purport to authorize actions in rem against the physical properties as such. If the intent is to leave the matter to the President's regulations, Order No. 50 is such regulation and authorizes such actions, within the mandatory duty imposed by section 12 and the like. If the intent is to leave the matter to future legislation, section 206a, supra, is such legislation, fairly construed, recognizing, creating the right, imposing the liability, changing the law, subjecting the United States to damages for negligence, to all variety of actions arising out of the control's operations, to actions sounding in tort; for the real defendant in interest is the United States, and it pays any adverse judgment.

This is tenable, even though section 206d recognizes like actions may theretofore have been brought, as they in fact were. Holding with Nash's Case, it follows section 10 has no application to the removability

of this and like cases. In reference to section 206a, it is permissive, and not mandatory; it relates to original jurisdiction, which it extends, and not to removal, which it does not restrict. But for it plaintiff might be constrained to sue at defendant's residence or in the federal court.

The action is a new species of the genus of removable cases, and the law of the latter opens to include it. In legal contemplation the United States is the real defendant. The liability is imposed upon it, and it will pay any judgment against defendant. All plaintiff's right is created by federal law, though admeasured by state law. Hence the case arises under the laws of the United States, and is removable, regardless of citizenship. See Macon Co. v. Ry. Co., 215 U. S. 501, 30 Sup. Ct. 184, 54 L. Ed. 300; Blevins v. Hines (D. C.) 264 Fed. 1008; Westbrook v. Dirctr. General (D. C.) 263 Fed. 211.

Remand is denied.

DEARBORN PUB. CO. v. FITZGERALD, Mayor, et al.

(District Court, N. D. Ohio, E. D. April 16, 1921.)

No. 621.

1. **Injunction ⊂=105(1)—Unfounded criminal prosecution restrained, to prevent multiplicity of suits and irreparable injury.**
   A continuing course of conduct in instituting prosecutions, not supported by a valid constitutional law or ordinance, or in excess of authority conferred by any valid law or ordinance can be enjoined, to prevent the multiplicity of actions, which would be necessary to redress the continuing wrongs, and to prevent irreparable injury by the infliction of damages not susceptible of accurate ascertainment at law.

2. **States ⊂=191(2)—United States ⊂=125—Suit to restrain unauthorized prosecution held not suit against state or United States.**
   Institution of prosecutions, unsupported by a valid constitutional law, or in excess of authority conferred by law, by either a federal, state, or municipal officer, is regarded as in excess of the authority vested in the officer, so that a suit to restrain such a prosecution is not a suit against the United States or a state.

3. **Libel and slander ⊂=146—Obscenity ⊂=7—Publication of article attacking Jews is not obscene or scandalous.**
   A publication of articles in a paper, attacking the Jews as a race, is not indecent, obscene, or scandalous, within a city ordinance prohibiting the offering for sale of a publication containing indecent, obscene, or scandalous articles.

4. **Municipal corporations ⊂=622—City cannot forbid in advance sale of publication because of prohibited articles.**
   The limit of a city's power to enforce an ordinance prohibiting the sale of obscene or scandalous publication is to conduct a prosecution for the specific offense thus committed. It cannot, by establishment of a censorship in advance of future publications, prohibit generally the sale thereof upon the streets.

5. **Newspapers ⊂=6½—Sale of paper attacking Jews cannot be prohibited, to prevent breaches of the peace.**
   The sale of a newspaper containing articles attacking the Jews as a race cannot be prohibited on the streets of a city, under an ordinance forbidding the sale of publications tending to promote breaches of the

peace, since it cannot be assumed that members of that race will resort to violence to stop the sale, or that others will be thereby incited to commit violence against the Jews.

6. Constitutional law ⊂=90—Prohibiting sale of paper attacking race violates freedom of the press.

The action of the city officials in prohibiting the sale on city streets of newspapers containing articles attacking the Jewish race, because of disapproval of those articles, is a violation of the right of the freedom of the press.

In Equity. Suit by the Dearborn Publishing Company against W. S. Fitzgerald, individually and as Mayor of the City of Cleveland, and others. On plaintiff's motion for preliminary injunction, and defendants' motion to dismiss the bill for lack of jurisdiction and want of equity. Preliminary injunction granted.

Squire, Sanders & Dempsey, of Cleveland, Ohio (William Lucking, of Detroit, Mich., of counsel), for plaintiff.

William B. Woods, Director of Law, of Cleveland, Ohio, for defendants.

WESTENHAVER, District Judge. This cause has been heard and submitted upon plaintiff's motion for a preliminary injunction, and upon defendants' motion to dismiss the bill for lack of jurisdiction and want of equity. The motion for a preliminary injunction was heard upon affidavits. The facts essential to a decision of the questions involved are not in dispute, and both motions can be disposed of together.

Plaintiff publishes a weekly newspaper called the Dearborn Independent. On and prior to March 14, 1921, copies of this newspaper were sold by venders upon the streets of Cleveland in the same manner as are sold local and other daily and weekly newspapers. On this date, four persons thus employed were arrested by order of the defendant Frank Smith, chief of police, acting under the express direction of the other two defendants. They were, after their arrest, charged by warrant and are now held for trial upon a criminal charge of offering for sale a certain indecent and scandalous publication, to wit, the Dearborn Independent; the same being calculated to excite scandal and having a tendency to create breaches of the peace, in violation of section 1770, Rev. Ord. of the City of Cleveland. A copy of the issue of March 12, 1921, was attached to and made a part of the warrant, and is now exhibited with the bill. The article therein, upon which the warrant is based, is found on pages 8 and 9, and is entitled "Jewish Rights Clash with American Rights." No trial has yet been had of these criminal charges.

Immediately thereafter, and upon application of plaintiff's representatives to defendants, they were notified by the latter that no further sales of the Dearborn Independent would be permitted upon the streets of Cleveland; that, if such sales were attempted at any time, the persons so attempting would be immediately arrested; that such sales would be regarded as unlawful and contrary to the ordinance above referred to, but that no objection to such sales would be made if the so-called anti-Semitic or anti-Jewish articles appearing therein

were omitted. Its sale at news stands and in shops, however, was not forbidden, and has not been interfered with. Upon this hearing the defendants do not deny these allegations. The affidavit of Mayor Fitzgerald, the only one filed on behalf of defendants, admits their substantial accuracy, and attempts only to justify such action on the ground that these articles would tend to create religious and racial dissensions, and have a tendency to create breaches of the peace. As a result, plaintiff's publication has been excluded from sale by news venders on the city streets, and its circulation reduced approximately three-fourths.

The article in the issue of March 12 has been examined. Earlier issues have not been exhibited or offered in evidence, but it may be assumed that they are of the same general type, and equally vicious or equally harmless, according to the personal views of the reader. An examination of the evidence convinces me that defendants' action was taken with the intent and purpose of preventing sales of the plaintiff's newspaper on the streets only because it contained these articles; that such action was not with a view to preventing the sale of indecent, obscene, or scandalous publications, the sale of which is forbidden by section 1770; that such action was not directed towards preserving the public peace of the city, and was not in any wise necessary to prevent any breach of the peace. The necessary effect of such action is to censor in advance the contents of the newspaper, by preventing its sale in the same manner as all other newspapers are sold, so long as it contains articles of like character. The questions of law are whether this action is without valid legal support, and, if so, whether a court of equity has jurisdiction by injunction to prevent it.

[1] Defendants' motion to dismiss raises several objections to the granting of relief, of which, however, it is necessary to consider separately only the objection that a court of equity cannot take jurisdiction, because so to do would be to enjoin the prosecution of a criminal action. This objection is without merit. Plaintiff disclaims any desire to enjoin the prosecution of the pending charges. If the only injury complained of was the further prosecution of those charges, plaintiff's remedy at law by a defense thereto might be regarded as adequate. Defendants' action, however, prevents other sales from time to time and from week to week. This is a continuing course of conduct, and, if not supported by a valid constitutional law, or is in excess of authority conferred on them by any valid law or ordinance, becomes a continuing and repeated wrong. In this situation a court of equity has from time immemorial granted relief upon two well-established principles. One is the multiplicity of actions which would be necessary to redress a continuing and repeated wrong; and the other is the irreparable nature of the injury inflicted, in that the damage is not susceptible of accurate ascertainment at law.

[2] This case is well within the numerous decisions sustaining the jurisdiction of a court of equity to grant relief upon either the one or the other of these principles, notwithstanding it may be necessary to enjoin pending or threatened criminal prosecutions under unconstitutional or invalid statutes or ordinances. In such cases the actions

of federal, state, or municipal officials are regarded as being in excess of any lawful power or authority vested in them, and suits against them are not regarded as suits against a state, or to restrain the prosecution of suits in a state court. See Ex parte Young, 209 U. S. 155, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570; Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, Ann. Cas. 1917B, 283; C. A. Weed & Co. v. Lockwood (2 C. C. A.) 266 Fed. 785; Star Co. v. Brush, 185 App. Div. 261, 172 N. Y. Supp. 851.

The case last cited sustains the jurisdiction of a court of equity, and adjudges the actions of a city, precisely like that here complained of, to be illegal. Judge Manton's opinion in the Weed Case is clearly my understanding of the law applicable to suits in equity to enjoin federal, state, and city officials, when acting under invalid statutes or ordinances, or in excess of any lawful power vested in them. The judgment in this case was reversed by the United States Supreme Court only because it held the act of Congress, popularly known as the Lever Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛e–3115⅛kk, 3115⅛l–3115⅛r), to be constitutional; but the law of it was approved, so far as it relates to the powers of a court of equity. See opinion of Chief Justice White, filed February 28, 1921.

Arbuckle v. Blackburn (6 C. C. A.) 113 Fed. 616, 51 C. C. A. 122, 65 L. R. A. 864, much relied on by defendants, is authority only for the proposition that, if an indictment is found under a constitutional statute, a court of equity will not try the issue of the defendant's guilt or innocence as a condition upon which to grant equitable relief by injunction.

Upon the merits, plaintiff plainly is entitled to relief. Two grounds of relief are urged, with respect to which no opinion need be expressed. One is that its method of selling its publication by agents employed by it upon the city streets of Cleveland is interstate commerce, with which defendants have no right to interfere. Another is that section 1770, Rev. Ord. of the City of Cleveland, is invalid, because not within the legislative power delegated by statute to cities of Ohio at the time it was enacted, and that, being invalid when enacted for want of such power, it is not made valid by that provision of the Home Rule Charter of the city of Cleveland continuing in force all existing ordinances. A decision of these two contentions is not necessary to a decision of this case.

[3, 4] Section 1770, if valid and in force, does not authorize or justify defendants' conduct. The publication complained of cannot by any stretch of the imagination be classified as indecent, obscene, or scandalous; but, if it were, the limit of the city's power would be to conduct a prosecution for the specific offense thus committed, and not the establishment of a censorship in advance of future publications, and prohibition generally of the sale thereof upon the streets, in the same manner as other publications may be sold. That the real basis of defendants' action is not the indecent, obscene, or scandalous character of the publication is further evidenced by their action in

permitting its sale at news stands or in shops, without any effort to prosecute therefor; whereas, under section 1770, it would be as much an offense to sell at a news stand or in a shop an indecent, obscene, or scandalous publication as it is to sell it upon the city streets.

[5] That the publication has a tendency to create breaches of the peace is equally without foundation in fact or in law. Assuming that section 1770 is sufficiently definite in this respect to be valid—an assumption which may well be doubted, in view of the adjudged cases (see U. S. v. L. Cohen Grocery Co., 254 U. S. —, 41 Sup. Ct. 298, 65 L. Ed. —, decided February 28, 1921, by the United States Supreme Court, holding the act of Congress popularly known as the Lever Act unconstitutional for indefiniteness; Froehlich v. City of Cleveland, 99 Ohio St. 376, 391, 124 N. E. 212)—its language was never intended to apply to a newspaper article of the kind in question. The affidavits conclusively show that no disorder or excitement was created on the streets by the sales in question. Nothing appears to indicate who were or might be excited by its sale to break the peace. It would be a libel, it seems to me, on people of the Jewish race to assume that they are imbued with such a spirit of lawlessness. If it be assumed that the article might tend to excite others to breaches of the peace against people of the Jewish race, the reply is plain. It is the duty of all officials charged with preserving the peace to suppress firmly and promptly all persons guilty of disturbing it, and not to forbid innocent persons to exercise their lawful and equal rights.

The principles of law involved are not only familiar, but have been set forth and applied in two situations so parallel upon the facts that a restatement or re-examination of the law becomes unnecessary. One line of cases arose as a result of certain efforts to suppress the public exhibition of the photoplay called "The Birth of a Nation." In the efforts to suppress that exhibition in Cleveland, section 1770 was invoked by the city officials as the source of their power, and it was urged that if the photoplay were exhibited it would have a tendency to create, and would probably result in, a serious breach of the peace, and that certain scenes in it were calculated to cast disgrace upon a large body of self-respecting and law-abiding citizens of the city. In point of fact, a part of the population of the United States, aggregating some 10,000,000, had the right to urge the same objections against the exhibition of that photoplay as any part of the population has to urge the objections now made against the so-called anti-Jewish articles in plaintiff's newspaper. In Epoch Producing Co. v. Davis, 19 Ohio N. P. (N. S.) 465, Judge Foran awarded an injunction restraining the city officials from prohibiting or interfering with the public exhibition of "The Birth of a Nation." In so doing, he deals specially with the contention that its exhibition might tend to create breaches of the peace, and makes use of language applicable to the present situation, to which nothing need or can be profitably added. He says (19 Ohio N. P. [N. S.] 475, 476):

"Will the exhibition of this photoplay have a tendency to provoke a breach of the peace? Certainly, so far as law-abiding citizens are concerned, such a

tendency does not exist and cannot be seen. * * * To admit that this photoplay tends to provoke a breach of the peace is to confess that citizens of African descent are not law-abiding citizens. This I am not willing to admit, as it would be an uncalled-for slander upon these citizens. A 'tendency to provoke a breach of the peace' does not mean a manufactured tendency; but it rather means, as applied in this instance, something the natural effect and tendency of which would be to unconsciously and spontaneously cause men to lose control of their reason and permit passion and anger to dominate judgment."

In numerous cases similar rulings were made, and all the courts, state and federal, when called on, issued without hesitation injunctions restraining public officials from forbidding the exhibition of this photoplay. In some cases relief was granted on the ground that the action of the city officials was in violation of the rights of free speech and a free press.

The other line of cases is an exact counterpart of the instant case. They involved efforts of city officials by ordinance to forbid the circulation and sale of particular newspapers. In Ex parte Neill, 32 Tex. Cr. R. 275, 22 S. W. 923, 40 Am. St. Rep. 776, the ordinance under review had declared a specific newspaper to be a public nuisance and forbade its sale on the streets of the city. It was held that the ordinance was invalid because it violated that provision of the Texas Bill of Rights which is precisely the same as section 11, art. 1, of the Constitution of Ohio, which is in these words:

"Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press."

In New York, the council of the city of Mt. Vernon passed an ordinance forbidding the circulation and sale within its city limits during the period of the war of the New York American and the New York Journal. This ordinance was held invalid, and a preliminary injunction awarded against its enforcement, by Judge Geigerich. See Star Co. v. Brush, 103 Misc. Rep. 631, 170 N. Y. Supp. 987. On appeal his judgment was affirmed by the Appellate Division, in an opinion which sustains broadly the jurisdiction of a court of equity to grant relief by injunction, and holds the ordinance to be an invasion of the constitutional right of a free press. See Star Co. v. Brush, 185 App. Div. 261, 172 N. Y. Supp. 851. Still another ordinance, apparently later in date, was adopted by the council of Mt. Vernon, which forbade the sale of newspapers upon the streets without first applying for and obtaining a license or permit, which license was subject to revocation. This ordinance was likewise held to be invalid, and its enforcement enjoined because it violated the constitutional guaranty of a free press, and Judge Geigerich, in delivering the opinion, says in effect that the ordinance, if valid, would permit the public authorities to suppress the circulation of any newspaper the views of which they disapproved, by revoking the license or permit, while at the same time permitting the free circulation without molestation, of other newspapers the views of which they approved. See Star Co. v. Brush, 104 Misc. Rep. 404, 172 N. Y. Supp. 320. Either the same or another ordinance of this city forbade the circulation and sale

of all newspapers and publications which had been or hereafter may be printed in the German language, as being deemed harmful to the best interests of the nation in the prosecution of the war, and this ordinance also was held to be invalid and its enforcement enjoined at the suit of the New Yorker Staats Zeitung and the German Herold Publishing Company. See 170 N. Y. Supp. 993.

[6] The propositions of law, as has been already said, upon which these several decisions are based, are so familiar and well established that further discussion is unnecessary. The action of the city officials, be it said with due respect, is not an effort to enforce valid provisions of section 1770. It is action under color of that section, and by virtue of official station to accomplish another and different purpose. That purpose, as has already been stated, is to prevent the sale upon equal terms and under the same conditions as the right of sale is accorded to all other newspapers, because plaintiff's newspaper contained a certain article which does not meet with the approval of the city officials. That such action is taken in good faith and under a belief that the article in question tends to create religious and racial dissensions may be conceded, but the law in all its long history supplies no instance in which either a race or a religion won the approval and disarmed the prejudice of another people by forbidding the latter to write and speak their minds freely. Be this, however, as it may, there is in law no more justification for prohibiting its sale upon the streets than there would be to prohibit the sale of any Cleveland newspaper whose political views and personal attitude on other questions met with their disapproval. If defendants' action were sustained, the constitutional liberty of every citizen freely to speak, write, and publish his sentiments on all subjects, being responsible only for the abuse of that right, would be placed at the mercy of every public official who for the moment was clothed with authority to preserve the public peace, and the right to a free press would likewise be destroyed.

No support for defendants' action can be found in the Espionage Law (40 Stat. 217), or in the decisions which have sustained its constitutionality. That law was passed by a sovereign power, clothed with all the war powers enjoyed by any sovereign power. That law makes it an offense to do certain things only while the United States is at war. Most of the cases have arisen under its provisions, which forbid acts or attempts, including written or spoken words, to cause insubordination, disloyalty, or refusal of duty in the military or naval forces of the United States, or to obstruct the recruiting or enlistment service of the United States. In administering this law, the courts have uniformly held that the written or spoken words must be published or uttered with the specific intent thus forbidden, and must also be of such a nature as is reasonably calculated to cause or produce the forbidden results, and upon these questions the right of trial by jury was accorded. That this law was not a violation of either the constitutional right to free speech or to a free press was held in numerous decisions upon reasoning so sound as not to admit of differences of opinion among persons learned in the law. See Schenck v. U.

S., 249 U. S. 47, 39 Sup. Ct. 247, 63 L. Ed. 470; Debs v. U. S., 249 U. S. 211, 39 Sup. Ct. 252, 36 L. Ed. 566.

A preliminary injunction will be granted as prayed. Bond is required in the penalty of $5,000, with security to be approved by the clerk, conditioned to pay all damages that may be sustained by any one, and all costs that may be awarded in the event this preliminary injunction shall hereafter be dissolved.

CASSARELLO v. UNITED STATES.

(District Court, M. D. Pennsylvania. December Term, 1919.)

No. 1137.

1. **Army and navy ⇐51½, New, vol. 12A Key-No. Series—Executor of beneficiary can collect war risk insurance installments accrued before beneficiary's death.**

Under Act Oct. 6, 1917 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514a et seq.), providing for war risk insurance payable to a beneficiary designated from among certain relatives, installments which became due and payable before the beneficiary's death were vested in the beneficiary and passed according to his will, and this construction is supported by the amending Act Dec. 24, 1919, § 19, making such installments payable to the personal representatives of the deceased beneficiary.

2. **Army and navy ⇐51½, New, vol. 12A Key-No. Series—State insurance statute cannot exclude from evidence regulations of War Risk Bureau.**

The rules and regulations of the Director of the Board of War Risk Insurance cannot be excluded from evidence in a suit to recover installments due thereon on the ground that such regulations were not attached to the policy as required by the law of the state, since a contract made in pursuance of the federal statute cannot be controlled by state laws or decisions.

3. **Evidence ⇐47—Judicial notice of regulations of department authorized by statute.**

Rules and regulations, prescribed by a department of the government in pursuance of its express statutory authority to make them, have the force of law, can be judicially noticed by the courts, without having been formally introduced in evidence.

4. **Evidence ⇐341—Certified copies of application for war risk insurance are admissible.**

Under Rev. St. § 882 (Comp. St. § 1494), making copies of any documents in any of the executive departments, authenticated under the seals of such departments, admissible in evidence the same as the originals thereof, a certified copy of the application for war risk insurance is admissible in evidence.

5. **Statutes ⇐216—Legislative intent expressed by authors of law referred to, where act obscure.**

Where the wording of an act is somewhat obscure, the courts may seek the legislative intent, as expressed by the authors of the law, as a guide.

6. **Army and navy ⇐51½, New, vol. 12A Key-No. Series—Future installments of war risk insurance cannot be disposed of by beneficiary's will.**

Under Act Oct. 6, 1917, § 402 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu), making war risk insurance payable only to beneficiaries selected from a specified class, and giving the right to change beneficiaries within the class and the rules and regulations of the Bureau of

War Risk Insurance thereunder, the installments of insurance which have not accrued at the time of the beneficiary's death cannot be disposed of by his will, but are to be distributed among those of the next of kin of insured who are within the designated class of beneficiaries.

7. Statutes ⟸219—Construction by bureau charged with execution is entitled to great weight.

The construction placed on the doubtful portion of a statute by the bureau charged with its execution is entitled to great weight, and it should not be lightly disregarded.

At Law. Action by Savino Cassarello, executor under the will of Patrick Cilleto, sometimes known as Patrick Chilant, against the United States, to recover installments due under a certificate of War Risk Insurance. Judgment rendered for plaintiff for only the installments which became due before the death of his testator.

See, also, 265 Fed. 326.

A. A. Vosburg, of Scranton, Pa., for plaintiff.

R. L. Burnett, of Scranton, Pa., and Ed. H. Horton, of Washington, D. C., for the United States.

WITMER, District Judge. Lorenzo Celetti, being in the military service of the United States under the name of Lawrence Seigle, on January 11, 1918, made application to the United States, under such assumed name, for insurance in the sum of $10,000, designating as beneficiary "step-brother (29 years old) Patsy Gilette," followed by a certificate of insurance issued through the Bureau of War Risk Insurance, for the Treasury Department.

Lorenzo Celetti died, while in the military service of the United States, on October 29, 1918. Immediately thereafter a claim for insurance was made by Patrick Cilleto. A question as to the identity of the beneficiary with that of the claimant arose. It was, however, finally settled that Patsy Giletti, variously known as Patrick Cilletto, Patsy Giletti, or Patrick Chilant, whose name was Pasquale Ciletti, was a brother of the full blood of the insured soldier. The designated beneficiary, Pasquale Celetti, died during the month of April, 1919, before the matter of his identity had been adjusted. He left a will, naming Savino Cassarello as executor, which provided, inter alia, as follows:

"Third. I am beneficiary of $10,000 under the Bureau of War Risk Insurance, for the death of Lawrence Seigle, my brother, private of 303 Guard and Fire, Q. M. C. U. S. A. By this will I authorize and empower the said Savino Cassarello to collect same and remit as he receive the money by the War Department with the exchange to my wife in Italy, also to find out if my mother is still living and if my mother is living, then, I direct thereby the said executor to forward to my mother Filomena Siconolfi $15 per month with the exchange to be deducted from the installment which receive from the War Department, or instruct my wife to give my mother an adequate support of an equal amount."

This action was brought against the United States by Savino Cassarello, executor of the estate of Pasquale Celetti, the beneficiary designated by Lawrence Seigle, for the purpose of recovering all the installments of war risk insurance accrued and unpaid, including both

those installments accrued prior to the death of the beneficiary (Pasquale Celetti) and those accruing after the beneficiary's death; the contention being that the designated beneficiary took a vested interest in the insurance upon the death of the insured, and that he could by will dispose of and pass as his estate the accrued as well as the accruing installments or payments provided to be paid the beneficiary designated in the certificate of insurance.

[1] As to the installments which had accrued prior to the beneficiary's death, remaining unpaid at that time, there seems to be no serious dispute. When the installments became due and payable, they no doubt vested in the person having a right to receive them, and having become vested, they passed according to such beneficiary's will. The contest has to do altogether with the deferred payments or installments not yet payable when the beneficiary died.

The contract of insurance, if it may be called such, was made under and by virtue of an act of Congress approved October 6, 1917 (40 Stat. 398, c. 105), which amended the act of September 2, 1914 (38 Stat. 711, c. 293; Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 514a–514j), by establishing in the Treasury Department a bureau to be known as the Bureau of War Risk Insurance, and providing further:

"Sec. 1. * * * That there be in such bureau * * * a Division of Military and Naval Insurance in charge of a * * * Commissioner of Military and Naval insurance. * * *

"Sec. 13. That the director, subject to the general direction of the Secretary of the Treasury, shall administer, execute, and enforce the provisions of this act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this act, necessary or appropriate to carry out its purposes, and shall decide all questions arising under the act, except as otherwise provided in sections five and four hundred and five. * * *"

40 Stat. c. 105, pp. 398, 399 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 514a, 514kk).

[2] In pursuance of the authority granted, the Director of the Bureau of War Risk Insurance did make certain rules and regulations. To the admission of these rules and regulations, the plaintiff objected on the ground that they were not attached to the policy, as required by the Pennsylvania law (Pa. St. 1920, § 12399). If we had under consideration the ordinary policy of insurance of an old line insurance company, this objection might be well taken; but a contract made in pursuance of a federal statute must be construed with reference to such statute, and cannot be controlled by the state laws or decisions. Watson v. Tarpley, 58 U. S. (18 How.) 517–521, 15 L. Ed. 509; Calhoun Mining Co. v. Ajax, 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Lewis' Sutherland on Statutory Construction, vol. 2, p. 1314.

[3] Furthermore, rules and regulations prescribed by a department of the government in pursuance of a statutory authority, have the force of law. U. S. v. Grimaud, 220 U. S. 506, 517, 31 Sup. Ct. 480, 55 L. Ed. 563; United States v. Birdsall, 233 U. S. 231, 34 Sup. Ct. 512, 58 L. Ed. 930; Covey v. United States (D. C.) 263 Fed. 768, 775. As was said in Caha v. United States, 152 U. S. 211, at page 221, 14 Sup. Ct. 513, at page 517 (38 L. Ed. 415):

"* * * There was no necessity for a formal introduction in evidence of such rules and regulations. They are matters of which courts of the United States take judicial notice. Questions of a kindred nature have been frequently presented, and it may be laid down as a general rule, deducible from the cases, that wherever, by express language of any act of Congress, power is entrusted to either of the principal departments of government to prescribe rules and regulations for the transaction of business in which the public is interested, and in respect to which they have a right to participate, and by which they are to be controlled, the rules and regulations prescribed in pursuance of such authority become a mass of that body of public records of which the courts take judicial notice."

[4] Under section 882, Revised Statutes (Comp. St. § 1494), providing for the admission in evidence of copies of documents of this nature, the certified copy of the application for insurance of Lawrence Seigle was properly in evidence.

[5] In arriving at a proper decision, this court may therefore turn for assistance, not only to the certificate of insurance, but also to the application for insurance, and the rules and regulations of the department, as well as the act itself, and, where the wording of the act is somewhat obscure, it may seek the legislative intent as expressed by the authors of the law, as a guide. In a very recent opinion of the Supreme Court (Duplex Printing Press Co. v. Deering, etc., 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. —, rendered January 3, 1921), Justice Pitney said:

"By repeated decisions of this court it has come to be well established that the debates in Congress expressive of the views and motives of individual members are not a safe guide, and hence may not be resorted to, in ascertaining the meaning and purpose of the law-making body. Aldridge v. Williams, 3 How. 9, 24; United States v. Union Pacific R. R. Co., 91 U. S. 72, 79; United States v. Freight Association, 166 U. S. 290, 318. But reports of committees of House or Senate stand upon a more solid footing, and may be regarded as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure. Binns v. United States, 194 U. S. 486, 495. And this has been extended to include explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage. Binns v. United States, supra; Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 198, 199; United States v. Coca Cola Co., 241 U. S. 265, 281; United States v. St. Paul, M. & M. Ry. Co., 247 U. S. 310, 318."

[6] The application for insurance contained the following clause:

"In case any beneficiary die or become disqualified after becoming entitled to an installment but before receiving all installments, the remaining installments are to be paid to such person or persons within the permitted class of beneficiaries as may be designated in my last will and testament, or in the absence of such will, as would under the laws of my place of residence be entitled to my personal property in case of intestacy."

This application was made part of the contract of insurance in the certificate of insurance which so far as it had a bearing on this suit, contains the following:

"Subject to the payment of the premiums required, this insurance is granted under the authority of an act amending 'An act entitled "An act to authorize the establishment of a Bureau of War Risk Insurance in the Treasury Department," approved September 2, 1914, and for other purposes,' approved October 6, 1917, and subject in all respects to the provisions of such Act, or any amendments thereto, and of all regulations thereunder, now in force or

hereafter adopted, all of which, together with the application for this insurance, and the terms and conditions published under the authority of the act, shall constitute the contract. * * *

"Important Notice.

"The insured may change the beneficiary without the consent of such beneficiary. This insurance is not assignable and is not subject to the claims of the creditors of the insured or of the beneficiaries."

Among such regulations mentioned in the certificate it would be necessary to include Bulletin 1, issued October 15, 1917, and providing on page 4 for the insertion in a policy of the following:

"If no beneficiary within the permitted class be designated by the insured, either in the insured's lifetime or by his last will and testament, or if any above designated beneficiaries is or becomes disqualified or does not survive the insured, the insurance (or if any above designated beneficiary shall survive the insured, but shall not receive all the installments, then the remaining installments) shall be payable to such person or persons within the permitted class of beneficiaries as would under the laws of the insured's place of residence be entitled to his personal property in case of intestacy."

In considering these various provisions of the regulations, application, and certificate, it is necessary also to keep in mind the words and purpose of the act. Article 3 of the act dealt with compensation for the soldier and a limited class of dependents, in case of his disability while in active service, or for such dependents in case of his death. It partakes of the nature of a pension. Article 4, containing the insurance provisions, states:

"Sec. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in article 3, the United States * * * shall grant insurance," etc. Comp. St. 1918 Comp. St. Ann. Supp. 1919, § 514u.

Protection for the soldier and his dependents is the primary object of the act. It purposely limits the beneficiaries. Section 402 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu.

"The insurance shall not be assignable, and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother or sister."

By the word "only" is limited expressly the class of beneficiaries. In the same section it further provides:

"Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided."

This negatives any idea of a right vested during the lifetime of the insured. Nor is there anything in the language of the act itself, or as appearing from the discussions of the bill by committee members on the floor, to lend countenance to any construction that a beneficiary had a vested right in installments not yet accrued, even after the death of the insured, but the contrary seems to have been in mind.

Mr. Rayburn of the Committee of Interstate and Foreign Commerce submitted a supplemental report in the House on September 5, 1917, containing these words:

"Speculation in the insurance must not be permitted, it must be unassignable and free from the claims of creditors, both of the insured and of the beneficiary. It must not be payable to any and every one, but to a limited class of relatives." House Report, 130, pt. 3.

In a discussion on the floor of the House, in dealing with that section of the act providing for the passing of installments to the permitted class under intestate laws, unless a beneficiary is designated during insured's life or by his will, within the permitted class, Mr. Rayburn said in part:

"The United States government says to this man (the soldier): 'We will carry that risk for $50 a thousand. We will give you the lowest insurance that you can get as a sound well man in peace times. If you have a wife, though, or child or mother dependent upon you, and you are killed, this insurance money may go to them, because you have a personal and direct interest in them. Some distant cousin off yonder that you never saw, or some uncle, probably, who is living in opulence and who does not need the money, will not get it.'" Cong. Rec. Sept. 8, 1917, p. 6761.

Senator Williams, in charge of the bill in the Senate, made use of the following language:

"It [the government] is not going into the insurance business at all. In the first place, it has confined its activities to the soldiers and the sailors in the service. In the second place, it confines the beneficiaries to the soldiers' and sailors' dependent families." Cong. Record, vol. 55, pt. 8, Oct. 3, 1917, p. 7690.

Comptroller Warwick, in an opinion to the Secretary of the Treasury, July 5, 1919, said:

"This insurance feature of the law is not an out-and-out contract of insurance on an ordinary business basis; neither is it a pension, but it partakes of the nature of both."

Both Senator Williams and Comptroller Warwick here touched upon a vital distinction to be borne in mind, that this is neither a pension nor insurance. It partakes in some respects of the nature of both. It is not governed by the law of either. It is governed by the statute creating it, and must be construed in accordance therewith. Section 402 of the bill, as originally introduced, in naming the class of beneficiaries, contained the provision:

"And to such other persons as may be provided from time to time by regulation."

These words were stricken out by Senate amendment 108. This shows clearly the intention of Congress to limit and fix the class of beneficiaries and to prevent any extension even by the bureau. The installments are intended for the soldier's dependents within a limited class, and only these.

Such was the construction placed upon the Act by the officers of the bureau charged with the duty of administering it. Express provision was made for this situation in Bulletin 1, supra. The decisions of the

Comptroller went even to the extent of holding that accrued, but unpaid, installments could not be paid to the estate of a beneficiary. 24 Comp. Dec. 521, 733. Congress, fully aware of the rulings of the Comptroller and of the provisions of Bulletin 1, passed the amendment of December 24, 1919 (41 Stat. c. 16, p. 371):

"Sec. 19. That the amount of the monthly installments of allotment and family allowance, compensation, or yearly renewable term insurance which has become payable under the provisions of the War Risk Insurance Act but which has not been paid prior to the death of the person entitled to receive the same may be payable to the personal representatives of the deceased person."

So far as concerns the installments which had accrued to a beneficiary in his lifetime, but were unpaid at his death, this shows an intention to change the practice established by the Comptroller's decision, and supports the conclusion already given as to the accrued installments. Concerning installments accruing after the death of the beneficiary, there was no change, but a re-enactment in section 15 of the amendment in the language:

"That if any person to whom such yearly renewable term insurance has been awarded dies, or his rights are otherwise terminated after the death of the insured, but before all of the two hundred and forty monthly installments have been paid, then the monthly installments payable and applicable shall be payable to such person or persons within the permitted class of beneficiaries as would, under the laws of the state of residence of the insured, be entitled to his personal property in case of intestacy; and if the permitted class of beneficiaries be exhausted before all of the two hundred and forty monthly installments have been paid, then there shall be paid to the estate of the last surviving person within the permitted class the remaining unpaid monthly installments."

[7] The intention of Congress here coincides with the construction placed on the original act by the bureau in Bulletin 1, and lends strong support to the conclusion that the bureau had rightly construed the act. Furthermore, the construction placed on a doubtful portion of a statute by the bureau charged with its execution is entitled to great weight and should not be lightly disregarded. U. S. v. Finnell, 185 U. S. 236, 244, 22 Sup. Ct. 633, 46 L. Ed. 890; Heath v. Wallace, 138 U. S. 573, 11 Sup. Ct. 380, 34 L. Ed. 1063; United States v. T. F. A., 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007; Pennell v. P. & R., 231 U. S. 675, 34 Sup. Ct. 220, 58 L. Ed. 430.

It appears, therefore, in view of all that has been shown, quite clear that a beneficiary, upon the death of the insured, did not take a vested interest in installments of war risk insurance not yet accrued, but that he was bound by the provisions pertaining thereto in the rules and regulations, and the provisions of the application, expressly made a part of the contract. Pasquale Celetti, the beneficiary, could not, therefore, pass the unaccrued installments by his will to his executor, Savino Cassarello. These amounts must be paid to such persons, within the permitted class of beneficiaries, as would, under the laws of the state of the residence of the insured, be entitled to his personal property in case of intestacy.

It is therefore ordered, adjudged, and decreed that Patrick Cilleto was entitled to the monthly installments of $57.50 on account of the insurance in the sum of $10,000 granted to Lawrence Seigel under the War Risk Insurance Act, which accrued after the death of said Lawrence Seigel and prior to the death of Patrick Cilleto; that the said Patrick Cilleto was entitled only to the monthly installments of $57.50 which accrued during his lifetime, and acquired no right, title, or interest in or to any installments accruing subsequent to the date of his death, and that said executor is not entitled to payment of any installments of said insurance which accrued after the death of Patrick Cilleto; that Savino Cassarello, executor under the will of said Patrick Cilleto, is entitled to payment of such monthly installments of $57.50 which accrued after the death of Lawrence Seigel and prior to the death of Patrick Cilleto, and which remained unpaid by the Bureau of War Risk Insurance at the time of the death of said Patrick Cilleto, and the executor of the will of said Patrick Cilleto is forever barred from asserting or maintaining any claim or action against the United States on account of any monthly installments of the insurance granted to Lawrence Seigel under the War Risk Insurance Act which accrued after the death of Patrick Cilleto.

Ex parte BEAVER.

(District Court, N. D. Ohio, E. D. April 12, 1921.)

No. 10944.

1. **Habeas corpus ⇐38—Minor of enlistment age cannot obtain release by habeas corpus, but nonconsenting parents may obtain relief.**
   A minor of the authorized enlistment age cannot, after having enlisted, obtain his release from military service by a writ of habeas corpus; but nonconsenting parents may by timely application secure his release.
2. **Army and navy ⇐44(3)—Right of parent or guardian to custody is subordinate to right to hold for military offenses.**
   If a minor, enlisting without the required consent of his parent or guardian, has committed an offense triable by court-martial and punishable by military law, the right of his parents or guardian to his custody and services is subordinate to the right of the military officers to hold him to answer for such offense.
3. **Army and navy ⇐18—Statute relative to enlistment in time of peace not applicable.**
   Act Aug. 1, 1894, § 2 (Comp. St. § 1888), providing that in time of peace no person not a citizen of the United States shall be enlisted, is not now applicable; the United States not being at peace.
4. **Army and navy ⇐18, 44(2)—Alien may not avoid enlistment, because statute prohibited enlistment.**
   Under Act Aug. 1, 1894, § 2 (Comp. St. § 1888), prohibiting the enlistment of aliens in time of peace, the United States alone may plead the disability of an alien, duly enlisted in time of peace, to avoid the enlistment contract, and the alien cannot obtain his discharge by habeas corpus, and escape liability for offenses against the military law under that section.

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

5. Army and navy ⇐19—Revised Statutes, as to enlistment without consent of parents or guardian, held superseded.

National Defense Act, June 3, 1916, § 27 (Comp. St. § 1885a), providing that no person under 18 shall be enlisted or mustered into the military service without the written consent of his parents or guardians, provided he has parents or guardians entitled to his custody and control, supersedes Rev. St. § 1117, containing a similar provision as to persons under 21.

6. Army and navy ⇐19—Enlistment of minors between ages of 16 and 18 not prohibited.

National Defense Act, § 27 (Comp. St. § 1885a), repeals Act March 2, 1899, § 4 (Comp. St. § 1889), making 18 the minimum age for enlistment, and, if it does not revive Rev. St. §§ 1116, 1118 (Comp. St. §§ 1884, 1886), prescribing a minimum age limit of 16 years, leaves the common law applicable; and hence the enlistment of minors between 16 and 18 is not prohibited, but authorized with the consent of parents or guardians.

Habeas Corpus. Application by Thomas Alfred Beaver for the writ on behalf of Albert Edward Beaver. Application denied.

Turney & Sipe, of Cleveland, Ohio, for petitioner.

E. S. Wertz, U. S. Atty., and D. J. Needham, Asst. U. S. Atty., both of Cleveland, Ohio, for respondent.

WESTENHAVER, District Judge. This is an application for writ of habeas corpus by Thomas Alfred Beaver, on behalf of his minor son, Albert Edward Beaver. Upon presentation of the petition, the respondent appeared, waived the issue and service of an alternative writ, and has made answer. The facts are agreed.

Albert Edward Beaver, the minor, is an alien subject of the king of Great Britain, residing at the time of his alleged enlistment with his father in the United States. He was born in England April 21, 1904 He enlisted in the United States army November 4, 1920, under the fictitious name of Roy Smith. He represented himself to be 19 years and 6 months of age, and that he had been born in the city of New York. He was duly accepted as a soldier, took the enlistment oath, and drew pay, rations, clothing, and allowances. He deserted December 27, 1920, and is now held by the respondent at the request of the United States military authorities to answer a charge of desertion. He is also liable to prosecution under the fifty-fourth Article of War (Comp. St. § 2308a) on the charge of fraudulent enlistment.

[1, 2] Much of the law is well settled. A minor of the authorized enlistment age cannot, after having enlisted, obtain his release from military service by writ of habeas corpus. If he is within the age requiring the consent of parents or guardian, and enlists without such consent, the parents or guardian may, by a timely application, obtain his release. If, however, in the meantime and before they shall apply for the minor's release, he has committed an offense triable by court-martial and punishable by military law, their right to his custody and service is subordinate to the right of the military authorities to hold him to answer for such an offense. This much is conceded. See In re Morrissey, 137 U. S. 157, 11 Sup. Ct. 57, 34 L. Ed. 644; Ex

parte Dostal (D. C.) 243 Fed. 665, in which the authorities are collected and reviewed.

[3, 4] It is urged, however, that the alienage of the minor renders this law and these authorities inapplicable. This contention is based upon section 2, Act of August 1, 1894 (section 1888, U. S. Comp. Stat.; 28 Stat. 216), which provides that in time of peace no person who is not a citizen of the United States shall be enlisted. A like prohibition is made against persons whose previous service has not been faithful and honest, and who cannot speak, read, or write the English language, or who are over 35 years of age. It is conceded that, unless the enlistment in this case was one made in time of peace, this section is without application. It is now authoritatively settled by two recent decisions of the United States Supreme Court that the United States is not at peace, but at war, and that the laws applicable in time of war to the United States army and court-martial proceedings are now applicable. See Kahn v. Anderson, 254 U. S. —, 41 Sup. Ct. 224, 65 L. Ed. —, and Givens v. Zerbst, 254 U. S. —, 41 Sup. Ct. 227, 65 L. Ed. —, both decided January 31, 1921. Moreover, even in time of peace, an alien duly enlisted cannot obtain his discharge by writ of habeas corpus from military service and escape liability for offenses against military law by invoking the provisions of the section above cited. Being sui juris, it is settled that the United States only may plead his disability to avoid his enlistment contract, and that he may not. See Ex parte Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636; Ex parte Dostal (D. C.) 243 Fed. 665, in which the authorities are collected and reviewed.

The ground most strenuously urged is that, inasmuch as the minor was under 18 years of age, his enlistment is not only unauthorized, but forbidden by law, and hence he is not, and never became, a soldier subject to military law as a member of the military establishment of the United States. The minimum enlistment age is said to be 18 years. This contention requires an examination of the United States statutes on the subject.

R. S. § 1116 (U. S. Comp. Stat. § 1884), provides:

"Recruits enlisting in the army must be effective, able-bodied men, and between the ages of 16 and 35 at the time of their enlistment."

R. S. § 1118 (U. S. Comp. Stat. § 1886), provides:

"No minor under the age of 16 years * * * shall be enlisted or mustered into the military service."

R. S. § 1117, provides:

"No person under the age of 21 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians; provided that such minor has such parents or guardians entitled to his custody and control."

Most of the cases, including In re Morrissey, supra, were decided under these sections. Later the Act of March 2, 1899, to increase the efficiency of the army, contained in section 4 (Comp. St. § 1889) the following proviso:

"The limits of age for original enlistments in the army shall be 18 and 35 years."

This proviso, it is asserted, repealed by implication the minimum age limit of 16 years previously embodied in sections 1116 and 1118. Such is the view of the editor of U. S. Comp. Stat. 1916. See notes to sections 1884 and 1886. It is also the view of the article entitled "Army and Navy," 5 Corp. Jur. p. 298. The exact question has not, however, been considered or decided in any of the reported cases.

[5] The National Defense Act of June 3, 1916, § 27 (Comp. St. § 1885a), provides:

"No person under the age of 18 years shall be enlisted or mustered into the military service of the United States without the written consent of his parents or guardians, provided that such minor has such parents or guardians entitled to his custody and control."

Obviously, this supersedes R. S. § 1117, and it is asserted that it repeals by implication the minimum age limitation prescribed by section 4, Act March 2, 1899, and perhaps restores the minimum age limit of 16 years as originally provided in R. S. §§ 1116 and 1118. The War Department officials charged with the administration of the law have interpreted it as having this effect. See Mss. opinion, H. A. White, Judge Advocate, Chief Administrative Law Division, dated January 12, 1921.

The question thus presented cannot be said to have been finally settled by decision, but the tendency thereof is to support the War Department's view. In Ex parte Rush (D. C.) 246 Fed. 172, a case arising since the adoption of the National Defense Act, the minor was over 17 years of age when he enlisted, and under 18 when he deserted. Clayton, District Judge, in denying a writ of habeas corpus, seems to have entertained the opinion that, as a result of section 27, a minor over 16, but under 18, years of age may enlist in the United States army and become subject to military law. This conclusion is, however, stated and assumed, rather than deduced as the result of an examination of the several pertinent sections above cited.

In Hoskins v. Pell (5 C. C. A.) 239 Fed. 279, 152 C. C. A. 267, L. R. A. 1917D, 1053, all the pertinent sections were quoted and apparently fully considered. The minor was not only under 18, but under 16, years of age at the time of his enlistment, and had merely taken the enlistment oath and returned home, without drawing pay, rations, or clothing. The writ was granted, because the minor was under 16 years of age, but the view is expressed that a minor over 16, even if under 18, acquires the status of a soldier by enlisting for military service, and is subject to be dealt with pursuant to military law.

In Ex parte Foley (D. C.) 243 Fed. 470, a case also arising since the adoption of section 27 of the National Defense Act, Judge Evans held that a minor under 18 years of age, who had enlisted without the consent of his parents, could not be discharged on their application after he had committed an offense punishable by military law.

In Hoskins v. Dickerson (5 C. C. A.) 239 Fed. 275, 152 C. C. A. 263, Ann. Cas. 1917C, 776, L. R. A. 1917D, 1056, a case arising since

the adoption of the National Defense Act, it was held that a minor over 16, but under 18, could not obtain a discharge by habeas corpus, and that his enlistment was valid, and made him subject to military trial for any offense committed by him, and that his father could not obtain his discharge by habeas corpus until after he had been tried and served his sentence for such military offense. This case, upon the facts, is exactly in point, and must be taken as sustaining the War Department view, even though the several sections are not reviewed at length.

[6] My view is that the enlistment of minors under 18 years of age is not now prohibited by law. Section 4 of the Act of March 2, 1899, does not expressly repeal the authority to enlist minors over 16 years of age, but does so, if at all, only by implication. That implication is, it seems to me, repelled or repealed by section 27, National Defense Act. Section 27 does not, it is true, expressly repeal section 4; but it would be entirely meaningless if it did not. Indirectly, but none the less explicitly, Congress recognizes and authorizes enlistments of all minors under 18 years of age with the consent of parents or guardians. The effect of this is to repeal the minimum limit of 18 years provided in section 4, even if it does not restore and re-enact the limit of 16 years originally found in R. S. §§ 1116 and 1118.

Moreover, in the event the 18-year minimum is repealed, and the 16-year minimum is not restored, then the common law applicable to the enlistment of minors under 18 years of age will be in force. By the common law it seems that a minor of the age of discretion might enlist, regardless of any other age limit. See 5 Corp. Jur. 300; In re Morrissey, 137 U. S. 157, 159, third paragraph, 11 Sup. Ct. 57, 34 L. Ed. 644; U. S. v. Blakeney, 3 Grat. (Va.) 405; Commonwealth v. Gamble, 11 Serg. & R. (Pa.) 92. This being so, the instant case is governed by that long line of authorities holding that a minor over 16 years of age, who has enlisted without the previous consent of his parents or lawful guardian, cannot, on his own application, be released in any event, and cannot be released on their application after he has committed an offense punishable by military law and is being held to answer the same.

If, however, the minimum enlistment age is 18 years, we should be confronted with the much-mooted question as to whether the enlistment of a minor below that age is so far void that he cannot be detained and tried by the military authorities for an offense against military law, committed while occupying the de facto status of a soldier. In support of the view that he cannot be so detained and tried, it is urged that a minor is not sui juris, and that his contract of enlistment is void, and hence does not operate to change his civilian to a military status, and make him a member of the military establishment of the United States for the purpose even of a trial for an offense committed while occupying that de facto status. This argument assumes that a minor's enlistment contract is void, and not merely voidable, while the latter seems to be the true rule. See In re Morrissey, supra, 137 U. S. 159, third paragraph, 11 Sup. Ct. 57, 34 L. Ed. 644, and cases cited.

Furthermore, a minor of the age of discretion is answerable for his criminal offenses, just as much as is an adult. If, therefore, a minor has misrepresented his age, and has thereby committed the offense of fraudulent enlistment, or if, after enlisting, he has been guilty of desertion, insubordination, communication with the enemy, or any one of the many offenses against military law, it is difficult to suggest a valid reason why he might not be detained and tried by the military authorities for such offenses. Authorities so holding are the following: In re Cosenow (C. C.) 37 Fed. 668; Commonwealth v. Gamble, 11 Serg. & R. (Pa.) 93; Wilbur v. Grace, 12 Johns. (N. Y.) 67–72. Such, also, seems to be the logic of Ex parte Grimley, 137 U. S. 147, 11 Sup. Ct. 54, 34 L. Ed. 636. The many expressions found in the cases to the effect that the enlistment of a minor under the minimum age is void are all dicta, with the apparent exception of Hoskins v. Pell (5 C. C. A.) 239 Fed. 279, 152 C. C. A. 267, L. R. A. 1917D, 1053. In that case, one of the three judges strongly dissents, and, upon the facts, it appears that the minor had gone no farther than to take the oath of enlistment and then return home, without drawing pay, rations, or clothing, in which situation he had not as yet committed the offense of fraudulent enlistment. No opinion, however, need be or is expressed on this question, as I am content to deny the application upon the other ground.

The application for writ of habeas corpus will be denied.

HUNT v. PEARCE et al.

(District Court, E. D. Oklahoma. April 11, 1921.)

No. 3474.

1. **Removal of causes ⇐=46—Though one nonresident defendant is not served, other held entitled to remove cause.**
   Under Rev. Laws Okl. 1910, § 4730, prescribing the procedure when one or more of several defendants have been served, where one of two nonresident defendants, sued on a joint cause of action, is not served, the other may remove the cause, especially in view of Act Cong. April 16, 1920, relative to service after removal.

2. **Appearance ⇐=9(6)—Proceedings for removal do not constitute general, but only special, appearance.**
   The filing of a petition for the removal of a cause from a state to a federal court, and the proceedings on such petition are not equivalent to a general appearance, but are a special appearance only for the purpose of the removal.

3. **Removal of causes ⇐=105—Defendant, served after removal, entitled to elect whether cause shall be remanded.**
   Where only one of two nonresident defendants, sued on a joint cause of action, is served, and he removes the cause to a federal court, the other defendant, after being served, has an election whether the case shall remain in the federal court or be remanded on his motion, especially in view of Act Cong. April 16, 1920.

At Law. Action by Mrs. M. E. Hunt against Mary E. Pearce and another. Case removed on petition of defendant to the federal court.

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

On motion by plaintiff to remand, and by defendants for an injunction against proceedings in state court. Motion to remand denied, and injunction granted.

William Neff, of Muskogee, Okl., for plaintiff.
Riley Cleveland, of Muskogee, Okl., for defendants.

WILLIAMS, District Judge. On November 27, 1920, the plaintiff, by petition in the district court of Muskogee county, Okl., commenced an action against defendants jointly for breach of contract, for the sum of $26,500. With the petition was filed a præcipe asking the clerk to issue summons for said defendants, one directed to the sheriff of Muskogee county for Mary E. Pearce, and another to the sheriff of Tulsa county for T. Pearce, said summons returnable on December 7, 1920. The sheriff of Tulsa county returned the summons as served on T. Pearce on November 29, 1920. That from Muskogee county shows that Mary E. Pearce was not found.

With her petition the plaintiff filed an affidavit, alleging that both of said defendants were nonresidents of the state of Oklahoma and residents of Arkansas, and the clerk issued a writ of attachment against the property of said defendants. Whereupon the sheriff of Muskogee county levied upon certain realty as the property of defendants. On December 6, 1920, Riley Cleveland—

"as attorney for defendants" in writing notified the plaintiff and her attorneys of record that "the defendants herein will, on the 9th day of December, 1920, at the hour of 9 o'clock, or as soon thereafter as the matter can be heard by the court, make application to the district court of Muskogee county, state of Oklahoma, to remove the above-entitled cause of action from the district court of Muskogee county, state of Oklahoma, to the United States District Court within and for the Eastern District of Oklahoma."

On the same day, the said Riley Cleveland "as attorney for petitioner" filed a petition with the clerk of the state court "for the removal to the District Court of United States for the Eastern District of Oklahoma" said cause, and after its presentation to the judge of said court, together with bond in the amount and conditioned as the law prescribes, and signed by the defendant. T. Pearce, and two sureties, on, to wit, the 13th day of December, 1920, an order was entered reciting that—

"upon the application of the defendants herein for an order removing this cause to the District Court of the United States for the Eastern District of Oklahoma, and it appearing that the defendants have filed their petition for such removal in due [form] of law, and that the defendants have filed a bond, duly conditioned, with good and sufficient surety, as provided by law, and that the defendants have given notice to the plaintiff of the filing of said petition and bond, as required by law; and it appearing to the court that this is a proper cause for removal to the said District Court of the United States for the Eastern District of Oklahoma: Now, therefore, this court does accept and approve said bond, and accepts such petition, and it is hereby ordered and adjudged that this cause be, and the same is, hereby removed to the District Court of the United States for the Eastern District of Oklahoma, and the clerk of this court is hereby directed to prepare the record in this cause for transmittal to the said court forthwith, and that all other proceedings in this court be stayed."

The record on removal was lodged with the clerk of this court on December 30, 1920. On January 27, 1921, the plaintiff moved this court to remand said cause to the state district court—

"as the defendants were sued jointly and all the defendants did not join in the removal petition, and the action does not present a separable controversy as to the defendant making the removal petition, and it is not claimed in the removal petition that a separable controversy is presented."

Pending the hearing of said application, attorneys for the plaintiff sought to invoke the jurisdiction of the state district court to have judgment rendered as by default against the defendant Mary E. Pearce, on the ground that the notice of the application for an order of removal by the attorney Riley Cleveland "as attorney for defendants" operated as a general appearance on her part in said court, and her failing to join in the application for removal left the action pending in said court as against her.

On February 9, 1920, ancillary petition for temporary injunction against the plaintiff to restrain and enjoin her and her agents and attorneys from proceeding further in said cause in the state district court was filed in this court and a temporary restraining order to that end was issued, and pending this hearing has been kept in force. On the same day application on the part of defendants T. Pearce and Mary E. Pearce to appear specially and move the court for permission to amend the petition for removal, so as to allege that the name of Mary E. Pearce by inadvertence was omitted, not only from said petition, but also from the bond filed in said case.

[1] Section 4730, Revised Laws of Oklahoma 1910, provides that:

"Where the action is against two or more defendants, and one or more shall have been served, but not all of them, the plaintiff may proceed as follows:

"First. If the action be against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct; and if he recover judgment, it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all, and the separate property of the defendants served; and if they are subject to arrest, against the persons of the defendants served.

"Second. If the action be against defendants severally liable, he may, without prejudice to his rights against those not served, proceed against the defendants served in the same manner as if they were the only defendants."

In Tremper v. Schwabacher et al. (C. C.) 84 Fed. 413, an identical statute being under consideration, the court said:

"Under this law, the defendant, * * * was obliged to appear and make his defense in the action, without waiting for service upon his codefendants. Therefore, at the time of filing his petition and bond for removal of the case, he stood alone, as if he were the sole defendant. He could not require his coderendants to join in a petition for removal, nor claim a stay of proceedings. It cannot be claimed that there is a separable controversy between him and the plaintiff; but, from necessity, he should be allowed to exercise his right to have the case removed, because, as the case stood at the time of the removal proceedings, he was the only defendant. The courts have held that where a defendant who, if sued alone, would be entitled to remove a case into a Circuit Court of the United States, is prevented from exercising the right by being joined with other defendants not entitled to the privilege, he may, after the disability has ceased, by the case being severed as to

his codefendants, remove the case, even though the time allowed for removal would have been passed if there had been no such disability. * * * By a similar course of reasoning, I reach the conclusion that in a case where several defendants have a right to remove a case, and only one of them is brought within the jurisdiction of the state court, and required to defend, he alone may claim the right. If in one case the departure of the codefendants who have appeared in court removes the barrier to the right of removal, the absence of codefendants who have not been brought within the jurisdiction of the state court, at the time when the right of removal must be exercised or waived, should give the same freedom to a defendant, in court, who may desire to exercise the right."

In Bowles v. H. J. Heinz Co. (C. C.) 188 Fed. 937, it is said:

"There is no separate controversy, and there is abundant authority for the general proposition that in such a case one of several defendants cannot remove the cause. I concur, however with Judge Hanford (Tremper v. Schwabacher [C. C.] 84 Fed. 413) in the conclusion that such rule does not apply where one only of two defendants has been served."

See, also, note 128, under section 1010, Comp. Stat. U. S. 1916, vol. 1, p. 900.

Act Cong. April 16, 1920, c. 146, provides:

"Hereafter, in all cases removed from any state court to any United States court for trial in which any one or more of the defendants has not been served with process, or in which the same has not been perfected prior to such removal, or in which the process served upon the defendant or defendants, or any of them, proves to be defective, such process may be completed by the United States court through its officers, or new process as to defendants upon whom process has not been completed may be issued out of such United States court, or service may be perfected in such court in the same manner as in cases which are originally filed in such United States court: Provided, nothing in this Act shall be construed to deprive any defendant upon whom process is so served after removal, of his right to move to remand the cause to the State court, the same as if process had been served upon him prior to such removal." 41 Stat. 554.

This provision appears to contemplate the procedure as sustained by United States Circuit Courts in Washington and New York in the above cases.

[2] As to the contention that the act of the attorney, in signing the notice of the proposed application for removal "as attorney for defendants" constituted a general appearance:

"It is now the well-settled doctrine of the federal courts that the filing of a petition for the removal of a cause from a state to a federal court, and the proceedings on such petition, are not the equivalent of a general appearance, and do not prevent defendant from thereafter appearing in the federal court and objecting to the jurisdiction over his person by reason of defect or irregularity in the process or the service thereof; the proceedings are a special appearance only for the purpose of a removal, whether expressly so stated or not." 4 Corpus Juris, 1343; Cain v. Commercial Pub. Co., 232 U. S. 124, 34 Sup. Ct. 284, 58 L. Ed. 534; Wabash Western R. Co. v. Brow, 164 U. S. 271, 17 Sup. Ct. 126, 41 L. Ed. 431; Goldey v. New Haven Morning News, 156 U. S. 518, 15 Sup. Ct. 559, 39 L. Ed. 517.

In Carpenter v. Willard Case Lumber Co. (C. C.) 158 Fed. 702, it is said:

"Again, it is not thought the appearance by the defendant in the state court for the purpose of filing its petition and bond for removal to this court constituted a general appearance to the merits of the case, or a waiver of

the invalidity of the attempted service because of the statute of this state. The service being invalid, no duty rested on defendant to obey the command of the summons issued from the state court. It could have permitted judgment to go by default against it and successfully resisted its enforcement. However, it did not desire to take such course, but pursued the more prudent one of appearing in the state court for the sole purpose of removing the controversy to this court, which it might lawfully do; and, when the controversy was so removed, the question of jurisdiction over the person of the defendant is one for the consideration of this court under the general provisions of the law, and not for the state court under special provisions. Louden Machinery Co. v. American Malleable Iron Co. (C. C.) 127 Fed. 1008, and cases therein cited."

The Carpenter Case was decided in the United States Circuit Court in Kansas, where the state practice is substantially the same as in Oklahoma.

Patchin v. Hunter (C. C.) 38 Fed. 51, is not in conflict with McHenry v. New York (C. C.) 25 Fed. 65, Tremper v. Schwabacher, supra, or Bowles v. Heinz Co., supra. In these cases all the defendants were nonresidents of the state in which the suit was brought, whilst in Patchin v. Hunter, one of the defendants being a nonresident and the other a resident in the state in which the suit was brought, and the cause of action being joint, the cause was under no condition apparent on the record removable. In a cause of action where both of the defendants are nonresidents of the state in which the suit is brought, the cause being joint, and service is had on both defendants, it is removable, providing both of the defendants so elect.

[3] In the cases cited the courts held that where one had not been served, the other could have the cause removed, and that taking the entire case to the federal court, after service was had from said court to which the cause was removed upon the other defendant upon his election, the case could remain in such federal court or be remanded on his motion. The said act of April 16, 1920, appears to confirm this conclusion.

An order will be entered, not only overruling the motion to remand, but also on the equity side enjoining the plaintiff, her attorneys and agents, from in any manner proceeding in this cause against either of said defendants in the state district court in which this action was originally brought.

THE WEST POINT.

Petition of LUCKENBACH.

(District Court, D. Massachusetts. March 19, 1921.)

No. 1027.

1. **Wharves ⇐22—Owner consenting to fire on barge does not assume risk.**
Consent by the owner of a wharf to the keeping of fire under the boilers of a barge, sunk alongside the wharf, to operate the barge's pumps, which was for the benefit of the wharf owner as well as of the barge owner, does not give implied authority to maintain such fires when the wind made it dangerous to the wharf, or establish assumption of risk to the wharf of fire caused by sparks from the barge.

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

2. **Shipping ⊂=209(3)—Evidence held to show wharf fire was caused by sparks from barge.**
On petition to limit liability of the owners of a barge, where the owner of a wharf claimed damages for the burning of the wharf, evidence *held* to show by preponderance thereof that the fire originated from sparks from the barge, by reason of the negligence of the servants of the owners of the barge; it being unnecessary for the claimant to exclude every other possible cause of the fire.

3. **Shipping ⊂=209(3)—Damage to wharf by fire held without knowledge or privity of barge owner.**
In proceedings to limit the liability of the owner of the barge, evidence *held* to show that the negligence of the employés on the barge, which caused a fire on the wharf, occurred without the privity and knowledge of the barge owners.

In Admiralty. Petition by Edgar F. Luckenbach, as managing owner and on behalf of himself and the other owners of the barge West Point, to limit their liability, in which the Pardee & Young Company filed answer and claim. Claim allowed, and petition referred to assessor to hear evidence and report.

Carter & Carter, of New York City, and Edward E. Blodgett, of Boston, Mass., for petitioner.

G. Philip Wardner, of Boston, Mass., for claimant.

HALE, District Judge. On November 13, 1912, the barge West Point was chartered by her owners to the Logan Coal Company, to transport a cargo of coal from Philadelphia to the Pardee & Young Company at Fall River, Mass. Pursuant to the charter, 16,019 tons of coal were so shipped. On December 3, 1912, the barge, with its cargo, arrived at Fall River and anchored late in the afternoon. In the afternoon of the same day two steam tugs belonging to the Staples Transportation Company took the barge in tow, and proceeded to tow her to Pardee & Young Company's coal dock, where the barge was to discharge. A little later on the same day the barge grounded off the end of the Pardee & Young Company's wharf, and it was afterwards found that she had struck a rock, and that a hole had been punched in her bottom. About 4 o'clock the next morning she was found to be full of water. Thereupon constant efforts were made by her owners to pump out the water, but without success. She was afterwards floated by the T. A. Scott Company; but in the meantime, on December 9, 1912, while the barge was still lying grounded in the dock, the buildings on the wharf of the Pardee & Young Company, near which the barge lay grounded, took fire and were destroyed. The barge owners thereafter filed a libel in this court against the two steam tugs which towed the barge into the dock, and against the Pardee & Young Company, to recover damages arising from the stranding and grounding of the barge. This suit was settled by the payment of $6,000 to the barge owners by the Staples Transportation Company, the owner of the tugs, and the Pardee & Young Company.

Subsequently the Pardee & Young Company brought suit, on the common-law side of this court, against the barge owners, to recover

for the damage caused by the fire, alleging that it was set by sparks which, through the negligence of the barge owners, their servants and agents, were permitted to escape from the barge and to be carried by the wind to the property of Pardee & Young Company. Thereupon Edgar F. Luckenbach, as managing owner on behalf of himself and the other owners of the barge, brought a petition to limit liability; the Pardee & Young Company filed its answer and claim in the limitation proceedings. The case now comes before the court upon this petition of the barge owners, and the answer and claim of the Pardee & Young Company.

The claimant contends that the fire was caused by sparks from the barge, due to the negligence of the barge owners, their agents and servants, and presents its claim against them for damages arising from such burning; and the claimant contends that the evidence now before the court, and largely of a circumstantial character, proves its case as alleged in its claim.

The petitioners contend that the whole case of the claimant is built upon suppositions and conjectures, and not upon any definite evidence that sparks from the barge actually caused the fire, and that the claimant has failed to prove by a preponderance of evidence that the injury occurred through the neglect of the petitioners, or that there was any fault on their part. They urge further that, in any event, they are entitled to limit their liability to the value of the barge.

The testimony discloses these facts: Claimant's wharf was 85 feet wide; it faced the northwest; the bow of the barge projected 15 or 20 feet beyond the northeast side; the barge was 220 feet long, and its stern must have projected over 100 feet beyond the southwest side of the wharf. From the northeast corner of the wharf to the barge was 4 feet. From the northwest corner of the wharf to the barge was 39 feet. Three feet from the front of the wharf there was a tower a little more than 98 feet high. The engine room in the tower was inclosed on four sides, 30 feet from front to back, 25 feet wide. This room contained all the hoisting machinery. Under the engine room was the car platform, 30 feet distant from the wharf. Underneath the car platform was an open space. Adjoining the engine room was the hoisting house, a wooden building, 10 feet wide, 12 feet deep, and 12 feet high, inclosed on all sides, with a door on the side towards the street, opening onto the car platform. The roof was shingled with 2 per cent. pitch; the northeast side of the building was 12 feet from the northeast side of the wharf. Its floor was made of 2-inch spruce planks. The building was sheathed, and, as the sheathing had dried, quite large cracks were left. On the southwest side of the wharf was the boiler room, inclosed on all sides, with a door on the southwest side. This room was 12 feet square and 18 feet high; it was right up against the southwest side of the engine room and continued down to the dock. This room contained one boiler, 6 feet in diameter and 16 feet high. In the boiler a stack projected up through the roof of the boiler room to a height of 50 feet above the wharf. The top of the stack was 15 feet below the southwest wall of the engine room. The engine room had a peak roof, the peak being 5 feet higher than the side

walls. The southwest side of the boiler room was 25 feet from the southwest side of the wharf. The stack stood midway between the front of the walls of the boiler room, about 8 feet northeast of the southwest wall of the boiler room. There was a door between the hoisting house and the engine room, which was kept shut. A 4-inch steam pipe, inclosed in asbestos, with iron rings, ran from the boiler through the hoisting house into the engine room. There were two windows, 30 by 60 inches each, in the engine room, 2½ feet above the floor on the side next to the barge. Six days after the barge grounded the fire took place, on December 9th. The weather was bright and clear. The wind was from 20 to 25 miles an hour, blowing from the barge to the wharf.

The testimony tends to show that the fire started in the old hoisting house; that this house had not been in use for about seven years; that it was kept locked; that there was nothing in it but a bag of waste, two barrels of oil, and a certain amount of dust; that the line of the northeast wall of the old hoisting house, extended towards the barge, would pass within 6 feet of her stack.

The testimony, accompanied by the photographs, shows further that the top of the bulwarks of the barge was considerably above the floor of the wall; that the top of the regular stack was not more than 22 feet lower than the floor of the hoisting house; that the stack was directly opposite a point half way between the northeast wall of the hoisting house and the northeast side of the wall; that it was 28 feet from the stack to the old hoisting house, that the wind was blowing from 20 to 25 miles an hour on the morning of the fire, from the barge to the wharf, and straight up the wharf; that on the same morning sparks were seen coming from the barge; and there is certain testimony, which I admitted, that sparks were seen coming from the barge on the days preceding the fire. The testimony tends to show that the fire started inside the hoisting house; but it also shows that there were large cracks in the walls and in the floor, and it is urged that sparks, striking the surface of the roof, would be likely to blow off, in the high wind, and lodge in the cracks. It does not appear that there had been a high wind in the same direction on any day between the grounding of the barge and the day of the fire.

The testimony tends to induce the belief that the agents of the barge owners must have had knowledge of the dry, inflammable character of the structure on the wharf, and of the danger of sparks escaping from the stack of the barge and setting fire to the structure upon the wharf when there was a high wind.

There is evidence that several of the agents of the barge owners were in and about the barge on the morning of the fire, and it seems clear that the agents and servants of the barge owners ought to have known of the liability of the escape of sparks under all the conditions in the case.

It is urged by the barge owners that the damages and injuries which the claimant sustained were not caused through any fault of the barge

owners or of those in charge of the barge, but that they were caused, as their answer to the claim sets forth, as follows:

"By a fire which started on the premises of Pardee & Young Company from overheated machinery, engines, and boilers and their connections and appliances, which was caused through the acts and negligence of the agents and servants of Pardee & Young Company, who were in charge and had the management of the said machinery, engines, and boilers and their connections and appliances, or through the acts of the agents and servants of Pardee & Young Company, or of some third person or persons who were permitted by Pardee & Young Company to enter upon said premises, who had or used a lighted match, or who had a lighted cigar or pipe, over whom the petitioner had no control, and for whose acts the petitioner is not liable or responsible, or was caused by spontaneous combustion, or was caused by sparks which emitted from the wrecking steamers or steam barges engaged in salving the said barge West Point and her cargo of coal, over which the petitioner had no control.

"If, however, it should be shown that the said fire was caused by sparks which were emitted from the barge West Point (but which the petitioner denies), then that was caused through the acts, negligence, and fault of the agents and servants of the said Pardee & Young Company, or of some third person or persons, over whom the petitioner had no control, and for whose acts the petitioner is not liable or responsible, in building, starting, drawing, or raking the fire of the said barge West Point, or in putting fresh coal on said fire and that from the time the said barge stranded and grounded to the 9th day of December, 1912, when it is claimed said fire started, and up to the time the said barge was raised and towed away, Pardee & Young Company, or its officers, agents, and servants did not protest against the building or starting of fire in the furnace under the boiler of said barge or continuing to do so, for the purpose of getting up steam to be used in the preservation of the said barge and cargo; but that said Pardee & Young Company assumed the necessary risk of keeping up steam, and which risk was inherent in the nature of the business in which the engine and boilers of said barge were employed, and which was for the benefit of said company; and it was for the benefit and at the implied request of said Pardee & Young Company, and without protest from said company, that a fire was kept in the furnace of said barge so steam could be kept up in the boiler of said barge.

"That the said damages and injuries which said Pardee & Young Company alleges it sustained, if any, were done and occasioned without the privity or knowledge of your petitioner and the other owners of the said barge West Point."

Upon an examination of the proofs it is found that there is little credible testimony of the fire originating from smoking and little foundation for the inference that such was the cause of the fire.

Although spontaneous combustion is possible in hot weather, there is not sufficient testimony to indicate that this was the foundation of the fire.

It may be said generally that the testimony of the barge owners relating to the cause of the fire presents merely possibilities.

It is urged by the barge owners that the barge was heated by soft coal, and that such coal does not give off sparks; but the proofs show that sparks are likely to be emitted when the boiler is under a forced draft, or where fires are being drawn. There is some evidence that there was wood on board, used "for lighting fires," although there is no affirmative testimony that such wood was in use on the morning of the fire.

[1, 2] It is urged, also, that something may be made of the fact that the people in charge of the barge obtained water and steam from the boiler on the wharf. It is not clear whether, on the morning of the fire, any steam was being supplied by the boiler on the wharf. The evidence does show that the claimant permitted the use of its boiler and steam, but it cannot be contended that, by so permitting the barge to take water and steam, the claimant gave any implied authority for the pumping operations, under all conditions of wind and weather. The pumping operations were for the benefit of all. They were not only for the benefit of the petitioners and the claimant, but for the benefit of any ships which had occasion to use the dock, or for those who were to be supplied with coal from the wharf. It cannot be contended that, if a vessel anchored in the dock for the purpose of delivering coal, and should take fire by sparks from the barge, a recovery would be prevented by the fact that the pumping operations were for its benefit. In my opinion there is nothing in the evidence as to the conduct of the claimant which can affect its right of recovery. It is not necessary for the claimant to exclude every other possible source of injury: Louisville & N. R. Co. v. Bell, 206 Fed. 395, 398, 124 C. C. A. 277; Railway v. Jones, 192 Fed. 769, 773, 113 C. C. A. 55, 47 L. R. A. (N. S.) 483.

Judged by the principle involved in the above cases, I think the testimony in the case at bar fairly induces the conclusion that the claimant has met the burden of showing, by a preponderance of evidence, that the fire originated from sparks from the barge and by reason of the negligence of the agents and servants of the owners of the barge.

[3] The claim is allowed, I find, however, that the loss or damage was without the privity and knowledge of the barge owners.

Otis T. Russell, Esq., of Russell, Russell & Russell, No. 185 Devonshire street, Boston, is appointed assessor, to hear evidence and report on the amount of the claim. Upon the coming in of the report of the assessor, further action will be taken in relation to limitation proceedings.

THE HELEN FAIRLAMB. THE SAPINERO. WHILDEN v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, E. D. Pennsylvania. March 9, 1921.)

No. 29.

Collision ⇐94—Schooner in fault for tacking in course of steamship.

A collision in the daytime on the Delaware river, between a schooner tacking down the river and an overtaking steamship, *held* due solely to the fault of the schooner in failing to keep a proper lookout and changing her course immediately after crossing the course of the steamship, and when so close that the latter was not apprised of the risk in time to impose on her the duty of keeping out of the way, under article 20 of the Inland Rules (Comp. St. § 7894).

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

In Admiralty. Suit for collision by Theodore L. Whilden, master of the Schooner Helen Fairlamb against the United States Shipping Board Emergency Fleet Corporation, owner of the steamship Sapinero. Decree for respondent.

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

Chas. D. McAvoy, U. S. Atty., and T. Henry Walnut, Sp. Asst. U. S. Atty., both of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. This suit arose out of a collision between the Helen Fairlamb, a two-masted schooner, and the steamship Sapinero, which occurred on March 12, 1919, in the daytime in the Delaware river between the mouth of the Schuylkill and Ft. Mifflin. The schooner was light, and was beating down the river with a reefed mainsail and full jib and foresail, the wind about south-southwest and the tide ebb. The schooner drew about 4 feet of water and was about 70 feet in length over all. The Sapinero is a large steamship owned by the United States Shipping Board Emergency Fleet Corporation. She was proceeding down the Delaware river about in mid-channel, loaded, in charge of a pilot and was drawing about 26 feet of water.

The Fairlamb in beating down the river, having tacked to the New Jersey side of the river, had gone about on her port tack to the west of the channel on the Pennsylvania side, and when westward of the channel had gone about again on her starboard tack when the collision occurred. She was struck upon the overhang of her stern; her davit and boat were carried away. The pilot of the Sapinero, seeing that a collision was about to occur, signaled full speed astern, which was obeyed, and ordered the wheel put hard aport, which was also obeyed. Immediately prior to the collision the master of the Fairlamb, who had been below, came on deck and ordered the wheel of the Fairlamb put hard aport, hoping to throw the Fairlamb up into the wind and avoid the collision.

The libelant claims liability through invoking article 20 of the Inland Steering and Sailing Rules (Comp. St. § 7894) providing that, when a steam vessel and sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. If the circumstances were such as to place the duty of keeping out of the way of the schooner upon the steamship, the schooner under article 21 (section 7895) had the right and duty to keep her course and speed; and if the schooner was proceeding upon a course on her starboard tack sufficiently evident to apprise the Sapinero of the fact that she was upon her course, it was its duty under article 22 (section 7896) to avoid crossing ahead of the schooner. Moreover, the schooner being the privileged vessel, it was the duty of the Sapinero, if the schooner was sufficiently started upon her starboard tack to apprise it of that fact, under article 23 (section 7897) to slacken her speed or stop or reverse.

The witnesses for the Fairlamb were Jaquette, a deckhand, who had been following the sea for 34 years, and who was at the wheel, Shultz,

also a deck hand, and who was attending the jib, Wensel, the cook, and Whilden, the master; the two latter having come upon deck when they saw that a collision was about to occur. Their testimony tended to show that, having crossed a considerable distance ahead of the Sapinero on her port tack, she was obliged to shorten her tack and go about because of the presence west of the channel of an anchored barge, obstructing her course, at a distance variously stated to be 200 feet to 200 yards west of the apparent course of the Sapinero, and that having gone about, she had filled away on her starboard tack, and was standing on a course across the river for 5 or 6 minutes, when the steamer was seen making directly across her course, and 3 or 4 minutes later the collision occurred.

The witnesses on behalf of the Sapinero were Capt. Poynter, the pilot, Chief Engineer Betts, and Capt. Kelley, the master of a Shiping Board tug which was following the Sapinero on her starboard quarter. Their testimony tended to show that, immediately after crossing the bow of the Sapinero on her port tack, the Fairlamb went about and again attempted to cross the bow of the Sapinero upon her starboard tack; that this was done without giving the Sapinero time or opportunity to observe what the intention of the Fairlamb was, nor time to avoid the collision.

There is one very important fact brought out by the testimony of Jaquette and Shultz. They both testified that, when crossing the river to the Pennsylvania or western side, they saw the steamship coming down. There is no evidence that they observed her again until after the schooner went about, and then just as the two vessels were in a position to cause the collision. Jaquette, who was steering, testified that after he went about it was about 5 minutes before he saw the steamer, and could not tell how long after that the collision occurred, but immediately upon seeing her, and the captain coming on deck, he ported his helm and threw her up to the wind. Schultz, who was the only other member of the crew on deck, testified that he did not see the steamer until about 5 minutes after the schooner came about on the starboard tack; that he was tending jib when he happened to see it, and he then called to Jaquette; that the steamer was then about 200 yards away. It is a very significant fact that neither of these men saw the steamer until it was too late to avoid the collision.

The testimony of the witnesses on both sides as to the time and distance is even more unreliable and vague than is customarily observed in collision cases. If the witnesses for the libelant have correctly stated the facts the schooner had gone about and was on her course for 5 or 6 minutes before the steamer was observed, plus 3 or 4 minutes after she was observed before the collision occurred, which would have given ample time for the pilot of the Sapinero to be apprised of her course, to have reversed his engines, and gone to starboard under the stern of the schooner.

If the witnesses for the respondent have correctly stated the facts, the Fairlamb attempted to go about immediately after crossing the bow of the steamer on her port tack, and had not time to fill out on her

course before she put herself directly in the path of the Sapinero. We must therefore look to the circumstances and to the probabilities, in order to determine the fault which caused the collision. It is uncontradicted that the Fairlamb did not continue on her port tack as far into shore as she might have done. She was light, with a draught of but 4 feet, and there was ample depth inside of where the barge lay to permit her to go further toward the shore. The reason she did not do this is stated by all the witnesses for the libelant to be due to her course being obstructed by the barge, although the respondent's witnesses testified that she was below the barge when she went about.

Accepting the libelant's version as true, it is apparent that there was not sufficient space between the course of the steamer and where the barge lay for the schooner to go about and fill away on her starboard tack. With but two men on deck, one at the wheel, intent upon watching the sails, and the other tending the jib, the probability is strongly toward their attention being so diverted, and their view so obstructed by the sails, that they did not see how close the steamship was until after the schooner had gone about.

It is apparent from the testimony that there was a fair sailing breeze. It is also apparent that the collision occurred so immediately after the schooner went about that she could not have been upon her course a sufficient length of time to apprise the steamer that she was on that course, so as to enable it to keep out of her way. The pilot, captain, and the first officer of the steamship were upon the bridge, and Kelley, the captain of the tug, was in a position where he could observe both vessels. While the estimate of the pilot, the master of the tug, and of Engineer Betts as to the distance between the schooner and steamer, when the former crossed the latter's bow, is incredible, yet their testimony that the schooner attempted to change her course and go about when the steamship was too close upon her is entirely probable, when taken in connection with the short distance between the course of the steamship and the position of the barge. The steamship blew her whistle, reversed her engines, and ported her helm practically simultaneously.

I am unable to find from the testimony in the case that the schooner was upon a course involving risk of collision long enough to apprise the steamship of the risk, so as to impose the duty upon her under article 20 of the Inland Rules (Comp. St. § 7894) to keep out of the schooner's way, nor to find that the schooner was justified in keeping her course and speed upon her starboard tack. I find that the two men upon the deck of the schooner, through attempting to go about without having sufficient time and space to justify them in doing so, and through not keeping a proper lookout for the steamship, did not, under article 27 of the Inland Rules (section 7901), give due regard to the special circumstances, which, if observed, would have rendered it entirely possible, without danger of collision, to have either passed the barge or to have laid to, until the steamship was out of the way. In short, the schooner attempted to change her course immediately after crossing the steamship's bow and thereby caused the

collision. It is found, therefore, that the collision was due solely to the careless and negligent manner in which the Fairlamb was navigated, and the libel must be dismissed.

A decree will be entered accordingly, with costs to the respondent.

LENOX, Inc., v. JONES, McDUFFEE & STRATTON CORPORATION.

(District Court, D. Massachusetts. March 4, 1921.)

No. 1038.

1. **Patents ⇐131—Public free to make and sell after expiration of term if unfair competition is not practiced.**
   The rights of monopoly given by a patent expire with its term, and others are free to make and sell the thing patented, subject only to the rule against unfair trade, by placing on the market articles without distinguishing markings and in such very close similitude of those of the original manufacturer as is calculated, and intended, to deceive purchasers.
2. **Trade-marks and trade-names ⇐70(2)—Unfair competition in use of design.**
   The use by an English manufacturer on plates and other tableware of a design very similar to that of the Holmes design patent, No. 50,064, for a design for a "Ming" plate, which ware was placed on the market by an American dealer after expiration of the patent, *held* not to constitute unfair competition with the American manufacturer under the patent which used the design only on high-grade chinaware, where there were considerable differences in the design and coloring, the English ware was of much cheaper grade, selling for one-fifth the price of the American, and where the marking on the bottom of the plates was distinctly different and contained the name of the manufacturer and the word "England."

In Equity. Suit by Lenox, Incorporated, against the Jones, McDuffee & Stratton Corporation. Decree for defendant.

Ellis Spear, Jr., and Edward N. Goding, both of Boston, Mass., and Edmund Quincy Moses, of New York City, for plaintiff.

Kenyon & Kenyon, of New York City, and Arthur J. Wellington, of Boston, Mass., for defendant.

ALDRICH, District Judge. The Lenox Company of New Jersey rests its case upon a design patent, numbered 50,064.

The application was filed October 16, 1916, and the design was patented December 19, 1916, under an express term limiting it to 3½ years.

The designer was Frank G. Holmes, and whatever rights there are under the patent are now owned or controlled by the Lenox Company.

In my view, this case leaves only a single question for me to decide, as will be explained later on.

The case has reference to a patented design for a plate or similar article. The design is particularly ornamental, and was the result of large expense in the line of artistic work, with the result of a rare

combination of artistic lines, scrollings, and birds attractively posed, or poised, including a Chinese tree, with figures of butterflies, strikingly wrought, all intended for the center of the ware. The Chinese tree was old, as counsel concede, and as everybody knows.

With the design, as it was brought out, were combined with the marginal scrollings peculiarly attractive shades and colorings, interspersed with the figures of birds in brilliant and varied plumage, artistically poised within shapely panels, in accordance with the design pattern. Yet the Lenox bases its claims more upon the design pattern than upon colorings and shades, yet claiming that the combination of colors and shades is an element to be considered; and this is so, I think, because it is a market production which strongly appeals to the artistic eye.

The design was one of admitted merit, yet, after all, it was one which contemplated a combination of colorings and shades to give artistic effect to the figures of the design, some of which were old. The patent, it is to be presumed, was not based altogether, perhaps not at all, upon the colorings and shadings, but rather upon the ornamental combination of figures and shapes and drawings, as shown by the pattern attached to the patent itself.

The ornamental combination and design were intended, of course, for the face of the plate.

On the back of the intended article of ware—as brought out for the trade—there is a wreath, inside of which is the letter "L"; under the wreath (if that is the proper characterization of the figure) is the word "Lenox"; underneath that the word "Ming"; and still again, under "Ming," "Design Patented."

The scrolls and figures and words of the original design are in black and white. Some figures of the design combination as patented, and as put upon the market, have been known since the fifteenth century, and the word "Ming" and the Chinese tree, as is supposed, associate themselves with the days of the Ming dynasty.

The design intended for the face of the ware is one of undoubted merit, as has already been said, and is one which was intended to be superimposed upon the face of a high grade of chinaware, and the product, as brought out, by the Lenox Company, for the trade, was a product resulting from great pains in selecting the quality of ingredients which were to enter into the ware itself.

It was put upon the market as an article of merit, and in commerce it was something which attracted the eye of trade—especially the eye of women, who, as the evidence shows, were the chief purchasers of high-class chinaware, like that of the Lenox "Ming" in question.

The merit of the decorative Ming production was such that its sales ran up into hundreds of thousands of dollars within a single year.

The chief difficulty with the plaintiff's case is that the patent expired before the menace of infringement which the Lenox Company now alleges as something injurious to its rights.

There are several defenses, but under the circumstances it seems obvious that the case should be dealt with as only, in substance, in-

volving the question of unfair competition, though other features of the defenses may, perhaps, be touched upon, in an incidental way.

[1] That rights of monopoly, under patents based upon machines, instrumentalities, designs, etc., expire at the end of the term expressed in the patent (except, perhaps, as to exact copies, or something in striking similitude, in bad faith), and that things covered by the patent become public property—provided they are reasonably marked, by the name of the manufacturer who adopts them, and are reasonably and properly designated as something made by one, other than the original patentee, or producer, or manufacturer, by giving the true name of the one who makes them, and puts them into the trade, except perhaps in cases in exact like, or perhaps something in very close similitude, of the original in bad faith, to the end that purchasers shall not be deceived into buying a particular thing as an original, when it is not, and thus deceived into buying something they are not getting—seems to have been settled by decisions which must control this case. Singer Co. v. June Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118; Merriam Co. v. Ogilvie, 159 Fed. 638, 88 C. C. A. 596, 16 L. R. A. (N. S.) 549, 14 Ann. Cas. 796; Merriam Co. v. Ogilvie, 170 Fed. 167, 95 C. C. A. 423; Dry Goods Co. v. Scriven Co., 165 Fed. 639, 91 C. C. A. 475; Allen v. Walton (C. C.) 178 Fed. 287; Keystone, etc. v. Portland Pub. Co., 186 Fed. 690, 108 C. C. A. 508; Merriam Co. v. Saalfield, 190 Fed. 927, 111 C. C. A. 517; Wheat Co. v. Humphrey Co., 250 Fed. 960, 163 C. C. A. 210.

[2] It follows, therefore, that the chief question here is whether the articles of English manufacture, which Jones, McDuffee & Stratton think they may put into their trade, are suitably and properly designated as another and as an English product, to the end that they shall reasonably differentiate themselves from the Lenox "Ming."

Now as to the English product:

It is a product of much cheaper material, and of a somewhat less attractive design, though quite like that of the Lenox, yet a design somewhat different, because the tree is one of different lines, the flowers differently placed, with a lower branch and flowers on the left-hand side of the English, an absence in the English of the butterflies which appear in the Lenox, and the birds, though of brilliant plumage and of attractive figures, are quite differently poised, the panels are differently shaped, and the flowers and other figures within the panels are quite different in the English from those in the "Ming" panel, and the shades of the ware, at least to the feminine eye, would differentiate the two.

I have described what is on the back of the Lenox, and the evidence tends to show (and I think it is true) that women, who are the chief purchasers of such ware, with feminine tact, or under the feminine impulse, and perhaps somewhat under the instinct of curiosity, after looking at the front design, as the next step look for the name of the manufacturer, and of the place of the maker, as indicated by what is on the back of the ware.

The evidence also tends to show that women purchasers are quite apt to hold the ware up to the light, to see how it shows up.

As to men purchasers of high-class chinaware, which, according to the evidence, are a small percentage of the purchasers, I think that sensible men would look at the back, if they were buying expensive chinaware. Whether they would hold the ware up to the light as a test is perhaps doubtful.

I have so far spoken of the design which appears upon the face of the English ware. Now as to the designation on the back of the English:

There is a figure of a crown, or something which at all events looks English, there are the words "Johnson Brothers," and the word "England," and on Defendant's Exhibit B, and perhaps on others, there is the word "Vigo," all of which are quite different from the words and figures on the Lenox.

Again, on the Lenox, the wreath and the "L" and the words are in black, while on the English the words and figures are in green.

I think the features, which I have described, sufficiently indicate to purchasers of the wares in question what they are getting, especially when it is considered that the inferior English product in the trade holds at prices only something like one-fifth of that of the higher class Lenox product.

The English product in trade demands only something like one-fifth of that of the original Lenox, and I think the figures and colorings, on the back of the English, reasonably and suitably designate the place from whence the product comes. I think this designation was in good faith, and was to the end that the public should not be cheated, and I find that the Jones McDuffee concern, in dealing with the English product and making contracts for shipments, acted in good faith with reference to the question whether the public would, or would not, be deceived.

No rule of law, or of reason, would require the differentiating names and marks of the makers to be placed on the face of chinaware, or of other ware carrying an attractive decorative design. Such a setting would at once mar the beauty of the design, and at once dethrone the purpose of the producer, which, of course, is that of attracting trade through a scheme of combinations appealing to the artistic eye.

The rule of reason only requires the distinctive marks to be placed on the back of the ware, where not only those of artistic tastes, but the average trade as well, would naturally look for the markings, if interested to know. This is where the markings would naturally and reasonably be placed on such ware as that in question, both as to the plaintiff's and the defendant's, and where they would naturally be looked for by members of the public who buy, and where it must be said they would reasonably expect to find them.

Yet we must look further to the relations between the English company and the Jones McDuffee concern, in respect to the English product, and as to the proposed shipments.

It seems that the "Vigo" pattern was brought out, to some extent, by the English company, through its American agency in New York, during the life of the Lenox design; yet I think it was done in good

faith, though that is something perhaps, not to be decided here, and the "Vigo" was, perhaps, handled somewhat by the Jones McDuffee Company. But that is not made a subject of complaint in this bill, because the English company, after correspondence with Mr. Brown, president of the Lenox Company, suspended solicitations, and notified Mr. Brown to that effect, and Mr. Brown acknowledged, with pleasure, the attitude of the English company, and so far as the evidence shows, and I think I am correct in saying this, the Jones McDuffee Company suspended their connections with it during the life of the patent.

Thus things occurring during the life of the Lenox design were amicably arranged, and the questions here have reference only to the menace of things done, or proposed to be done, since the expiration of the life of the Lenox design patent.

The Jones, McDuffee & Stratton Company is a corporation which, through the father of the Jones now president of the corporation, succeeded to a business founded by Otis Norcross, and is a concern, as well as that of the Lenox, which stands high in the field of commerce in which they are operating.

A representative of the Jones McDuffee concern (I think Theodore Jones), being in New York for business purposes, was shown by a representative of the English company samples, or tentative sample designs, of the ware which, as was explained, was to be brought out by Johnson Bros., in England. There were explanations as to dissimilitudes in shades, patterns, and quality of ware, and, I think, of differences between that and the Lenox in respect to designs and markings, together with explanations as to the differences in cost.

The English samples indicated a cheaper grade of ware (earthenware, I think, and in some grades that of semi-porcelain), and the designs were in quite close similitude to that of the Ming patent. And the Jones McDuffee Company man, understanding that the Ming patent had expired, and without understanding that he was violating any of the rights of the Lenox Company, and in good faith, made contracts in respect to the wares which were being brought out in England, contracts which contemplated very considerable future shipments of the English ware, which shipments were to be to the Jones, McDuffee & Stratton Company. The Jones McDuffee Company has, in the past, exclusively handled the high-grade "Ming" china in the Boston trade zone, and are still handling it (I believe, and as the evidence shows), with laudable commendations as to its high class and character.

But I find that the Jones concern was not, and is not, in trust relations with the Lenox Company. I find that both the Jones Company and the English Company, in respect to the transactions in question, were acting in good faith, so far as their acts concerned the rights of the Lenox Company, and when this litigation was started that shipments were suspended without the Jones McDuffee Company's pressing the Lenox Company to a hearing upon its petition for a preliminary injunction.

Patent monopoly was intended by the framers, in the primal sense, among other things, to advance science, and to encourage invention

in respect to instrumentalities, to stimulate original and attractive designs in the field of art, through granting exclusive control to inventors and designers for a limited period. Yet it still remains that it is quite as true, in the broader and more important sense, that there was an intent in the interest of the general public, to the end that the public at large, after the limited monopoly had had its run, should receive the benefits of developments which the government had encouraged, through giving exclusive monopoly to inventors and designers for a limited period.

The scheme of the Lenox assembly—the figures, lines, scrolls, and other attractive features—was one which unquestionably resulted in producing an exquisite design, and the purpose of the Lenox Company, in respect to the quality and grade of ware which it brought to trade and commerce, in connection with the design, was laudable. But exclusive control has had its day, according to the express terms of the patent covering the design.

Therefore, if there was no wrongful purpose, the Lenox design, except as to limited qualifications, is open to others; and if the English product, which the Jones Company proposes to use, was suitably marked and designated as English product, so that purchasers should not be led to believe that they are getting the original Lenox "Ming," when in fact they are getting something else, an article manufactured by some one other than the Lenox, thinking that it was the Lenox.

The circumstances of the hearing show that the parties look upon this case as an important one, and it is gratifying and refreshing to say that counsel and parties have conducted their litigation with fairness and dignity, each side to the other.

If all litigation were to be conducted with as little "bad blood" as has been shown here, "bad blood" being an expression sometimes used to express heated legal controversy, and if parties and counsel in all cases should exhibit the fine quality of courtesy which has been shown in this hearing, the difficulties of judges, having for a time the task of deciding cases, would be greatly lessened.

The particular remedy which the plaintiff seeks, after stating its views as to the grounds for it, is a permanent injunction against further shipments or importations to the Jones Company of the English product which have been described.

In view of the rule of law in respect to the rights of the public, after a patent has expired, to which I have referred, and tried to explain, and of the distinctive markings wherein the manufacture, in respect to such art, they would ordinarily be placed, and where in the trade they would be expected to be found, I do not think the English product, under the circumstances, in the hands of the Jones McDuffee Company, can be said unreasonably, or unfairly, if at all, to come into competition, in trade, in regard to the genuine Ming.

Under all the circumstances, and for the reasons given, I find as a fact, and rule as law, that the bill and the petition should be dismissed, and they are dismissed, with costs to the defendant.

DUNGAN, HOOD & CO., Inc., v. C. F. BALLY, Limited.

(District Court, E. D. Pennsylvania. February 17, 1921.)

No. 7694.

Corporations ⊂=642(4½)—Foreign corporation held to be "doing business" in state by an agent, subjecting it to suit in federal court, so that service on agent was good.

Defendant, a Swiss corporation, manufacturing boots and shoes in Switzerland and France, made a contract for the purchase of leather from plaintiff, a dealer in Pennsylvania, delivery to be made f. o. b. cars Philadelphia. A director of defendant came to Philadelphia as a witness in a suit by defendant there pending, and while there, under authority from defendant, in failing to adjust a controversy with plaintiff, refused on behalf of defendant to accept further deliveries under the contract. He also transacted business with other dealers, and while there was served with summons in an action by plaintiff against defendant on the contract. *Held*, that his acts constituted a doing of business by defendant in the state, which subjected it to the suit in the federal court in that jurisdiction, and that the service was good.

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

At Law. Action by Dungan, Hood & Co., Incorporated, against C. F. Bally, Limited. On rule to quash writ and set aside service. Rule discharged.

Conlen, Brinton & Acker, of Philadelphia, Pa., for plaintiff.
John Cadwalader, Jr., of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The defendant is a corporation organized under the laws of Switzerland, and engaged in Switzerland and France in the manufacture of boots and shoes. The plaintiff is a corporation of Pennsylvania, engaged in the manufacture of leather. In 1919 the plaintiff accepted an order from the defendant for the sale of 3,000 skins. Part of the leather under this contract had been delivered and paid for at the time of the service of the writ in this case, but there was a controversy between the parties as to the quantity of the merchandise delivered.

During November, 1920, Ernest O. Bally, a director of the defendant corporation, came to Philadelphia as a witness for his company in a suit brought by it against the Quaker City Corporation, pending in this court. While present in Philadelphia, an arrangement was made through correspondence between the New York office of C. F. Bally, Limited, and Dungan, Hood & Co., for the purpose of an interview between Mr. Bally and the officers of Dungan, Hood & Co., to attempt to settle the controversy over the contract. Mr. Bally went to the office of the plaintiffs; the dispute between the parties was discussed; no agreement was reached, and Mr. Bally thereupon, having authority to do so, declined on behalf of the defendant to accept any further shipments. Thereafter a writ was issued and served upon Mr. Bally as a director of the defendant corporation. It appears that C. F. Bally,

Limited, bought the leather from Dungan, Hood & Co. through an order given and accepted by mail, and that it was sold f. o. b. cars Philadelphia.

While Mr. Bally was in Philadelphia, he also called upon the Surpass Leather Company and examined certain skins at that company's premises with the view of making an arrangement whereby leather which had been sold and delivered to C. F. Bally, Limited, should be taken back and another kind of leather substituted. While in Philadelphia, he also called at the office of John B. Evans and Co., leather dealers, for the purpose of getting one of the firm to testify in the case pending in this court as to prices at a prior date. While at the Evans premises, Mr. Bally examined leather and obtained prices on the same, and it was while there he was served with the writ of summons.

The question raised by the rule is whether the defendant, C. F. Bally, Limited, in view of these facts, was engaged in business within the district, so as to bring it within the jurisdiction of this court through service of the summons upon Mr. Bally, as one of its directors. When Mr. Bally came within the district, he came as a witness for the corporation, for the purpose of attending a session of this court. It is not disputed that such attendance did not bring the corporation, through its director, into the jurisdiction, for the purpose of bringing it into court as defendant in another case.

The defendant has no factory, does not manufacture within the Eastern district of Pennsylvania; it has not now and never has had any of its capital invested, and does not sell any of its output, within this district. It has purchased leather from various manufacturers and dealers in the district. It never registered in the state of Pennsylvania under the Act of April 22, 1874 (P. L. 108), nor has it appointed the secretary of the commonwealth its agent upon whom process can be served under the Act of June 8, 1911 (Act June 8, 1911 [P. L. 710]; Pa. St. 1920, §§ 11054–11058). The purpose of the acts of assembly of Pennsylvania requiring a foreign corporation to register with the secretary of the commonwealth is to enable those having business dealings with them to make them answerable in the courts of the state in which they are engaged in business. One penalty for failure to comply with the act of 1911 is that the corporation may not maintain an action in the courts of the state. Failure to comply, however, does not render it immune from process, if it has, in fact, through duly appointed agents, been engaged in business within the state.

As the present suit is brought in a federal court on the ground of diversity of citizenship, the fact that the defendant has not complied with the act of 1911 is immaterial. The contract for the alleged breach of which the present suit was brought was, to the extent that the leather was to be delivered by the plaintiff f. o. b. cars, to be performed at Philadelphia. The carrier thereby became the agent of the defendant for the purpose of delivery. While delivery to the carrier under a sale f. o. b. cars is not engaging in business, so as to bring the defendant within the jurisdiction for the purpose of suit, yet it was considered a circumstance in connection with other facts in the case of Premo Specialty

Manufacturing Co. v. Jersey-Creme Co., 200 Fed. 352, 118 C. C. A. 458, 43 L. R. A. (N. S.) 1015, in which service upon the treasurer and secretary of the defendant while within the district in connection with the contract in suit was held valid. In that case the contract was entered into by an agent physically within the district, which is not the fact in the present case, although the acceptance of the defendant's order was sent from Philadelphia. The business which Mr. Bally transacted within the district was in relation to the very contract in suit, and the parties not having come to an agreement, Mr. Bally on behalf of the defendant, so far as the present rule is concerned, repudiated the contract by refusing further performance. While his purpose in coming into the jurisdiction was to attend court as a witness for the present defendant in an action in which it was the plaintiff, as a matter of convenience, he came clothed with authority from the defendant to represent it in transacting its business concerning an adjustment of the controversy arising under the contract in suit, and he also transacted business of the defendant with the Surpass Leather Company concerning a contract with it. The case is stronger upon the facts than the case of Brush Creek Coal & Mining Co. v. Morgan Gardner Electric Co. (C. C.) 136 Fed. 505.

While an individual may be served with summons wherever he may be found, he may be entitled to immunity from service upon the ground that he came into the jurisdiction for the purpose of attending court as a party or witness, and thus be entitled to the privilege of not being subject to the process when going to or from, or being within the jurisdiction for the purpose of participation in the trial of an action. But if, as said in the case of Skinner v. Waite (C. C.) 155 Fed. 825, he lays aside his character of party or witness and engages in transactions giving rise to other litigation, he is deemed to have waived his privilege; and the same rule applies to a corporation. It may waive the privilege of immunity of its officer or agent in the same manner.

The defendant's business was that of manufacturing shoes. In order to manufacture shoes it was necessary for it to purchase leather. Its contracts for the purchase of leather and the settlement of controversies concerning them was business of the defendant. How can it be said that, when its authorized officer transacted its business in relation to the contract in suit, and for it repudiated the contract, it was not engaged in business in the jurisdiction? In People's Tobacco Co., Ltd., v. American Tobacco Co., 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587, Ann. Cas. 1918C, 537, the court said:

"Each case depends upon its own facts. The general rule deducible from all our decisions is that the business must be of such nature and character as to warrant the inference that the corporation has subjected itself to the local jurisdiction, and is by its duly authorized officers or agents present within the state or district where service is attempted. Phila. & Reading Ry. Co. v. McKibbin, 243 U. S. 264; St. Louis Southwestern Ry. Co. v. Alexander, 227 U. S. 218."

The validity of service depends upon whether the corporation was doing business in the district in such a manner and to such an extent as to warrant the inference that, through its agents, it was present here.

Green v. C. B. Q. Rwy. Co., 205 U. S. 530, 27 Sup. Ct. 595, 51 L. Ed. 916. Under the facts in this case it appears that Mr. Bally was an officer upon whom service may be had, that he had full authority to transact the defendant's business while here. As Judge Dickinson said in Nickerson v. Warren City Tank & Boiler Co. (D. C.) 223 Fed. 843:

"Strictly speaking, a corporation does not migrate when its officers move into another jurisdiction."

But in that case the jurisdiction was sustained upon the ground that the corporation was engaged within the state of Pennsylvania in the business of erecting an oil tank which was in charge of a foreman present here for that purpose and it was present here transacting the very business for which it was incorporated. The language of Judge Platt, in New Haven Pulp & Board Co. v. Downingtown Mfg. Co. (C. C.) 130 Fed. 605, 608, is pertinent:

"The court did not invite the cause, but it is here, and, unless an inexorable sanction exists, it is not inclined to force a domestic corporation to migrate to a foreign forum in search of justice. It would seem ungracious for the defendant to permit its agent to visit Connecticut concerning matters which touch one branch of a transaction, and to object to service upon such agent of a notice that the plaintiff seeks to recoup in one direction what it has lately lost in another."

Also, as was said by Mr. Justice Peckham, in Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602, 619, 19 Sup. Ct. 308, 315 (43 L. Ed. 569):

"A vast mass of business is now done throughout the country by corporations which are chartered by states other then those in which they are transacting part of their business, and justice requires that some fair and reasonable means should exist for bringing such corporations within the jurisdiction of the courts of the state where the business was done, out of which the dispute arises."

Rule discharged.

KEELEY v. EVANS, Dist. Atty., et al.

(District Court, D. Oregon. February 14, 1921.)

No. 8530.

1. **Courts ⇐508(2)—Federal court cannot review action of state court in denying admission to bar.**

A federal court is without power or authority to review, re-examine, or reverse the action of the Supreme Court of a state in denying a license to practice law in the state, nor has it jurisdiction to require the state courts to grant such license.

2. **Constitutional law ⇐206(4), 207(2), 306—Denial of admission to bar not abridgment of "privilege or immunity."**

While the right of an attorney to practice law is a property right of which he cannot be deprived without due process of law, refusal to grant him a license to practice in the courts of a state is not an abridgment of any privilege or immunity, in which he is protected by the Fourteenth Amendment or article 4, § 2, of the Constitution.

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

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

3. Attorney and client ⇐1—Statute prescribing qualification for admission to bar valid.

A state statute prescribing the qualifications prerequisite to the admission of any person to practice law in the courts of the state and the tribunal and procedure by which such qualifications shall be determined is within the power of the Legislature and valid.

In Equity. Suit by Lee Roy E. Keeley against Walter H. Evans, District Attorney for Multnomah County, Or., and the Justices of the Supreme Court of Oregon. On motion to dismiss bill. Motion sustained.

Lee Roy E. Keeley, of Portland, Or., for complainant.

Walter H. Evans and E. F. Bernard, both of Portland, Or., for defendant Evans.

George M. Brown, Atty. Gen., of Oregon, and Wallace McCamant, of Portland, Or., for defendant Justices of Supreme Court.

WOLVERTON, District Judge. Complainant is a citizen of the United States, and was on and prior to March 24, 1919, a citizen and resident of the state of California, and a member of the bar of that state in good standing. On that date he made application to the Supreme Court of this state (Oregon) for admission to practice law herein, and was licensed to practice for a period of nine months, under rule of court 41 (173 Pac. xiii). Objection was thereafter, and within six months, under the rule, entered to his permanent admission. Service of a copy of the objection was made upon complainant. The objections were referred by the court to the Board of Bar Examiners of Oregon for investigation, and on December 5, 1919, complainant was accorded a hearing before the board. One member of the board declined to act, because of a challenge on the part of complainant on the ground of prejudice. The remaining members made report to the court exonerating complainant from the charges preferred under the objections, but declined to recommend his permanent admission, because of lack of professional character requisite for an attorney of the state, based upon a consideration of the testimony taken before the board as a whole, and particularly the statements and conduct of the applicant at the hearing.

On February 17, 1920, the matter came up without argument before the court, upon the report and the accompanying evidence, and complainant's admission was denied. Upon applicant's motion, a rehearing was granted and had, at which arguments were presented upon each side, and considered. The court, deeming the action of complainant before the Board of Examiners unbecoming, and that he is by nature turbulent and intemperate, entered an order refusing permanent admission. Deeming himself aggrieved, complainant has instituted this suit against the Chief Justice and the Associate Justices of the Supreme Court and Walter H. Evans, district attorney for Multnomah county, praying injunction restraining them from interfering with his engaging in the practice of the law in Oregon; that the provisions of sections 1077 to 1081, inclusive, of Lord's Oregon Laws,

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

and rules 38 to 42, inclusive, of the Rules of the Supreme Court (173 Pac. xii), be adjudged and decreed to be unconstitutional and void; that defendants, except Evans, be directed and required to admit complainant to the bar of the state, and to license and authorize him to practice law in all the courts therein; and that complainant have judgment against defendants, except Evans, for the sum of $5,030 and costs.

The jurisdiction of this court and the sufficiency of the bill of complaint are brought to test by motions to dismiss. The record presents a case, not of a proceeding for the disbarment of complainant, but of one whereby he is seeking admission to the bar as an attorney from another state, and a denial by the court of such admission. The license extended him to practice for the period of nine months was only temporary and probationary, pending an opportunity for those concerned to make proper investigation of complainant's fitness to be admitted permanently. The cause of complainant's application was therefore pending during the probationary period or until otherwise disposed of.

[1] It is beyond question that this, a federal court, has no power or authority to review, re-examine, or reverse the action of the state Supreme Court in denying a license to practice law in the state. The United States Supreme Court has so declared as to its own authority to re-examine or reverse, as a reviewing body, the action of a state court in disbarring a member of the bar of its own court. Selling v. Radford, 243 U. S. 46, 50, 37 Sup. Ct. 377, 61 L. Ed. 585, Ann. Cas. 1917D, 569. If that court has no such authority, it follows, by a much stronger reason, that this court possesses none.

Nor can this court interpose to give complainant affirmative relief, such as to require the Supreme Court of the state to issue him a license to practice law in the state. This follows by reason of the distinct organization of the two courts, one being national and the other state, between which there is no jurisdictional co-ordination as it respects the administration of state polity. A federal court will administer the laws of the state in controversies in which it is given jurisdiction, but it will not interpose to direct or review the administration of state affairs.

[2] This would dispose of the case, but for the contention that complainant is entitled to admission to the bar of this state in spite of regulations prescribed by the laws of the state and rules of court governing the admission of attorneys from another state, and, in this relation, that the Supreme Court has denied him the right to be heard in his own behalf, and that he has been deprived of a privilege due to a citizen of the United States, and to which citizens of the several states are entitled, contrary to the provisions of section 2, article 4, of the federal Constitution, and the Fifth and Fourteenth Amendments thereto.

Without doubt, the right of an attorney to practice law is a property right, which can be taken from him only after judicial hearing and a fair opportunity to be heard in his own defense. Ex parte Garland, 4 Wall. 333, 18 L. Ed. 366; Ex parte Robinson, 19 Wall. 505,

22 L. Ed. 205; State ex rel. McElhinney, 241 Mo. 592, 606, 145 S. W. 1139; Smith v. Medical Examiners, 140 Iowa, 66, 117 N. W. 1116. As we have seen, the proceedings against complainant were not for his disbarment, but, notwithstanding, it is without question that he not only had ample notice and a fair opportunity to be heard, but he actually appeared before both the board and the court, and was afforded full and adequate opportunity to present his case in all of its angles. Due process of law does not embrace nor control mere forms of procedure in state courts, or regulate practice therein. All of its requirements are complied with, provided, in the proceedings which are claimed not to have been due process, the person proceeded against has had sufficient notice and an adequate opportunity has been afforded him to defend. Louisville & Nashville Rd. Co. v. Schmidt, 177 U. S. 230, 236, 20 Sup. Ct. 620, 44 L. Ed. 747.

Complainant is precluded, in view of the record, from at all insisting that he has been condemned without due process of law. Nor can he insist with confidence that he has been deprived of the privileges and immunities of a citizen of the United States. The right to practice law in the state courts is not such a privilege or immunity, within the meaning of the first section of the Fourteenth Amendment. Bradwell v. Illinois, 16 Wall. 130, 21 L. Ed. 442. As it relates to the privileges and immunities of citizens of the several states, these, says Washington, Circuit Justice, sitting in the Circuit Court, in Corfield v. Coryell, 6 Fed. Cas. 546, 551, No. 3,230, may—

"be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject nevertheless to such restraints as the government may justly prescribe for the general good of the whole."

Speaking of this clause of the Constitution, the Supreme Court, in Slaughterhouse Cases, 16 Wall. 36, 77 (21 L. Ed. 394), declares:

"Its sole purpose was to declare to the several states that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise; the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

[3] Leaving this subject for the present, let us inquire by what right and authority an attorney is entitled to engage in the practice of the law and acquires that privilege. Formerly, and under the common law, it rested with the courts to determine who was qualified to become one of its officers as an attorney and counselor, and for what cause he ought to be removed. Ex parte Secombe, 19 How. 9, 11, 15 L. Ed. 565.

But it is competent for the Legislature of a state, unless restricted by the Constitution, to confer that power upon the Supreme Court of the state. Cooper's Case, 22 N. Y. 67, 90. Attorneys are officers of the court, and, generally speaking, they are admitted as such upon its orders, upon evidence of their possessing sufficient legal learning and fair private character. Ex parte Garland, supra. "It has been," says the court (4 Wall. 378, 18 L. Ed. 366), "the general practice in

this country to obtain this evidence by an examination of the parties." So the court declares, in Ex parte Robinson, supra, 19 Wall. p. 512, 22 L. Ed. 205:

"Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors."

This is, in substance, what is required by the state statute: The applicant must show that he is a citizen of good moral character, which may be proved by any evidence satisfactory to the court, and that he is possessed of the requisite learning and ability. An attorney from another state may be admitted generally upon proof that he is a person of good moral character, which may also be proved by evidence satisfactory to the court. So it is obvious that the requirements for admission to practice in the state courts are not different from those that are exacted generally. At any rate, the Legislature has the right to prescribe qualifications for the office, to which the applicant or attorney must conform, as a prerequisite to his admission. Ex parte Garland, supra, 4 Wall. p. 379, 18 L. Ed. 366.

Now, in view of these regulations, what right, privilege, or immunity is extended to the citizens of the state to become practitioners at law that is not likewise extended to a citizen of another state? Obviously, there is none, and complainant has not been subjected to any different regulation. Nor have complainant's privileges and immunities been abridged, within the first section of the Fourteenth Amendment. If the service is public, the state may prescribe qualifications, and require an examination to test the fitness of any person to engage in and remain in the public calling. Smith v. Texas, 233 U. S. 630, 636, 34 Sup. Ct. 681, 58 L. Ed. 1129, L. R. A. 1915D, 677, Ann. Cas. 1915D, 420.

It cannot be denied that an attorney's calling is public in character. He is an officer of the court, and his services are to the public. It is eminently proper that his qualifications and fitness to engage in the service shall be inquired into before he is permitted to enter the profession. So it has been declared that:

"State legislation, which in carrying out a public purpose is limited in its application, is not a denial of equal protection of the laws, within the meaning of the Fourteenth Amendment, if within the sphere of its operation it affects alike all persons similarly situated." Williams v. Arkansas, 217 U. S. 79, 30 Sup. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865, first clause of syllabus.

See, also, Tinsley v. Anderson, 171 U. S. 101, 18 Sup. Ct. 805, 43 L. Ed. 91, Dent v. West Virginia, 129 U. S. 114, 9 Sup. Ct. 231, 32 L. Ed. 623, cited in Smith v. Texas, supra, and Field v. Barber Asphalt Co., 194 U. S. 618, 24 Sup. Ct. 784, 48 L. Ed. 1142.

The case of Dent v. West Virginia is peculiarly instructive, as it pertains to the power of the state to exact reasonable tests touching the qualification and fitness of applicants as a prerequisite to receiving the license of the state to engage in a public calling. Surely complainant has not been treated differently from any other citizen of another state, applying for license to practice law in this state. Nor has he

in reality been treated differently from a citizen of this state applying to enter the practice herein. All are required to show to the satisfaction of the court their moral fitness to engage in such practice. This means that one must be possessed of a "fair private and professional character," as expressed by the court in Selling v. Radford, supra, before he is entitled to admission from another state. The prerequisite is neither exceptional nor discriminatory; nor does the procedure prescribed deny to complainant the equal protection of the law.

After a careful review of the crucial questions involved, I am impelled to the conclusion that, within the jurisdiction or power of this court, complainant has not shown himself entitled to the relief prayed for, in any aspect.

The motions to dismiss will be sustained.

PAYNE, Director General of Railroads, v. CLARKE.

(District Court, S. D. California, S. D. March 8, 1921.)

No. 855.

1. **Carriers ⟸35—Misquotation of rate by agent does not affect lawful charge.**
   A misstatement by an agent of a railroad company of the amount of a freight charge on an interstate shipment, and its payment by the shipper, *held* not to relieve him from liability for the lawful rate.
2. **Carriers ⟸30—Publication not essential to lawful rate.**
   A rate filed by a carrier with, and approved by, the Interstate Commerce Commission, constitutes the lawful rate, irrespective of its subsequent publication.
3. **Courts ⟸347—Counterclaim for damage to shipment may be pleaded in action for freight in federal court.**
   In an action to recover a freight charge in a federal court, defendant *held* entitled to assert a counterclaim for damage to the shipment, where such counterclaim is permitted, or required, by the state practice.

At Law. Action by John Barton Payne, as Agent and Director General of Railroads, against A. B. Clarke. On demurrer to, and motion to strike, answer. Demurrer overruled, and motion denied.

Fred E. Pettit, Jr., and E. E. Bennett, both of Los Angeles, Cal., for plaintiff.

Moe M. Fogel, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. Plaintiff, under appropriate authority, sues to recover $111.44 alleged to be due as an unpaid balance on lawful transportation charges on an automobile shipped by defendant from Ida Grove, Iowa, to Portland, Or. The total charges, "computed in accordance with tariffs, rates and classifications approved by and on file with the Interstate Commerce Commission of the United States and duly published and posted as provided by law," together with required War Tax, amounted to $247.40.

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

Defendant, answering, admits, either expressly or by failure to deny, all the material allegations of the complaint, save that he denies that the rates and classifications as approved by the Interstate Commerce Commission "were published as required by the act providing for the regulation of common carriers," etc. He also alleges in appropriate language a counterclaim against the plaintiff in the sum of $150, arising out of damage done to the automobile in transit, "caused by the negligence of the plaintiff herein in its method of handling said shipment en route." Defendant also alleges that, according to rates quoted him by agents of plaintiff, he could have shipped said automobile from Sioux City, Iowa, or Omaha, Neb., to Portland, for "approximately $125," but was induced to ship the same from Ida Grove at a cost then stated to him to be the sum of $135.96, which he then paid; that but for the mistake asserted to have been made by plaintiff's agent, etc., he would have shipped the said automobile from either Sioux City or Omaha; and that it is now inequitable, etc., to require him to pay the sum demanded herein, etc.

Plaintiff moves to strike out all the above-mentioned allegations, and also demurs to the answer on the ground that no defense or counterclaim is stated.

[1] The question of the liability of a shipper to pay to the common carrier the exact charge provided for in the approved rates and tariffs, has been given careful consideration by this court in Davis v. Southern Pacific (D. C.) 235 Fed. 731, and In re Independent Sewer Pipe Co. (D. C.) 248 Fed. 547. The Supreme Court of the United States in L. & N. R. R. Co. v. Maxwell, 237 U. S. 94, 97, 35 Sup. Ct. 494, 495 (59 L. Ed. 853, L. R. A. 1915E, 665) in discussing the matter of public policy involved, and holding the shipper liable as for the payment of the exact rate fixed and approved by the Interstate Commerce Commission, said:

"Ignorance or misquotation of rates is not an excuse for paying or charging either less, or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discriminations."

The same authority in K. C. S. Ry. v. Carl, 227 U. S. 639, 653, 33 Sup. Ct. 391, 395 (57 L. Ed. 683), held:

"Neither the intentional nor accidental misstatement of the applicable published rate will bind the carrier or shipper. The lawful rate is that which the carrier must exact and that which the shipper must pay. The shipper's knowledge of the lawful rate is conclusively presumed."

[2] Assuming, as the court must do, the correctness of plaintiff's allegation that the full amount of the true rate for the service rendered has not been paid, plaintiff will be entitled to recover, even if such rate were not published as required by the act, or if plaintiff's agent gave to defendant an erroneous rate. In other words, the fixing of a rate, followed by the filing of the same with, and the approval of, the Interstate Commerce Commission, constitutes the lawful and binding rate to be paid, irrespective of any question of publication thereafter.

[3] The main argument in the case centers about the right of defendant to assert herein his counterclaim for damage done to the property in transit. In this behalf, plaintiff's contention is that under the decisions in Illinois Central Ry. v. Hoopes (D. C.) 233 Fed. 135, C. & N. W. v. Stein (D. C.) 233 Fed. 716, Johnson-Brown v. D., L. & W. R. R. (D. C.) 239 Fed. 590, and D., L. & W. R. R. v. Nuhs, 93 N. J. Law, 309, 111 Atl. 223, a counterclaim for damage done to the goods in transit may not be interposed as a defense or set off to a claim for unpaid carriage charges. The reason for the holding made is stated by the District Court of Nebraska in the Stein Case, and is followed by the three other cases cited. It is to the effect that, maintaining inviolate the public policy hereinabove mentioned, to permit the counterclaim to be pleaded would be to prevent "the usual right to make compromise" with respect to damage claims against railroads, and cause the court to "undertake the impossible task of holding the carrier to diligence and good faith in preparing and presenting its defenses, in order to prevent the granting and receiving of rebates by insidious agreement between parties with reference to the disposition of the suit."

Upon careful consideration of the subject-matter, however, I am more attracted by the reasoning indulged in by the courts in Wells-Fargo Co. v. Cuneo (D. C.) 241 Fed. 727, and C. & N. W. v. Tecktonius (D. C.) 262 Fed. 715, to the general intent that, if there be a disposition to work a discrimination and secure a rebate through the consummation of a fraudulent compromise of a suit for damages to goods in transit, the same may be effected with equal ease in a separate suit as in the suit for the recovery of unpaid carriage charges. In other words, if the parties are intending to arrange for a rebate from the established tariff through the medium of the compromise and settlement of a fraudulent claim for damages, they can do this as well in one suit as in another, and as a matter of fact the possibilities of fraud would be greater if the parties were remitted to an independent forum for the consideration of the mere damage claim. There, in the absence of some circumstance involving it, the court would have no concern with the bona fides of the claim. When pressed as a counterclaim to a suit for unpaid carriage charges, however, in order that the public policy involved might be best maintained, the trial court would be unusually astute to see that every item of damage claimed was bottomed upon persuasive proof.

In my judgment the mere possibility of compromise and settlement works toward a negation of the principle of public policy involved. It admits of a payment by the carrier, as for damages, upon a fraudulent claim, of a part of the moneys theretofore received in satisfaction of the carriage charges lawfully due. Whenever and under whatever guise that fraud is perpetrated, the principle striven for in the cases relied on by plaintiff is completely set at naught.

The courts must presume in advance that the parties will act in good faith in whatever form the litigation may come before the court for consideration, and it must also be presumed that no counterclaim

for damages will or can be allowed, except in the event of due proof of the same being made to the court, and the court passing affirmatively upon it. The pleading of the counterclaim herein is in accordance with the established practice in California, section 438, Code of Civil Procedure, and as a matter of fact, if defendant has a claim and does not plead it herein, there is grave doubt if under California practice he would not be denied the opportunity of asserting it hereafter in any form. California Code of Civil Procedure, § 439.

Finally, commendable economy and efficiency in judicial procedure would seem to justify the disposition of the entire related controversy in the one action. If the theory of the plaintiff were correct, upon an agreement to pay the entire freight charges in advance and a payment through mistake or otherwise of only a portion thereof, plaintiff would be entitled to recover the full amount of the asserted unpaid freight charges, even though there should have been a complete failure to deliver the merchandise carried. If defendant by way of defense in the same suit could not show a partial damage to the article carried, he could not show its entire loss. The difference is one of degree only.

The motion to strike, being a single motion directed to all of the averments in the answer, is denied, and the demurrer is overruled.

GOWANUS STORAGE CO., Inc., v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, E. D. New York. March 21, 1921.)

1. **Admiralty ⇐12—Contract for storage of cargo not "maritime contract," within admiralty jurisdiction.**
   A contract to furnish storage for the cargo of a vessel is not maritime, and a court of admiralty is without jurisdiction of a suit for preventing the carrying out of such contract, or for its breach.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Maritime Contract.]

2. **Admiralty ⇐10—Where cause of action is separable, admiralty has jurisdiction of part which is maritime.**
   A court of admiralty is without jurisdiction of a cause of action which is maritime only in part, unless it is separable, in which case relief may be given on the part within the jurisdiction.

In Admiralty. Suit by the Gowanus Storage Company, Incorporated, against the United States Shipping Board Emergency Fleet Corporation. Decree for libelant on part of cause of action.

Foley & Martin, of New York City, for libelant.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., for respondent.

GARVIN, District Judge. At the close of the trial the court announced that on the facts libelant had established its cause of action by a preponderance of evidence. The respondent, by timely objection, questioned the jurisdiction of the court.

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

The libel was filed against the United States Shipping Board Emergency Fleet Corporation, and alleges that the libelant was in possession of a certain dock and pier at the foot of Twentieth and Twenty-First streets in the borough of Brooklyn, city of New York, as lessee; that because of the manner in which the steamship Western Belle, in possession and control of and operated by the respondent, was moored in Gowanus Bay, libelant was deprived of the rent and use of its said dock from February 4 to February 10, 1920, was prevented from carrying out a contract which it had with the steamship Mermoquowa and respondent, and from arranging for storing and handling the cargo of the latter vessel under said contract. The Mermoquowa had arranged to dock at the libelant's pier, and was unable to do so because of the position of the Western Belle. The libelant had made a contract with the steamship Mermoquowa and respondent, whereby the steamship and the respondent agreed with the libelant to take and use said pier from and after February 4th, for the purpose of discharging the cargo of the steamship, at a rental of $100 a day for the dock, with $100 additional per day for the use of the shed on the said pier or dock. The agreement further provided for the procurement of storage by the libelant of 18,000 bales of cork wood, the cargo of the vessel, for which libelant was to receive 35 cents a bale. The damage sustained by the libelant is represented by the benefit and profit which it would have obtained under the agreement with the steamship Mermoquowa aforesaid.

The respondent suggests that, in determining whether an action of this character is within the jurisdiction of admiralty, the court must first consider the agreement between the libelant and the Mermoquowa and its owners, in order to ascertain if it was of such a nature that a court of admiralty would have jurisdiction of an action for a breach thereof, and refers to authorities which hold that admiralty has no jurisdiction over a cause of action that is only partly maritime in character. The Belfast, 7 Wall. 637, 19 L. Ed. 266; The Pennsylvania, 154 Fed. 9, 83 C. C. A .139; Plummer v. Webb, 4 Mason, 380, Fed. Cas. No. 11233.

The libelant urges that the obstruction of the channel of the waters of Gowanus Bay by the Western Belle was unlawful, and that where the owner of a dock fronting on navigable waters sustains injury by reason of an obstruction in such navigable waters he may recover damages from him who commits the wrongful act, citing Rivers and Harbors Act, § 15, 30 Stat. 1152 (Comp. St. § 9920), The Grand Manan (D. C.) 208 Fed. 583, The Pocohuntas (D. C.) 217 Fed. 135, and other authorities. This may be quite true, but it does not follow that an admiralty court has jurisdiction, although libelant would undoubtedly have a cause of action at common law.

The following cases upon which libelant relies to support its contention that the admiralty court has jurisdiction are distinguishable from the case at bar: The Grand Manan (D. C.) 208 Fed. 583, was a collision between a moving steamer and a dredge at anchor. Philadelphia & Wilmington R. R. Co. v. Philadelphia, etc., Steamboat Co.,

23 How. 209, 16 L. Ed. 433, involved an injury to a vessel by piles left in a river. Braisted v. Denton (D. C.) 115 Fed. 428, and The Vanderbilt (D. C.) 86 Fed. 785, were cases where it held that a recovery may be had for wharfage actually furnished to a vessel.

On the other hand, a lease of a wharf is not a maritime contract on which may be maintained an action in admiralty for the collection of the rent. The James T. Furber (D. C.) 129 Fed. 808. In The Richard Winslow (D. C.) 67 Fed. 259, it is held that an action for damages to a cargo of goods carried by a vessel and stored therein after her arrival at her port of destination cannot be the basis of a claim enforceable in a court of admiralty. In H. S. Pickands (D. C.) 42 Fed. 239, and in The Mary Stewart (D. C.) 10 Fed. 137, it was held that the damage must happen on the water.

[1] Many years ago it was held by Judge Story, in Andrews v. Essex Insurance Co., 3 Mason, 6, Fed. Cas. No. 374, that an action will not lie in admiralty for breach of a contract leading to the execution of a maritime contract. From the foregoing authorities I think it is clear that an admiralty court would have no jurisdiction over a contract to procure permanent storage for all or a part of a cargo after it had been unloaded. The contract which the libelant had with the Mermoquowa was, in part, not within the jurisdiction of an admiralty court, and under the authority of The Belfast, 7 Wall. 637, 19 L. Ed. 266, supra, it follows that libelant would not have an action in admiralty for a breach, if the part referred to is not separable.

[2] The agreement to procure permanent storage, however, appears to be easily separable; in its other provisions the contract is a maritime contract within the jurisdiction of this court. The Vanderbilt (D. C.) 86 Fed. 785, Braisted v. Denton (D. C.) 115 Fed. 428, Terminal Shipping Co. v. Hamberg et al. (D. C.) 222 Fed. 1020. Where jurisdiction has been questioned, a contract has been held to be separable. Pacific Coast Steamship Co. v. Moore et al. (D. C.) 70 Fed. 870.

If the foregoing conclusions are correct, there must be a decree for the libelant, with the usual reference to a master. No recovery, however, may be had for damages connected with the storage of the 18,000 bales of cork wood; this being without prejudice to libelant's rights, otherwise, in respect thereto.

THE NO. 223.

Petition of CENTRAL R. OF NEW JERSEY.

(District Court, S. D. New York. March 8, 1920.)

No. 561.

Damages ⇐132(6)—$5,778, for crushed leg, not excessive.

Claimant awarded $5,778 damages for the crushing of his leg; it being shown that he was a longshoreman, 45 years old, earning from $22 to $25 per week, that he was in hospital 74 days, had three operations, was confined to his house over a year, and is permanently disabled for doing anything except light work.

In Admiralty. In the matter of the petition of the Central Railroad of New Jersey, owner of the lighter No. 223, for limitation of liability. On exceptions to report of special commissioner awarding damages to claimant, John Spillan, for personal injury. Report confirmed.

Decree affirmed 271 Fed. 532.

De Forest Bros., of New York City (James T. Kilbreth, of New York City, of counsel), for petitioner.

J. Arthur Hilton, of New York City, for claimant.

AUGUSTUS N. HAND, District Judge. John Spillan, the claimant, according to the decision of this court, suffered injuries from the negligence of the petitioner. The matter was referred to Edward L. Owen, as special commissioner, to report on damages, and it now comes before me on exceptions to the commissioner's report allowing damages in the sum of $5,778, the full amount realized from the sale of lighter No. 223, in the limitation proceeding.

Spillan's left foot was caught by a hawser on his boat, and as a result the bones were broken and the leg crushed. He was in a Long Island hospital 74 days, went from there to his home, and remained confined to the house over a year. During this period he had three different operations upon the wound and it remained open for about one year and three months after the date of the injury, which was on April 12, 1917.

He testified that prior to the time of the accident he was earning from $22 to $25 a week wages as a longshoreman; that after the accident he attempted to do light work as a porter, and obtained employment for 10 weeks at wages from $14 to $16 a week, but could not continue, owing to pain and disability of his leg. He testified, likewise, that he had not tried since the time of this employment to secure other work, because he knew it was useless.

The physician who attended him in the hospital has been abroad, so that he was not called. A physician whom he employed to examine him during the trial testified that his ankle was permanently disabled, that there was a general inflammation of the ankle joint, interference with the circulation, a limp in walking, and that the conditions were permanent. He identified four scars due to operations.

I have no doubt that the disability of the claimant is exaggerated,

and I am not impressed with his claim that he could obtain and do no work. I see no reason to doubt, however, that he had a serious injury, which confined him to the house for a year and three months, made several operations upon his leg necessary, and resulted in a permanent impairment of the limb, which is likely to prevent him from doing heavy work in the future. He is 45 years old.

If his loss, at a rate of wages paid to a longshoreman during the one year and three monthhs prior to his securing work, and the succeeding period ending at the date of the hearing before the commission on May 2, 1919, be taken at the rate of $22 a week, the period would cover approximately 107 weeks, aggregating $2,354, from which should be subtracted the amount which he earned during the 10 weeks he was employed, leaving as his damages up to that date the sum of $2,194. Upon the assumption that he might, from the date of the hearing, obtain wages at a loss of only $6 a week, and that his expectancy of life was then 10 years, his damages would be the present worth of $3,120.

The present worth of this sum of $3,120 would approximate $2,000. The actual damages, without any allowance for damages as compensation for pain and suffering, would therefore amount to about $4,200. This calculation is upon the assumption that, if the accident had not happened, the claimant could have got no higher wages during the period succeeding April 12, 1917, than he earned before; whereas, as a matter of fact, it is well known that wages for manual labor have enormously increased. It also assumes that since May 2, 1919, the impairment of the claimant's leg represented a loss in earning capacity of only $6 per week, a figure which I am inclined to think is extremely low. Indeed, what proof there is would indicate that at the time of the hearing the claimant was not in condition to work in any remunerative way.

Under all the circumstances, I think the allowance of the commissioner of $5,778 to cover estimated past and future loss of earnings, bodily impairment, and pain and suffering, is reasonable, and should be confirmed.

THE NO. 223.

Petition of CENTRAL R. CO. OF NEW JERSEY.

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

No. 81.

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

In the matter of the petition of the Central Railroad Company of New Jersey, owner of the lighter No. 223, for limitation of liability. From an award of damages to John Spillan, claimant, petitioner appeals. Affirmed.

For opinion below, see 271 Fed. 531.

De Forest Bros., of New York City (J. T. Kilbreth, of New York City, of counsel), for appellant.

J. Arthur Hilton, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

Ex parte CLARK.

(District Court, E. D. New York. March 14, 1921.)

1. **Army and navy ⇐44(1)—Deserter of marine regiment detached for military service is triable by naval court-martial.**
   Under Act Aug. 29, 1916, providing that a marine detached for military service may be tried by a naval court-martial after such detachment ceases, a marine who deserted from a regiment with the American military forces in Germany, and was apprehended and delivered to the commandant of a navy yard, may be tried for the desertion by a naval court-martial.
2. **Army and navy ⇐44(2)—Deserting marine may be tried after expiration of enlistment.**
   Under Articles of War, art. 39 (Comp. St. § 2308a), providing that any period during which, by reason of some manifest impediment, the accused is not amenable to military justice, shall be excluded in computing the period of limitation, a marine who deserted from his regiment while it was in Germany, and was not apprehended until after the time of his enlistment would have expired, can be tried for his desertion; his concealment being a manifest impediment within the statute.

Application by Jennie H. Clark for writ of habeas corpus to procure the release from custody of Lewis B. Clark, Jr. Writ dismissed.

Emery C. Weller, of New York City, for relator.

Leroy W. Ross, U. S. Atty., and Henry J. Walsh, Asst. U. S. Atty., both of Brooklyn, N. Y., for respondent.

GARVIN, District Judge. On June 16, 1919, while attached to the Sixth Regiment of Marines with the American forces in Germany the relator deserted. He had enlisted with the United States Marine Corps on October 13, 1916, for a term of four years. Subsequent to his desertion, and shortly after his term of enlistment would have expired, the French authorities surrendered him to the American Army at Paris. He was then delivered by the military authorities to the custody of the commandant of the United States Navy Yard at New York, N. Y., and a naval court-martial was convened to try him for his act of desertion.

[1] A writ of habeas corpus was obtained, and the claim is advanced in his behalf that the act of desertion with which he is charged is triable by a military court-martial, and not by the naval authorities. This question appears to be settled by Act Cong. Aug. 29, 1916 (39 Stat. 651), whereby it is provided that—

> "An officer or soldier of the Marine Corps, when so detached, may be tried by military court-martial for an offense committed against the laws for the government of the naval service prior to his detachment, and for an offense committed against these articles [Articles of War] he may be tried by a naval court-martial after such detachment ceases." Comp. St. § 2308a, art. 2.

The relator was subject to the Articles of War as the result of his detachment. His desertion from the army was a violation of article 58 of the Articles of War, which provides that an officer or soldier who is

guilty thereof may be tried by a court-martial. A member of the Marine Corps may be tried by a naval court-martial (39 Stat. 651, supra), after his detachment ceases, for an offense committed against the Articles of War during the period of his detachment. In this case the relator is now subject to the naval authorities, and therefore he may be tried by a naval court-martial.

[2] There is no merit in the contention that the naval authorities have no jurisdiction over the relator, because his term of enlistment had expired before proceedings against him had been begun. The Articles of War provide (article 39):

As to time: "Except for desertion committed in time of war, or for mutiny or murder, no person subject to military law shall be liable to be tried or punished by a court-martial for any crime or offense committed more than two years before the arraignment of such person: Provided, that for desertion in time of peace or for any crime or offense punishable under articles ninety-three and ninety-four of this Code the period of limitations upon trial and punishment by court-martial shall be three years: Provided further, that the period of any absence of the accused from the jurisdiction of the United States, and also any period during which by reason of some manifest impediment the accused shall not have been amenable to military justice, shall be excluded in computing the aforesaid periods of limitation."

It is apparent that as relator had deserted and could not be found, during the period of his desertion there was such a "manifest impediment" in the way of bringing him to justice as would justify excluding the period of his desertion from any computation of the time within which a prosecution must be begun. I have carefully considered the decision of the Judge Advocate General in the Matter of George M. Runyon, dated December 29, 1920, and if the effect thereof is that a man may desert, remain in hiding until the time of his enlistment expires, and then escape all responsibility, I cannot agree with such a conclusion. The effect thereof upon the morale of army and navy alike would be disastrous. While there is no obligation to serve after the period of enlistment, it does not follow that conduct during that period may go unpunished for the reason assigned. If that were the law, it might be well urged that a court-martial has no power to imprison after the expiration of the enlistment.

The writ is dismissed, and the relator remanded to the custody of the respondent.

UNITED STATES v. MURRAY et al.

(District Court, E. D. New York. January 17, 1921.)

Criminal law ⇐242(11)—Clerk directed to file record of commissioner to enable defendants to seek review of order of removal.

Defendants, who have been ordered removed to another district for trial on an indictment there pending against them, and who are seeking a review of that order, are entitled to have the record of the proceedings before the commissioner, on which the order of removal was entered, filed by the clerk of the District Court, so that he can properly certify it, if the court's opinion that the order is not reviewable is decided to be erroneous by the Circuit Court of Appeals.

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

John Murray and others were indicted in the United States District Court for the Eastern District of North Carolina for conspiring to commit an offense against the government. On motion by defendants, after the order for their removal to the district in which they were indicted had been entered, to compel the clerk of the court, to file the record of the proceedings before the commissioner, so as to enable the defendants to procure a review of the order of removal. Clerk directed to file the record.

John T. Eno, Asst. U. S. Atty., of Brooklyn, N. Y.
Robert R. Moore, of New York City, for defendants.

GARVIN, District Judge. The defendants were indicted by a grand jury in the United States District Court for the Eastern District of North Carolina for conspiring to commit an offense against the government, to wit, breaking into a post office and stealing and carrying away large quantities of government property. They were later held under a commissioner's warrant in this district, and a hearing was had before the commissioner for the purpose of determining whether they should be removed to the Eastern District of North Carolina to be tried under the indictment. The commissioner held them for removal as a result of the hearing, and an application was made to me for an order of removal. Upon this application a hearing was held before me, further testimony was taken by the commissioner at my direction, the matter then argued at length, and after a careful examination of the record and of the authorities submitted I concluded that the application was proper and made an order of removal accordingly.

Upon the argument, the defendants urgently requested that they be given an opportunity to review my action in the event that an order of removal should be made. Although I had grave doubt whether such an order could be reviewed, I concluded to and did allow an appeal from the order at defendants' request, so that the matter might be determined by the Circuit Court of Appeals. At the same time I granted a stay of execution of the order, so that by no possibility could the defendants be prejudiced, if the Circuit Court of Appeals should determine that the order was reviewable and that it should not have been made. The stay, conditioned upon prompt action by the defendants to seek a review of the order, was granted September 19, 1920. Thereafter the defendants printed the record of the proceedings before the commissioner, but could not bring on for argument the application to review the order, because they could not obtain a certification of the record from the clerk of this court, who refused to receive and file the same, claiming that there was no authority for filing such a record in the clerk's office. Finally the United States attorney moved before me to have the stay of execution of the order of removal vacated. When this motion came on for argument, the defendants protested, and urged their earnest desire to present the removal order to the Circuit Court of Appeals for review. I directed them to take steps without delay to obtain a judicial determination of the defendants' rights and adjourned the motion of the government. The defendants have now

moved to compel the clerk of this court to file the record, and have transmitted the said record to me.

I am still of the opinion that the order of removal is not appealable, but, if I am wrong, the defendants should have an opportunity to review my action. There is precedent for reviewing an act of an officer of this court performed while he is sitting as a magistrate (Veeder v. United States, 252 Fed. 414, 164 C. C. A. 338), and this can only be accomplished, I take it, by first filing the record with the clerk of the court, who can then properly certify the same. No formal orders need be entered. I have made appropriate indorsements on the respective motion papers, directing the clerk to file the record, and denying the motion to vacate the stay, with leave to renew, unless the defendants proceed with reasonable expedition.

NORRIS et al. v. NO-LEAK-O PISTON RING CO.

(District Court, D. Maryland. March 28, 1921.)

Copyrights ⇐53—Infringement by copying advertising circular.

The copying by defendant from a trade paper, with its consent, and publishing in an advertising pamphlet, of a list giving sizes and description of piston rings used in different motorcars, which list was copied by the paper without consent from a copyrighted pamphlet prepared for advertising purposes by complainant, a business competitor of defendant, *held* an infringement of the copyright, though defendant did not know that the list it used was copied from complainants'.

In Equity. Suit by William K. Norris and others, trustees of the McQuay Norris Manufacturing Company, against No-Leak-O Piston Ring Company. Decree for plaintiffs.

Bartlett, Poe & Claggett, of Baltimore, Md., and Judson, Green & Henry, of St. Louis, Mo., for plaintiffs.

John E. Cross, of Baltimore, Md., for defendant.

ROSE, District Judge. The plaintiff and the defendant each make and sell piston rings. The plaintiff says the defendant has infringed its copyright on an advertising pamphlet, which gives the sizes and other details of piston rings found in each model of every motor maker whose machines are used in this country.

Since 1913 the plaintiff has annually gone to considerable trouble and expense to collect and compile the needed information, and has copyrighted its successive yearly issues. It is the 1919 edition which the defendant is said to have infringed. The plaintiff spent on it somewhere between $6,000 and $7,000. It is extensively distributed among automobile repair shops, garages, dealers in cars, and to some extent among the owners of them. It is a good advertisement, because any one called on to repair an automobile has need of the information it contains. The plaintiff has always been vigilant and successful in protecting its rights against infringers. It has brought several suits,

and has won all of them—sometimes because its opponents surrendered, and sometimes because the court, after hearing, so decreed.

In order that the plaintiff might more readily detect infringers, it has, for years past, introduced into each of its annual lists some nonexisting models of machines. There were 12 of these in the edition of 1919. In December of that year, the Motor World, a trade publication, published a catalogue of piston ring dimensions. This catalogue is a reproduction of plaintiff's, except that the Motor World's list omitted models of years prior to 1916, and it separated passenger cars from trucks. There is no question as to where the Motor World got its list, for it reproduced 10 of plaintiff's 12 fictitious models. Indeed, this infringement was admitted by the Motor World itself in some letters written by it in reply to plaintiff's complaint. These letters were produced by the plaintiff, upon defendant's demand. The defendant asked and received from the Motor World permission to use this list. It recombined the passenger cars and trucks, so as to give its list the same general character as that of plaintiff's, and as the result of its own investigation, supplemented the plaintiff's information with the dimensions of piston rings required for some 1920 models, not, of course, included in plaintiff's 1919 edition. Defendant had, at a cost of some $3,000, 50,000 to 55,000 of these lists printed. Prior to the institution of this suit, it had distributed 10,000 of them.

There is no doubt as to the infringement. The defendant did not know that it was copying plaintiff's copyrighted book, but that fact does not relieve it from answering to the plaintiff for the damage thereby caused. The distribution by the defendant to the trade of 10,000 or more of the infringing pamphlets must have cost the plaintiff a good deal, and many an order for piston rings, which would otherwise have gone to plaintiff, may well have been diverted to the defendant. The defendant's business is large. Its net profit in 1920 was $60,000. Presumably its gross sales were several times this figure.

On the whole, it seems to me that an award of $3,000 for the damage done plaintiff would be just. The plaintiff is a St. Louis corporation. The defendant has its headquarters in Baltimore. The case had to be carefully prepared, and was tried through more than an average court day. I think a counsel fee of $750 would be reasonable.

In re LATHAM.

In re RICHARDSON.

(District Court, N. D. New York. April 13, 1921.)

Bankruptcy ⇐45—Voluntary petitioners required to pay filing fee and referee's fee.

Where persons filing voluntary petitions in bankruptcy were able to pay their attorney, and were earning money, and by proper saving and conduct could accumulate and procure the money with which to pay the filing fee and referee's fee, they will not be permitted to maintain the proceedings without such payment.

In Bankruptcy. Voluntary bankruptcy proceedings by Albert R. Latham and by Harry G. Richardson. In each of the above cases application is made by the referee in bankruptcy for an order directing the bankrupt to pay the filing fee within a reasonable time, and also the expenses of this proceeding, in default of which payment the petition in bankruptcy shall be dismissed. Order granted.

W. W. Ellsworth, of Binghamton, N. Y., for the motion.
Moe Goldstein, of Binghamton, N. Y., for bankrupts.

RAY, District Judge. In each of these cases the bankrupt filed his petition without payment of the filing fee, claiming that he was unable to pay same or to procure the money with which to pay same. The referee to whom the matters were referred had some reason to think that this claim of the bankrupts was not sustained by the facts, and at a meeting of creditors inquired into the matter, and later of his own motion obtained an order to show cause why the relief indicated hereinbefore should not be granted. In each of the cases it appears that at the time of instituting these proceedings in bankruptcy, or before, the bankrupt paid to his attorney, Moe Goldstein, the sum of $20, and promised to pay more. In each of the cases it appears that the bankrupt is earning money, and that by proper saving and conduct he can accumulate or procure the money with which to pay the filing fee in the bankruptcy proceeding.

The referee is unable to see why a confessed bankrupt on filing his petition to be discharged from all his debts in bankruptcy proceedings should be permitted to pay his attorney and have the benefit of the law without paying the other officers of the court the compensation which they are entitled to have deposited by the bankrupt as preliminary to and a condition of being permitted to file the petition at all. The court agrees with this view of the matter, which is in accordance with decisions rendered by different District Judges in various bankruptcy proceedings.

There will be an order in each of the above-entitled matters that the bankrupt pay to the clerk of the court the filing fee, $30, and $10 to reimburse the referee for disbursements and expenses on this application, within 30 days from this date, and, if not so paid, that the petition of the alleged bankrupt be dismissed.

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

NATIONAL SAFETY GAS COCK CO., Inc., v. CONSOLIDATED GAS CO. OF NEW YORK.

(District Court, S. D. New York. October 23, 1919.)

Patents ⇐328—919,019, for safety cock for gas burners, void for lack of invention.

The Jakobson patent, No. 919,019, for a safety cock for gas burners, *held* void for lack of invention.

In Equity. Suit by the National Safety Gas Cock Company, Incorporated, against the Consolidated Gas Company of New York. Decree for defendant.

Decree affirmed (C. C. A.) 271 Fed. 539.

Munn, Anderson & Munn, of New York City, for plaintiff.

Thomas L. Wilder, of Utica, N. Y., for defendant.

MAYER, District Judge. The sole question is that of invention, for, if the patent is valid, it is infringed. This is a crowded art, punctured by gradual mechanical improvements, consisting mainly in a rearrangement of fundamental elements.

Jakobson's safety cock for gas burners is undoubtedly a meritorious improvement over the prior art, and, within modest limits, has been commercially successful. But the improvement is of a character familiar to the courts, as within the expected knowledge of one skilled in the art. The simple nature of the art does not need exposition. Of the prior art, it is enough to cite Jakobson, No. 685,612; Shute, No. 756,066; Brown, No. 759,341, showing the centering projection; and Mattice No. 792,531. The only difference between the claim of the Shute patent and the patent in suit is that in the Shute patent the socket is in the lever, instead of the plug—a reversal of parts.

The Shute patent does not show a centering projection for the spring; but this is an ordinary mechanical expedient, as witness the Brown patent, supra. In view of the foregoing, it must be held that the improvement of Jakobson does not rise to the dignity of invention.

Bill dismissed, with costs.

NATIONAL SAFETY GAS COCK CO., Inc., v. CONSOLIDATED GAS CO. OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. January 19, 1921.)

No. 105.

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

Suit in equity by the National Safety Gas Cock Company, Incorporated, against the Consolidated Gas Company of New York. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see (D. C.) 271 Fed. 539.

Munn, Anderson & Munn, of New York City (J. K. Brachvogel, of New York City, of counsel), for appellant.

Thomas L. Wilder, of Utica, N. Y., for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

PER CURIAM. Decree affirmed.

WASHINGTON-SOUTHERN NAV. CO. v. BALTIMORE & PHILADELPHIA STEAMBOAT CO.

(District Court, E. D. Pennsylvania. April 14, 1921.)

No. 116 of 1920.

Admiralty ⇐58—Rule as to right to security applies to pending cases.

Rule 50 of the Admiralty Rules of March 7, 1921 (267 Fed. xix), making the entry of security for damages claimed by the cross-libelant conditional on security having been given in the original suit, applies to a pending suit, in which a motion by cross-libelant for security was pending on March 7, 1921.

In Admiralty. Libel by the Washington-Southern Navigation Company against the Baltimore & Philadelphia Steamboat Company, with cross-libel. On motion for an order upon libelant and cross-respondent to give security for claim of cross-libelant. Motion denied conditionally.

A. E. Weil, Esq., of Philadelphia, Pa., for libelant.

John Cadwalader, Jr., and Thos. Raeburn White, both of Philadelphia, Pa., for respondent.

THOMPSON, District Judge. The cross-libelant and respondent has not given security to respond in damages to the claim of the libelant in the original suit.

Under rule 53 of the former Admiralty Rules (29 Sup. Ct. xiv) this would not, upon cause shown, have prevented an order upon the libelant and cross-respondent to give security for the cross-libelant's damages. That rule, however, is not any longer in force, as it was superseded on March 7, 1921, by rule 50 of the recently adopted Rules in Admiralty (267 Fed. xix), which makes the entry of security for the damages claimed by the cross-libelant conditional upon the respondent or claimant in the original suit having given security to respond in damages.

Although the present motion was filed prior to the new rules taking effect, it did not come up for hearing until afterwards. There is nothing in the order of the Supreme Court providing that the new rules shall not apply to suits pending before March 7, 1921, and it would undoubtedly cause confusion to have two sets of rules regulating procedure in force at the same time. The order of the Supreme Court, adopting and establishing the rules, was made December 6, 1920, so that ample notice of the change was given to the bar.

The order at present applied for cannot, therefore, be entered, unless the cross-libelant shall give security as respondent in the original suit. It is therefore ordered that, if the respondent shall give security to respond in damages in the original suit within 10 days, the cross-respondent shall give security for the cross-libelant's damages. Unless security be given by the respondent within 10 days, the motion will be denied.

Proceedings meanwhile to stay.

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

LAWSON v. BAILEY et al.

(Court of Appeals of District of Columbia. Submitted February 10, 1921. Decided March 7, 1921.)

No. 3443.

1. Mortgages ⇐369(3)—Inadequate price held not to authorize setting aside trustee's sale.
   An owner of premises subject to a trust deed, who was misled by the fraud of her agent into allowing the premises to be sold by the trustee, cannot redeem the property from a purchaser, who was ignorant of the fraud and whose conduct was in all respects equitable, on the ground of inadequacy of price and of her mistake, where the premises were worth $3,700 and the sale price was $2,295.
2. Mortgages ⇐369(2)—Equity of purchaser at mortgage sale not defeated by taking deed from fraudulent grantee.
   The fact that an innocent purchaser at a sale under a trust deed strengthened his title by taking also a deed from an alleged fraudulent grantee of the former owner gives the former owner no equitable right to redeem, where the owner expressly disclaimed any fraud on the part of the purchaser.

Appeal from the Supreme Court of the District of Columbia.

Suit by Bertie L. Lawson against James H. Bailey and others. From a decree of the court dismissing the bill, after plaintiff made a statement of what she could show, defendants appeal. Affirmed.

James A. Cobb, M. N. Richardson, and Charles S. Shreve, all of Washington, D. C., for appellants.

H. I. Quinn, of Washington, D. C., for appellee.

STAFFORD, Acting Associate Justice. [1] The plaintiff made a statement of what she could show, and thereupon the court dismissed her bill. A short statement of her offer is this: As owner of premises subject to a trust deed to secure $2,000, she, being misled by the fraud of her own agent, allowed the premises to be sold by the trustee for nonpayment of interest, and to be conveyed by the trustee to the purchaser. The premises were worth $3,700. The price brought was $2,295. The purchaser was ignorant of the fraud practiced upon her, and his conduct was in all respects equitable. The plaintiff asks to be allowed to redeem, on the ground of inadequacy of price and of her mistake in relying upon the fraudulent representations of her agent. She relies upon Graffam v. Burgess, 117 U. S. 180, 6 Sup. Ct. 686, 29 L. Ed. 839. That case is far stronger for relief than this. The inadequacy was the difference between $181 and $10,000, and the conduct of the purchaser was, to say the least, highly inequitable. On the other hand, this court has held that the difference between $35,000 and $20,100 is not in itself sufficient. Anderson v. White, 2 App. D. C. 408.

It should be noted that this is not a case where the purchaser is seeking specific performance, and a case of mistake or hardship is set up by the seller as a reason why equity should leave the purchaser to

his remedy at law. It is a case where equity is asked to give affirmative relief by setting aside a sale and a deed under it.

[2] The plaintiff urges that the fact that the purchasing defendant has taken a deed from an alleged fraudulent grantee of the plaintiff since the bringing of the suit gives her some additional right, although she expressly disclaims any fraud on the part of the defendant. This we cannot treat as aiding her case. The defendant cannot be punished for strengthening his title or avoiding a possible adverse claim.

The decree was right and is affirmed.

Affirmed.

Mr. Justice STAFFORD, 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.

ZINKHAN v. DISTRICT OF COLUMBIA, Use of LANGELLOTTI et al.

(Court of Appeals of District of Columbia. Submitted February 11, 1921. Decided March 7, 1921.)

No. 3451.

1. **Trial ⟸60(1)—Evidence as to events before incarceration of plaintiff held incompetent before justification of imprisonment.**

   In an action against the superintendent of an asylum and jail for false imprisonment, evidence offered by plaintiff as to the circumstances surrounding his arrest and detention by the officers before he was taken to the asylum and jail was incompetent, before the defendant had made any attempt to justify the imprisonment on such proceedings.

2. **Appeal and error ⟸1053(3)—Instructions held not to cure admission of incompetent evidence.**

   In action for false imprisonment, admission of incompetent evidence as to the arrest and detention of plaintiff before he was taken to the asylum and jail of which defendant was superintendent, which was of a nature calculated to inflame the jury, was not cured by an instruction that plaintiff could recover only the actual damages he suffered because of his confinement in the asylum and jail during the time his detention therein by defendant was unlawful, even if a pointed and vigorous instruction could have removed the effect of such evidence.

3. **Asylums ⟸7—Superintendent of asylum and jail held not liable for acts of subordinates.**

   The superintendent of the Washington Asylum is not liable for damages for the acts of his subordinates, who are appointed by the commissioners, and not subject to discharge by the superintendent, under Act March 3, 1911, and many of whom possess special skill as alienists, which the superintendent does not possess.

4. **Asylums ⟸7—False imprisonment ⟸8—Superintendent liable for detention before receiving commitment.**

   The superintendent of the Washington Asylum and Jail is liable for the detention therein of a man brought to the asylum by officers for observation as to his sanity, between the time the superintendent personally learned of such detention and the time he received a proper commitment authorizing the detention.

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

5. Asylums ⊂⇒7—False imprisonment ⊂⇒13—Superintendent held not liable for confinment in asylum instead of jail.

Where a man brought to the Washington Asylum and Jail for mental observation was, by order of the physicians and nurses, confined in the asylum rather than in the jail, the superintendent was not liable for the damages suffered by reason of the place of confinement, since, not being an alienist himself, he was justified in relying on the opinion of the physicians.

6. False imprisonment ⊂⇒34—Expenses of securing discharge from lawful confinement not recoverable.

In an action for false imprisonment, plaintiff cannot recover the expenses of securing his release and discharge, which were incurred after the imprisonment had become legal by the issuance of a proper commitment.

Appeal from the Supreme Court of the District of Columbia.

Action by the District of Columbia, to the use of Frank Langellotti, and by Frank Langellotti in his own right, against Lous F. Zinkhan. Judgment for plaintiff. and defendant appeals. Reversed, with directions to grant a new trial.

F. H. Stephens and Robert L. Williams, both of Washington, D. C., for appellant.

G. W. Offutt, Jr., and C. V. Imlay, both of Washington, D. C., for appellee.

STAFFORD, Acting Associate Justice. Langellotti sued the defendant, Zinkhan, for unlawfully imprisoning him in the Washington Asylum and Jail, to his humiliation, vexation, and disgrace, as well as to his financial loss and damage. The defendant pleaded that in all he did he was acting as superintendent of said institution, pursuant to his legal duty, and in obedience to an order of commitment signed by a proper officer and regular on its face. The case was tried to a jury; a verdict was returned for the plaintiff, and judgment thereon rendered. The case is here for a review of the court's action in admitting evidence and in granting and refusing instructions.

It appears that the plaintiff was arrested in the night, and brought to the institution at about 1 o'clock in the morning, and was then received by the official in charge, and that the defendant knew nothing about the matter until about 9 o'clock of the same morning. The first six assignments of error relate to the admission in evidence of the circumstances attending the arrest, detention, and conveyance of the plaintiff, prior to his reception at the Asylum and Jail.

[1] Instead of contenting himself with putting in his own case, by showing his imprisonment and forcible detention by the defendant, and leaving the defendant to justify his action, if and as he could, the plaintiff chose to anticipate all possible defenses by going back and showing all that led up to his being taken to the place of imprisonment. This course was objected to step by step by the defendant, and exceptions were taken. The result is that the record shows a good deal of highly prejudicial matter, introduced on the plea that it was preliminary and introductory to what followed; whereas, it was mat-

ter not necessary in that behalf, and for which the defendant was in no way responsible. For example, the plaintiff was allowed to show that one police officer had a warrant for plaintiff's arrest, and went to the place where the plaintiff worked to serve it, but did not find him, and then went to the plaintiff's home, and, still being unsuccessful, turned the warrant over to another police officer; that this officer succeeded, taking the plaintiff into custody at his home in the middle of the night, conveying him to the police station, and there delivering him to the officer in charge of the station; that there the plaintiff's name was taken and placed on the book, his person searched, and he himself conveyed in a patrol wagon to the Asylum Hospital, upon instructions given by the officer who had made the arrest; that a certain pencil memorandum, showing that the plaintiff was to be held for mental observation, was prepared by the officer in charge at the station, and handed to another officer, to be by him copied on a certain blank form when he should arrive at the hospital; and that among the records of the officer having charge of the cases of mental disorder there was an absence of certain necessary papers.

[2] As before stated, there was nothing in all this which the plaintiff needed to show in order to make out his case. If the defendant had chosen to go into these matters, and had shown the court that they were admissible in his defense, another question would have been presented; but the defendant chose to begin his defense with the time when he became responsible in some measure for what was done to the plaintiff, and he had a right to protest against the admission of these circumstances. They were of a character to inflame the minds of the jury against the defendant, as well as against those who were the immediate actors, and it would be a matter of grave doubt whether, by the most pointed and vigorous language, the court would have been able to lead the jury to cast it out of their minds on the question of damages. But although the court did grant and read an instruction that the plaintiff could recover only such actual damages as he suffered because he was confined in the Washington Asylum and Jail during the time his detention therein by the defendant was unlawful, the matter was not otherwise called to the attention of the jury by the court, and we cannot but feel that the poison inherent in such evidence must have done its work.

[3] It appears that when the plaintiff was brought to the hospital of the Washington Asylum and Jail at about 1 o'clock in the morning the defendant was not personally on duty, but was abed and asleep, and knew nothing of what happened in matters concerning this case until about 9 o'clock. The plaintiff was turned over to the doctor and nurse in charge, and was received and treated like other patients who are sent there for observation touching their mental condition. The defendant is superintendent by virtue of an appointment from the commissioners of the District, and under his direction and control are the jail building itself and all the other buildings used in connection with it, including the hospital building, where the plaintiff was received. All the subordinates of the superintendent receive their appointments from the commissioners themselves, and are not subject to discharge

by the superintendent. 36 Stat. 1003. It appears that the number of such subordinates is large, including physicians, nurses, and orderlies; that the superintendent is not a physician nor an alienist.

The declaration and the plaintiff's view of the law treat the superintendent as responsible for the acts and omissions of all his subordinates in the line of their duty, and therefore treat the defendant as responsible for the reception and detention of the plaintiff, as much before the time when the facts came to his notice as afterwards; for the declaration does not allege that there was any failure on the part of the defendant to make proper rules or to give suitable directions to his subordinates. The defendant's view, on the other hand, is that he is not liable for the acts of his subordinates as such, since he is not made liable by any statutory provision, nor has any power to appoint or remove them, and since they as well as he are acting in the performance of public duties.

We are referred by plaintiff's counsel to an elaborate and learned note to State v. Kolb, 1 A. L. R. 222, for a review of the authorities upon the question, from which it appears that the general rule (see Robertson v. Sichel, 127 U. S 507, 8 Sup. Ct. 1286, 32 L. Ed. 203) is against the liability of public officers for the acts of their subordinates; but he contends that the defendant is to be considered like a sheriff, and sheriffs, the author of the note says, are usually held liable for the acts of their deputies, generally upon an obligation, declared by statute, but also, he thinks, upon a common-law principle of which the statute is only declaratory. It would be impossible to decide how much weight should be given to this statement of the result of the cases without a careful examination of each and a knowledge of the statute under which the case arose. Flanagan v. Hoyt, 36 Vt. 565, for instance, was based upon statutory liability.

But we need not go into the matter at such length, because, even if a sheriff, who appoints his own deputies, and is generally made liable for their official acts by statute, is also liable upon common-law principles, it does not follow that the defendant is also liable; for the defendant is not a sheriff. He is a superintendent of a great institution, with very many subordinates, exercising care in matters touching which he has no knowledge or skill, and in whose appointment and retention he has no voice, and he was acting, at the most, only as a warden or keeper of a jail. A jailer and a sheriff are not the same, although the same person may hold both offices. It seems to us it would be unjust to hold a defendant liable, in a case like the present, for the acts of his subordinates merely as such, and when there was no other ground upon which to hold him. For the time, therefore, after the reception of the plaintiff at the hospital until the defendant became cognizant of his presence, we hold as a matter of law that upon the facts presented the defendant was not liable.

[4] Beginning, then, with the time at which the defendant did learn of the plaintiff's presence, and going on to the time at which he received the warrant of commitment, he was holding the plaintiff, as the court below rightly ruled, without authority of law. Just when the defendant received the commitment was a fact for him to show as a part of his justification, and it may have been as late as 4 o'clock in

the afternoon. He admits having received notice of the plaintiff's imprisonment as nearly as 9 or 9:30 in the morning. For these seven or eight hours the imprisonment was unlawful upon any view of the case that we are able to take, and for it the defendant was legally responsible. But we agree with the court below that the commitment was a sufficient justification to the defendant as jailer to receive and hold the plaintiff from that time on.

[5] At this point, however, another question arises: Was the defendant justified in keeping the plaintiff in the hospital, where he did, or was he bound to have kept him in the jail proper? This was treated as a question of fact by the court below, and as dependent upon the question "whether the plaintiff showed indications of being of unsound mind," or whether "there were other circumstances upon the basis of which defendant Zinkhan might reasonably believe that said plaintiff should be placed in said psychopathic ward." This would seem to be a fair way to submit the question, if there was really any question to submit. But to our minds the case shows beyond any question that in keeping the plaintiff where he did the defendant could not be justly charged with acting negligently or unreasonably. It is not suggested that he had the slightest ill will toward the plaintiff. Before the plaintiff came to his attention as a prisoner, he had never even heard of him. Personally it is not claimed that he treated him in any way that would indicate animus of any sort. On the other hand, the plaintiff was observed by the physicians and nurses in charge, and was retained in the psycopathic ward in accordance with their judgment. How can it fairly be said that he was not justified as a reasonable man in acting upon their judgment? Was he to set up his own opinion upon a question touching which he had no special knowledge? If it had been a case of supposed physical illness, instead of supposed mental illness, would he not have been justified in relying and acting upon the advice of the physicians and nurses, unless there were something to indicate that they were grossly mistaken or unfair? It really seems to us too plain for doubt that he did in this respect what he was in duty bound to do in the circumstances with which he had to deal.

[6] If we are right in this, then there was no ground for recovery after the commitment paper was received, and of course it follows that there was no ground for assessing against the defendant as damages the amount it may have cost the plaintiff to secure his release and discharge from an imprisonment which was at that time legal.

The judgment must be reversed, with costs, and with directions to grant a new trial.

Reversed.

Mr. Justice STAFFORD, 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.

PHILLIPS & SAGER v. KERN.

(Court of Appeals of District of Columbia. Submitted February 9, 1921. Decided March 7, 1921.)

No. 3427.

1. **Appeal and error ⟸204(1)—Objection and exception necessary to consideration of admission of evidence.**
Error assigned in admitting evidence need not be considered, where no objection was interposed or exception reserved to the admission of the evidence.

2. **Corporations ⟸519(2)—Evidence of stock ownership of individual incompetent on issue as to whether latter or corporation contracted with party suing corporation.**
In an action against a corporation for breach of contract, where the defense was that an individual, and not the corporation contracted with plaintiff, evidence for plaintiff that the individual named owned 50 per cent. of the capital stock of the corporation was immaterial and incompetent.

3. **Appeal and error ⟸1050(1)—Evidence of stock ownership held prejudicial on question of identity of contractor.**
In an action against a corporation for breach of a contract, where the crucial issue of fact was whether plaintiff contracted with the corporation or with an individual evidence erroneously admitted that the individual named owned 50 per cent. of the stock of the corporation was highly prejudicial to defendant.

4. **Evidence ⟸246—Letters by attorney, before he represented plaintiff, not admissible for defendant.**
In an action for breach of a contract to construct a house, and convey the lot and house to plaintiff, letters written by the present counsel for plaintiff, before he represented plaintiff, showing that the contract for the lot was made by an individual, and not by the defendant corporation, were not admissible against the plaintiff, especially in view of the fact that it was immaterial who purchased the lot that was to be conveyed to plaintiff, if defendant in fact contracted to convey it.

5. **Evidence ⟸543(3)—Witness held not qualified to state cost of house.**
In an action for breach of a contract to construct for plaintiff a house similar to a specified sample house, a witness who qualified as to knowledge of the cost of building materials, but who stated that his only examination of the sample house was going around outside it, and that he did not know of the materials used therein, the finish, or equipment, was not qualified to give evidence of the value of the house to be constructed for plaintiff.

6. **Vendor and purchaser ⟸351(1)—Measure of damages for breach of contract to build and convey stated.**
In an action for breach of a contract to build a house, and convey it and the lot to plaintiff, the measure of damages is not the difference between the contract price and the cost of building the house at the time of the default, but was the difference between the contract price and the market value of the house and lot at the time of default, which was the expiration of the period after the completion of the title within which the house could reasonably have been built, taking into consideration the building conditions generally prevailing.

7. **Evidence ⟸113(8)—Cost of erecting does not show market value of house.**
In an action for breach of contract to build a house, and convey it and the lot to plaintiff, evidence on behalf of plaintiff of the cost of erecting the house at the date of default, either with or without proof of the value

of the lot, is not sufficient to establish the market value of the property, which would be the price that the property so located would sell for upon the open market.

Appeal from the Supreme Court of the District of Columbia.

Action by John P. Kern against Phillips & Sager, a corporation, for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed and remanded for a new trial.

W. Gwynn Gardiner, of Washington, D. C., for appellant.

Alex H. Bell, P. H. Marshall, and F. J. Rice, all of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a judgment for damages for breach of contract.

It appears that appellee, Kern, hereafter referred to as plaintiff, in 1917 entered into a contract alleged to have been made with appellant company, defendant below, under which it agreed to build a house on the north part of lot 16, square 986, in the city of Washington, and convey the property thus improved to plaintiff for the sum of $4,500. To accomplish this, William S. Phillips, of the defendant company, purchased lot 16 for $2,100 cash, it being understood that there would be room thereon for the erection of three houses, and plaintiff contracted to purchase the north house. The contract specified that the house was to be a duplicate of a sample house which had been previously erected at Eleventh and Oaks Streets, Northwest, in this city, with certain minor changes specified in the contract.

Trouble was encountered in perfecting the title to the lot, which necessitated delay. The parties, however, extended the contract to meet this contingency. When the title was completed, plaintiff went to the office of defendant company and asked Mr. Sager "what he intended to do about the house—whether he was going to build the house or not?" To which Sager replied, "You don't expect me to build a house to-day for $4,500, which would cost me $6,500 to build it?" The house was not built, or the contract carried out. This action was brought to recover damages for its breach. From a judgment for plaintiff in the sum of $1,500, the case comes here on appeal.

[1] Error is assigned in admitting the conversation between plaintiff and Sager, on the ground that Sager, being the vice president and treasurer of the corporation, could not, by his admission, bind the corporation. We are relieved, however, from the consideration of this assignment, since no objection was interposed or exception reserved to the admission of this testimony.

The contract was in the usual form employed by agents in the sale of real estate in this District. It contained, among other conditions, a stipulation that "this contract is made subject to approval by owner." It was signed:

"Phillips & Sager, Agents. By J. Arthur Lewis, Salesman. Accepted by John P. Kern, Purchaser. Address: 1125 D N. E.; 218 or 228 Tenn. Ave., N. E. Title to be in the name of John P. Kern; his wife, Hazel B., as joint tenants. Accepted by ———, Owner."

The corporation defended upon the ground that it was a contract between plaintiff and William S. Phillips, and that the corporation merely acted as agent in negotiating the sale. This constituted the chief issue of fact, and, as such, was submitted by the court to the jury under proper instructions.

[2, 3] In the course of the trial, plaintiff, over objection of defendant, was permitted to prove that William S. Phillips owned 50 per cent. of the capital stock of the Phillips & Sager corporation. There is no theory upon which this evidence can be held admissible. Plaintiff pitched his case upon a contract with the corporation, and not with Phillips individually. It is therefore immaterial who the stockholders are, or the number of shares they respectively own. Proof that Phillips owned 50 per cent. of the stock was highly prejudicial, for the influence it may have had upon the jury in determining the crucial issue of fact as to whether plaintiff contracted with Phillips or the corporation.

[4] Error is assigned upon the refusal of the court to admit in evidence two letters written by P. H. Marshall, present counsel for plaintiff, to William S. Phillips. The letters were written on behalf of the heirs of Henry Koons, the vendee in the contract which Phillips made for the purchase of the lot, calling upon Phillips to complete his contract and threatening him, upon failure to do so, with suit for specific performance. These letters were written before Marshall became counsel for plaintiff. They are not admissible, therefore, even for the purpose of creating an inference that plaintiff had knowledge, through his attorney, of the fact that Phillips was the principal in the present contract. It may here be suggested that the fact that Phillips purchased the lot from Koons has only remote relevancy to the present contract, since Phillips may well have purchased the lot, and the corporation have contracted to build the house for plaintiff and convey to him a portion of the lot. In other words, it was of little concern to plaintiff who purchased the lot, so long as he was given a valid title to the portion he contracted for.

[5] A further ground for reversal of the judgment consists in the failure of the proof to establish a proper basis for the computation of damages. A witness was called to prove the cost of reproducing the sample house on the lot in question at or about the time of the alleged default. The witness, after qualifying as to his knowledge of the value and increased cost of building materials in December, 1917, testified:

"I think a building of that type, comparing it with a building, a similar building, I erected at that time, at that approximate time, it would be worth about, I should say, $5,500."

But, when questioned as to the examination he made of the sample house, he stated that he could not get inside of the house, but "simply went around it, and looked at it, and gave it a pretty good view." He did not pretend to testify as to the character of materials used in its construction; the kind of heating plant, if it contained one at all; whether it was lighted by gas or electricity, or neither; the number of

rooms; the quality of finish; the kind and extent of plumbing, if any; or any of the most essential elements to be considered in determining the cost of building a house. It was error to permit this evidence to go to the jury.

[6] The court instructed the jury that—

"The measure of the recovery that Mr. Kern, the plaintiff, would be entitled to, in the way of damages, would be the difference between the contract price of this property, as specified in this written contract, and the cost of building that house at the time of the default, if you find that there was a default."

The true measure of the damage was not the difference between the contract price and the cost of building the house, but the difference between the contract price and the market value of the portion of the lot purchased, with the house erected thereon, at the date of the default; the date of default being the expiration of the period after the completion of the title within which the house could reasonably have been built, taking into consideration the building conditions generally prevailing in the District of Columbia at that time.

[7] But the testimony totally fails to meet this standard. No proof was offered as to the size of the lot to be conveyed, or as to its value. It must not be lost sight of, however, that this suit is not for the breach of a building contract, but of a contract for the purchase of real estate. Proof, therefore, of the value of the lot and the cost of erecting the house at the date of default would not in themselves establish the market value of the property, since the real market value at that time would be the price that such a property, so located, would sell for upon the open market. Upon this point no evidence whatever was adduced.

The judgment is reversed with costs, and the cause is remanded for a new trial.

Reversed and remanded.

Mr. Justice STAFFORD, 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.

WINSTON v. WINSTON.

(Court of Appeals of District of Columbia. Submitted February 15, 1921. Decided March 7, 1921.)

No. 3460.

1. **Divorce ⟸62(2)—Three years' residence within district jurisdictional, where cause accrued outside.**
The requirements of Code of Law 1901, § 971, that complainant for divorce shall have been a bona fide resident of the District for at least three years, next before the application for divorce, for any cause which shall have occurred outside of the District and prior to residence therein, is jurisdictional, and the bill must be dismissed, where the alleged causes of divorce all occurred outside the District, and there is no allegation that plaintiff had resided within the District for three years.

2. **Divorce ⟸91—Bill held to show matrimonial domicile outside of District.**
A bill alleging that plaintiff had resided within the District before her marriage to a naval officer, who was a resident of North Carolina, that after the marriage he was stationed in Pennsylvania and New York, and that the parties separated while they were in New York, where the causes for divorce occurred, clearly shows that the matrimonial domicile had never been established within the District, so that plaintiff lost her residence therein, and cannot have a divorce until she has reacquired a residence, which has continued for a sufficient period to confer jurisdiction upon the court.

3. **Divorce ⟸63—Wife can acquire domicile without reference to husband after separation.**
A wife, who separated from her husband, can return to the District, in which she formerly resided, and reacquire a domicile there sufficient to entitle her to maintain a bill for divorce, without reference to the domicile of her husband.

4. **Divorce ⟸65—Appearance or admission by defendant does not waive jurisdictional residence requirement.**
The requirement of three years' residence by a plaintiff for divorce for a cause arising outside the District is a jurisdictional one, which is not remedied by the appearance of the defendant, nor is the defendant precluded from raising the question by the admission in his answer.

Appeal from the Supreme Court of the District of Columbia.

Suit for limited divorce by Marie E. Winston against Hollis T. Winston. From a decree dismissing the bill, complainant appeals. Reversed and remanded, with directions to dismiss the bill.

George E. Sullivan and F. Sprigg Perry, both of Washington, D. C., for appellant.

J. V. Morgan, of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. This appeal is from a decree of the Supreme Court of the District of Columbia dismissing the bill of appellant, plaintiff, for a limited divorce.

At the outset, we are confronted with a question of jurisdiction fatal to plaintiff's case. She avers in the bill that—

"Plaintiff is a citizen of the United States, a resident of the city of Washington, District of Columbia, residing at present at No. 1825 Nineteenth

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street Northwest, in said city and District, and brings this suit in her own right as hereinafter set forth as the wife of the above-named defendant, Hollis T. Winston."

[1] While defendant admits this averment, there is nothing to show that plaintiff had resided in the District of Columbia three years prior to filing her bill, or that the marital domicile had ever been in the District. Section 971 of the District Code provides as follows:

"No decree of nullity of marriage or divorce shall be rendered in favor of any one not a resident of the District of Columbia, and no divorce shall be decreed in favor of any person who has not been a bona fide resident of said District for at least three years next before the application therefor for any cause which shall have occurred out of said District and prior to residence therein."

The statute, it will be observed, contains two limitations upon the right of a party to maintain an action for limited divorce in this District: First, the plaintiff must be "a resident of the District of Columbia"; and, second, if the cause "occurred out of said District," before action will lie, the plaintiff must have "been a bona fide resident of said District for at least three years next before the application therefor." Plaintiff charges that the offenses of the husband upon which she bases her claim for relief were committed in Brooklyn. No offense is averred to have been committed within the District of Columbia; hence her case comes clearly within the three-year limitation of the statute. This is jurisdictional, and requires, not only an affirmative averment of the fact in the bill, but proof in support thereof. Wood v. Wood, 59 Ark. 441, 27 S. W. 641, 28 L. R. A. 157, 43 Am. St. Rep. 42; Miller v. Miller, 33 Fla. 453, 15 South. 222, 24 L. R. A. 137.

[2] Plaintiff avers in her bill that she and defendant were married in this District on September 1, 1917; that defendant was a naval officer assigned to duty at the Navy Yard, in Brooklyn, N. Y.; that immediately after their marriage they took up their residence in Brooklyn, and that it was from there that plaintiff, on March 20, 1918, left defendant, refusing longer to live with him. It also appears that defendant was born in North Carolina, and had lived there with his parents until the time of his appointment in the Naval Academy; that he is officially registered in the Navy as a resident of North Carolina; that, for several months prior to his marriage, he had been stationed in Brooklyn; and that at the time of the trial he was stationed in Philadelphia, Pa.

[3] It is unnecessary to determine whether the marital domicile in this case was in North Carolina or New York, since it is clear that it never was in the District of Columbia. It is not sufficient that, prior to her marriage, plaintiff had resided many years with her parents in the District of Columbia, and that, when she left her husband in Brooklyn, she returned here. Inasmuch as she and defendant went into another jurisdiction and acquired a domicile, it is necessary for her, upon her return, to reacquire a residence for sufficient period to confer jurisdiction upon the court to decree a divorce, which, in this instance, is three years. Harteau v. Harteau, 14 Pick. (Mass.) 181, 25 Am. Dec. 372. That plaintiff, however, could return here and ac-

quire such domicile without reference to the domicile of her husband is settled. Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Carty v. Carty, 70 W. Va. 146, 73 S. E. 310, 38 L. R. A. (N. S.) 297.

[4] Where the statute, as here, fixes the period for which a party applying for divorce shall have resided within the jurisdiction before filing a bill, the requirement is mandatory, and the court is without power to decree a divorce, unless it affirmatively appears that the plaintiff has actually resided within the jurisdiction the full time required by statute. Lawrence v. Nelson, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583; Bradfield v. Bradfield, 154 Mich. 115, 117 N. W. 588, 129 Am. St. Rep. 468. Even the appearance of defendant could not remedy the defect. Holton v. Holton, 64 Or. 290, 129 Pac. 532, 48 L. R. A. (N. S.) 779. Nor is defendant precluded from raising the question of jurisdiction by reason of the admission in his answer. Bradfield v. Bradfield, supra.

The decree of the lower court, dismissing the bill on the merits, is reversed, and the cause is remanded, with instructions to enter a decree dismissing the bill for the want of jurisdiction.

Reversed and remanded.

Mr. Justice STAFFORD, 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.

UNDERWOOD v. UNDERWOOD.

(Court of Appeals of District of Columbia. Submitted February 8, 1921. Decided March 7, 1921.)

No. 3421.

1. **Divorce ⇐37(22)—Ill temper and financial differences not cause for desertion.**
   Proof of ill temper on the part of the wife and of differences over financial matters is not sufficient to justify the husband in abandoning his wife.

2. **Divorce ⇐37(20)—Wife's denial of intercourse not a ground.**
   A wife's denial of matrimonial intercourse is not of itself a ground for divorce.

3. **Divorce ⇐37(22)—Only grounds for divorce justify desertion.**
   Acts which justify desertion must be such as would support a decree for divorce.

4. **Divorce ⇐37(8)—Spouse unjustifiably deserted need not seek reconciliation.**
   Where a husband abandoned his wife without justification, and notified her that under no circumstances would he live with her, she is not required to take any steps to induce him to return or offer to go to him as a condition to suit for divorce.

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5. Divorce ⟸37(8)—Party at fault must seek reconciliation to bar divorce for desertion.

The party at fault in the original separation must make a good-faith offer to return, in order to prevent the desertion from becoming a statutory ground for divorce.

6. Divorce ⟸56—Offer of husband, rejected by wife, does not show "collusion."

Evidence that the husband offered money to his wife if she would go to another jurisdiction and secure absolute divorce, or would permit him to do so, which offer was rejected by the wife unequivocally, does not show "collusion," which requires a meeting of minds on a course of conduct by which the parties co-operate in an attempt to lay the foundation for an action for divorce, and such offer does not prevent the wife from obtaining a divorce a mensa et thoro.

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

Appeal from the Supreme Court of the District of Columbia.

Suit by Margaret L. Underwood against Lineas D. Underwood, for divorce a mensa et thoro. Decree for complainant, and defendant appeals. Affirmed.

Paul V. Keyser, of Washington, D. C., for appellant.

R. C. Thompson and John E. Laskey, both of Washington, D. C., for appellee.

VAN ORSDEL, Associate Justice. Appellee, Margaret L. Underwood, brought this suit in the Supreme Court of the District of Columbia against her husband, Lineas D. Underwood, for divorce a mensa et thoro.

The parties were married in 1899. A son was born in 1902. In 1913 appellant left his wife, but through her friends and the intervention of relatives a reconciliation was effected. It is conceded that things moved along harmoniously for a year or a year and a half thereafter. In August, 1916, appellant again left his wife, and has since refused to live with her. Indeed, he testified in the present case that he intended, when he left appellee, that the separation should be permanent.

[1, 2] We deem it unnecessary to review the facts adduced at the trial below. The record fails to establish any justification for appellant's desertion of his wife. Proof of ill temper on the part of the wife and differences over financial matters are not sufficient to justify the husband in abandoning his wife. Appellant also contends that appellee denied him matrimonial intercourse. This is denied by the wife. However, if this were true, the wife's denial to the husband of matrimonial intercourse is not, of itself, ground for divorce in this jurisdiction. Steele v. Steele, 1 McArthur, 505.

[3] It is settled in this jurisdiction that acts justifying desertion must be such as would support a decree for divorce. Hitchcock v. Hitchcock, 15 App. D. C. 81. It is clear that appellant has established no such treatment by his wife as would bring him within the rule.

[4] It is contended, however, that appellee is without standing, since she took no steps to induce appellant to return or made any offer

to go to him. It is apparent from the record that such efforts would have been unavailing. When appellant left, he deliberately notified his wife that under no circumstances would he live with her, that he had ceased to love her, and that "he could not bear to touch her." Under these circumstances, there was no duty devolving upon the wife to use her efforts to terminate the desertion. Where, as here, the wife has not procured, consented to, or connived at the separation, she is under no obligation to solicit the husband's return.

[5] On the other hand, if appellant wished to prevent his desertion from maturing into a cause of action for divorce by his wife, it was incumbent upon him to offer in good faith to return.

"The party at fault in the original separation, desiring to resume proper marital relations within two years, and thus prevent the desertion from becoming a statutory ground for divorce, must make a good-faith offer to return, without other conditions than those incident to the proper treatment of each by the other as husband and wife." Seeds v. Seeds, 139 Iowa, 717, 117 N. W. 1069.

[6] But it is urged that the separation was brought about as the result of collusion between the parties. It appears that appellant offered his wife $12,000 if she would go into another jurisdiction and secure an absolute divorce on the ground of desertion, or if she would permit him to establish a residence elsewhere and secure a divorce. But there is no proof that the wife even considered the offer. On the contrary, it clearly appears that she promptly and unequivocally rejected the proposition, with the statement that she did not wish a divorce. Before there can be collusion, there must be a meeting of the minds upon a course of conduct by which the parties co-operate in an attempt to lay the foundation for an action for divorce; but nothing occurred in this case which, by the broadest inference, could be distorted into such an agreement. The fraud which appellant admits he was prepared to perpetrate upon the court and society was promptly rejected by the wife.

The decree is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

SMITH v. WARNOCK.

WARNOCK v. SMITH.

(Court of Appeals of District of Columbia. Submitted January 20, 1921. Decided March 7, 1921.)

Nos. 1363, 1365.

1. **Patents ⟸90(5)—Actual test, and not completion of machine, constitutes reduction to practice.**
   It is the actual test of a machine, and not the time of its completion, that is essential to establish reduction to practice.
2. **Patents ⟸90(5)—Nunc pro tunc reduction to practice not recognized.**
   The patent law recognizes no such thing as reduction to practice nunc pro tunc.
3. **Patents ⟸90(5)—One first conceiving, but last to reduce to practice, entitled to priority when diligent.**
   One who was the first to conceive an invention, and who was diligent, was entitled to priority over another, first reducing the invention to practice.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Karl D. Smith and Robert Warnock. From a decision granting Smith priority, except as to one count, both parties appeal. Affirmed.

Fred L. Chappell and Otis A. Earl, both of Kalamazoo, Mich., for Smith.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., and Edmund Quincy Moses, of New York City, for Warnock.

VAN ORSDEL, Associate Justice. This is an interference proceeding between an application filed by the party Warnock January 8, 1916, and the application of Smith, filed September 7, 1917. The invention relates to an air pump. The issue is in seven counts, of which the following are illustrative:

"1. In a structure of the class described, the combination of a cylinder, a cylinder head comprising an inner head member having an annular inlet valve seat on its outer face and a plurality of inlet passages opening into said valve seat, and a plurality of cylinder ports, an intermediate head member having an annular discharge valve seat on its outer face and discharge ports opening into said discharge valve seat, said inner and intermediate head members being formed to enclose between them an annular inlet valve chamber into which said cylinder ports open, an outer head member having a recess in its inner face constituting a discharge valve chamber, said chamber being provided with a discharge opening, annular disk-like valves arranged in said valve chambers to coact with said valve seats, and coiled seating springs for said valves, said intermediate and outer head members being provided with bore-like seats for said springs aligned with said valves.

"2. In a structure of the class described, the combination of a cylinder, a cylinder head comprising an inner head member having an annular inlet valve seat on its outer face and a plurality of inlet passages opening into said valve

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seat, a plurality of cylinder ports, an intermediate head member having an annular discharge valve seat on its outer face and discharge ports opening into said discharge valve seat, said inner and intermediate head members being formed to enclose between them an annular inlet valve chamber into which said cylinder ports open, an outer head member having a recess in its inner face constituting a discharge valve chamber, said chamber being provided with a discharge opening and annular disk-like valves arranged in said valve chambers to coact with said valve seats.

"3. In a structure of the class described, the combination with a cylinder, of a head therefor comprising a pair of superimposed head members, the inner head member having a valve seat on its outer face, a plurality of inlet ports, said head members being formed to enclose between them an inlet valve chamber into which the cylinder ports open, the superimposed member being provided with a discharge port opening into said inlet valve chamber, a valve for said discharge port, and a disk-like inlet valve.

"4. In a structure of the class described, the combination of a cylinder, a cylinder head comprising a pair of superimposed head members formed to enclose between them an annular inlet valve chamber, the inner head member having an annular inlet valve seat in its outer face and a plurality of inlet passages opening into said inlet valve chamber, the superimposed head member being provided with an annular discharge valve seat and discharge ports opening into said valve seat and to said inlet valve chamber, annular disk-like valves arranged to coact with said valve seats, and seating springs for said valves."

The Examiner of Interferences awarded priority as to all of the counts to the party Smith. The Board of Examiners in Chief affirmed the Examiner, except as to count 2, which was awarded to Warnock. The Commissioner affirmed the Board. From his decision both parties have appealed.

This case turns largely upon the single question of whether the making of certain pumps by Smith amounted to reduction to practice. In 1913 Smith made a pump, known as Exhibit 3, which was found by the tribunals below to contain all the elements set out in counts 3, 5, and 7. Smith contends that the tests made of this machine amounted to a reduction to practice, but it was held below to establish only conception. In December, 1914, Smith built another pump, known as Exhibit 7, which, like Exhibit 3, failed to meet counts 1, 2, 4, and 6. This was followed by the construction and reduction to practice of what is known as Exhibit 13, which failed to meet any of the counts, since they call for annular disk-like valves, and this pump contained a flap valve.

The Board of Examiners in Chief, in its opinion holding that Smith had failed to reduce Exhibits 3 and 7 to practice, said:

"Smith's Exhibit 7 was built and tested in December, 1914. Like Exhibit 3, it fails to satisfy counts 1, 2, 4 or 6, nor does the testimony to the successful testing of Exhibit 7 in 1914, establish reduction to practice. As in the case of Exhibit 3, the testimony does not bring out with sufficient particularity what the tests showed and the failure to follow up this form of pump at that time and the pushing of Exhibit 13 which does not satisfy any count are more significant than the assertions of the witnesses that the tests were successful."

To this point we agree with the Commissioner that Smith had failed to reduce to practice the invention in issue. We now come to a pump constructed by Smith in August, 1915, as shown in blueprint

Exhibits 15 and 17, which meet counts 2, 3, 5, and 7. It did not contain springs and "bore-like seats" called for in count 1, or the springs of counts 4 and 6. This pump was sent by the Union Steam Pump Company, of which Smith was assistant superintendent, to the Empire Cream Separator Company, where Warnock was employed. We agree with all the tribunals below that the tests made of this pump amounted to a reduction to practice. We think this conclusion is amply supported by the testimony and especially the circumstances of the test. Smith, therefore, is entitled to a date for reduction to practice for a pump as disclosed in blueprint 15 as of August, 1915.

[1, 2] The earliest date of conception that can be accorded Warnock is August, 1914. We agree with the Commissioner that what he did in 1914 towards developing a pump did not constitute reduction to practice. Like Smith's Exhibits 3 and 7, it amounted merely to an experiment. Warnock, however, accomplished reduction to practice in September, 1915. He contends that this test was begun in August, but his proof limits him to his Exhibit S, dated September 10, 1915. While it may well be that he had his machine, which was tested out in September, completed in August, it is the actual test that is essential to establish reduction to practice. The patent law recognizes no such thing as reduction to practice nunc pro tunc.

[3] Count 2 is limited to inner, intermediate and outer head members, the outer one of which has a recess in its inner face constituting a valve chamber with a valve located therein. It is also limited to a "plurality of cylinder ports." These features first appeared in exhibits introduced by Warnock and proved to have been made in March, 1915. Smith is not in position to claim conception of these features earlier than his filing date, September 7, 1915. Warnock, therefore, though the last to reduce to practice, was the first to conceive, and, being diligent, he is entitled, as held by the Commissioner, to priority as to count 2.

The decision of the Commissioner of Patents is affirmed.

Affirmed.

SMITH v. WARNOCK.

WARNOCK v. SMITH.

(Court of Appeals of District of Columbia. Submitted January 20, 1921. Decided March 7, 1921.)

Nos. 1364, 1366.

1. Patents ⇐106(2)—Count for vacuum pump broad enough to read on machine with flap valve.
   A count in an interference proceeding covering a vacuum pump *held* broad enough to read on a machine reduced to practice, though such machine had a flap valve, instead of the annular disk valve, called for by the other counts.

2. Patents ⇐90(5)—One first to conceive and last to reduce to practice denied priority, when diligence lacking.
   One who was first to conceive an invention and last to reduce it to practice, and was lacking in diligence at the time another inventor came into the field, is not entitled to priority.

3. Patents ⇐90(5)—One first to conceive and first to reduce to practice entitled to priority.
   One who was first to conceive an invention and the first to reduce it to practice is entitled to priority.

Appeal from a Decision of the Commissioner of Patents.

Interference proceeding between Karl D. Smith and Robert Warnock. From a decision granting Smith priority as to one count, and Warnock priority as to the others, both parties appeal. Affirmed.

Fred L. Chappell and Otis A. Earl, both of Kalamazoo, Mich., for Smith.

Joseph H. Milans and Calvin T. Milans, both of Washington, D. C., and Edmund Quincy Moses, of New York City, for Warnock.

VAN ORSDEL, Associate Justice. This is a companion interference to Nos. 1363 and 1365, —— App. D. C. ——, 271 Fed. 556, this day decided. As in that case, it relates to a vacuum pump. The testimony is in a single record, and applies to both interferences. The issue in the present interference is in three counts, of which the following will serve our present purpose:

"1. In a structure of the class described, the combination with a cylinder, of a head therefor comprising a pair of superimposed head members, the inner head member having an annular inlet chamber, an annular valve seat on its outer face, a plurality of inlet ports opening into said valve seat, and a plurality of cylinder ports, said head members being formed to inclose between them an annular inlet valve chamber into which the cylinder ports open, the superimposed member being provided with an annular discharge valve seat and a plurality of discharge ports opening into said discharge valve seat and to said inlet valve chamber, and annular disk-like valves disposed on said seats."

"3. In a structure of the class described, the combination with an open ended cylinder, of a head detachably secured thereto and provided with three su-

perimposed chambers, the lower chamber constituting an inlet chamber, the upper chamber constituting a discharge valve chamber, and the intermediate chamber constituting an inlet valve chamber, said head being provided with inlet, outlet, and cylinder ports establishing communication between said inlet valve chamber and said inlet chamber, discharge chamber, and cylinder, respectively, and valves for closing the upper ends of said inlet ports and said discharge ports."

[1] Counts 1 and 2 include a head member with an annular inlet chamber. It therefore appears that Smith's Exhibit 7 machine embodied these counts, but it was not reduced to practice; hence it merely fixes a date of conception by Smith. Smith's Exhibit 13, which we held was reduced to practice, but did not embody any of the counts of the companion interference, since it had a flap valve, embodies count 3, which is not limited to the annular disk valve, but is broad enough to read upon the Exhibit 13 machine.

[2] It therefore follows that, since Smith's machine, as reduced to practice in August, 1915, and his application in the companion case, failed to disclose the annular inlet chamber as part of the head, he is held to his filing date, March 6, 1917, for constructive reduction to practice of counts 1 and 2. While he may be accorded conception as of the date of the Exhibit 7 machine—December, 1914—he was first to conceive and last to reduce to practice, and, lacking diligence at the time Warnock came into the field, he cannot prevail as to these counts.

[3] Count 3, however, was embodied in the Exhibit 3 and Exhibit 13 machines of Smith. He therefore is entitled to the date of the Exhibit 3 device—1913—for conception, and the date of the Exhibit 13 machine—December, 1914—for reduction to practice. Being, therefore, the first to conceive and the first to reduce to practice, he must prevail as to count 3.

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.

FIRST NAT. BANK OF KANSAS CITY, MO., v. SELDOMRIDGE.

(Circuit Court of Appeals, Eighth Circuit. January 18, 1921. Rehearing Denied May 19, 1921.)

No. 5550.

1. **Contracts ⟸97(1)—Right to rescind for fraud waived by treating contract as in force after discovery of fraud.**
One induced to enter into a contract by fraud, by continuing to treat the contract as in force after discovery of the fraud, loses the right to rescind.

2. **Banks and banking ⟸186—Recognition after knowledge of fraud waiver of right to rescind discount.**
Defendant bank discounted for a correspondent bank a note of a third person, secured by chattel mortgage indorsed by the payee bank without recourse, but personally by its president and cashier, and with a letter from the cashier authorizing defendant, on maturity of the note, to charge the same to the bank's account, which was credited with the amount of the discount. When the correspondent bank went into the hands of a receiver, before maturity of the note defendant, claiming to have discovered fraudulent representations in respect to the mortgage security, charged its account, not with the amount credited on the discount, but with the amount of the note, claiming authority under the cashier's letter. *Held*, that it thereby recognized the contract of discount, and could not disaffirm it for the fraud, when sued by the receiver to recover the balance of the correspondent's account.

3. **Banks and banking ⟸134(1)—Bank cannot apply deposit on note discounted for depositor on which latter is not liable.**
A bank *held* without authority to apply a deposit in payment of a note discounted for the depositor, but which the latter had indorsed without recourse.

4. **Banks and banking ⟸134(1)—Bank cannot exercise option to charge note to depositor's account after latter's insolvency.**
A bank cannot exercise an option given it to charge the amount of a note discounted for a depositor to the latter's account at maturity, where prior to such maturity the depositor has gone into the hands of a receiver and the rights of others have intervened.

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action at law by H. H. Seldomridge, receiver of the Mercantile Bank of Pueblo against the First National Bank of Kansas City, Mo. Judgment for plaintiff, and defendant brings error. Affirmed.

R. E. Ball, of Kansas City, Mo. (I. P. Ryland, of Kansas City, Mo., on the brief), for plaintiff in error.

Alva B. Adams, of Pueblo, Colo. (Robert S. Gast, of Pueblo, Colo., and Cooper, Neel & Wright, of Kansas City, Mo., on the brief), for defendant in error.

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

MUNGER, District Judge. The receiver of the Mercantile National Bank of Pueblo, Colo., hereafter called the Pueblo Bank, recovered a judgment against the First National Bank of Kansas City, hereafter

called the defendant, for a balance of money the Pueblo Bank had on deposit with the defendant at the time the Pueblo Bank was closed by the Comptroller of the Currency, and this error proceeding seeks a review of that judgment. The case was tried by the court without a jury pursuant to written stipulation of the parties. Under the pleadings it was conceded that the defendant had credited to the Pueblo Bank the amount of money claimed by the plaintiff, but it was alleged that the Pueblo Bank had obtained one item of credit by its sale to the defendant about November 23, 1914, of a promissory note which had belonged to the Pueblo Bank and which it had indorsed without recourse. This note had been signed by A. J. Monahan & Co. and was dated November 20, 1914, and was due on or before five months after date without grace, and there was delivered with it as collateral security, a prior note of Monahan & Co. executed to the Pueblo Bank, dated May 1, 1914, and due in five months, and which was also indorsed without recourse, and a chattel mortgage dated July 2, 1914, given by Monahan & Co. to the Pueblo Bank upon all of the cattle of Monahan & Co., described as 1,000 head or more and as kept on a ranch near Pueblo. This mortgage recited that it was given to secure the note of May 1.

The questions that have been discussed by counsel cover a wide range, but the facts that are deemed essential are in narrow compass. The defendant requested and was refused a finding that the evidence was insufficient to make a case for the plaintiff, and the determination of the propriety of that refusal is the only question that requires consideration. The defendant asserts that the refusal of this request was error, because under the pleadings and the evidence the defendant had proven that the credit of November 23, 1914, had been obtained by the fraud of the Pueblo Bank, and the defendant was therefore justified in repudiating the entry of credit then given. The asserted fraud is that the Pueblo Bank, when it sold the note to the defendant, fraudulently concealed the fact that the Live Stock Exchange National Bank of Chicago held a prior and superior chattel mortgage given by Monahan & Co. on the same cattle; that it fraudulently concealed the fact that the number of cattle owned by Monahan & Co. was much less than the number stated in the chattel mortgage held by defendant; that it fraudulently concealed the fact that before the defendant discounted the note practically all of the cattle had been shipped to Texas, and that a new chattel mortgage had then been given upon them in that state by a purported owner of them. It was shown that the Pueblo Bank was closed and placed in the hands of the Comptroller of the Currency on March 29, 1915, and the defendant was then informed, by one of its officers who was at Pueblo, of several suspicious facts affecting other of its loans, and that over 200 of the cattle of Monahan & Co. had died before the execution of the defendant's mortgage, and that the remainder had been sold. The defendant on that day made a debit entry charging the account of the Pueblo Bank with the amount of the Monahan & Co. note of November 20.

Assuming without deciding, that the facts show such a fraud by the Pueblo Bank as would authorize the defendant to repudiate the item

of credit given to the Pueblo Bank because of its purchase of the note, another question is presented by the record as to the right of the defendant to avail itself of this defense. When this note was first transmitted by the Pueblo Bank to the defendant, it was indorsed without recourse by the Pueblo Bank; but the defendant returned it with a request for the personal indorsements of the president and cashier of the Pueblo Bank and for instructions to charge the note to the bank's account at maturity, as had been the custom in previous dealings between these banks. The Pueblo Bank returned the note with the requested personal indorsements, and with a letter signed by the cashier which stated:

"We take pleasure in complying with your instructions, and herewith inclose the note properly indorsed. I desire to state this note, signed by A. J. Monahan & Co., $19,725.18, will be due about April 20, 1915, and this letter will be your authority to charge the account of the Mercantile National Bank with the same on that date."

The plaintiff contends that the defendant did not repudiate the purchase of the note and collateral security and its acceptance of the guaranty of the Pueblo Bank, and did not proceed as upon a rescission for the alleged fraud; but that the defendant then and ever since has affirmed the contract of purchase and the offer to allow the note to be charged against the deposit, and has asserted its cancellation of credit relying upon its ownership of the note and mortgage and the authority of the letter of the Pueblo Bank.

[1] The rules to be applied to the facts have often been stated. Grymes v. Sanders et al., 93 U. S. 55, 62, 23 L. Ed. 798:

"Where a party desires to rescind upon the ground of mistake or fraud, he must, upon the discovery of the facts, at once announce his purpose, and adhere to it. If he be silent, and continue to treat the property as his own, he will be held to have waived the objection, and will be conclusively bound by the contract, as if the mistake or fraud had not occurred. He is not permitted to play fast and loose. Delay and vacillation are fatal to the right which had before subsisted. These remarks are peculiarly applicable to speculative property like that here in question, which is liable to large and constant fluctuations in value." Shappirio v. Goldberg, 192 U. S. 232, 242, 24 Sup. Ct. 259, 48 L. Ed. 419; Burk v. Johnson, 146 Fed. 209, 218, 76 C. C. A. 567; Richardson v. Lowe, 149 Fed. 625, 628, 631, 79 C. C. A. 317; Ripley v. Jackson Zinc & Lead Co., 221 Fed. 209, 211, 136 C. C. A. 619.

Stuart v. Hayden, 72 Fed. 402, 411, 18 C. C. A. 618, 626:

"One who is induced to make a sale or trade by the deceit of his vendee has a choice of two remedies upon his discovery of the fraud: He may affirm the contract, and sue for his damages; or he may rescind it, and sue for the property he has sold. The former remedy counts upon and affirms the validity of the transaction; the latter repudiates the transaction, and counts upon its invalidity. The two remedies are utterly inconsistent, and the choice of one rejects the other, because a sale cannot be valid and void at the same time."

Mudsill Min. Co. v. Watrous, 61 Fed. 163, 186, 9 C. C. A. 415, 437:

"When a purchaser acquires knowledge that he has been defrauded, he has an election of legal remedies. He may keep the property and sue for damages, or repudiate the contract and demand rescission. These remedies are not concurrent, but inconsistent, and the adoption of one of necessity excludes the other. The rule is well settled in equity that after knowledge of the fraud

the party must, within reasonable time, make an election as to whether he will affirm the trade, notwithstanding the fraud, or offer to restore the property and demand the return of his purchase money. If, after the knowledge of the facts which entitle him to rescind, he deal with the property as owner, it is evidence of acquiescence and an affirmance of the contract. The authorities to this point are numerous, and the principle well settled."

See A. Klipstein & Co. v. Grant, 141 Fed. 72, 72 C. C. A. 511; Roseboom v. Corbitt, 196 Fed. 627, 634, 116 C. C. A. 301; Miller v. Continental Shipbuilding Corporation (C. C. A.) 265 Fed. 158, 161; Issenhuth v. Kirkpatrick, 258 Fed. 293, 295, 169 C. C. A. 309; 2 Pom. Eq. Jur. § 897.

The election may be manifested by any conduct or declarations showing the course the party intends to pursue. One method by which a party may declare his election to affirm is by bringing suit, or by defending a suit brought against him on the theory of affirmance. Robb v. Vos, 155 U. S. 13, 43, 15 Sup. Ct. 4, 39 L. Ed. 52; Black on Rescission, §§ 590, 625.

[2] The defendant in this case when it discovered that Monahan & Co. did not have any of the mortgaged cattle, made a debit entry against the Pueblo Bank. The amount of this charge did not purport to be the amount of credit defendant had given the Pueblo Bank upon the discount of this note, with legal interest to that date, which would have been the amount it was entitled to recover or set off in case of repudiation of the contract of discount and the offer of a charge against the deposit of the Pueblo Bank, but it was the amount due on the face of the note at its maturity, and the exact amount authorized by the letter of the Pueblo Bank. The receiver of the Pueblo Bank wrote the defendant on the eleventh day after that bank had closed, inquiring as to the authority for making the charge, and on the following day the defendant replied that it had acquired the note from the Pueblo Bank indorsed without recourse by the bank, but indorsed personally by the president and cashier, and with the collateral security, and saying that the letter of transmittal gave the defendant authority to charge that note to the Pueblo Bank's account. It also said that, in addition to this, it had come into possession of facts which caused it to believe that Monahan & Co. had disposed of all the property securing the collateral note, with the connivance of the officers of the Pueblo Bank, and closed by saying that under the express authority above quoted the debits in question were made. It offered upon request to return the notes and collateral, but did not tender them until about April 22, when the receiver refused them. At some later time the defendant claimed to have learned that the cattle had been incumbered by a prior mortgage which had been transferred to the Chicago bank, but which had been paid by the Pueblo Bank before the defendant made its debit entry on March 29, 1915, and also to have later mortgage upon them there.

learned of the shipping of the cattle to Texas and of the giving of a

By its answer in this case the defendant asserted that those acts were frauds chargeable to the Pueblo Bank, but it also alleged that it debited the item in dispute because it had discounted the note on the express

agreement of the Pueblo Bank that unless paid at maturity by the makers the defendant had full power and authority to debit the account of the Pueblo Bank with the amount of the note, and again repeats that it debited the account of the Pueblo Bank "with the amount of said note, out of which defendant had been defrauded and pursuant to the written authority of said the Mercantile National Bank."

The briefs of counsel likewise justify the attempted application of the deposit upon the propositions that the credit was procured by fraud and was the application of the deposit expressly agreed to by the Pueblo Bank. These positions are clearly inconsistent, because the defendant could not repudiate the contract of sale and offer of a charge against the Pueblo Bank deposit without surrendering all rights under them. Its claim of credit for the amount of the face of the note, instead of for the credit given the Pueblo Bank, its assertion to the receiver of the grounds for its action, and its pleading and contention that it was authorized by the express authority of the Pueblo Bank to charge its account with the amount of the note, manifest its election to enforce the note and security notwithstanding its offers to return the papers and its claim of fraud inducing their acceptance of them. The offer to return the papers is equivocal, as it might express the thought that the defendant was placing the Pueblo Bank in statu quo, or the thought that the defendant had received payment according to the letter authorizing the application of deposit, and therefore was no longer entitled to the collateral note and mortgage. It did not elect to rescind, and to adhere to it without vacillation, nor did it act consistently with a purpose to pursue that course, and must be held to have waived the right to disaffirm the contract of discount.

[3] The defendant also contends that it was justified in applying the deposit of the Pueblo Bank by the terms of the notes, the chattel mortgage, and the authority given by letter from that bank. The note, to the payment of which the deposit was applied, was not due until 23 days after the application. It is the general rule that, if a depositor becomes insolvent, a bank may apply his deposit on his debt to the bank, even though it has not matured. Rolling Mill Co. v. Ore & Steel Co., 152 U. S. 596, 616, 14 Sup. Ct. 710, 38 L. Ed. 565; Schuler v. Israel, 120 U. S. 506, 510, 7 Sup. Ct. 648, 30 L. Ed. 707; Clearwater County v. Pfeffer, 236 Fed. 183, 187, 149 C. C. A. 373. But this rule is not always applied as against a mere surety or guarantor of another's debt. See Harrison v. Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Mechanics' Bank of Detroit v. Stone, 115 Mich. 648, 649, 74 N. W. 204; O'Grady v. Stotts City Bank, 106 Mo. App. 366, 369, 80 S. W. 696; 7 Corp. Jur. 657.

[4] But in this case the Pueblo Bank was not indebted to the defendant upon the note, or as surety or guarantor of it, because it had indorsed it without recourse, and its only contractual liability was expressed in its letter of November 23, 1914, transmitting the note, and stating that the letter would be authority for the defendant to charge the account of the Pueblo Bank with the amount of the note on the date of its maturity, and this was but the grant of an option to the defendant. The defendant could not exercise this power prior to the

maturity of the note, and did not endeavor to do so prior to the time that the bank was placed in the hands of the Comptroller of the Currency, and thereafter it was not entitled to apply the deposit, as the rights of others had attached. Corn Exchange Nat. Bank v. Locher, 151 Fed. 764, 766, 81 C. C. A. 388; Macy v. Roedenbeck, 227 Fed. 346, 351, 142 C. C. A. 42, L. R. A. 1916C, 12.

The judgment will be affirmed.

RICH v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1921. Rehearing Denied May 12, 1921.)

No. 5248.

1. **Criminal law ⟸901—Demurrer to evidence is waived by introducing the evidence thereafter.**
   Alleged error in the overruling of defendant's demurrer to the evidence of the prosecution is waived by defendant thereafter introducing evidence.

2. **Criminal law ⟸1169(11)—Evidence as to defendant's possession of other property not alleged to have been stolen held not reversible error.**
   In a prosecution for possession of goods known to have been stolen, the admission of evidence that at the same time defendant had in his possession a certain quantity of silk shirting, which in two counts withdrawn from the jury it had been alleged was stolen, *held* not reversible error, where no evidence was admitted tending to show that the shirting had been stolen.

3. **Criminal law ⟸1169(11)—Evidence of defendant's possession of other property held harmless, under defendant's statement and testimony.**
   In a prosecution for possession of stolen shoes, the admission of evidence that, when arrested, defendant had in his possession also a quantity of silk shirting, was not prejudicial to defendant, where he admitted the possession, both in his voluntary statement to the officers and in his testimony at the trial.

4. **Witnesses ⟸280—Cross-examination as to whether defendant was given "third degree" held improper.**
   In a prosecution for crime, where defendant's statement to the officers was given in evidence, it was not error for the trial court to exclude cross-question whether the witness gave defendant the "third degree," for the reason that the court did not know what was meant by the third degree, where defendant was permitted to cross-examine fully as to force and threats at the time the statement was made.

5. **Criminal law ⟸534(2)—Evidence held to corroborate defendant's confession he knew goods were stolen.**
   In a prosecution for transporting in interstate commerce goods known to have been stolen from an interstate shipment, evidence showing that the goods were part of an interstate shipment which had been stolen, and that they were found in the possession of one to whom defendant had sold them, is sufficient to corroborate defendant's confession.

6. **Criminal law ⟸1163(1)—Errors must be shown to be prejudicial by party complaining.**
   Under Act Feb. 26, 1919, amending Judicial Code, § 269 (Comp. St. Ann. Supp. 1919, § 1246), and requiring the Court of Appeals to look to the entire record before the court, and render judgment without regard to technical errors, the former practice of holding an error reversible

unless the opposite party can affirmatively demonstrate it was harmless is changed, and the burden now is on the complaining party to show from the record as a whole the denial of some substantial right.

In Error to the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Michael Rich was convicted of having transported in interstate commerce shoes which he knew to have been stolen, and of having those shoes in his possession with such knowledge, and he brings error. Affirmed.

Thomas B. Harvey, of St. Louis, Mo., for plaintiff in error.

N. C. Whaley, Asst. U. S. Atty., of St. Louis, Mo. (James E. Carroll, U. S. Atty., of St. Louis, Mo., on the brief), for the United States.

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

CARLAND, Circuit Judge. Plaintiff in error, hereafter defendant, was convicted and sentenced for having on July 28, 1917, transported in interstate commerce from East St. Louis, Ill., to St. Louis Mo., 80 pairs of shoes which had theretofore been stolen from the Big Four Railway platform in said East St. Louis, being a shipment made by French, Shriner & Urner, of Boston, Mass., to the J. G. Brandt Shoe Co., of St. Louis, Mo., said defendant at the time of said transportation well knowing said shoes to have been stolen, and for having said shoes in his possession with the knowledge aforesaid. 37 Stat. 670 (Comp. St. §§ 8603, 8604).

[1] Counsel for defendant contends that in the trial certain errors intervened which compel a reversal of the judgment of conviction. None of the 13 assignments of error present any question for review, except the ninth, and that alleged error was waived by defendant in the introduction of evidence after his demurrer to the evidence on the part of the prosecution had been overruled. Notwithstanding the want of proper assignments we will notice certain errors argued by counsel in this court.

[2] The first of these alleged errors arose when the trial court permitted the witness Barron to testify that, when the defendant was arrested, there was found on his auto truck 25 bolts of silk shirting. Silk shirting was not mentioned in the counts upon which defendant was tried, but had been mentioned in two other counts, which had been dismissed by the prosecution before trial. The witness Churchill also was permitted to testify that 1,500 yards of silk shirting was on defendant's truck when he was arrested. Other witnesses were allowed to testify as to a statement made by the defendant to the officers who had him in charge, wherein defendant referred, not only to the shoes, but to the silk shirting. It is claimed that, there being no charge in the indictment in regard to the silk shirting, evidence in relation thereto was immaterial and prejudicial to the defendant. It is also claimed that it was an attempt on the part of the prosecution to prove the commission of an offense other than that charged in the

indictment. The last contention mentioned is without merit. There was no evidence that the silk shirting had been stolen or that the defendant knew that it had been stolen. There is nothing in silk shirting itself that would render it criminal to transport it in an automobile or to have it in one's possession. The statement of the defendant, made to the officers which had him in charge, was voluntary so far as the evidence shows, and, the defendant himself having referred to the silk shirting, we do not think he can complain that the officers testified as to all the defendant said. The prosecution was entitled to the whole of the statement, and that was the theory upon which evidence of defendant's admission in relation to the silk shirting was admitted by the court.

[3] So far as the other evidence in regard to the amount of silk shirting found in the automobile is concerned, the defendant on cross-examination without objection testified that he had silk shirting on his truck when arrested. He also testified that it came from Ike Keshnell, in East St. Louis. It appears, therefore, that the defendant himself brought the matter of silk shirting into the case by his statement to the officers, and at the trial testified in regard thereto without objection. In this view of the case, we do not think that defendant is in a position to complain in regard to the admission of evidence concerning the silk shirting. Although the sufficiency of the evidence to sustain the verdict is not before us, we have carefully read the same, and have no doubt that there was sufficient evidence to warrant the jury in finding the defendant guilty.

[4] Much is made of the refusal of the trial court to allow the witness McCormick to answer the question propounded by counsel for the defendant as to whether or not the officers had not given the defendant the third degree; the object of counsel being to show in some way that the statement of the defendant made to the officers was obtained in such circumstances as to render it inadmissible as evidence. The defendant, when on the stand, testified that he was not beaten at the time the statement was made, that he did not remember whether he was pushed or shoved, or whether any one put their hands upon him, and that no threats were used. The trial court stated that he did not know what the words "third degree" meant when he sustained the objection to the question of counsel for defendant, but stated that if counsel would ask a legitimate question he would permit it to be answered. We think the trial court was clearly within its right in requiring counsel, if he desired to show that the statement of defendant was made under duress, to ask such questions as would develop that fact. The record shows that counsel was so permitted. When this permission was granted, counsel seemed to think that it was competent to attempt to show the bad character of the witness and the history of his official life. This fact in itself would seem to show that there was no basis in fact for the claim that the statement was obtained by duress.

Complaint is made of the ruling of the court in permitting the witness McCormick to testify as to what the railway record showed with reference to the receipt by it of the shipment of the shoes, and as to

whether they had been delivered to the consignee. The objection to this testimony was that it was leading, suggestive, and called for the conclusion of the witness. There was no objection that it was not the best evidence, and counsel could not have made that objection, in face of the admission made by him at the commencement of the trial to the effect that the shoes referred to in the indictment were in fact a part of a shipment made by French, Shriner & Urner from Boston, Mass., and at the time were moving to the J. G. Brandt Shoe Company, at St. Louis, Mo., and that the government might show the movement of the shipment by secondary evidence.

[5] It is next objected that the statement or confession of the defendant was not corroborated as to the fact that the shoes had been stolen and that the defendant knew that they had been stolen. It was shown beyond dispute that the shoes were part of a shipment in interstate commerce from French, Shriner & Urner, Boston, Mass., to the Brandt Shoe Company, St. Louis; that they arrived at East St. Louis; that they were not delivered to the consignee in the regular course of business, but were taken by some one from the platform of the Big Four Railway Co. at East St. Louis. The shoes were found in the possession of Holtzman, to whom defendant had sold them, and there was abundant evidence to show that the defendant knew that the shoes had been stolen. The following authorities clearly show that there was sufficient corroboration of the confession: Martin v. U. S. (C. C. A.) 264 Fed. 950; Goff v. U. S., 257 Fed. 295, 168 C. C. A. 378; Naftzger v. U. S., 200 Fed. 494, 118 C. C. A. 598; Berryman v. U. S., 259 Fed. 208, 170 C. C. A. 276. In the last case cited the fact that Berryman had intoxicating liquor in his auto, which he was transporting, was held sufficient corroboration of his statement as to where he got the intoxicating liquor.

There were no proper exceptions taken to the charge of the court as given. It is claimed by counsel for defendant that the trial court erred in stating to the jury:

"That there is no question about the goods having been stolen in East St. Louis from a car carrying this interstate shipment. This is practically admitted, because the proof shows it."

The statement of the court was justified by the evidence, and, if it was, there was no error in the court so stating. Horning, Pet. v. District of Columbia, 254 U. S. 135, 41 Sup. Ct. 53, 65 L. Ed. ——, decided by the Supreme Court November 22, 1920. In the above case the Supreme Court said:

"If the defendant suffered any wrong, it was purely formal, since, as we have said, on the facts admitted there was no doubt of his guilt"—citing the statute now to be considered.

[6] We are referred by counsel for the defendant to the Act of February 26, 1919, c. 48, 40 Stat. 1181, being an amendment to section 269 of the Judicial Code (Comp. St. Ann. Supp. 1919, § 1246), which authorizes and commands us to look to the entire record before the court and render judgment without regard to technical errors. We think it is proper to observe that this statute was not passed

for the benefit of any particular party to litigation, and we have observed the command of the statute in noticing errors that were not assigned or excepted to; this in the interest of justice where the liberty of a citizen is involved.

We cite, with our approval upon the meaning of this statute in another aspect, the language of the Court of Appeals of the Seventh Circuit in the case of William D. Haywood et al. v. United States, 268 Fed. 795, as follows:

"From recent legislation [citing statute] we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

Viewing the record in this case as a whole, we are of the opinion that the judgment below ought to be affirmed; and it is so ordered.

PORTO RICO MINING CO. et al. v. CONKLIN.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1921. Rehearing Denied May 4, 1921.)

No. 5438.

1. **Appeal and error ⟸931(1), 1009(3)—Findings of fact presumptively correct, and not disturbed when based on conflicting evidence.**
   Where a chancellor has made his findings of fact and decree on conflicting evidence, they will be treated as presumptively correct by an appellate court, and will not be disturbed unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence.

2. **Mines and minerals ⟸64—Facts authorizing rescission of contract for purchase of mining leases.**
   Evidence sustaining findings that defendants, to induce the purchase from them by complainant of mining leases, made false representations and concealed facts in respect to the character and value of the mines, and bribed the expert employed by complainant to examine and report on the property, and that complainant relied on such representations and reports, *held* sufficient to justify his rescission of the contract.

3. **Mines and minerals ⟸64—Mere suspicion of fraud does not require immediate election to rescind purchase of mining leases.**
   A purchaser of mining leases, on discovery that he has been defrauded, must rescind the contract at once, or he waives the right; but the acquiring of knowledge of facts which merely create a suspicion, and put him on inquiry, does not require an immediate election, and a delay until he can obtain substantial evidence of the fraud in the exercise of due diligence, is not a waiver.

4. **Mines and minerals ⟸64—Right to rescission of purchase of mining leases not barred by laches or estoppel.**
   Complainant contracted for the purchase of mining leases, to be paid for in installments, with provision that on default in payment of any installment his rights should be forfeited, and all payments made retained as liquidated damages. After payment of the greater part of the price, he obtained information by hearsay indicating that he had been defrauded

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

in the purchase, but an attempt to verify such information was at the time unsuccessful. *Held*, that a suit for rescission of the contract, commenced four months later, during which time he was prosecuting inquiries, was not barred by laches, nor by estoppel, because of his payment of the installments which fell due in the meantime.

Stone, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Suit in equity by Roland R. Conklin against the Porto Rico Mining Company and others. Decree for complainant, and defendants appeal. Affirmed.

J. G. L. Harvey, of Kansas City, Mo. (James A. Reed, of Kansas City, Mo., on the brief), for appellants.

Leslie J. Lyons, of Kansas City, Mo. (Hiram W. Currey and Paul E. Bradley, both of Joplin, Mo., and Forrest W. Hanna, of Kansas City, Mo., on the brief), for appellee.

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

ELLIOTT, District Judge. This was a suit instituted in the court below by appellee, Conklin, against the Porto Rico Mining Company, Barnett Mining Company, G. A. Barnett, and J. W. Ground as defendants. The record discloses, however, that the defendant Ground is not a party to this appeal; he having settled with the appellee for his liability upon the judgment rendered against him and the appellants.

The record and briefs in this appeal are largely devoted to a discussion of the settlement made by Ground with the appellee, the terms and the legal effect of such settlement, as to the liability of these appellants for the payment of the balance unpaid on such judgment. Especial exception is taken both in the record and briefs on this appeal to an order of the trial court denying the petition of the appellant Barnett to enjoin appellee from taking proceedings to satisfy the judgment in question. Soon after the argument of this case in this court an appeal was perfected by Barnett from the order made by the trial court denying his petition, which prayed that appellee be enjoined from taking any proceedings to satisfy the judgment of appellee against Ground and these appellants, thereby eliminating the questions therein involved from consideration upon this appeal. Barnett v. Conklin, 268 Fed. 177.

Appellee was plaintiff below, appellants were defendants, and for convenience will be referred to herein as such. The plaintiff, Conklin, had purchased from the defendants a mining property, located in the Joplin district, for the sum of $175,000, and a suit in the trial court was instituted for the purpose of rescinding the contract of purchase and the recovery of the money paid to the defendants, on the ground of misrepresentation and fraud. A decree of rescission was entered, as prayed, and money judgment rendered in the sum of $167,225.88; the defendants having been given credit, on account of property which the plaintiff was unable to restore, in the sum of $5,455.63.

A brief statement of the allegations of the plaintiff in his bill is as follows:

After alleging citizenship and description of the property, and the fact that it was leased and subleased, and that plaintiff entered into a contract with defendants for the purchase of the mining properties for the price of $175,000, the contract is set forth in full in the bill, and is in substance that it was entered into the 11th day of March, 1916, between plaintiff and defendants, describing the mining claims, and also a 200-ton lead and zinc concentrating plant, together with any buildings, mining equipment, tools, and machinery on the premises; $10,000 being paid in cash; $15,000 to be paid on or before March 21, 1916; $70,000, April 20, 1916; $20,000, May 20, 1916; $20,000, June 20, 1916; $20,000, July 20, 1916; and $20,000, August 20, 1916—with interest thereon, as therein stated, at 6 per cent. Said contract contained a clause that, if plaintiff failed to make any of the deferred payments within 10 days after the same became due, then the bank where the bills of sale had been placed was thereby directed to deliver said bills of sale and assignments of the mining leases to the defendants and all payments which had been made on the purchase price were to be retained by the defendants as liquidated damages, and the agreement should thereby become null and void. The contract contained a provision that certain proceeds of the working of the mine should be deposited to the credit of the defendants and applied upon the payments thereafter to become due. There was also a provision that defendants were to continue in possession of the mine and continue to operate it, which was afterwards modified and possession was turned over to the plaintiff.

There is no question here as to the amount of the payments made by the plaintiff, and they will therefore not be set forth in detail. Suffice it to say that payments were made at the time named in the contract, or on such dates of extension as were agreed to by the parties. Further allegations of the bill were that the bills of sale of the property and the assignments of the leases, so placed in escrow in the bank, were never delivered to the plaintiff, but remained in the bank and that plaintiff refused to receive the delivery of said escrow papers on account of the fraudulent concealment practiced on and false representations and pretenses made to the plaintiff, which were by him discovered and verified soon after the date of making plaintiff's last payment to the defendants.

Then followed allegations as to the abandonment of certain shafts and that there were no hoisters or other means of getting below, and that the land had been theretofore mined and all the valuable ore had been mined out of certain tracts of land and the same filled with water; that the mining on a part of the ground had been done so that a drift was cut from one portion of the mine into the mined ground in the other, and the same had been drained of water through the grounds of the latter; that the defendants concealed from the miners doing the work that this cut there was a drift and connected the different portions of the mine, telling the workmen that such drift had been run to a drill hole, and was for the purpose of giving better air to the miners.

Plaintiff avers that, prior to the negotiations of the plaintiff for the purchase of said properties, defendants entered into a conspiracy with one Harley Cox, who was the ground boss in charge of the underground workings of said mine, whereby said Cox was to conceal the fact that said mining ground had been denuded of the valuable deposits of ore, and to present the said mining properties to purchasers as a valuable and attractive property to purchasers; that said mining properties were cut out and exhausted, as was well known by defendants; that plaintiff was induced to enter into the contract of purchase with the defendants by the fraudulent concealment and false and fraudulent statements and representations and false pretenses and frauds of the defendants and their co-conspirator, Harley Cox; that the defendants pretended to the plaintiff that the mined-over part of the land contained a large stope of rich ore, easily and cheaply mined, and that a large area of said land had not been mined at all, and was rich with ore running better than 3½ per cent., and to prevent the plaintiff from getting into said ground and discovering the fact that said ground did not contain any rich stope of ore but that said ground was cut out and exhausted, the defendants, by and through this ground boss, Harley Cox, caused the said drift connecting the mining excavations between the different portions of the mines to be filled up, and by means of shooting down the roof and sides of said drift made it appear as though there had never been any drift connecting such grounds, and thereby rendering it most inconvenient and practically impossible for the plaintiff's examiner to discover the true condition of the ground known as the Millard ground, and thereby inducing the plaintiff's examiner to rely on the pretenses and representations of defendants; that by said means it was concealed from the plaintiff, and plaintiff was prevented from discovering that said ground did not contain any stope of rich ore, but was entirely denuded of ore-bearing ground rich enough to mine at any profit; that in the said Millard ground there was a cave-in or falling of the roof into the excavation, which prevented mining a large part of the tract, and that defendants by the means aforesaid concealed said falling of the roof and prevented the plaintiff from discovering the same, as well as from discovering that the west side of said mine did not contain any stope at all that could be mined at a profit or otherwise; that all of the ore-bearing ground on that part of the land described in the contract as the Barnett Mining Company's lease had in fact been cut out, and defendants knew this fact, yet pretended that the same contained a rich stope, and fraudulently, in order to cheat and defraud the plaintiff, induced the plaintiff to enter into said contract and to make the payments above named; that the south part of the lands described in the leases (describing them) was entirely virgin or unmined land, except that a small area in the northwest corner had been cut over, and the defendants represented and pretended that they had drilled land adjacent to and west of said tract, and that the drilling showed rich ore-bearing ground, and that the ore body extended over on this area, and that a few drill holes had been put down on said tract, describing the location, which showed rich ore, and that said ground was rich in

ore; but plaintiff avers the facts to be that said drilling had indicated that all of said ground was barren of ore, that said tract had been thoroughly drilled, with the result that no ore had been discovered, all of which was well known to the defendants, but entirely unknown to the plaintiff, and said false pretenses, false claims, and fraudulent statements were made by the defendants in order to, and the same did in fact, deceive and mislead the plaintiff and his agent, and induced the plaintiff to enter into the contract of purchase and make the aforesaid payments thereunder.

Plaintiff avers that the defendants induced him to agree that defendants should remain in the possession of the property for which the plaintiff agreed to pay the defendants $175,000, and credit the net proceeds derived from mining operations thereon until all the payments set forth in the contract were made, in order to keep in the hands of the defendants the certain means of concealing the facts that the mines sold were cut out and exhausted mines; that the defendants assured the plaintiff that the ground would make a recovery of ore better than 3½ per cent.; that during the time the defendants operated the said mines pending the payments of the purchase money, they kept the aforesaid Harley Cox as ground boss and superintendent of the said mines; that in order to make it appear from the records of the mining that said mines were yielding a recovery of 3½ per cent., as falsely represented, the defendants caused large numbers of cans of dirt to be left off the count of cans hoisted, thereby making it appear that a smaller amount of dirt was run through the mill than was actually run through, and thereby making it appear that the dirt hoisted was richer in ore than it actually was, and thereby did in fact deceive and mislead the plaintiff, and did in fact fraudulently conceal from the plaintiff that the said mines were in fact cut out and exhausted mines, and by said frauds the plaintiff was in fact induced to make his payments to the defendants as herein stated; that plaintiff had in his employ a mining engineer, who owed the plaintiff the duty to make the most thorough and searching investigations from time to time, and to discover and report to the plaintiff the true status and conditions of the said mine, and to search out and discover any fraud that might be practiced on the plaintiff in the operation of said mine, and to discover and report to plaintiff any fact indicating that said mine was not as represented to the plaintiff at the time of the execution of the contract aforesaid; and the defendants knowing that plaintiff's said engineer sustained such fiduciary relation to the plaintiff, and with intent to prevent the discovery of the frauds being practiced on the plaintiff, and to prevent the full, free, and proper fulfillment of the performance of said engineer's duties to the plaintiff, from time to time during the period plaintiff was negotiating for said property and making the payments to defendants as herein averred, have paid money to the said engineer, but in what amounts the plaintiff is unable to state, but plaintiff states that the amount so paid was in excess of $2,000; that said payments to plaintiff's said mining engineer and employee were made secretly, and as soon as plaintiff had information indicating that said payments were made, plaintiff discharged his said employee;

that plaintiff would not have entered into this contract of purchase, had he known the defendants were secretly paying money to his said engineer, and that he would not have made the payments thereafter, or any part thereof, had he known such secret payments were being made to his said employee; that he notified the Joplin National Bank and the cashier thereof to return the escrow papers described in the contract, the leases and bills of sale, to the defendants, and notified the defendants of such action, and by the terms of the bill plaintiff offered to return to the defendants all that he received from them under the contract set out, pleading that he stood ready, willing, and was able to do and perform any obligation the court might by its order determine the plaintiff ought to do and perform, touching the matters therein, affecting the rights of the defendants. Plaintiff thereupon prayed judgment for $174,000, with interest from the date of the respective payments, and for such other and further relief as to the court might seem just.

The answer to the bill of complaint, passing over the formal allegations, admitted the ownership of the property in question on the 11th day of March, 1916; admitting that on that date the contract named in plaintiff's bill was entered into, that plaintiff made the various payments named in the bill; alleging that the defendants remained in possession of the property and made a profit of $16,000, which was credited on the contract as a part payment of the $175,000 by the plaintiff; admitted that the contract had never been delivered to the plaintiff, that it remained in the bank, and that plaintiff had refused to receive the delivery of the escrow papers.

Then follow allegations, in substance, that the defendants admit that this land had been mined by the defendants previous to the making of this contract, but denying that the valuable ore had been mined out of the tract, or that they knew of the fact, and then denying that all the valuable ores had been taken from the lands, alleging their good faith, and denying fraud, denying any agreement on their part, denying any conspiracy, and denying specifically the misrepresentations set forth in the bill of complaint. Defendants deny that any effort was made by them, or either of them, or any one representing them, to prevent the plaintiff or servants or agents from making a full and complete investigation of conditions of the property prior to the time the contract was entered into, deny any misrepresentation, deny any inducement set forth by the plaintiff, and deny that the possession of the property was retained by the defendants for the purpose of concealing the facts set forth in the bill of complaint, alleging that the same was held by the defendants for security for the payment of the amount named in the contract. They specifically deny that they caused a large number of cans of dirt to be left off the record in order to make it appear that a smaller amount of dirt was run through the mill, thereby making it appear that the dirt was actually richer than it was, deny that they had any knowledge with reference to whether or not the plaintiff had a mining engineer for the purpose alleged in the bill, and at the times alleged in the bill, deny that they paid or agreed to pay him any sum of money whatever, and deny that at the time of entering into the contract the valuable ores had been taken from said mine. Defendants

further aver that at the time the contract was entered into ore was selling at over $100 per ton, and that at such price said mine was a rich, valuable property, but that, after the defendants had delivered possession to the plaintiff, ore went down nearly $50 per ton; alleging further that at the time of said contract said defendants informed the plaintiff's agent that, if he took the mining property, he must take it upon his own examination, and if he was not satisfied with his own examination of the property not to enter into the contract, but that the plaintiff took the property after his own examination, and not by virtue of any fraudulent statement of the defendants or either of them.

Thereupon defendants, answering further, state that plaintiff cannot rescind the said contract to purchase for the reason that, after he had full knowledge of all the matters pleaded in the bill of complaint to the same extent he had such knowledge at the time of the filing of his petition herein, the plaintiff held and mined said premises, and pursued, carried out, ratified, and confirmed said contract and purchase, and speculated upon the relative advantage to him of so doing, or, on the other hand, of attempting to rescind said contract and purchase up to the day of filing his petition herein, and that plaintiff during said interval so acted and conducted himself with such knowledge and information as to confirm said purchase and deprive himself of any right to rescind he might have had.

There is then set forth the provisions of the contract, the times of payment, the extension of the time on different payments, etc.; that he failed to mine the premises and work them in a minerlike manner, and failed to properly timber or otherwise support the ground, or to leave pillars for that purpose, and had cut the underground workings in such a manner as to weaken and impair the ground and injure and destroy the same for the purpose of mining; that plaintiff removed certain portions of the machinery and equipment therein set forth, and that certain powder used by the plaintiff under a contract originally made by the defendants was charged to the defendants, the plaintiff thereby securing the benefit of a reduced price; that the plaintiff by his laches had not only lost any right of rescission he might have had, but that he fully ratified and confirmed said contract and purchase, and by a later contract of May 24th modified the original contract of purchase and extended the time of payment, and that of August 24th, withholding a part of the balance due August 20, 1916, and by the various other matters and things complained of therein plaintiff ratified and confirmed the said contract and purchase, and waived any rights or claims he might ever have had on account of the matters complained of in his petition; that plaintiff never expressed to defendants any dissatisfaction with the said contract of purchase, or demanded any rescission thereof until the filing of this suit. Defendants pray judgment in their favor, that they go hence without day, and for costs.

Barring the specifications of error relied upon by defendants which are clearly eliminated by Barnett v. Conklin, supra, there remain but four specifications of error:

(1) The court erred in holding that there was any proof upon which to base a finding that the defendants had paid or agreed to pay the agent of the plaintiff any sum of money for a favorable report on the mine sold to the plaintiff by the contract referred to in the pleadings and decree.

(2) The court erred in holding that there was sufficient proof upon which to base a finding that the defendants had paid or agreed to pay the agent of the plaintiff any sum of money for a favorable report on the mine sold to plaintiff by the contract referred to in the pleadings and decree.

(3) The court erred in holding that the plaintiff by his conduct had not waived the right to rescind the contract described in the pleadings and decree of the court.

(4) The court erred, in view of the undisputed evidence in the case that the plaintiff after he became possessed of the knowledge upon which he bases his right to rescind the contract proceeded to use the property as his own and damaged and disposed of the same while so using it to the amount of more than $7,000 and thereby making it impossible to return the property to defendants, in holding that such conduct did not preclude a rescission by plaintiff.

[1] Nos. 1 and 2 set forth above may be considered together. The chancellor heard the witnesses, observed their demeanor upon the stand, and after full argument and thorough consideration duly filed memorandum opinion on final hearing, and thereby held that there was sufficient evidence to sustain the various charges of misrepresentation and fraud alleged in the bill. It is the settled law of the federal courts that, where a chancellor has made his findings of fact and decree on conflicting evidence, they will be treated as presumptively correct by an appellate court, and will not be disturbed, unless an obvious error has intervened in the application of the law, or some serious mistake has been made in the consideration of the evidence. Blank v. Aronson, 187 Fed. 241, 109 C. C. A. 327; Thallmann v. Thomas, 111 Fed. 277, 49 C. C. A. 317.

[2] Taking the entire record, together with the reasonable inferences to be drawn therefrom, we are impressed with the correctness of his findings. The entire situation, as it is revealed by the record is: Ground, the father-in-law of Barnett, both of them experienced miners and having expert knowledge and actual experience with the properties in question; the plaintiff, a business man in New York; the attention of the plaintiff brought to other mines in that vicinity with a purpose of investment; an arrangement made with a friend of his on the ground, one Briegel. We find the defendant Ground, father-in-law of Barnett, in Texas, and Barnett sends for him; he arrives there in March, and at once there is a conference with Barnett, and Ground undertakes the task of purchasing the one-fifth interest held by Barnett's nephew, J. J. Barnett, and the first interview with him occurred just a few days prior to the time the sale to this plaintiff was consummated.

Ground's representations to J. J. Barnett, in his attempt to purchase the latter's interest in the mine, were, in substance, that the mine was

worked out; that it was practically worthless. He exhibited a blueprint map that had been prepared, probably not for this purpose, probably true, showing the ore workings, and that the ore was largely exhausted. These statements differed materially from those testified to that were made immediately thereafter to plaintiff's agent Briegel by the defendants Barnett and Cox. As to evidence of statements of Barnett and Cox, it is sufficient to say that it clearly supports the allegations of the bill.

The purchase of this interest of the nephew Barnett is, in a way, connected with the sale to this plaintiff. Defendant Ground denied to him that there were any negotiations for a sale of the property pending, except one involving a trade for some lands in Oklahoma. That was false; the sale of the property to this plaintiff was pending. Ground was not only attempting to, but he actually did, defraud J. J. Barnett by the purchase of his one-fifth interest in this property, for the purpose of transferring the whole of it to the plaintiff for the sum of $175,000 making his share in the property at that figure worth $35,000, while, through the false representations of Ground, J. J. Barnett parted with this interest in this property for $9,350. Ground denies that he told Barnett that the ground was cut out; denies making the statement that there was no deal pending. However, it conclusively appears by the testimony of numerous witnesses: Judge Scott, the attorney for the plaintiff; Briegel, his agent; Barnett—all corroborate the testimony of the plaintiff that the details of the contract and purchase were being formulated at the very time that Ground made this purchase of J. J. Barnett, and it occurred, as a matter of fact, between the date of the telegram from the plaintiff to his agent Briegel authorizing him to make the purchase, and the date of the making of the contract referred to in the bill. If that was not true, and if Ground acted fairly and conscientiously with J. J. Barnett, the owner of a one-fifth interest in the property, then that fact conclusively shows the misrepresentations to the plaintiff, because the blueprint of the ground, exhibited to J. J. Barnett by Ground, showing the mine practically worked out, is inconsistent with the admitted statements of the defendants to the plaintiff and his agent; and the statement that the mine was cut out is inconsistent with the representations as to the great value of the mine, made by the defendants to the agents of the plaintiff. This representation as to the mine being worked out and of little value, and that no sale was contemplated or was in process, was testified to by J. J. Barnett, who has no interest in the result of this action and is not a party to it. Ground was an active participant in getting this title, and getting it for the purpose of transfer to this plaintiff.

It is admitted that the plaintiff, when he determined to look over this and other mines in that vicinity, with the thought of investing in them, employed Burch, deputy state mine inspector, upon assurances by Burch that he could get at the facts with reference to this and other property, and the plaintiff, relying upon his statements that he could and would secure the facts, and report to him the conditions as they actually existed, employed him, giving him $100 per week, and

then and there made up a form of report that should be made upon this and other properties that the plaintiff wanted investigated. The record discloses that Burch thereafter, in pursuance of that employment by the plaintiff, did make report to the plaintiff, and it is disclosed that the report he made was not from an investigation, and was not a statement of what he knew to be the fact with reference to these mines in the particulars affecting the representations (important here), but they were the statements made to him by the defendants; the defendants knowing that he was the paid agent of the plaintiff.

The manner of the payment of money to Burch by the defendants shows the character of the men involved. Burch, just a day or two succeeding the date of the sale, meets the defendant Barnett in the bank, the latter draws $500 in cash, he and Burch go to the basement, and in the toilet Burch is handed the $500. A month later $2,000 more is paid to Burch, and what is the explanation given? Barnett admits the payment of these sums; Burch says that the money was paid by Barnett purely as a present. It may be noted that Burch made contradictory statements upon the witness stand, and in the light of his testimony alone a fair inference supports the conclusion that it was a bribe paid by the defendants for the misrepresentations he made to this plaintiff to induce the plaintiff to make this purchase. Another phase of the testimony would indicate that the defendants intended to convey the impression that they were paying this money to plaintiff's agent on the theory of a commission yet to be earned by Burch in the sale of another property. Burch, however, admitted that this deal did not go through, and the commission was never earned, and that so far as he knew Barnett was still holding him liable for the $2,500 paid, although he had never mentioned the matter of reimbursing him, and had never made any demand upon him. This explanation does not explain. If the defendants had remained silent with reference to this, the purpose of it could have been no more certain.

Among other statements made by the defendant Barnett is an admission that he entered into a scheme and combination with the other defendants to defraud Conklin, by arranging to pay Conklin's agents, Briegel and this mine inspector, Burch, a commission of $20,000, if they would make favorable reports and recommend to Conklin the purchase of Barnett mine No. 2, for $200,000. This is with reference to another mine, and is a matter that was pending at the same time, and conclusively shows the knowledge on the part of the defendants of the relation that Burch sustained to the plaintiff.

In the light of this and other testimony in the record, the chancellor was clearly justified in his finding that "the explanations made by defendants and by Burch are totally unsatisfactory and are not credited." That Burch did make false representations to Conklin cannot be controverted. The testimony of the plaintiff is that the written reports made by Burch upon this property were entirely false as to all matters concerning the character and quality of the mine, the richness and recovery of the ore, and the profits derived from its operation. The written statement of Burch, the agent, "This mine is worth two McDonalds," was false, and was known by him to

be false. This report of Burch covering this property gave much information, went into many details, and was furnished pursuant to an agreement with the plaintiff in which the agent, Burch, himself testified that he agreed with the plaintiff to get statistics for him, and that he worked for three weeks during February and early March, and was paid $100 a week, identifying the checks given him in payment for these services. He also identified the reports that he made covering the mines.

It cannot reasonably be said that upon this entire record there is no substantial testimony of a conspiracy on the part of these defendants and Burch to defraud this plaintiff in the sale of this property. That the representations alleged by the plaintiff in his bill were actually made is supported by the testimony of the agents of the plaintiff. That the reports were made by Burch as the agent of the plaintiff is not denied. That Burch, in collaborating with the defendants, furnished the plaintiff just the report that was given to him by the defendants, we think, is reasonably sustained by the record. That these reports were false sufficiently appears. That the plaintiff relied upon them there is nothing to dispute. He testifies that he knew nothing of mining properties, that he informed these people to that effect, that he employed this man Burch for the very purpose of getting expert information upon the character of the mine and the ore, the quantity, etc., and that he did rely upon those reports and that they were false.

The record reasonably sustains the finding that this purchase by this plaintiff was induced by these misrepresentations, and that the defendants agreed to pay Burch a commission for his favorable recommendation of the mining property in question, and that they did pay him $2,500 for that service. It is just as clear that these representations were not only fraudulent, but that they were made with the intent and purpose charged in the bill of complaint. From this kind of testimony, and in the light of many other incontrovertible facts which we have not taken time to set forth here, we have no difficulty in finding that these defendants made the representations ascribed to them by the plaintiff and in the sense alleged by the plaintiff. As said in a recent case in this court:

> "It would be a reproach to the law if the rule determinative of the rights of the parties upon the foregoing facts were uncertain. Fortunately the situations are few in which one party to a business transaction can deliberately lie to the other with legal impunity." Walker v. Pike County Land Co., 139 Fed. 609, 71 C. C. A. 593.

Burch, as the agent of the plaintiff, stood in a fiduciary relationship to him and was bound to the utmost good faith in his dealings with Conklin. The fact that the defendants entered into an arrangement with him, whereby they bribed him, knowing him to be the agent of the plaintiff, to make a favorable report of this mine, and subsequently paid him the commission agreed upon, would, in itself, be a sufficient ground for the rescission of this contract.

It is contended by the defendants that plaintiff had an opportunity of inspecting the property in question, and that if he did not exercise

that right that it is his own fault. This contention overlooks the facts: First, that the means of knowledge as to the condition of the property were not equally open to the plaintiff and the defendants; and, second, that the plaintiff was in the state of New York, and that the defendants, knowing that plaintiff relied upon his agent, bribed and corrupted him to make this favorable report on the property, with the intent that it should be relied upon by plaintiff, to the end that it might induce him to pay a sum largely in excess of its value.

We are of the opinion that the record clearly sustains the findings of the chancellor, and that the said specifications of error, numbered 1 and 2 herein, are not well taken, and must be denied.

[3, 4] The next two specifications of error relied upon by defendants involve the right to rescind this contract under the circumstances above set forth and the alleged laches and waiver on the part of plaintiff.

"The glaring fraud perpetrated on the appellant gave him the right, the moment he discovered it, to rescind this purchase. There was, however, no obligation upon him to exercise that right. He had the option to reconvey the land, and recover his purchase money, or to retain the property and affirm the contract. Justly and wisely the law gives him his choice, but at the same time it imposes on him the duty of making his election speedily. It not only imposes this duty, but it compels its performance. If he elects to rescind, it demands that he shall return the property he has obtained, and give notice of his election promptly upon the discovery of the fraud, to the end that the parties may be placed in statu quo. * * * If the fraud is discovered while the value of the property remains substantially as it was when the sale was made, a rescission of the contract then is just and equitable." Scheftel v. Hays, 58 Fed. 457, 459, 7 C. C. A. 308, 310.

Upon the foregoing statement it seems clear that plaintiff was entitled to rescind this contract and to recover the amount paid for this property, unless he has waived his right to rescind, has ratified the contract, or is guilty of laches, and is equitably estopped to assert his right to rescind, all of which must be determined in the light of the facts, supported by substantial evidence in the record. A brief résumé of the facts appearing in the record, material to the determination of this issue, is:

Plaintiff, in New York, secured his information that his agent, Burch, had been bribed, through a letter written by his attorney, Judge Scott, at Joplin, Mo., dated June 26, 1916, in which he wrote:

"I have just learned from Mr. George H. Playter a very startling piece of news, which alarms me very much, in reference to the Roland mine. Mr. Playter told me that Dr. Barnett told him that he had been compelled to pay to Lee Burch the sum of $10,000 in the matter of the purchase of the Barnett property. He said there was no question but that Briegel got half of it, as Burch and Briegel were dividing everything that Burch obtained on a fifty-fifty basis. This was startling news to me. If I were you, I would say nothing about this to Briegel or any one else until I came here and had a talk with Mr. Playter and Dr. Barnett. I have concluded not to say anything to Dr. Barnett about it until you arrived. I thought of telegraphing you this information as soon as I got it, but after thinking it over concluded it would be better to write you about it."

Thereafter, on June 29th, Scott wired to plaintiff at New York, and followed it with another letter, in which letter Scott says:

"I asked Mr. Ground if that was true. He stated that the amount was incorrect. He said that without his knowledge or consent Dr. Barnett had paid to Mr. Burch the sum of $2,500 commission on the sale of the Barnett mine, one-half of which was understood to be for Briegel, and Mr. Ground stated that as soon as he learned that the money had been paid he protested very strongly against it to Dr. Barnett, his son-in-law, and refused to be involved in the transaction. I told him that I intended to give you the information immediately. I therefore wired you the message which I now confirm, as follows: 'Just learned correct amount paid Burch Barnett twenty five hundred. Confidential communication.' Mr. Ground said that, if I gave you this information, it must be a confidential communication, and that it must not be known that the information came from him. He requested me very earnestly not to tell you the source of my information, as it might make trouble between himself and his son-in-law. I told him that you were my client, and that the communication would be one between attorney and client, and therefore confidential. I assured him that you would never in any way involve him in the matter, or let any one know that he had been kind enough to give us the information. I felt that, regardless of his request, it was my duty to disclose to you the source of the information and all available facts. Under the circumstances, I think you should keep this matter as quiet as possible, and when you come out here we can go into it fully, and decide what, if any, action should be taken."

The plaintiff was in New York, and the record does not disclose that he believed this statement. He made his arrangements to go to Joplin as soon as he could conveniently, arriving there in August. He at once had a short talk with the defendant Barnett, and evidently followed the advice of his counsel, and did not mention the matter of the bribe to Barnett, but went to Kansas City and had a talk with Ground, in which he asked Ground if a commission had been paid to Burch, and Ground assured him that there was nothing to the report. Here the record discloses that at this time the defendants were pressing plaintiff for the last payment on this property, and it further appears by the terms of the contract that, if he failed to pay, he forfeited to the defendants, as liquidated damages, all that he had paid on the contract of purchase. Observing that this information, which came through Judge Scott was that one Playter had said that Barnett told him that Burch had been paid $10,000, then came the information through the same source, through Scott, that Ground had said that $2,500 only was paid. The record does not disclose that plaintiff believed this report at this time. He was simply put upon inquiry, and it would seem that he exercised reasonable diligence, using the means of knowledge which were at his command to discover the truth with reference to the alleged fraud.

The mere statement of this report to him by a third party would not justify him in rushing to a rescission and thus incurring the forfeiture named in his contract. Even if, when he received these letters and reached Joplin, he had believed the charges, this information which had come to him would not necessarily evidence that he had knowledge of facts which would justify the charge or support a demand for rescission. There is a distinction between his belief and his conviction that the evidence he commanded or was able to command would connect the defendants with the fraud. A mere rumor or suspicion does not require an election. Information of that character puts one upon inquiry and requires the exercise of that reasonable diligence which

a man of ordinary prudence would and should use to ascertain the facts and the evidence necessary to sustain a charge that an advantage had been obtained by reason of the unfair and fraudulent transactions on the part of the defendants. The record discloses that in a fair, open way, the plaintiff went to the defendant Ground himself, and Ground assured him that Scott had made a mistake and that there was nothing to the charge. The plaintiff, therefore, had no evidence of wrongdoing and accordingly protected his interest in the contract and returned to his business, but immediately upon his return received the letter from Briegel, dated August 23, 1916, which letter shows that he had left with his agent, Briegel, the duty to try to get some evidence of the fraudulent transactions, if any there was, which letter, among other things, stated:

"Joplin, Mo., August 23, 1916.

"Mr. Roland R. Conklin, 1 Wall Street, New York City—My Dear Mr. Conklin: Prior to the time that you left Joplin, when the Burch matter came up, I told you that if it were possible, after an understanding had been arrived at with Barnett regarding the powder situation, that I was going to thresh the matter out and ascertain the details. When I received your letter of Sunday the 13th from Kansas City, in which you told me that you had talked with Mr. Ground and had verified the suspicions that you had in that connection, I felt that the only way to handle the matter was to simply take the bull by the horns, which I did.

"I called Burch into the office and advised him that after the 1st of the month his services would no longer be required by the corporation. He most naturally was very anxious to know the reason and asked whether or not he had not made good. I could not help but tell him that in my opinion his work had been satisfactory, but I added, however, to avoid trouble, that it was your idea to economize at every possible point, and that you deemed it advisable to secure the services of a man who was capable of handling Von Borries' work as well as the work he (Burch) was doing, and that you felt that his experience would not warrant the responsibility being left to him, inasmuch as the future carried some difficult problems. * * *

"I told him that it had come to you that he had accepted $2,500 from Dr. Barnett to make a favorable report on that property prior to the time we purchased it, and that Barnett had explained that it was necessary that he be paid that amount in order for the deal to be made.

"I told him that you had no desire to do he nor anybody else an injustice, but when this was brought to your attention you felt that it deserved some investigation, and that you had satisfied yourself through parties concerned as to the truth of it. I told him that in the face of these things that he must realize that you could not have any confidence in him. He listened patiently to these accusations, and then denied them and insisted that he be given an opportunity of proving the truth. This, of course, I could not deny him, and I am submitting to you the situation exactly as it was presented to me. * * *

"Burch has retained Spencer & Grayson, and intends suing Scott for damages, and, from what I can learn, they don't seem to think there will be any doubt but what they will get a judgment against Scott, and they contend that, if it were known that Scott accepted a commission from the seller at the time he was acting as our attorney, that it would disbar him.

"I can't for the life of me understand it. Barnett and Ground are admittedly in a tight hole. They have either insinuated a lie to you, or else they have deliberately lied to me, and if it is true that Burch did accept this money to make a favorable report on the property, I can only say that I am very, very sadly disappointed in him. If, on the other hand, it was accepted as they represent, it is another matter. Two sides of the story, however, have been heard, without ever having made any effort at investigation, and I am afraid that I must call upon you to act as judge. * * *

"Yours faithfully, Jess Briegel."

It will therefore be seen, on August 23d, the agent of the plaintiff on the ground at Joplin still believed in the honesty of the parties concerned. There was no evidence of wrongdoing. There was no testimony to support the charge. It ought not to be seriously contended that plaintiff should have determined then and there that he had discovered the fraud, and that he had evidence of such fraud that would justify him in taking the chances of forfeiture set forth in the contract, without further inquiry. He as yet had but suspicion, a statement of some one that some one else told him that his agent had received a commission. He must also have the proof that his agent had a prearrangement with the seller under which he received the commission, but there was no hint of proof or evidence to sustain that essential element. Further, the record discloses that when this communication came in June to him in New York, both of his agents at the location of the property were placed under suspicion, and he had no one to rely upon except his attorney, who, the record discloses, advised him to keep the matter secret until they could make further investigation and get some evidence to sustain the suspicion. His attorney evidently acted upon the thought that one who would go into an arrangement of that kind would use every effort to avoid giving up the evidence of it, realizing that it would be necessary, if he would rescind the contract, to get hold of facts that would sustain the charge and therefore justify an action for rescission, and that he could not advise rescission until he could pursue the investigation and get the evidence. Mr. Conklin's suspicions were aroused. He pursued the investigation through his agent at Joplin, and immediately upon having the data, the facts presented in evidence in this case, commenced his suit to rescind on the 18th of October, 1916.

Until knowledge of this fraudulent transaction or knowledge of facts equivalent thereto were brought home to this plaintiff, there could be no laches in his failure to rescind and prosecute this suit. These suspicions which he entertained were not knowledge, they were not facts, and the record discloses that he pursued the information arousing his suspicion diligently, and, immediately upon securing the facts and knowledge introduced in support of his charges, made his rescission and commenced his action. A consideration of this situation, as thus developed in the record, not only shows diligence on the part of the plaintiff in the pursuit of his inquiry, but there is an entire absence of facts upon which a ratification can reasonably be predicated, after he discovered the fraud.

"To constitute laches as a bar to relief in equity, something more than mere lapse of time is necessary. There must be some change of circumstances from the time the suit might have been brought rendering it inequitable to grant the relief sought. Where the defendant has not been prejudiced, and there is a reasonable excuse for the delay, the suit is not barred." Central R. Co. of N. J. v. Jersey City (D. C.) 199 Fed. 245.

"Laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced." Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738.

"The doctrine of laches rests upon equitable principles which are neither arbitrary nor technical, and what amounts to laches depends largely upon the circumstances of each particular case. The ultimate inquiry is on which

side would fall the balance of justice in sustaining or denying the defense. The important elements to be considered are the length of time which has elapsed, the nature of the acts which have been done in the meanwhile, the knowledge which the complainant had of the fraud which he charges, and the time when he acquired that knowledge and the change in the situation during neglectful repose, either as to the loss of evidence which would have been available to the defendant or the advance in value of the property which may be the subject of the suit." Northern Pac. Ry. Co. v. Boyd, 177 Fed. 804, 823, 101 C. C. A. 18, 37.

Applying the rule above stated, the chancellor who tried this case found no difficulty in determining on which side would fall the balance of justice, and denied the defense of these defendants. The length of time that elapsed, from the time of the first suspicion in June to the date of the commencement of this action in October, considering the uncertainty of the information and the difficulty of arriving at the truth, and that the plaintiff went directly to the defendants at the very first opportunity, going the long distance from New York City to Joplin for the purpose, and that they denied that there was anything to it, and considering that thereafter the inquiry was pursued with such diligence that by the date of the commencement of the action in October he had secured the testimony that was introduced in support of his claim in this case, it cannot be said to be an extreme length of time. The chancellor was clearly justified in holding that the plaintiff had used reasonable diligence under the circumstances. This, too, must be determined in the light of the fact that the record discloses that in the meantime, from the date of the first suspicion in June until the rescission of the contract and the commencement of the action, there had been no change whatever in the situation, either as to the loss of evidence which would have been available to the defendants, or otherwise. It has been held that:

"If * * * it clearly appears that lapse of time has not in fact changed the conditions and relative positions of the parties, and that they are not materially impaired, and there are peculiar circumstances entitled to consideration as excusing the delay, the court will not deny the appropriate relief, although a strict and unqualified application of the rule of limitations would seem to require it. Every case is governed chiefly by its own circumstances." Wilson v. Wilson, 41 Or. 459, 69 Pac. 923.

This court has held:

"Equitable estoppel is the indispensable foundation of such laches, acquiescence, or ratification as will bar a suit. Knowledge on the part of the person to be estopped, or such notice as would lead the ordinarily diligent to knowledge of the material facts that would ordinarily cause action, ignorance of those facts by the party claiming the estoppel, and silence and inaction for an unreasonably long time by the party to be estopped, causing the party claiming the estoppel to take such a position in reliance thereon that injury to him will result from delayed action to avoid, are essential elements of such an estoppel, or of such laches, acquiescence, or ratification by silence and inaction as is here claimed." Elder v. Western Mining Co., 237 Fed. 966, 976, 150 C. C. A. 616, 626.

For the reasons heretofore suggested, the undisputed facts in this case fail to support any of these essential elements, and the chancellor committed no error in his findings and judgment in favor of the plaintiff and against the defendants.

The decree of the District Court is affirmed.

STONE, Circuit Judge (dissenting). I am compelled to dissent because the evidence is, to my mind, conclusive that Conklin waived all right to rescind the contract by his delay and actions after he knew the facts upon which he later predicated this action to rescind. This evidence shows that plaintiff was put upon investigation of this bribery transaction late in June, and followed the matter up through Briegel until he came out to Joplin, in the first half of August; that while in Joplin he investigated further and became convinced, and September 1st discharged Burch, partially on account thereof; that a payment of $20,000 was due July 20th, but shortly before that date plaintiff requested and received an extension until July 27th, when one-half the payment was made, and an extension for the other half obtained to August 8th, when it was paid; that the final payment, $20,000 due August 20th, was extended, at his request, to September 5th, when it was paid, except a small sum held back at his request to enable him to take advantage of certain powder contracts; that plaintiff continued to work the mine during some of September, and again in November and December; that portions of the machinery at the mine were removed during September to other property of plaintiff; that the lease to defendants was forfeited, because of plaintiff's failure to work.

We thus find the plaintiff, after knowledge of the facts upon which he now relies for rescission, recognizing the contract as in force by obtaining extensions of payments, making those payments, continuing to operate the property, and finally, through failure to operate, for reasons not connected with defendants' actions, losing to defendants, as well as to himself, the lease they held from the owner. This certainly constitutes an election to consider the contract as binding, and is a renunciation of any rights of rescission.

I think that the case should be reversed.

McCUTCHEN v. UNION TRUST CO. OF PHILADELPHIA et al.

HARDIN v. UNION TRUST CO. OF PHILADELPHIA.

(Circuit Court of Appeals, Eighth Circuit. January 12, 1921. Rehearing Denied. May 4, 1921.)

Nos. 5406, 5481.

Mortgages ⇐529(3)—Erroneous sale under decree held properly set aside.

In a suit in a federal court for foreclosure of a mortgage on mining property, after decree, a sale was ordered without redemption, and the property was bought in by one acting in the interests of the mortgagee for the amount of receivers' certificates and other liens, which were prior to the mortgage. Later, in a suit in the state courts to which the mortgagee was not a party, the Supreme Court of the state held that under the state statutes the sale was subject to redemption by the owner of the mortgagor's interest, whereupon the purchaser and the mortgagee

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

filed petitions for relief in the federal court, which were in effect supplemented bills. *Held* that, in order to do equity to all parties in interest, the sale should be set aside, and all parties restored to their rights and priorities as they stood before it was made.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit in equity by the Union Trust Company of Philadelphia against the Branch Mint Mining & Milling Company and others. Charles W. McCutchen and James D. Hardin appeal from an order confirming a foreclosure sale. Affirmed, on conditions.

Halleck F. Rose, of Omaha, Neb. (John F. Stout and Arthur R. Wells, both of Omaha, Neb., and E. E. Wagner, of Sioux City, Iowa, on the brief), for appellant McCutchen.

Frank McNulty, of Aberdeen, S. D., for appellant Hardin.

Chambers Kellar, of Lead, S. D. (R. N. Ogden, of Deadwood, S. D., on the brief), for appellees.

Before HOOK, Circuit Judge, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. These appeals will be considered together. They present phases of a long and complicated litigation over what would ordinarily be a simple matter, the foreclosure of a mortgage upon a mining property in South Dakota. McCutchen appeals from an order denying him leave to intervene and from the confirmation of the judicial sale in foreclosure of the mortgage. Hardin, a party to the cause, appeals from the confirmation. Steps in the litigation appear in Phillips v. Mining Co., 27 S. D. 350, 131 N. W. 308; Hardin v. Union Trust Co., 191 Fed. 152, 111 C. C. A. 632, certiorari denied 226 U. S. 606, 33 Sup. Ct. 111, 57 L. Ed. 379; Hardin v. Graham, 38 S. D. 57, 159 N. W. 895; Hardin v. Graham, 38 S. D. 222, 160 N. W. 850.

At the risk of prolixity the material features of the long controversy will be stated. It often happens that, when that is done, and one is not lost in the contemplation of processes, regardless of their effects, the just solution plainly appears. On September 15, 1903, the Branch Mint Mining & Milling Company was the owner of a mining property in South Dakota. On that day it executed a mortgage on the property to the appellee the Union Trust Company of Philadelphia, a Pennsylvania corporation, as trustee, to secure its mortgage bonds aggregating $144,575. The mortgage covered the lands, mines, ores, mining rights, buildings, machinery, tools, implements, franchises, and income of the Mining Company, also an appurtenant narrow gauge railroad about four miles long connecting the mines with the mill. The mortgage was then a first lien on the property. The appellant Hardin was a large stockholder in the Mining Company and was then or thereafter its president.

On October 12, 1909, Hardin acquired the title to the property by a judicial sale without redemption in proceedings in a state court of South Dakota, expressly subject, however, to the lien of the above mortgage. On May 12, 1908, some holders of miners' liens on the

property sued the Mining Company, the Trust Company, and Hardin in the state court to establish their liens as prior to the rights of the defendants and for foreclosure. Service was made on the Trust Company in Philadelphia, but it did not appear and answer. Hardin filed a cross-complaint, in which he sought to enforce a lien for materials, etc., with priority over the mortgage to the Trust Company, but he caused no process to be issued and served upon it. The Trust Company did not appear or answer the cross-complaint. On May 1, 1909, the plaintiffs in that case secured judgment for their claims, with the priority sought, and for foreclosure and sale. The case as to Hardin's cross-complaint was continued. On July 27, 1909, Hardin secured a judgment for about $400,000 on his claim, with recitals that his lien was inferior to those of the plaintiffs in that suit, but superior to the mortgage of the Trust Company.

On February 4, 1910, the Trust Company appeared specially and moved the state court to strike from Hardin's judgment all references to the Trust Company and all recitals of superiority of Hardin's claim over its mortgage, for the reason that as to such matters the court was without jurisdiction. The motion of the Trust Company was sustained and Hardin appealed to the Supreme Court of the state. The decision against Hardin was affirmed. Phillips v. Mining Co., 27 S. D. 350, 131 N. W. 308. The property in controversy was sold under the miners' lien judgments of the plaintiffs in that suit. The certificate of sale after passing through several hands including Hardin's was finally redeemed by the Trust Company November 2, 1909. The delivery of a deed by the sheriff to the Trust Company on its redemption was subsequently enforced by mandamus proceedings against that officer. The money for this redemption was furnished by Walter E. Graham, one of the mortgage bondholders, and the Trust Company conveyed to him its title under the redemption deed. As will be presently related, Graham afterwards had the money he furnished embraced in a receivers' certificate in a suit in the federal court.

On October 15, 1909, the Trust Company brought the present suit in the United States Circuit (now District) Court for the District of South Dakota to foreclose its mortgage and for the appointment of a receiver. The Mining Company and Hardin were made defendants. On December 2, 1909, the court appointed two receivers of the property in controversy, one of whom was an attorney for the Trust Company, and the other an attorney for the defendants. The order provided that they should not receive compensation from the property, but should "be paid by the parties who have employed them to act as attorneys in this action." On December 4, 1909, Hardin answered asserting a miner's lien for $378,867.32, and that it was superior to the mortgage of the Trust Company. On July 27, 1910, a decree was rendered in the case. The court found there was due the Trust Company upon the mortgage bonds, principal and interest, the sum of $158,192.78, which as to defendant Hardin was a first and prior lien on the property; that Hardin had no miner's lien, and that whatever rights he had under the judgment of the state court above referred to were inferior to the rights of the Trust Company.

The decree provided for a foreclosure of the mortgage and a sale by a special master of the court; also that upon a sale by a master a certificate of sale should issue, to be followed by a deed to the purchaser or his assigns, if no redemption was made within a year. On appeal by Hardin this court affirmed the decree below. Hardin v. Union Trust Co., 191 Fed. 152, 111 C. C. A. 632. The Supreme Court denied a writ of certiorari. 226 U. S. 606, 33 Sup. Ct. 111, 57 L. Ed. 379.

On August 3, 1911, one of the receivers appointed by the court below filed a petition in the cause, stating in substance that he was an attorney for the defendants Mining Company and Hardin, that his associate, who was an attorney for the Trust Company had died, that it was the intention of the prior order that each side to the case should have a receiver, and asking that the vacancy be filled by the appointment of an attorney named. An order of appointment was made accordingly with like provision as before regarding compensation. On December 31, 1912, the two receivers filed a report, setting forth: First, that Walter E. Graham had advanced various sums of money for purposes entitling him to priority, such as assessment work on unpatented mining claims, public taxes, redemption from a foreclosure sale under miners' liens (above referred to), and receivership expenses; second, that a final decree foreclosing the mortgage of the Trust Company had been entered and the proceedings were in condition to be closed. They asked authority to issue to Graham a receivers' certificate for his advances; also for an order directing them, as receivers, to sell all the property in their possession, in one parcel and without redemption, to pay the receivers' certificate, the foreclosure decree, and the expenses of sale, and to execute a receivers' deed to the purchaser.

The court below entered an order according to the petition. It directed the receivers to issue their certificates to Graham, to advertise and sell the property in one parcel and without redemption, and to execute and deliver a deed to the purchaser. It further ordered that the proceeds of the sale be applied, first, to the expenses of the sale; second, to the amount of the receivers' certificates; and, third, to the Trust Company's decree of foreclosure, and that the balance, if any, be paid to the owner of the property. On January 7, 1913, a receivers' certificate for $20,472.92 was issued to Graham. After due advertisement the receivers sold the property without redemption to Graham for the amount of his claim and costs; there was nothing to apply on the foreclosure decree. The report of sale by the receivers was confirmed March 3, 1913; their deed to Graham was executed and recorded March 6, 1913; and on May 22, 1913, by an order of the court below, they were discharged, and the receivership declared closed. Graham's receivers' certificate was applied on his purchase and was surrendered to the receivers and canceled.

The statutes of South Dakota provide that an officer making an execution or mortgage foreclosure sale of real property shall issue to the purchaser a certificate of sale, which shall be subject to redemp-

tion by the judgment debtor or his successor in interest, or by inferior lien holders within times specified. Redemption is effected by service of notice and payment, and when made by the debtor the effect of the sale is ended. 2 Laws 1913, Code of Civil Procedure, §§ 375–383, 646–648. The claims embraced in Graham's receivers' certificate were for taxes, miners' liens, and for assessment work on the mining claims. It is not clear whether the receivers' sale for such liens would by itself independently be an execution or a mortgage foreclosure sale subject to redemption under the statutes cited; but, as will be presently observed the Supreme Court of the state held that the claims were incidental to the foreclosure of the mortgage and that the receivers' sale was therefore subject to the same rule.

On June 12, 1913, Hardin, who as above related had in 1909 acquired the title of the Mining Company, subject to the mortgage of the Trust Company by proceedings in the state court, attempted to redeem from Graham by serving a notice of redemption and tendering him the amount paid at the receivers' sale (receivers' certificate and costs), with interest, all then aggregating $21,844.20. The tender was refused. Thereupon Hardin sued Graham in the state court for an adjudication that he had effected a redemption; the Trust Company was not made a party. That court held that the federal receivers' sale to Graham was without redemption, and therefore the notice and tender were ineffective. Hardin appealed from that decision to the Supreme Court of the state.

It will be helpful at this point to restate briefly the status of the title. Hardin's ownership acquired in 1909 was then subject to the mortgage to the Trust Company, and later to the foreclosure decree on that mortgage. It was also subject to the miners' liens of Phillips and others foreclosed in the state court, with deed ultimately to Graham, from which no direct redemption was made, and later to Graham's receivers' certificate in the federal court below, the amount of which embraced the foreclosed miners' liens and other claims of a character superior to the rights of both Hardin and the Trust Company, and still later to whatever title Graham acquired by the receivers' sale, confirmation, and deed under the orders of the court below, recited to be without redemption.

On Hardin's appeal to the Supreme Court of the state the judgment of the state court of first instance that he had no right of redemption from the receivers' sale was reversed November 13, 1916. Hardin v. Graham, 38 S. D. 57, 159 N. W. 895. The questions presented by the conditions we have recited were disposed of as follows: First, the mining property, including the railroad, regarded as an entirety, was real estate, and not personalty, under the state statutes; any judicial sale of it under the Trust Company's decree of foreclosure in the federal court below, or for any claim or debt incidental to the mortgage or the foreclosure, such as the claims embraced in Graham's receivers' certificate, was also subject to redemption as prescribed by the state statutes; the federal court below was without jurisdiction to order the receivers' sale without redemption; the federal court being without jurisdiction, Hardin's action in the state court was not a

collateral attack on its orders and decrees. Second, upon the face of the deed to Graham on the foreclosure of the miners' liens in the state court Hardin was cut off, but it appearing that Graham had advanced the consideration money for the purpose of protecting the mortgage bondholders, and that at his instance the amount was embraced in the receivers' certificate issued upon the order of the federal court in the foreclosure case, he was entitled to a lien, but was estopped from asserting title under the deed. Third, the mortgage to the Trust Company was still unforeclosed and rested upon the federal court's unexecuted decree of foreclosure; that Hardin had a right to redeem from the receivers' sale to Graham without paying or tendering the amount of that decree, but after redemption by him the foreclosure decree would still stand as an incumbrance on the property. January 6, 1917, on Hardin's petition for rehearing, the Supreme Court of the state upon further consideration, and because the Trust Company was not a party to that action modified its opinion. It withdrew the paragraph relating to the status of the decree of foreclosure and expressly left the determination of that matter to the federal court. The state court of first instance was directed to enter judgment allowing Hardin to redeem from Graham upon payment of the requisite amount within a reasonable time to be fixed and upon such payment to adjudge redemption but failing payment to re-enter the judgment appealed from. Hardin v. Graham, 38 S. D. 222, 160 N. W. 850.

On April 27, 1918, after remittitur from the Supreme Court of the state a judgment was entered, first, that Hardin had redeemed from the receivers' sale by paying into court the proper amount within the time fixed and had thereby acquired all the right, title, and interest of Graham; second, that the receivers' deed to Graham was void; and, third, that the judgment so entered was without prejudice to the right and jurisdiction of the federal court to determine whether the mortgage of the Trust Company was unforeclosed, and whether its decree of foreclosure was an incumbrance upon the property notwithstanding Hardin's redemption from Graham. The amount paid by Hardin to the clerk of the state court for redemption was $33,085.98. Besides the sum paid by Graham at the receivers' sale, it included subsequent taxes and the cost of subsequent assessment work on mining claims paid by him. No part of it was for the mortgage debt due the Trust Company.

On April 8, 1918, after the modified opinion of the Supreme Court of the state, Graham filed in the foreclosure suit below a petition for an order on Hardin to show cause why the orders for the receivers' sale and for the discharge of the receivers should not be vacated, and the same or other receivers appointed to hold and preserve the property pending the litigation, and why Graham should not be restored to his position prior to the receivers' sale. A few days later the Trust Company filed a similar petition for execution on its foreclosure decree. Graham's petition, which contained an exhaustive review of the litigation in both state and federal courts, recited that the tender of the amount fixed by the state court for Hardin's redemption from the re-

ceivers' sale was refused at that time. Hardin appeared and answered, the two petitions were consolidated for hearing, and a hearing was had.

The court below rendered an opinion July 17, 1918, and a decree August 13, 1918. It held in substance that under the state redemption statutes it had jurisdiction to order the receivers' sale without redemption to pay the debts prior to the mortgage and foreclosure decree, that a sale without redemption was expressly sought by the receivers, one of whom was counsel for Hardin, that although the language of their petition and of the court's order thereon was broad enough to embrace the foreclosure decree as well as the receivers' debts prior thereto no such sale was in fact made, and consequently the foreclosure decree stood unimpaired and unexecuted. The court below said that, since Graham had not in the first instance invoked its power to protect his title against Hardin, but had subjected himself to the jurisdiction of the state courts in Hardin's action to redeem, it would follow the lines of decisions by those courts. It was accordingly adjudged that the decree of foreclosure was in full force and effect, and that the Trust Company should have special execution thereon. A receiver was appointed. A special execution to the marshal was then issued; the marshal reported a sale October 9, 1918, to the Trust Company for $200,000, leaving a deficiency of $50,000, round figures.

On October 12, 1918, and January 14, 1919, Hardin filed objections to the confirmation of the sale. December 12, 1918, appellant McCutchen moved for leave to intervene and also objected to the confirmation. McCutchen had furnished Hardin the money to redeem from Graham and as security he had taken Hardin's deed of the property August 30, 1917. On the hearing of these motions it was shown that McCutchen was informed of the proceedings as they occurred between the time he acquired his interest and the time he sought to intervene. On December 18, 1918, Graham took the money Hardin had deposited with the clerk of the state court for redemption from the receivers' sale. On January 14, 1919, the court below denied McCutchen's motion to intervene, and on the following day it overruled the objections and confirmed the sale. These appeals followed.

We accept the decision of the state courts, without considering whether the order of the court below for a receivers' sale without redemption was beyond its jurisdiction, and therefore subject to collateral attack in those courts, or whether, having jurisdiction of the parties and of the subject-matter of the litigation, the court below merely committed error in the remedy exclusively correctable there or by appeal to this court. It is apparent that the state Supreme Court perceived the injustice that would result from holding the sale to Graham subject to redemption with the result claimed by Hardin, and it sought to prevent it. The Trust Company was not a party to that action, and the status of its foreclosure decree was left to the court below in which it was rendered. The court below thereupon held in effect that the receivers' sale was for the receivers' debts alone, and that Hardin's redemption as owner merely satisfied them leaving the foreclosure decree untouched.

We think that if, after sale, confirmation, and deed to Graham his title so acquired is subjected to redemption contrary to the express provision of the order of the court under which the proceedings moved, some adequate measure of equitable relief from the consequences sought to be enforced by Hardin is required by the plainest principles of equity. It is not reasonably conceivable that, in trying to protect the mortgage bondholders with their foreclosure decree of $158,392.78, Graham would have bought the property for the comparatively small amount of his claims under conditions that would result, not only in the loss of his title so acquired, but also in the satisfaction of the foreclosure decree without payment. The proceedings resulting in the sale without redemption were not mere process on the decree, as counsel term them. They were more than that. In making the order for the sale the court below judicially considered and passed upon conditions which arose after the foreclosure decree. It was doubtless influenced by its conception of the character of the property and of the claims embraced in the receivers' certificate, and by the affirmative request for such a sale and motion to confirm it by counsel for Hardin acting as one of the receivers. The action by Hardin in the state court was an attack, not upon the sale as a whole, as it more properly should have been, but upon a single feature of it which operated against him. That important feature of the sale having been held invalid, it would seem manifestly right that the sale itself be vacated and the parties restored to their prior status. If Hardin's attack had been in the court which ordered the sale, and if it had been there held that the non-redemption provision was erroneous or invalid, the entire sale would undoubtedly have been set aside. He would not have been allowed to profit by the situation in which the other parties would have been placed by the ruling. The state courts, not having jurisdiction of the entire matter, could not go so far; but, when it arose again in the court below, it was competent for that court to grant the proper relief. Otherwise a trap would be made of the rules of law. The fact that the terms of court at which the foreclosure decree and the order for the receivers' sale were entered had expired is not important. The decision of the state courts, giving to the order an effect not contemplated when it was made, and involving also the foreclosure decree according to Hardin's contention, occurred subsequently. It was proper to bring the subsequent situation so created to the attention of the court below by supplemental bill. As to the province of such a bill after decree, see Root v. Woolworth, 150 U. S. 401, 14 Sup. Ct. 136, 37 L. Ed. 1123. The petitions of Graham and the Trust Company for orders on Hardin to show cause may be taken as supplemental bills. Issues were joined and tried, and a decision rendered, with all the judicial accompaniments of a proceeding of that kind.

Something remains to be said on behalf of Hardin and McCutchen. It is clear that in redeeming from the receivers' sale Hardin who owned the property, but was not personally liable for the judgment debt expected to remove all incumbrances. He did not anticipate that his title would remain subject to the foreclosure decree as

the court below has found. Although there are indications that much of the litigation over the property has been caused by his efforts to cut off without paying the large mortgage, apparently valid in all respects, we do not think that, when a court of equity is called upon to exercise its widest powers by restoring the status quo, it should penalize him. By his petition for an order to show cause, which is treated as a supplemental bill after decree, Graham asked that the receivers' sale be vacated and for a restoration to his prior position. If that had been done, Hardin also would have been similarly restored, with refund to him of the redemption money.

At this point arises the claim of McCutchen, who furnished Hardin the money and took his deed as security. After the decision of the court below that the foreclosure decree was not involved in the receivers' sale and remained as an incumbrance after Hardin's redemption, Graham took down the redemption money on deposit with the clerk of the state court. It should be repaid upon the vacation of the receivers' sale and the restoration of Graham's liens. McCutchen was not entitled to intervene as a matter of right. As an outsider and mere volunteer, he bought into the pending litigation. According to familiar doctrine, his application rested in the discretion of the court below, and it denied it. But if the court had held, as we do, that the redemption money should be returned, it would doubtless have exercised its discretion by allowing McCutchen to intervene, not for the purpose of contesting the sale under the foreclosure decree, but to assert his claim to the money. Upon that matter Hardin should have an opportunity to be heard.

The confirmation of the sale to the Trust Company under its foreclosure decree should be conditioned upon payment into the court below, within a time to be fixed by it, of the amount of redemption money, without interest, for the benefit of Hardin and McCutchen as their interests may be shown. On the other hand, it ought not to be required to accept unwillingly a confirmation of the sale subject to Graham's restored liens. Therefore, if the money is paid into court as directed, and the Trust Company signifies of record, within a time to be fixed by the court below, that it accepts the title acquired by the sale to it subject to Graham's liens, the confirmation of the sale shall stand affirmed; otherwise, it shall be vacated.

The cause is remanded to the court below for further proceedings in conformity with this opinion.

BLOEMECKE v. APPLEGATE.

(Circuit Court of Appeals, Third Circuit. April 4, 1921.)

No. 2578.

1. **Bankruptcy ⇐391(3)—Proceedings on debt not dischargeable not stayed, unless they interfere with administration.**
Under Bankruptcy Act, § 11 (Comp. St. § 9595), authorizing stay of suit founded on a claim from which a discharge would be a release, proceedings by a creditor for body execution against bankrupt on a judgment for a debt which would not be released by the discharge in bankruptcy will not be stayed, since they do not interfere with the administration of the res in possession of the court.

2. **Bankruptcy ⇐426(2)—Misappropriation by officer of private corporation not dischargeable.**
Under Bankruptcy Act 1898, § 17 (Comp. St. § 9601), excepting from release by discharge debts created by fraud or misappropriation while acting as an officer, which differed from the similar section in preceding acts by omitting therefrom the word "public" before "officer," any officer, private or public, is included, so that a debt against the president of a private corporation for misappropriation of funds is not released by discharge.

3. **Bankruptcy ⇐426(2)—Misappropriation by president of corporation is while acting a "fiduciary capacity."**
A debt incurred by a president of a corporation in the exercise of his official duties, which amounted to fraud or misappropriation by him, is created while he is acting in a fiduciary capacity, within Bankruptcy Act 1898, § 17 (Comp. St. § 9601).
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fiduciary Capacity or Character.]

4. **Bankruptcy ⇐423(1)—Liability for property obtained by false pretenses not released.**
Bankruptcy Act 1898, § 17, subd. 2 (Comp. St. § 9601), excepting from release by discharge liabilities for obtaining property by false pretenses or false representations, includes liability for money so obtained, so that the liability of the president of a private corporation to it for the difference between the purchase price paid by him for property bought for the company and the price he stated to the company is not released by discharge.

Appeal from and Petition to Revise Decree of the District Court of the United States for the District of New Jersey; Charles F. Lynch, Judge.

In the matter of the voluntary proceedings in bankruptcy against Henry J. Bloemecke. A rule issued on bankrupt's petition against Charles L. Applegate to show cause why he should not be enjoined from further proceedings in the state court. A judgment against the bankrupt was discharged (265 Fed. 343), and the bankrupt appeals and files petition to revise. Affirmed.

Bilder & Bilder, of Newark, N. J. (Nathan Bilder, of Newark, N. J., of counsel), for appellant.

Howe & Davis, of Orange, N. J. (Thomas A. Davis, of Orange, N. J., of counsel), for appellee.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

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

DAVIS, Circuit Judge. On September 8, 1910, the bankrupt, with others, organized the Realty Corporation of North America for the purpose of carrying on a general real estate business. Bloemecke was elected president of the corporation. Business was carried on by it from the time of organization until 1914. Since then no business has been done, though the corporation is still in existence. In October, 1910, the corporation had under advisement the purchase of a tract of land of about 77½ acres, called the Lindemeyer tract, on Ridgewood avenue, in Glen Ridge and Montclair, N. J. Bloemecke represented to the board of directors that it would be advantageous to the corporation if negotiations were conducted by him as an individual and title was taken in his individual name. Authority was given and the purchase was so made. He reported to the company that he purchased the tract for $216,500. The corporation subsequently learned that he paid only $201,500, and retained and applied for his own individual benefit the sum of $15,000 of the funds of the corporation.

In November following a tract of land of about 32 acres, known as the Lockwood tract, on Broad street, Bloomfield, N. J., was likewise purchased by Bloemecke for the corporation, and he reported to the directors that he paid $54,500 for the tract, whereas in fact, as the corporation subsequently learned, he paid only $52,500, and retained $2,000 of the money belonging to the company for his individual benefit.

In the same month Bloemecke sold to the corporation a tract of land of 8 acres on Orange road, Montclair, N. J., which he had purchased, with the intention of turning the same over to the corporation, it is alleged, and represented that he paid $15,750 for it; but he actually paid only $14,500, and kept $1,250 of the money paid him by the corporation for his own benefit. On these three transactions Bloemecke by fraudulent representations thus obtained $18,250.

On February 21, 1917, Charles L. Applegate, one of the stockholders of the corporation, filed a bill in the Court of Chancery of New Jersey on behalf of himself and other stockholders who might desire to join him, setting forth the above transactions, and prayed that Bloemecke be directed to account for and pay to the corporation the $18,250, with interest, costs, and counsel fee. On the pleadings and proofs the court entered final decree on July 23, 1918, ordering that the said money which remained in Bloemecke's hands as trustee of the corporation be paid by him to the corporation, and that he pay costs and a counsel fee of $500.

Bloemecke filed a voluntary petition in bankruptcy on September 5, 1918, and scheduled the $18,250 as a debt. Application was made on May 27, 1919, to the Chancellor of New Jersey for a capias ad satisfaciendum against the body of Henry J. Bloemecke, and hearing thereon was set for June 17, 1917. On June 9, 1919, Judge Haight, sitting in the United States District Court for the District of New Jersey, allowed a rule to show cause with ad interim restraint, returnable on June 16, 1919, on Charles L. Applegate, why he should not be enjoined and restrained from taking further proceedings in the Court of Chancery until Bloemecke's discharge in bankruptcy had been determined.

This rule was heard by Judge Lynch, who entered an order on April 19, 1920, dismissing it. The case is here on appeal from Judge Lynch's order.

Bloemecke's petition for rule to show cause was based on section 11 of the Bankruptcy Act of 1898 (Comp. St. § 9595), which provides that:

"A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition against him, shall be stayed until after an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until twelve months after the date of such adjudication, or, if within that time such person applies for a discharge, then until the question of such discharge is determined."

In his petition, Bloemecke alleged that "the claim is not founded upon fraud or false representation, and is a claim from which a discharge in bankruptcy would be a release." In his answer to the petition, Applegate said that:

"The debt was created by fraud, embezzlement, misappropriation, and defalcation of the bankrupt, acting as an officer of said corporation, to wit, as its president, and while acting in a fiduciary capacity, to wit, while he was expending money of the corporation."

Section 17 of the act (Comp. St. § 9601) provides that:

"A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

[1] The $18,250, with interest, is a debt which Bloemecke owes to the corporation. This was decided by the Court of Chancery and admitted by the bankrupt in his schedules in bankruptcy. Proceedings on a debt which is not dischargeable should not be stayed by a bankruptcy court, unless they interfere with the administration of the res in possession of that court. In re Dowie (D. C.) 202 Fed. 816. The proceedings in the Court of Chancery do not in any way interfere with the administration of the assets in bankruptcy. It is necessary, therefore, to determine whether or not the debt in question is dischargeable in bankruptcy. If it is, proceedings should be stayed, and the order of the District Court reversed; if it is not, the order should be affirmed. The bankrupt maintains that the debt is dischargeable because it was not created by his fraud, embezzlement, misappropriation, or defalcation "while acting as an officer or in any fiduciary capacity."

It is not denied that Bloemecke was president and director of the Realty Corporation of North America at the time the acts were committed of which Applegate complained in the proceedings in the Court of Chancery. That, while president and director, Bloemecke perpetrated a fraud upon the corporation by means of which he secretly obtained $18,250, cannot be denied. This has been established in the Court of Chancery. He was not, however, he contends, in purchasing the said tracts of land, doing so in the exercise of his official duty as president or director of the corporation, and therefore does not come

within the exceptions of section 17 of the act. The bankrupt was one of the influential men among the officers and directors, if not the most influential. He, with one Bradley, appears to have been the leading spirit of the organization of the corporation. He was elected its president, and was intrusted with its funds, which he deposited in his own personal account. He had been engaged in real estate business before the organization of the corporation, and the officers of the corporation seemed to rely upon his judgment in real estate matters, and intrusted to him the purchase of two of these tracts of land. In the absence of any statement, brought to our attention, in the charter or by-laws of the corporation, or in the evidence, of what his duties as president were, when the work which he actually performed for the corporation is considered, we are unable to say that they were not in some measure performed in the exercise of his official duties.

[2] The officer referred to in section 17 (4) of the act includes an officer of a private corporation. In section 1 (1) of the act of 1841 (5 Stat. 440), Congress provided that:

"All persons whatsoever * * * owing debts which shall not have been created in consequence of a defalcation as a public officer, or as executor, administrator, guardian or trustee, or while acting in any *other* fiduciary capacity * * * shall be deemed bankrupts."

Section 33 of the act of 1867 (14 Stat. 533) provides that:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a *public* officer, or while acting in any fiduciary character, shall be discharged under this act."

The act of 1898 omitted the word "public," used in the Acts of 1841 and 1867. This must have been done for the purpose of enlarging the number of persons who could create a debt by fraud, embezzlement, misappropriation, or defalcation without being able thereafter to secure a discharge in bankruptcy. Any "officer," private or public, is included in that term in the act of 1898. In re Harper (D. C.) 133 Fed. 970; In re Gulick (D. C.) 190 Fed. 52; Haggerty v. Badkin, 72 N. J. Eq. 473, 66 Atl. 420. Under the provisions of the acts of 1841 and 1867, the position of Bloemecke might have been tenable, but not under the act of 1898. We are of the opinion that Bloemecke created the debt by fraud while acting as an officer of the Realty Corporation of North America, and is not released from it by a discharge in bankruptcy.

[3] The question of whether or not Bloemecke was acting in a fiduciary capacity has been settled, so far as the Court of Chancery of New Jersey is concerned, by its decree, which has become final. That court held that Bloemecke was trustee for the Realty Corporation of North America and its stockholders, and that the $18,250 was the property of the corporation. "Bloemecke, as president of the company and as the custodian of the fund intrusted to him, is bound satisfactorily to account for what he did with the stockholders' money." The bankrupt relies upon such cases as Chapman v. Forsyth, 43 U. S. (2 How.) 202, 11 L. Ed. 236, which construed the acts of 1841 and 1867. The act of 1841 referred to "public" officers and express or technical trusts of executors, administrators, guardians, and trustees. The act of 1867 omit-

ted the words "executor," "administrator," "guardian," and "trustee," and also the word "other," before "fiduciary." The act of 1898 omitted, not only these, but also the word "public," before "officers," contained in both of the prior acts. Congress doubtless had in mind that the courts had construed the term "fiduciary" as meaning an express, technical trust, and by omitting those words from the act of 1898 it must have intended to extend the class coming within the meaning of "fiduciary capacity." Fulton v. Hammond (C. C.) 11 Fed. 291; In re Harper, supra; Haggerty v. Badkin, supra; In re Gulick (D. C.) 186 Fed. 350.

In the case of Haggerty v. Badkin, Vice Chancellor Pitney after an exhaustive review of the leading cases, both state and federal, said that:

"Money is received or detained by one from another in a fiduciary capacity, when, in the mind of the person handing the money to the other, as such mind is known to that other, it does not become the absolute money and property of that other to do with as he chooses as his own money, but is received by him for a particular purpose in which a person or persons other than the person receiving it is or are interested."

Applying this definition to Bloemecke's transactions, he was acting in a "fiduciary capacity," for the money delivered to him was not his own, to do with as he chose, but, on the contrary, was received by him for a particular purpose, in which the corporation was interested.

The case of Crawford v. Burke, 195 U. S. 176, 25 Sup. Ct. 9, 49 L. Ed. 147, is the only case, brought to our attention, of the Supreme Court of the United States construing the words "fiduciary capacity" in the act of 1898. That was a case in which a bankrupt, who was a broker, bought and sold stocks on a margin for his clients. In the course of his business he bought and carried for Burke some stocks, which he sold without Burke's knowledge and doubtless mingled the proceeds of sale with his own money. Pending suit in trover to recover damages for converting the stock, Crawford obtained his discharge in bankruptcy, and pleaded it puis darrein continuance. The Supreme Court of Illinois held that the discharge was not a bar to recovery, but the Supreme Court of the United States reversed the Illinois decision, on the ground that there was "no evidence that the frauds perpetrated by the defendants were committed by them in an official or fiduciary capacity." In transactions of a mercantile character, such as where a factor sells goods for a principal and mingles the proceeds of his sales with his own money, and the like, an implied contract arises, and the natural remedy is by action of assumpsit at common law. In such transactions, courts generally hold that factors are not acting in a "fiduciary capacity." Haggerty v. Badkin, supra.

The facts in the instant case are very different from those of Crawford v. Burke, supra, and those cases generally construing the relations of factor and principal in commercial transactions. Keeping in mind the amendments, bearing upon this question, of the acts of 1841 and 1867, we are constrained to conclude that Bloemecke created this debt by his fraud while acting in a fiduciary capacity.

[4] If, however, we are wrong in so holding, then subsection 2 of section 17 applies. This 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."

Money is property within the meaning of this statute. Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723. It is not denied, and in fact cannot be denied, that Bloemecke obtained the $18,250 by false pretenses and false representations, and on these pretenses and representations, that he had paid $18,250 for the three properties more than he actually had paid, he secured the money.

This debt, therefore, is a liability from which a discharge in bankruptcy will not release Bloemecke. It was accordingly not error for the District Court to refuse to stay the proceedings in the Court of Chancery.

The order of the District Court, dismissing the petition of the bankrupt, is therefore affirmed.

COCA-COLA CO v. OLD DOMINION BEVERAGE CORPORATION.*

(Circuit Court of Appeals, Fourth Circuit. March 3, 1921.)

No. 1729.

1. **Trade-marks and trade-names ⟸45—Descriptiveness immaterial, when registered under 10-year proviso.**
   It is immaterial that a trade-mark registered under the 10-year proviso of the federal Trade-Mark Law (Comp. St. § 9490) may once have been descriptive or may still be to some degree.
2. **Trade-marks and trade-names ⟸41—When registered trade-mark and infringement used in interstate commerce, protection of federal act may be invoked.**
   Where the owner of a registered trade-mark and an infringer both used their marks in interstate as well as intrastate commerce, the trade-mark owner may invoke the federal statutes, no matter how narrow the construction of the protection that they can constitutionally give.
3. **Courts ⟸292—Common-law rights in trade-mark enforceable in federal court, when diverse citizenship and sufficient amount in controversy exists.**
   Where the parties to a suit for infringement of a trade-mark and unfair competition are corporations of different states and the amount in controversy exceeds $3,000, a United States court may enforce plaintiff's common-law rights in its trade-mark and against unfair competition.
4. **Trade-marks and trade-names ⟸79—Injunction being appropriate relief justifies suing in equity.**
   In a suit for infringement of a trade-mark and unfair competition, an injunction is an appropriate part of the relief sought ,and hence the complaint is properly brought on the equity side of the court.
5. **Trade-marks and trade-names ⟸53—Cannot be used by one manufacturing beverage similar to owner's beverage though unpatented.**
   Though any one, if he can, may manufacture a beverage similar to an unpatented beverage sold under a trade-name, and claim that it is not

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 624, 65 L. Ed. —.

only as good as that sold under the trade-name but in fact is the same thing, he cannot, in so doing, use the trade-mark to the damage of its owner.

6. Trade-marks and trade-names ⊜59(5)—Defendant held to have infringed plaintiff's trade-mark and been guilty of unfair competition in sale of beverage under similar name.

Where plaintiff's beverage had been on sale under its trade-name, "Coca-Cola," registered as a trade-mark, long before defendant began business, and its business had grown to great proportions, defendant, by adopting the name "Taka-Kola," uniting the words by a hyphen and displaying them in script, as did plaintiff, and using a color scheme on the crown corks of its bottles making them indistinguishable at a distance of a few feet, was guilty of unfair competition and infringement of plaintiff's trade-mark, especially where the similarity of names had suggested to unscrupulous retailers the mixing of the two products and the sale of the mixed product as Coca-Cola.

Appeal from the District Court of the United States for the Eastern District of Virginia, at Richmond; Henry Clay McDowell, Judge.

Suit by the Coca-Cola Company against the Old Dominion Beverage Corporation. From a decree dismissing the bill of complaint, plaintiff appeals. Reversed and remanded.

Edward S. Rogers, of Chicago, Ill., and Harold Hirsch, of Atlanta, Ga. (C. V. Meredith, of Richmond, Va., Candler, Thomson & Hirsch, of Atlanta, Ga., and Frank F. Reed, of Chicago, Ill., on the brief), for appellant.

Robert E. Scott and L. O. Wendenburg, both of Richmond, Va. (T. Gray Haddon, of Richmond, Va., on the brief), for appellee.

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

ROSE, District Judge. [1] Plaintiff's trade-mark "Coca-Cola" is duly registered under the ten-year proviso of the federal trade-mark law (Comp. St. § 9490). It is therefore immaterial that it may once have been desciptive or that to a degree it may be so still. Thaddeus Davis Co. v. Davids, 233 U. S. 468, 34 Sup. Ct. 648, 58 L. Ed. 1046, Ann. Cas. 1915B, 322. The Supreme Court has very recently overruled the contention that, because of what is said to have been or to be its deceptive character, plaintiff may not be heard to complain of its infringement. Coca-Cola Co. v. Koke Co., 254 U. S. 143, 41 Sup. Ct. 113, 65 L. Ed. ——, decided December 6, 1920.

The bill in this case charges that defendant has infringed it by the sale of its wares under the trade-mark "Taka-Kola," and has also unfairly competed by the use of such words and by the design and ornamentation of its bottles. In dismissing the cause without opinion the learned District Judge of the Western District of Virginia sitting by special assignment may have been influenced by the decision of the Circuit Court of Appeals for the Ninth Circuit in Koke Co. v. Coca-Cola Co., 255 Fed. 894, 167 C. C. A. 214, since reversed by the Supreme Court in the case heretofore cited.

[2] Plaintiff, from a time long anterior to the use of the words "Taka-Kola" by anybody, had actively and continuously marketed its

wares in the very localities in which defendant has offered its drink for sale. Both plaintiff and defendant use their respective marks in interstate as well as in intrastate commerce, so that the former may invoke the federal acts, no matter how narrow may be the construction of the protection they can constitutionally give. Louis Bergdoll Brewing Co. v. Bergdoll Brewing Co. (D. C.) 218 Fed. 131.

[3, 4] The parties are corporations of different states, and the value of the thing in controversy exceeds $3,000, so that the courts of the United States may enforce the common-law rights of the plaintiff, as well in its trade-mark as against unfair competition. An injunction is an appropriate part of the relief for which it asks, so that it has properly preferred its complaint to the equity side of the court. The beverages upon which the marks are used are not only of the same general character, but are in fact so similar in taste, color, and appearance that it is doubtful whether the ordinary purchaser can tell one from the other when they come to him unmarked and otherwise unidentified.

When defendant began business, the plaintiff's drink had been on sale in most parts of the country, and certainly in Virginia, for a quarter of a century or more. Its business had grown to great proportions, a result due in large, if not in largest, part to the extensive and expensive advertising it has always done, the cost of which in recent years has averaged a million or more annually. Defendant was promoted by some persons who came here from Tennessee, where they or some of them had been connected with a concern which, in the Patent Office, had had a losing fight with the plaintiff over the right to use the words "Tenn-Cola." Coca-Cola Co. v. Tenn-Cola Co. (Patent Office opposition No. 1894).

Perhaps the geographical proximity of Tennessee to Atlanta, in which plaintiff's business began, and in which it became so visibly and attractively lucrative, explains why this is not the first instance in which plaintiff has thought itself compelled to complain of infringement and of unfair competition originating in that state. Coca-Cola Co. v. Nashville Syrup Co. (D. C.) 200 Fed. 157, affirmed in 215 Fed. 527, 132 C. C. A. 39, and of which Coca-Cola Co. v. Duberstein (D. C.) 249 Fed. 763, appears to have been an aftermath; Coca-Cola Co. v. Gay Ola Co., 200 Fed. 920, 119 C. C. A. 164; Coca-Cola Co. v. Tenn-Cola Co., supra.

In the instant case the defendant's mark "Taka-Kola" consists, as does "Coca-Cola," of two words, each of four letters and of two syllables. In each phrase a consonant and a vowel alternate, there being in each four of the one and four of the other. In plaintiffs' *a* and *o* each appear twice. Defendant's has three *a*'s and one *o*. The consonant *l* is common to both, and in each is the seventh letter from the beginning. Plaintiff's contains three *c*'s, having in every instance the hard or *k* sound. Twice defendant replaces the *c* with a *k*, and once by a *t*, the use of which last must be relied upon to distinguish the two words, for in every other respect they are for all practical purposes identical. The two words of plaintiff's are united by a hyphen; so are those of the defendant. The plaintiff displays its in script. The

defendant has followed suit. The color scheme of the crown corks with which each seals its bottles is so nearly the same that, when they are lying on their sides with the tops outward, or are standing upon their bottoms in racks or trays, they are at a distance of a few feet indistinguishable. It taxes credulity to believe that so close a resemblance was accidental.

There, however, appears to be nothing of substance in plaintiff's claim that defendant has imitated its distinctive type of bottle. The two designs are not enough alike to justify a finding that as to them there is unfair competition. The defendant, after the manner of others in like case, says it has always wanted to sell its drink for what it is, and to that end has done all that in it lies to distinguish its product from Coca-Cola. The courts have had frequent occasion to note the scant success which too often rewards such efforts.

In this case it is true that the evidence does not show that the defendant ever asked any one to sell its product as Coca-Cola. It appears that in Richmond, at least, most purchasers know that Taka-Kola is in a way different from Coca-Cola. On the other hand, the similarity of names seems to have suggested to unscrupulous retailers that they could mix defendant's product with that of plaintiff and sell the compound as Coca-Cola; the marked likeness in taste and color making such a partial substitution safe and easy. At one time, when in Richmond the supply of Coca-Cola ran short, this fraud appears to have been practiced to an appreciable extent.

[5] The strength of defendant's position, if it has any, must lie in the soundness of the contention which it sets up, implicitly, if not explicitly, that as Coca-Cola is not patented it has the right to make it if it will and can, or may make something as near like it as its skill and knowledge will permit; that, having produced a beverage which in all substantial respects is almost if not quite the same thing, there is no reason why it may not tell the public it has done so; and that it makes no legal difference whether to give this information it uses many sentences, or but one or only two short words. It says that, while the phrase "Taka-Kola" informs possible purchasers that the beverage it makes is very much like Coca-Cola, it also gives him to understand that it is the product of another concern.

The argument is ingenious. It is of course true that, because plaintiff's drink is not patented, any one who knows how can make it without leave or license from plaintiff; but also, because it never has been patented, the name which constitutes plaintiff's trade-mark for it may not, without plaintiff's consent, be either used or imitated by another. Buffalo Specialty Co. v. Van Cleef, 227 Fed. 391, 142 C. C. A. 87; Hopkins on Trade-Marks, 3rd Ed. Sec. 51.

May defendant employ, for the sole purpose of bringing its wares speedily and cheaply into notice, a variant of plaintiff's trade-mark so close as to suggest the latter to every one, thereby turning to its own profit the reputation which the plaintiff has built up through many years of skill and effort, and at the cost of millions expended in advertising its goods under its mark? It may tell the thirsty that its drink is not only as good as Coca-Cola, but that it believes it to be in fact the

same thing; but can it do so by using plaintiff's trade-mark to plaintiff's hurt? Even if there is no attempt by defendant to palm off its goods as those of plaintiff, does it necessarily follow that defendant is not unfairly competing? The right to equitable relief is not confined to cases in which one man is selling his goods as those of another. International News Service v. Associated Press, 248 U. S. 215, 241, 39 Sup. Ct. 68, 63 L. Ed. 211, 2 A. L. R. 293. What in that case, upon a different state of facts, was said of the respondent, is applicable to defendant's conduct here, for it, too, "amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point when the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not." Vide supra, page 240.

[6] By using the words "Taka-Kola," and by imitating the ornamentation of the crowns of plaintiff's bottles, defendant has unfairly competed and is still doing so; but has it not also infringed upon plaintiff's exclusive right to the use of its federally registered trade-mark? A trade-mark is property of a limited and qualified kind, it is true. It cannot exist apart from the business with which it is connected, nor in jurisdictions into which that business has not gone, leaving on one side the possible effect of state or federal registration. But it is property still within the somewhat restricted limits thus imposed upon its owner's rights. It would seem to follow, as we think it does, that it is entitled to protection against the attempt of a competitor to use it to push his wares to the possible and probable damage of the owner. Plaintiff's rights are limited at the most to two words. All the rest of infinity is open to defendant. It will be safe if it puts behind it the temptation to use in any fashion that which belongs to the plaintiff. It has not done so voluntarily, and compulsion must be applied.

It is unnecessary to say that we are deciding the case before us. Here we have found, from all the facts, both infringement of a trade-mark and unfair competition. We are not to be understood as intimating any opinion as to whether plaintiff has or has not any exclusive rights in either of the words which make up the trade-mark, when either is used separately from the other, and under circumstances in which there is no attempt by a competitor to use plaintiff's property to plaintiff's damage.

Both on the grounds of unfair competition and of infringement of a registered trade-mark defendant must be enjoined from the further use in its business of the phrase "Taka-Kola," and from continuing its unfair competition in the simulation of the ornamentation of the crowns of plaintiff's bottles, and must account for what it has done. It follows that the decree dismissing the bill of complaint must be reversed, and the cause remanded for further proceedings in accordance with the conclusions herein stated.

Reversed.

BURKE CONST. CO. v. KLINE et al.*

(Circuit Court of Appeals, Eighth Circuit. March 18, 1921.)

No. 5706.

1. **Courts ⇐493(2)—Final adjudication, in federal suit based on diversity of citizenship, would be futile, if defendants could avoid it by subsequent suit and first adjudication in state court.**
   If defendants in a suit in a federal court, of which that court first acquired jurisdiction on the ground of diversity of citizenship, by subsequently bringing a suit in a state court against the plaintiff to obtain an adjudication of the same controversies between these citizens of different states, could thus lawfully confer jurisdiction thereof on the state court, first to finally adjudge the issues through a race of diligence before the plaintiff would be able to obtain an adjudication thereof in the federal court, the federal court's jurisdiction and adjudication would thereby be rendered futile, because the matters would have become res judicata before the federal court could decide them.
2. **Courts ⇐493(2)—Constitutional right to adjudication in federal court cannot be defeated by subsequent suit in state court by federal defendant.**
   The right of a citizen under Const., art. 3, § 2, to have determined by a federal court a controversy between himself and a citizen of another state, cannot be defeated by the institution by defendant, after suit was begun in the federal court, of an action in a state court to determine the same controversy.
3. **Courts ⇐508(2)—Federal court may enjoin prosecution of subsequently instituted suit in state court on same question.**
   Where the defendant, in a suit in a federal court whose jurisdiction was based on the diversity of citizenship, thereafter brought an action in the state court on the same controversy, the federal court can protect its jurisdiction and plaintiff's constitutional right to have the cause determined in the federal court, by enjoining the proceedings in the state court pending the determination in the federal court.
4. **Courts ⇐508(2)—Federal court can restrain suit in state court against federal plaintiff's sureties, which might determine liability.**
   Where a paving contractor had instituted a suit in the federal court against an improvement district to determine controversies arising out of the contract, and the district thereafter brought an action against the contractor and his sureties in the state court, the federal court can enjoin the prosecution of the action in the state court against the sureties, as well as against the contractor, since the determination of the liability of the sureties in the state action could fix the contractor's liability to them and thereby deprive him of his right to have that controversy determined by the federal court.

Lewis, District Judge, dissenting.

Appeal from the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Suit by the Burke Construction Company against John P. Kline and others, as the Board of Improvement of Paving Improvement District No. 20 of the City of Texarkana, Ark. From an order denying plaintiff's application for an injunction, plaintiff appeals. Order reversed, and cause remanded, with instructions.

James B. McDonough, of Ft. Smith, Ark., James D. Head, of Texarkana, Ark., and Vincent M. Miles, of Ft. Smith, Ark., for appellant.

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

*Certiorari granted 254 U. S. —, 41 Sup. Ct. 624, 65 L. Ed. —.

Frank S. Quinn and W. H. Arnold, both of Texarkana, Ark., for appellees.

Before SANBORN, Circuit Judge, and LEWIS and COTTERAL, District Judges.

SANBORN, Circuit Judge. This is an appeal of the Burke Construction Company, a corporation, a citizen and resident of the state of Missouri, from an order denying its application for an injunction restraining the board of improvement of paving improvement district No. 20 of the city of Texarkana, a corporation and citizen of the state of Arkansas, the members of the board, its attorney, agents, and representatives, from prosecuting a suit in equity it brought against the Burke Construction Company and others on March 19, 1920, to obtain a trial and adjudication of the same controversy between these two citizens, to obtain a trial and adjudication of which the Burke Company had brought an action at law against the board and its members in the United States District Court of the Western District of Arkansas to recover $85,250.84 on February 16, 1920. The controversy between the two corporations involved their respective liabilities, each to the other, under a contract between them, made on November 29, 1916, whereby the Burke Company agreed to pave certain streets in the town of Texarkana, under which contract it had partially paved those streets. The Burke Company alleged in its complaint for the $85,250.84 that in all things it had complied with and was ready and willing to fulfill the terms of the contract between them, but that the board failed to pay it, according to the terms thereof, moneys which it had earned, wrongfully and arbitrarily changed the requirements of the agreement after it was made, unnecessarily delayed the Burke Company in its work thereunder, unlawfully seized and appropriated to its own use the tools, machinery, and equipment of the Burke Company, which it had furnished to perform the contract, notified and compelled it to cease performance before the contract was completed, and committed other breaches of the agreement, to the damage of the Burke Company in the amount stated.

In the subsequent suit, which the board brought in the state chancery court of Arkansas in March, 1920, against the Burke Company, it counted on the same contract, joined with the Burke Company as defendants M. C. Burke, J. A. Burke, and the United States Fidelity & Guaranty Company, signers of the Burke Company's bond as sureties for its faithful performance of the contract, and alleged, among other things, that the board had complied with its obligations thereunder, but that the Burke Company had failed to complete its performance thereof, though notified to do so; that the board held in its hands $13,752.45, retained percentages of the compensation that had been earned by the Burke Company on the work it had completed previous to November, 1919, $60,000 balance of $150,000 the board had received for bonds of the district it had sold to pay for the paving under the contract, and the compensation earned by the Burke Company in November, 1919, amounting in all to approximately $77,000; that it had taken the tools, machinery, and equipment which the Burke Company

had provided for itself to perform the contract; that it will cost $80,000 to complete its performance; and that there is "a conflict between plaintiff and defendants upon many subjects arising under said contract"; and the board prayed that (1) an accounting be had with reference to the work that had been done by the Burke Construction Company under the agreement, and (2) that the board have judgment against the Burke Construction Company and the sureties on its bond for $80,000, the amount required to complete performance of the contract, and have judgment for other damages; that it retain and use the Burke Company's tools, machinery and equipment and the $77,000 in money.

On July 2, 1920, the board filed its answer to the complaint of the Burke Company in the action in the federal court, in which it denied many of the averments of the Burke Company in its complaint, repeated the allegations of the board in its complaint in the state chancery suit, set up a counterclaim, and prayed for a judgment against the Burke Company for $99,498.63, the amount then alleged to be required to complete performance of the contract, for a lien on the $77,000 in its hands, and for other relief. In July, 1920, the action in the federal court below was tried to a jury, which disagreed. Counsel for the board then gave notice that they would proceed with the prosecution of its suit against the Burke Company and its sureties in the state chancery court.

In this state of facts the Burke Company brought this suit in equity in the federal court below against the board and its members, setting forth in its complaint the facts which have been recited, and prayed for an injunction against the board, its members, its attorneys, representatives, and servants, from proceeding with the taking of testimony or the further prosecution of its suit in the state chancery court until after the trial and adjudication of the controversy between these citizens of different states in the action first brought in the federal court below, and the enforcement of its judgment or decree by that court.

[1] The controversy which was the subject thereof was between citizens of different states. Of that controversy between these citizens of different states and of the parties to that suit the court below acquired full jurisdiction by the filing of the complaint and the commencement of that suit by the Burke Company on March 19, 1920. By the Constitution of the United States (article 3, § 2) and the acts of Congress (U. S. Comp. Stat. § 991), the constitutional right was granted to the Burke Company to ask and to have a trial and adjudication of that controversy and the enforcement of that adjudication by the federal court. If the board, which subsequently, on March, 1920, brought its suit against the Burke Company and the sureties on its bond to secure an adjudication by that court of the same controversy between the same citizens, by a race of diligence lawfully may secure such an adjudication in the suit in the state court before in the orderly and proper course of proceeding in the suit in the federal court, the Burke Company is able to obtain such an adjudication and the enforcement thereof in the federal court, then the federal court's adjudication will be made futile, because before it has rendered it the

controversy will have become res adjudicata by the adjudication of the state court (Boatmen's Bank v. Fritzlen [8 C. C. A.] 135 Fed. 650, 667, 68 C. C. A. 288; Insurance Co. v. Harris, 97 U. S. 331, 336, 24 L. Ed. 959; Barber Asphalt Paving Co. v. Morris [8 C. C. A.] 132 Fed. 945, 951, 66 C. C. A. 55, 67 L. R. A. 761), and the Burke Company will have been deprived of the right granted to it by the Constitution of the United States to the determination of its controversy with the board by the trial and adjudication thereof by the federal court, which first acquired jurisdiction of it and of the parties thereto.

[2] A citizen who would exercise this constitutional right usually is compelled to bring his suit in the federal court in the state of the residence of the defendant in order to get service of process upon and jurisdiction of him. The reason for the grant to him by the Constitution, and in this case to the Burke Company, of this right to have the decision of its controversy with the citizen of another state by the federal court, was thereby to avoid the local attachments and prejudices in favor of the defendant that those who made the Constitution feared might injuriously affect the administration of justice in the state courts against the claims of citizens of other states, and the question which this case presents is:

When a citizen of one state, in the exercise of his constitutional right to an adjudication of a controversy he has with a citizen of another state, brings a personal action against the latter in the proper federal court in the state of the defendant's residence and citizenship, invokes and persistently demands an adjudication of that controversy and the enforcement of that adjudication by that federal court, and that court first acquires full jurisdiction of the controversy and the parties to it, may the defendant, by subsequently commencing a suit in one of the courts of his state against the plaintiff in the first suit and others to secure an adjudication of the same controversy, and by pressing it to a judgment or decree before an adjudication can be obtained in the federal court, deprive the plaintiff of his constitutional right to an adjudication of the controversy and enforcement thereof by the federal court, oust that court of the jurisdiction first acquired by it and render the action in it futile, or may the federal court, which first acquires jurisdiction of the controversy and of the parties, lawfully protect and preserve its jurisdiction, its adjudication of the controversy, and the enforcement thereof by the use of its injunction against the defendants, who seek to deprive it of jurisdiction, their attorneys, representatives, and agents?

The first impression which the presentation of the question presents to the mind is that it should be so answered as to preserve and enforce the right of the citizen to the trial and decision of his controversy by the federal court which the Constitution and the acts of Congress granted to him. Counsel for the board, however, while they concede that, where courts have concurrent jurisdiction of the same parties and controversies, the court which first acquires jurisdiction of the res in a controversy holds it against courts in which subsequent suits are brought concerning that thing, contend that this case falls under the rule that actions in personam between the same parties con-

cerning the same controversies may proceed at the same time in courts of concurrent jurisdiction, and the adjudication first obtained renders the controversy decided res adjudicata as against a subsequent adjudication in the other court, and renders the suit therein futile.

But the answer to this contention is that, in the case at bar, after the Burke Company had invoked the jurisdiction of the federal court and had thereby exercised its constitutional right to an adjudication of its controversy by that court, that federal court had exclusive jurisdiction to hear and decide the controversy, and the state court in which the subsequent action was brought had no concurrent jurisdiction thereof as long as the Burke Company insisted upon and demanded its constitutional right. In the investigation, study, and decision of this question the fact must be borne in mind that general statements, in text-books and in opinions in cases in which the right of neither of the parties to the exclusive determination of the controversy involved by the federal court by virtue of article 3, § 2, of the Constitution was not claimed, demanded, thoughtfully considered, or adjudged, that actions in personam involving the same issues between the same parties may proceed at the same time in courts of concurrent jurisdiction, are neither authoritative nor persuasive on the question in this case, because in such cases it is probable that the claim of this constitutional right never came to the mind of or was determined by the writer. Bearing this rule of law and of reason in mind let us consider the authorities cited by counsel for the board.

Stanton v. Embry, 93 U. S. 548, 554, 23 L. Ed. 983, is the leading case for the general rule that actions in personam involving the same controversy between the same parties may proceed at the same time in courts of concurrent jurisdiction, and the adjudication first obtained prevails. But in Stanton v. Embry the plaintiff first brought an action for $10,000 and interest against the defendants for services in one of the courts of the state of Connecticut. The same plaintiffs subsequently brought an action for the same cause against the same defendants in one of the courts in the District of Columbia. The defendants pleaded the first suit in abatement of the second suit, and the Supreme Court held that the pendency of the prior suit in the state court was not a bar to the subsequent suit between the same parties for the same cause of action in the court of the District of Columbia. No question of the constitutional right of a plaintiff in a first suit in a federal court to the determination of his controversy by that court either existed, was presented, considered, or decided.

In Woren v. Witherbee, Sherman & Co. and in Kuzman v. Same (D. C.) 240 Fed. 1013, the same state of facts, so far as they relate to the question under discussion here, existed as in Stanton v. Embry.

In W. E. Stewart Land Co. v. Arthur, 267 Fed. 184 (8 C. C. A.), the land company first sued Arthur, the defendant, upon two checks and a promissory note in the federal court in the state of Iowa. Subsequently the land company, the same plaintiff, sued Arthur, the same defendant, in one of the courts in Oklahoma on the same instruments and attached property in that state. Arthur, the defendant, who had not invoked or claimed any constitutional right to a trial of the con-

troversy in the federal court, sought to have that court enjoin the land company from proceeding to take testimony in the Oklahoma case, and this court held that he was not entitled to such an injunction. But here no question of the constitutional right of the land company, which alone invoked the jurisdiction of the federal court to an adjudication of its controversy, was presented or decided, for by itself bringing its second action in the state court it waived and renounced its constitutional right to the decision of the controversy by the federal court and submitted itself to the jurisdiction of the state court. And Arthur never invoked or claimed any such constitutional right. If, after the land company had brought its action in the federal court in Iowa, the defendant Arthur had brought a suit in Oklahoma against the Land Company for an adjudication of the controversy between these parties, and the land company had insisted upon its constitutional right to an adjudication by the federal court and sought an injunction to prevent Arthur from depriving it of that right by an early decision of the question in the Oklahoma court, a different question would have been presented and a different answer returned.

In Merritt v. American Steel Barge Co. (8 C. C. A.) 79 Fed. 228, 229, 230, 231, 24 C. C. A. 530, the Merritts, citizens of Minnesota, brought an action in one of the courts in the state of Minnesota against the Barge Company, a citizen of New York, for damages for its alleged conversion of certain corporate stock and personal property. The Barge Company removed the action to the federal court in Minnesota. After that removal the Barge Company itself, which, against the protests of the Merritts, had invoked the jurisdiction of the federal court by removing the case to that court, sued the Merritts in a state court of New York to determine the rights of the respective parties to the stock and personal property involved in the controversy in the Minnesota case, and obtained a decree in the New York court to the effect that all this property belonged to the Barge Company, and that decree was held to render the matters there adjudged res adjudicata at the subsequent trial of the action in the federal court in Minnesota. But no question of the constitutional right of the Barge Company or of the Merritts to the adjudication of its controversy by the federal court was presented or adjudged, for the Barge Company, which had invoked its jurisdiction of the controversy, had renounced its right to such an adjudication by invoking and securing the adjudication of its controversy by the New York state court, and the Merritts never claimed any such right under the Constitution.

The cases upon which counsel for the board seem to rely with the most confidence have now been reviewed. Others that have been cited by them, and read and considered by the court, are Ogden City v. Weaver (8 C. C. A.) 108 Fed. 564, 47 C. C. A. 485; Barber Asphalt Paving Co. v. Morris (8 C. C. A.) 132 Fed. 945, 66 C. C. A. 55, 67 L. R. A. 761; Gates v. Bucki (8 C. C. A.) 53 Fed. 961, 4 C. C. A. 116; Buck v. Colbath, 70 U. S. (3 Wall.) 334, 18 L. Ed. 257; Standley v. Roberts (8 C. C. A.) 59 Fed. 336, 8 C. C. A. 305; Insurance Co. v. Harris, 97 U. S. 331, 24 L. Ed. 959; In re Lasserot, 240 Fed. 325, 153 C. C. A. 251; Zimmerman v. So Relle (8 C. C. A.) 80 Fed. 417,

25 C. C. A. 518; McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; Defiance Water Co. v. City of Defiance (C. C.) 100 Fed. 178; Bellamy v. St. Louis, Iron Mtn. & S. S. Ry. Co. (8 C. C. A.) 220 Fed. 876, 136 C. C. A. 442; St. Louis & I. M. Ry. Co. v. McKnight, 244 U. S. 368, 37 Sup. Ct. 611, 61 L. Ed. 1200; Baltimore & O. R. Co. v. Wabash R. Co., 119 Fed. 678, 682, 57 C. C. A. 322. But no opinion or decision, in any case where the question was presented, argued, or seriously considered by the court, has been found to the effect that a citizen of one state, who had the constitutional right to the adjudication of a controversy between himself and a citizen of another state, who first brought a suit in personam or in rem to obtain such an adjudication in a federal court that first obtained jurisdiction of the controversy and of the parties, and who persistently claimed his constitutional right, could be deprived of it by a subsequent suit in a state court brought by the defendant in the federal court against the plaintiff therein, or against him and others, to obtain a determination of the same controversy by the state court or by any other action which the defendant in the federal court might take.

On the other hand, the plain terms of the grant of this right in the Constitution and in the acts of Congress, the reason for and the purpose of it, the supremacy of the Constitution and of the rights granted under it to the citizens of the United States and of the authority and jurisdiction vested by it in the federal courts, the more persuasive reasons and the authorities converge with compelling force to establish these conclusions:

When a citizen of one state, in the exercise of the right granted to him by the Constitution and the acts of Congress to an adjudication of a controversy judicable in a federal court between him and a citizen of another state, brings a suit in personam or in rem against the latter in the proper federal court to obtain the adjudication of that controversy by that court, and that court first acquires jurisdiction of that controversy and of the parties thereto, and the plaintiff therein persistently demands the adjudication of the controversy by the federal court, the defendant in that suit may not deprive the plaintiff of his constitutional right to such an adjudication by the federal court, or of the enforcement thereof by that court, by bringing a subsequent suit in a state court against the plaintiff in the federal court or against him and others to obtain an adjudication by the latter court of the same controversy or of that controversy and of other controversies, or by any other action or proceedings such a defendant may take. Sharon v. Terry (C. C.) 36 Fed. 337, 354, 1 L. R. A. 572; Brown v. Fletcher, 231 Fed. 92, 94, 145 C. C. A. 280; Wadley v. Blount (C. C.) 65 Fed. 667, 670, 672, 673, 674, 675, 676; Taylor v. Taintor, 83 U. S. (16 Wall.) 366, 370, 21 L. Ed. 287; Ex parte Young, 209 U. S. 123, 162, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764; Prout v. Starr, 188 U. S. 537, 544, 23 Sup. Ct. 398, 47 L. Ed. 584; Gamble v. City of San Diego (C. C.) 79 Fed. 487, 500.

"The courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction

extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction." Chicot County v. Sherwood, 148 U. S. 529, 533, 534, 13 Sup. Ct. 695, 697, 698, 37 L. Ed. 546.

Nor may they unduly or unnecessarily postpone the hearings or delay the proceedings in their courts to the disadvantage of suitors vested with the right to a determination of their controversies by such courts by the Constitution and the acts of Congress. McClellan v. Carland, 217 U. S. 268, 30 Sup. Ct. 501, 54 L. Ed. 762; McClellan v. Carland (8 C. C. A.) 187 Fed. 915, 919, 110 C. C. A. 49. The power is conferred and the duty is imposed on a federal court, which, at the suit of a citizen of one state against a citizen of another state, to secure from it an adjudication of a controversy between them judicable in the federal court and which first acquires jurisdiction of the controversy and the parties, to protect its jurisdiction of and its power to adjudicate the controversy and to enforce its adjudication by its injunction against any subsequent proceedings in a state court or elsewhere by the defendant, his attorneys, agents or representatives which would or might have the effect to defeat or impair its jurisdiction, its adjudication, its orders, judgments, or decrees or its enforcement thereof. Looney v. Eastern Texas Ry. Co., 247 U. S. 214, 221, 38 Sup. Ct. 460, 62 L. Ed. 1084; Wells Fargo & Co. v. Taylor, 254 U. S. 175, 41 Sup. Ct. 96, 65 L. Ed. ——; Wallace v. McConnell, 13 Pet. 143, 10 L. Ed. 95; French v. Hay, 22 Wall. 250, 22 L. Ed. 857; Dietzsch v. Huidekoper, 103 U. S. 494, 26 L. Ed. 497; St. Louis-San Francisco Ry. Co. v. McElvain (D. C.) 253 Fed. 123, 131; Sharon v. Terry (C. C.) 36 Fed. 337, 364, 365, 366, 1 L. R. A. 572; Julian v. Central Trust Co., 193 U. S. 93, 113, 24 Sup. Ct. 399, 48 L. Ed. 629; Swift v. Black Panther Oil & Gas Co., 244 Fed. 20, 22, 156 C. C. A. 448; Wadley v. Blount (C. C.) 65 Fed. 667, 669, 670, 671, 673, 674, 675; Starr v. Chicago, R. I. & P. Ry. Co. (C. C.) 110 Fed. 3, 6, 7; Prout v. Starr, 188 U. S. 537, 544, 23 Sup. Ct. 398, 47 L. Ed. 584; Smyth v. Ames, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

In Sharon v. Terry (C. C.) 36 Fed. 337, 1 L. R. A. 572, the controversy was between citizens of different states concerning the effect and breach of a marriage contract as the controversy here is concerning the effect and breach of a paving contract. The plaintiff in the federal court first brought suit against the defendant, and the defendant subsequently brought a suit against the plaintiff in a state court to secure an adjudication of the same controversy and obtained the earlier decree, but the federal court held the decree of the state court void because it was violative of the constitutional right of the plaintiff to an adjudication of the controversy and the enforcement of that adjudication by the federal court, because, for the defendant, after the federal court had acquired jurisdiction of the controversy and the parties, to proceed in a suit in the state court against the plaintiff to obtain an adjudication of the controversy by that court, would, if effective, defeat the object of the suit in the federal court, and Judge Field said:

"William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him, and

it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The Constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states, a provision which had its origin in the impression that local attachments and prejudices might injuriously affect the administration of justice in the state courts against the claims of citizens of other states. * * * The jurisdiction of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated, or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible. It is essential to any orderly and decent administration of justice, and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other."

[3] And the conclusion is that the power was vested in and the duty was imposed upon the court below to prevent by its injunction, until it could adjudge the controversy between the Burke Company and the board and its members, and could enforce its final judgment or decree in the suit in that court, the prosecution by the board, its members, attorneys, agents, or representatives, of its suit in the state court against the defendants therein, or any of them, which would or might interfere with, delay, or impair the effect of its adjudication between the Burke Company and the board involved in the first action, which was brought by the Burke Company in that court.

[4] This conclusion renders further discussion and any extended treatment of the motions in this case unnecessary. The contention of counsel for the board, however, that the injunction issued by this court was too broad, because it restrained it from prosecuting any action against the sureties on the bond of the Burke Company to perform the contract, has received consideration, but it has not proved convincing. The liability of the sureties is conditioned by the liability of the Burke Company under the contract, even if they may be severally or separately sued. English v. Shelby, 116 Ark. 212, 220, 172 S. W. 817. And a suit by the board against, and a recovery of them, or of either of them, might, and if the Burke Company were properly called to defend, as it probably would be, probably would determine its liability to pay the amount of that judgment to the surety or the board before the court below could adjudicate the controversy that conditions the liability of the board, the Burke Company, and the sureties. The constitutional right of the Burke Company to the exclusive adjudication of this controversy and to the enforcement of that adjudication by the federal court may not be lawfully evaded or avoided by the board, or by its members or agents, either by joining the sureties of the Burke Company as defendants with the latter in a suit by the board against them, or by suing them separately in a state court to obtain in that court an adjudication of the controversy between the Burke Company and the board, which conditions the liability of each to the other, and the injunction to be issued pursuant to this decision should be broad enough to prevent any such result.

Let the order and decree from which this appeal was taken be reversed, let this case be remanded to the court below, with instructions to issue its injunction in accordance with the views expressed in

this opinion, let the injunction issued by this court herein be, and it is, continued in force until the injunction to be issued by the court below, pursuant to this opinion, takes effect, let the motions of the board and its members for a modification of the injunction issued by this court, and for an injunction against the prosecution by the Burke Company of its action first brought in the federal court below be denied, and let the Burke Company recover its costs in this court.

LEWIS, District Judge (dissenting). Taking the two proceedings as both in personam, I admit at once that the jurisdiction of the Federal court in the law action cannot be ousted or obstructed by the suit in equity brought later in the State court; and I think an admission to the controverse is equally necessary, that the jurisdiction of the State court cannot be ousted or obstructed by the prior action in the Federal court. Each party had a right to invoke, by appropriate procedure, the jurisdiction of the tribunal to which he appealed, and I do not conceive that the right of one is any greater in that respect than that of the other. Each is a suitor before a court with plenary power to decide the one controversy, and there is no presumption that one will decide it better, or more justly, than the other. Jurisdiction is the right and power to hear, consider and determine a controversy between parties litigant. How, then, does the exercise of that power by the State court interfere with or impede the exercise of the same power by the Federal court? The same right, duty and power is lodged in each, it is concurrent, and when exercised by one the controversy is at an end. There would then be no longer a cause in which the power could be exerted, and there could be no conflict or interference. The controversy would become res adjudicata, and the parties plaintiff had an equal right to proceed until that end was reached. I understand this to be the rule of comity which came out of the necessities of our dual system, and which, it is said, ripened long ago into a principle of right and law. I had believed that this court had firmly announced its adherence to the rule in Merritt v. Steel Barge Co., 79 Fed. 228, wherein it is said, at page 232, 24 C. C. A. 530, at page 535:

"Although a judgment may be rendered in the second suit before the first suit is tried, and may be pleaded in bar in the latter suit because the issue and the parties to the two suits are the same, yet it has never been supposed that the fact that a judgment of another court is offered in evidence to conclude the parties on a given issue or issues either defeats or impairs its jurisdiction, or has any necessary tendency to occasion a conflict of authority"

—and in Ogden City v. Weaver, 108 Fed. 564, wherein it is said, at page 568, 47 C. C. A. 485, at page 489:

"It is simply one of those cases, such as frequently occur, where a State court and a Federal court, in the exercise of a jurisdiction which rightfully belongs to each, are called upon to determine the same question, and the fact that they may disagree and decide the question differently in no wise interferes with the right of either to proceed"

—and in W. E. Stewart Land Co. v. Arthur, 267 Fed. 184. In B. & O. R. Co. v. Wabash R. Co., 119 Fed. 678, 57 C. C. A. 322, Judge Jenkins, speaking for the court in the Seventh Circuit, said:

"Where a suit is strictly in personam, in which nothing more than a personal judgment is sought, there is no objection to a subsequent action in another jurisdiction, either before or after judgment, although the same issues are to be tried and determined; and this because it neither ousts the jurisdiction of the court in which the first suit was brought, nor does it delay or obstruct the exercise of that jurisdiction, nor lead to a conflict of authority where each court acts in accordance with law."

Supporting authority may be found in the cases cited above. In Arthur's Case, supra, he was first sued by the Land Company in a Federal court in Iowa, and later by the same plaintiff on the same cause of action in a State court in Oklahoma. This court held that the Land Company should not be enjoined in the maintenance of both actions against him at the same time; and to me it seems an unjust rule that permits the plaintiff to maintain the second action and denies an equal right to the defendant.

I think the order of the District Judge denying the writ in this case should be affirmed, and I therefore dissent

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UNITED STATES v. CASTER et al.*

(Circuit Court of Appeals, Eighth Circuit. March 17, 1921.)

No. 5696.

1. **Indians ⟸14—Public lands ⟸114(1)—Patent to Indian allotment passes title on recording without delivery.**
   Under Rev. St. § 458 (Comp. St. § 705), prescribing the procedure for issuance of a patent, a patent to public lands passes title to the patentee on its being recorded as therein required, before its delivery to the patentee, and this rule applies to lands allotted to Indians, as well as to other public land.

2. **Equity ⟸363—Pleading ⟸8(15)—General allegation of misrepresentation inducing patents to Indian allottees is a conclusion, not admitted by motion to dismiss.**
   A general allegation that the commission appointed by the Secretary of the Interior to examine as to the competency of Indian allottees was misled by misrepresentations that the Indians were competent to control their own affairs is a mere allegation of a conclusion, not admitted by the motion to dismiss, and is insufficient to sustain the complaint as one to cancel the patents for fraud, since fraud must be stated with fullness and particularity.

Appeal from the District Court of the United States for the District of South Dakota; James D. Elliott, Judge.

Suit by the United States, in its own behalf and as guardian of certain Indians, against G. M. Caster and another. From a decree dismissing the complaint, the United States appeals. Affirmed.

E. W. Fiske, U. S. Atty., of Sioux Falls, S. D. (George Philip, Asst. U. S. Atty., of Rapid City, S. D., and John T. Grigsby, Asst. U. S. Atty., of Sioux Falls, S. D., on the brief), for the United States.

E. E. Wagner, of Sioux City, Iowa, and A. H. Orvis, of Yankton, S. D., for appellees.

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

*Rehearing denied June 21, 1921.

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

CARLAND, Circuit Judge. Appellant brought this action, in its own behalf and as guardian of certain Indians of the Yankton Band of the Sioux Tribe of Indians and their heirs, against appellees, for the purpose of obtaining a decree adjudging the appellant to be the owner of the allotted lands described in the complaint, subject to the rights of the Indian allottees mentioned therein, and for the cancellation of all conveyances of said lands made by said Indians to the appellees. On motion of appellees Caster and Hegnes, the complaint was dismissed generally.

The question raised by the appeal is whether or not the complaint states a cause of action. The complaint alleges that the lands in controversy were allotted to the several Indians mentioned therein under the Act of Congress of February 8, 1887 (24 Stat. 388); that pursuant to section 5 of said act (Comp. St. § 4201) the Secretary of the Interior caused trust patents to be issued to each allottee, which patents were—

"of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of 25 years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the state or territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or encumbrance whatsoever: Provided, that the President of the United States may in any case in his discretion extend the period."

That on April 20, 1916, and prior to the expiration of the period for which any of said allotted lands were held in trust, the President of the United States issued an executive order extending the trust period on the allotments described in the complaint for the further period of 10 years. The complaint then alleges as follows:

"For the purpose of assisting him in the exercise of the authority vested by said act of May 8, 1906, the Secretary of the Interior appointed a commission consisting of A. W. Leech, Superintendent of the Yankton Reservation, O. M. McPherson, special agent of the Indian Service, and James McLaughlin, inspector for the Interior Department, and directed such commission to make an investigation of the competency and capability of the Indian allottees residing on the Yankton Reservation to manage and control their property. The commission proceeded to make such an investigation, and on its completion submitted reports to the Secretary of the Interior representing that a number of such Indians, including those named in paragraph II, were competent to manage and control their own affairs and recommending that the Secretary of the Interior issue to them patents in fee covering their several allotments.

"Relying upon such representations and recommendations, the Secretary of the Interior directed that patents in fee be issued to the several Indian allottees named in paragraph II covering their respective allotments. Such patents in fee were thereupon prepared, signed by the President of the United States, countersigned by the Recorder of the United States General Land Office, sealed with the seal of said office, and recorded in said office in a book there regularly kept for the recording of such instruments.

"The Secretary of the Interior decided to make delivery of the patents in person, and notified the successful applicants for patents in fee, including the

allottees named in paragraph II, that he would be in Greenwood, S. D., on May 13, 1916, to make delivery. He arrived there on May 12, 1916, and thereupon learned that he had been grossly misled as to the competency of such allottees; that they were palpably incompetent to manage and control their respective properties and were not qualified to receive patents in fee; that, while such allottees had been represented to him as competent, some of them were wholly untutored, and each and all of them were without business experience, were incapable of protecting his or her property, or of appreciating its true value, and were easily imposed upon by the craft and design of their more astute white neighbors; and that certain of them, as hereinafter stated, before the execution of their respective fee patents in some cases and after such execution in others, but before the time for the delivery of the patents, had been unlawfully, secretly, and surreptitiously imposed upon by white men, and had entered into secret and unlawful agreements for the sale and disposition of their several allotments and had otherwise been duped and defrauded in relation thereto. The said patents having been executed under a misapprehension of the true facts and under a gross mistake, the Secretary of the Interior thereupon refused to deliver the patents, took them back to Washington, and ordered them to be marked 'Canceled.'

"The members of the commission responsible for the representations and recommendations heretofore mentioned had been likewise misled in making their investigations and examinations of the character, habits, industry, etc., of the Indian allottees named in paragraph II and made their findings of fact under a like misapprehension of the true facts and under a gross mistake. The plaintiff therefore avers that title to the said lands is still in the United States for the benefit of the respective allottees, but in any event the plaintiff is entitled to have said patents set aside, canceled and annulled by reason of the mistake of fact and the misrepresentations hereinbefore set out."

The complaint further alleges on information and belief that appellees Caster and Hegnes conspired together unlawfully to obtain the lands involved in this suit, and in furtherance of such conspiracy, and before the execution of the fee patents in some cases and after such execution in others, but before the time for the delivery of the patents, severally had entered into secret and unlawful contracts with certain of the Indian allottees, under which the latter agreed upon receipt of such patents to convey their respective allotments for grossly inadequate considerations to said appellees, and did fraudulently cause said several Indian allottees and their heirs to execute certain warranty deeds and quitclaim deeds, purporting to convey their respective allotments or portions thereof for grossly inadequate considerations. The complaint further alleges:

"Each and all of the Indian allottees were at the time of the execution of such deeds incapable of competently managing and controlling their property. Although fully aware of such incompetency, defendants G. M. Caster or Hegnes, or both, their respective agents or intermediaries, fraudulently and illegally represented to the several Indians that they were competent at law legally to execute such deeds, that the amount of money or other consideration offered in each case for the land involved represented the actual and fair market value thereof, and that said defendants, their respective agents or intermediaries, as the case may be, had lawful authority to make such offers of purchase. Such false representations were made with the intent on the part of the said defendants that the same should be believed and relied on, and the same were believed and relied on, by the several Indian allottees, who, as hereinbefore stated, executed the deeds specified in paragraph XV and received the sums of money offered, or portions thereof, or other considerations, which sums or the value of the other considerations were materially less than the actual or fair market value of the lands involved."

We take judicial notice of section 5 of the Act of February 8, 1887, which provides that if any conveyance shall be made of the lands set apart and allotted as therein provided, or any contract made touching the same, before the expiration of the period for which the lands are held in trust, such conveyance or contract shall be absolutely null and void, also the Act of Congress approved June 25, 1910 (36 Stat. 857 [Comp. St. § 10227]), which makes it unlawful for any person to induce any Indian to execute any contract, deed, mortgage, or other instrument, not authorized by law to be made, purporting to convey any land or any interest therein held by the United States in trust for such Indians or to offer any such contract, deed, mortgage, or other instrument for record in the office of any recorder of deeds, also the Act of Congress approved May 8, 1906 (34 Stat. 182), which authorizes the Secretary of the Interior whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs, at any time to cause to be issued to such allottee a patent in fee simple, instead of awaiting the termination of the trust period.

[1] It will be seen from the foregoing statement of facts that the complaint is drawn primarily upon the theory that the lands in controversy are still the property of the United States subject to the rights of the Indian allottees therein. This theory is inconsistent with the pleaded facts. Ever since the case of U. S. v. Schurz, 102 U. S. 378, 26 L. Ed. 167, was decided it has been settled law that the delivery of a patent in fee of public land is not necessary to pass the title to the patentee. Counsel for appellant admits this to be true, but seeks to make a distinction between what are known as public lands and Indian lands. It is also admitted that patents in fee of both public and Indian lands are issued under and by authority of the provisions of Rev. Stat. § 458 (Comp. St. § 705), which reads as follows:

"All patents issuing from the General Land Office shall be issued in the name of the United States, and be signed by the President, and countersigned by the Recorder of the General Land Office; and shall be recorded in the office, in books to be kept for the purpose."

We cannot find that the officers of the United States having charge of the disposal of the public lands ever made any such distinction as is sought to be made in this case. In 1836, when the law just quoted mentioned "public lands," United States Attorney General Butler (3 Op. Attys. Gen. 167) decided that the words "public lands," as used in section 4 of the law under consideration (Comp. St. § 4198), must be regarded as a comprehensive generic phrase, designed to include all lands the title to which is so circumstanced as to require for its complete transmission a patent from the United States. Subsequently the statute was amended to include all patents. The Supreme Court in the Schurz Case said:

"The acts of Congress provide for the record of all patents for land in an office, and in books kept for that purpose. An officer, called the recorder, is appointed by law to make and to keep these records. He is required to record every patent before it is issued, and to countersign the instrument to be delivered to the grantee. This, then, is the final record of the transac-

tion, the legally prescribed act which completes what Sir William Blackstone calls 'title by record,' and when this is done, the grantee is invested with that title. * * * Whenever this takes place, the land has ceased to be the land of the government; or, to speak in technical language, the legal title has passed from the government, and the power of these officers to deal with it has also passed away. The fact that the evidence of this transfer of title remains in the possession of the land officers cannot restore the title to the United States or defeat that of the grantee, any more than the burning up of a man's title deeds destroys his title." 102 U. S. 402, 403, 26 L. Ed. 167.

See, also, McGarrahan v. New Idria Mining Co., 96 U. S. 316, 24 L. Ed. 630; Lonabaugh et al. v. U. S., 179 Fed. 476, 103 C. C. A. 56; Bicknell v. Comstock, 113 U. S. 149, 5 Sup. Ct. 399, 28 L. Ed. 962; Shaw v. Kellogg, 170 U. S. 340, 18 Sup. Ct. 632, 42 L. Ed. 1050; In re Emblen, 161 U. S. 52, 16 Sup. Ct. 487, 40 L. Ed. 613; Noble v. Union River Logging R. R. Co., 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. 1228, 31 L. Ed. 844; Steele v. Smelting Co., 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Smelting Co. v. Kemp, 104 U. S. 636, 26 L. Ed. 875.

The Department of the Interior and the Department of Justice have acted uniformly on the theory that the law as announced in the Schurz Case is applicable to patents in fee for allotted Indian lands. McLarty, 4 Land Dec. 498; Voght, 9 Land Dec. 122; Spirlock v. Northern Pac. R. R. Co., 22 Land Dec. 92; Barnes, 36 Land Dec. 202; Sullivan, 14 Land Dec. 389; Bowlegs v. Lane, 43 App. D. C. 494; Dickson v. Luck Land Co., 242 U. S. 371, 37 Sup. Ct. 167, 61 L. Ed. 371; Seaples v. Card (D. C.) 246 Fed. 507; King v. McAndrews, 111 Fed. 860, 50 C. C. A. 29. The cases of Northern Pac. R. R. Co. v. U. S., 227 U. S. 356, 33 Sup. Ct. 368, 57 L. Ed. 544, and La Roque v. U. S., 239 U. S. 62, 36 Sup Ct. 22, 60 L. Ed. 147, when the facts in those cases are considered, decide nothing contrary to the Schurz Case; nor does the case of Brown v. Hitchcock, 173 U. S. 475, 19 Sup. Ct. 485, 43 L. Ed. 772. See Warner Valley Stock Co. v. Morrow, 48 Or. 258, 86 Pac. 369. We have examined the other cases cited by counsel for appellant, and do not find that the rule of law established by the Schurz Case has been departed from. We are clearly of the opinion, therefore, that the complaint shows on its face that the title of the United States to the lands in controversy became divested by the execution and recording of the patents in fee, and that said title still remains divested, notwithstanding the attempt on the part of the Secretary of the Interior to reconsider the facts and recall and cancel the patents. If this is so, the appellant has no interest in the lands which would authorize it to maintain the action.

[2] The appellant further contends, however, by way of what seems to be an afterthought, that the complaint states a cause of action which would authorize the cancellation of the patents for fraud practiced upon the officers of the United States having charge of these lands. It is alleged in effect that the commission appointed by the Secretary of the Interior to examine as to the competency of the Indian allottees was misled, and that the Secretary of the Interior was also misled by the representations and recommendations that the Indians were competent to control their own affairs; but this is

a mere allegation of a conclusion of law, which the motion to dismiss does not admit. It has been stated by the Supreme Court of the United States that, when fraud and misrepresentations are relied upon as ground of interference by the court, they should be stated with such fullness and particularity as to show that they must necessarily have affected the action of the officers of the department. Mere general allegations of fraud and misrepresentations will not suffice. Quinby v. Conlan, 104 U. S. 420, 26 L. Ed. 800. There was no mistake of law. Mistake of fact is all that is claimed in the complaint; that is, the fact that the Indians to whom lands were allotted were not competent. Who made the misrepresentations and what they were nowhere appears. We do not believe that an extended discussion of the questions involved would subserve any useful purpose, or make more clear that which appears from a mere inspection of the complaint, which is that it states no cause of action.

Judgment below affirmed.

BLACK v. LA PORTE.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1921.)

No. 5571.

1. **Animals ⇐100(2¼)—Limitation of 60 days inapplicable to trespass suit against tenant.**

The requirement of Comp. Laws N. D. 1913, § 8500, that an action to recover for damages by trespassing animals, in which the animals are held to secure the damages, shall be brought within 60 days, does not apply to an action by a landlord against his tenant to recover damages for breach of a covenant in the lease that the tenant would not pasture his stock upon irrigated lands, in which action the landlord claimed no lien on the trespassing animals.

2. **Landlord and tenant ⇐90(5)—Hold-over tenant is tenant or trespasser, at option of landlord.**

A tenant, who holds over after the expiration of his term, becomes either a tenant or a trespasser, at the option of the landlord.

3. **Landlord and tenant ⇐90(2)—Tenant holds over under terms of lease.**

A tenant, who holds over after the expiration of his term under express permission by the landlord to remain for a reasonable time, holds under the provisions of the original lease, in the absence of the execution of a new lease or express stipulations to the contrary.

4. **Pleading ⇐237(6)—Proffered trial amendment to conform to proof held improperly refused.**

In an action by a landlord against his tenant for breach of covenant in the lease not to pasture stock on irrigated lands, where the evidence showed such pasturing after the expiration of the lease, while the tenant was holding over with permission of the landlord, it was error to refuse a proffered amendment to the plaintiff's complaint, which theretofore had alleged the injury as prior to redelivery of possession and about the date of expiration of the lease, so as to allege the injury to have occurred prior to the date of surrender of possession.

5. **Landlord and tenant ⇐152(3)—Lease held to require tenant to repair dam.**

A covenant in a lease, whereby the tenant bound himself to keep the irrigation system, including the dams, in as good repair as when the

lease was made, imposes an absolute obligation on the tenant to keep the dams in repair, especially where other clauses in the lease made provision for ordinary wear and tear of the premises.

6. **Landlord and tenant ⊂=152(4)—Tenant covenanting to repair must make good damage from natural causes.**

A tenant, who covenanted absolutely to keep the dams of an irrigation system in as good repair as when the lease was made, is required to restore the dam after its destruction by a flood, when it had been weakened by burrowing rodents, especially when the parties had so construed the lease by the tenant making similar repairs after previous destruction of the dam from the same causes.

In Error to the District Court of the United States for the District of North Dakota; Joseph W. Woodrough, Judge.

Action by William Black against John La Porte for damages for the violation of a lease. Judgment for defendant on a verdict directed in his favor, and plaintiff brings error. Reversed, and new trial awarded.

E. B. Goss, of Minot, N. D. (McGee & Goss, of Minot, N. D., on the brief), for plaintiff in error.

L. J. Palda, Jr., of Minot, N. D. (Palda & Aaker, of Minot, N. D., on the brief), for defendant in error.

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

MUNGER, District Judge. The plaintiff in error (hereafter called plaintiff) by an instrument in writing leased a large tract of land in North Dakota to the defendant in error (hereafter called defendant) for a term of years. Plaintiff brought this action, claiming that the defendant had violated the covenants of the lease. The defendant took issue, and pleaded a set-off. A verdict was directed in favor of the defendant for the amount of his set-off, less a small item of damage allowed to plaintiff, and plaintiff prosecutes this proceeding in error.

The specifications of error relate to rulings of the court in refusing to allow plaintiff to make proof under the first count of his complaint, refusing to allow an amendment to that count, and in refusing to submit to the jury the evidence under the second count in the complaint. After some evidence had been offered by the plaintiff, the court sustained an objection to the introduction of evidence under the first count in the complaint, upon the ground that no cause of action was stated in that count. That count alleged the execution of a written lease of the lands from plaintiff to defendant for a period of five years ending April 1, 1917. The lease was set forth, and among its covenants was the following agreement on the part of the defendant:

"That he will use all lands under ditches, and all that part of the above-described land which is under irrigation, for cutting and making hay alone, and that he will use no part of the land under ditches, or irrigated, at any time or during any part of any year, for pasturing horses and cattle."

It was alleged that the defendant occupied these lands under this lease for the five years, and after April 1, 1917, and that he caused plaintiff injury and damages, because in violation of the terms of the

lease, and in the fall of 1916, and the early spring of 1917, and during the term of the lease, he knowingly pastured and allowed the pasturing of his cattle upon the land under ditches and irrigated. Evidence was received on behalf of the plaintiff, showing that defendant occupied the lands under the lease and continued in possession until April 20, 1917, and that defendant's cattle occupied the irrigated lands after April 1, 1917, doing injury thereto. It was also shown that the plaintiff had notified the defendant in January, 1917, that it would not be necessary for him to remove from the lands exactly on April 1, 1917, if the weather was not suitable, and asked the defendant to inform him of the probable date he would remove. The plaintiff also visited at the ranch on April 2, 3, and 4, and again on April 10, 1917.

[1] He then arranged for a purchase from the defendant of some stock, grain, and machinery. The defendant then promised to remove soon, and the plaintiff made no demand for possession by any particular time. At this point the court sustained an objection to the introduction of evidence in support of the first count, upon the ground that it stated no cause of action. The court was influenced to this conclusion by reason of a statute of North Dakota (section 8500, Comp. Laws N. D. 1913) reading as follows:

"Any person owning or having in his charge or possession any horses, mules, cattle, goats, sheep or swine, which shall trespass upon the lands of another, whether fenced or not fenced, shall be liable to the party injured for all damages sustained by him by reason of such trespassing, to be recovered in a civil action in the county in which such damages occurred, and the proceedings shall be the same in all respects as in other civil actions except as herein modified: Provided, that no property shall be exempt from execution issued upon judgments obtained under this chapter except absolute exemptions: And provided, further, that the party claiming damages under the provisions of this chapter shall bring an action to recover the same within sixty days after the infliction of such damages."

Other related sections (sections 8501–8506) allow the person injured to keep the offending animals in custody until the damages are paid or security is given, and for a lien upon the animals for the damages recovered. It was the view of the court that the plaintiff sought recovery under this statute, and that it afforded him the exclusive ground of recovery, and that the action had not been brought within the period of 60 days limited by the statute for beginning suit. The effect of the North Dakota statutes to which reference has been made has been considered by the Supreme Court of that state in the case of Schneider v. Marquart, 178 N. W. 195, and it was held that they applied only to cases where the person injured has seized the cattle and seeks to impress a lien upon the offending animals. We are satisfied with the construction thus given to the statute. The plaintiff in this case was not seeking any such a remedy. The first count of his complaint stated a cause of action for injury done to his lands in violation of the covenants of the written lease, and alleged as occurring before the expiration of its term. The court was in error in sustaining the objection to evidence upon the theory that the first count of the complaint stated no cause of action.

[2] We think the court also erred in sustaining the objection to the further offer of proof under the first count. The proof offered tended to show that the defendant continued to occupy the leased premises until April 20, 1917, and that plaintiff on April 4, 1917, advised the defendant that he was violating the terms of the lease by allowing his cattle to be upon the irrigated lands and that the defendant admitted it to be a violation of the lease and that he knew the lease was then in force. The terms upon which defendant held this land until he surrendered possession on April 20, 1917, were defined by his written lease except as to the length of his term. A tenant for years, holding over after the expiration of his term, without paying rent or otherwise acknowledging a continuance of the tenancy, becomes either a tenant or a trespasser at the sole option of the landlord. Taylor, Land. & Ten. §§ 22, 525; Conway v. Starkweather, 1 Denio (N. Y.) 113; Schuyler v. Smith, 51 N. Y. 309, 10 Am. Rep. 609; Wadsworth v. Owens, 21 N. D. 255, 130 N. W. 932; Dietrich v. Ely, 63 Fed. 413, 11 C. C. A. 266; 2 Tiffany, Land. & Ten. § 209. The plaintiff did not assume to treat the defendant as a trespasser, and this action proceeded on the theory of a tenancy.

[3] The proofs showed that the landlord had given express authority to the tenant to remain after April 1st for a reasonable time, and the tenant had acted upon that authority. No new lease was executed, but, in the absence of express stipulations, the new tenancy created by the tenants holding over after the expiration of a lease is implied by law to be upon the same terms and subject to the covenants contained in the expired lease. City of Plattsmouth v. New Hampshire Sav. Bank, 139 Fed. 631, 71 C. C. A. 507; Baker v. Root, 2 Fed. Cas. No. 780; Wadsworth v. Owens, 21 N. D. 255, 130 N. W. 932; Weston v. Weston, 102 Mass. 514; Harry v. Harry, 127 Ind. 91, 26 N. E. 562; Zippar v. Reppy, 15 Colo. 260, 25 Pac. 164; Taylor, Land. & Ten. § 525; 2 Tiffany, Land. & Ten. 1479; I Underhill, Land. & Ten. § 97.

[4] The proof offered should have been received as tending to show a breach of the covenant of the lease relating to the use of the irrigated land, although the pasturing of the cattle thereon may not have occurred until after April 1, 1917. We think the proffered amendment to the plaintiff's complaint, alleging the injury to have occurred prior to April 20, 1917, should also have been allowed, as it but more clearly stated an injury which had been alleged to have occurred prior to the redelivery of possession to the defendant and about April 1, 1917.

[5] The second count of plaintiff's complaint alleges a breach of another covenant of the lease by which the defendant bound himself to keep the irrigation system then in operation on the lands, including the dams, ditches, laterals, and other improvements in connection with the irrigation system, in as good repair as when the lease was made. It was alleged that the defendant had allowed one retaining dam, which was a part of the irrigation system, to be destroyed, and had failed to replace it, and damages were claimed in consequence of this failure. The evidence supported this claim, but there was some evidence that the dam might have been destroyed by the action of muskrats or other

rodents in so weakening it that an ensuing flood carried it away. The court struck out all testimony under this count, and refused to submit any issue thereunder to the jury, as he was of the opinion that there was no liability of the defendant for the action of the elements or for the weakening of the dam caused by rodents.

As to the lessee's liability for the condition of other portions of the leased premises, there was an expressed exception because of wear and tear and reasonable use, and damages by the elements; but the covenant relating to the irrigation system, and the dams which were a part of it, was an absolute obligation to keep them in repair, and no exception was stated. There is significance in the contrast of these covenants. It is true that other of the covenants, if they stood alone, were broad enough in language to include the irrigation system; but such general provisions must yield to a specific covenant, which singled out the irrigation system for special consideration.

There is another reason why the exceptions in the other covenants should not be read into the covenant relating to the dams and the irrigation system. The dams were made by throwing an embankment of earth across the streams, and the irrigation ditches were cut in the fields. The chief danger to the dams was the action of the elements, the floods arising from high water, and the action of animals such as muskrats in boring into the dam. The chief danger to the irrigation ditches was the ordinary filling of them, because the surrounding soil was carried into them. To allow an exception because of the ordinary wear and the action of the elements would therefore practically nullify the covenant to repair.

The parties also placed an agreed construction on the covenant, for the tenant replaced the dam when it was washed out by a flood in 1915, after muskrats had been working in the banks; and when it was again washed out in 1916 from the same causes, the plaintiff demanded that the defendant rebuild, and the defendant agreed to do the filling for a new dam, and the defendant testified that he had always been anxious and willing to pay for the dam. For these reasons the covenant must be regarded as an express covenant to repair.

[6] When the tenant makes an express covenant to repair, he must make good all damages, not only from processes of ordinary decay, but also from casualty, such as injury or destruction by fire or flood. Dermott v. Jones, 2 Wall. 1, 8, 17 L. Ed. 762; Polack v. Pioche, 35 Cal. 416, 95 Am. Dec. 115; Brecknock v. Pritchard, 6 T. R. 750; Compton v. Allen, Style, 162, 82 Eng. Rep. 612; Digby v. Atkinson, 4 Camp. 275; Leavitt v. Fletcher, 10 Allen (Mass.) 119; Phillips v. Stevens, 16 Mass. 238; Beach v. Crain, 2 N. Y. 86, 49 Am. Dec. 369; Lockrow v. Horgan, 58 N. Y. 635; Hoy v. Holt, 91 Pa. 88, 36 Am. Rep. 659; Gettysburg Electric Ry. Co. v. Electric Light, Heat & P. Co., 200 Pa. 372, 49 Atl. 952; McKinley v. C. Jutte & Co., 230 Pa. 122, 79 Atl. 244, Ann. Cas. 1912A, 452; David v. Ryan, 47 Iowa, 642; Cline v. Black, 4 McCord (S. C.) 431; Ross v. Overton, 3 Call. (Va.) 309, 2 Am. Dec. 552; Crocker v. Hill, 61 N. H. 345, 60 Am. Rep. 322; Fowler v. Payne, 49 Miss. 32; Ely v. Ely, 80 Ill. 532; Nave v. Berry, 22 Ala. 382; Proc-

tor v. Keith, 12 B. Mon. (Ky.) 254; Meyers v. Myrrell, 57 Ga. 518; Armstrong v. Maybee, 17 Wash. 24, 48 Pac. 737, 61 Am. St. Rep. 898; Bradley v. Holliman, 134 Ark. 588, 202 S. W. 469; Lovett v. United States, 9 Ct. Cl. 479; California Dry Dock Co. v. Armstrong (C. C.) 17 Fed. 216; 1 Taylor, Land. & Ten. §§ 357, 360, 364; 24 Cyc. 1085, 1088, 1089. See, also, Berg v. Erickson, 234 Fed. 817, 148 C. C. A. 415, L. R. A. 1917A, 648. The evidence under this count should have been submitted to the jury.

The judgment will be reversed, and a new trial awarded.

FORD MOTOR CO. v. HOTEL WOODWARD CO.

(Circuit Court of Appeals, Second Circuit. February 24, 1921.)

No. 45.

1. **Appeal and error ⇐1097(1)—Rulings on former appeal are law of case, to be followed, except in extraordinary circumstances.**
   The conclusions of law on a former appeal become the law of the case; and, while the court is not absolutely bound thereby, the rules should only be departed from under extraordinary circumstances.

2. **Frauds, statute of ⇐115(4)—Agreement to give lease, signed by prospective lessor, enforceable, though providing for giving of mortgage by lessee, who did not sign.**
   Though it was part of a contract to give a lease that the lessee was to execute a mortgage to secure payment of the rent, it is sufficient, in an action for breach of the contract to make a lease, to show compliance with Real Property Law N. Y. § 259, requiring a contract for the leasing of land for longer than one year to be in writing and subscribed by the lessor, without showing that it was signed by the lessee, notwithstanding section 242, requiring estates in land to be created, etc., by conveyance in writing subscribed by the person creating it.

3. **Frauds, statute of ⇐152(1)—Contract provable by oral testimony, unless statute pleaded.**
   The statute of frauds is a rule of evidence, and, if it be not pleaded, a contract within its terms can be proved by oral testimony alone.

4. **Frauds, statute of ⇐125(3)—Oral contract to give lease not void, but only voidable.**
   Notwithstanding Real Property Law N. Y. § 259, declaring a contract for the leasing of real property for a longer period than one year void, unless in writing, etc., such a contract is not void, but only voidable.

5. **Frauds, statute of ⇐118(2)—When letter referred to draft of lease, the draft was part of the letter.**
   Where a letter signed by prospective lessor was relied on as a memorandum of a contract to give a lease, and referred therein to a draft of a lease thereby approved as amended, the draft as amended became a part of the letter.

6. **Frauds, statute of ⇐118(1)—"Memorandum" may consist of more than one paper.**
   A memorandum, under the statute, is not necessarily one paper, but may consist of a series of letters, telegrams, or written drafts.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Memorandum.]

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7. **Evidence ⟸450(4)—Parties present when agreement in form of letter was written properly permitted to testify to meaning.**
Where an agreement to give a lease, in the form of a letter written by defendant's general attorney in the presence of plaintiff's president, and delivered to the president, stated that a question "of limitation of assignment of equity as security" was left until the lease was signed, such sentence required explanation, and the general attorney and president were properly permitted to testify as to its meaning.

8. **Landlord and tenant ⟸22(4)—Dispute as to what was said, when agreement in form of letter was written, held for the jury.**
Where there was a conflict as to whether defendant's general attorney told plaintiff's president, at the time he signed an agreement, in the form of a letter, to give a lease of part of a proposed building, that defendant would not make the lease at that time, and that the letter was written merely to enable plaintiff to go ahead with its plan to finance its hotel, the question was for the jury.

9. **Landlord and tenant ⟸22(4)—Subsequent modifications in proposed lease not evidence that minds had not met.**
Where defendant's general attorney wrote and delivered to plaintiff's president a letter approving modifications in a proposed lease, the fact that subsequent modifications were made in the contract was not evidence that the minds of the parties had not met at the date of the letter.

10. **Corporations ⟸409—President, vice president, and secretary had prima facie authority to authorize attorney to agree to lease.**
Where the vice president of a corporation had charge of the whole negotiations with a prospective lessee of part of a building which the corporation contemplated constructing, and the president and secretary were also conversant with the matter, they had prima facie authority to authorize the general attorney to agree to give a lease.

11. **Corporations ⟸426(6)—Directors' ratification of negotiations with prospective lessee of contemplated building ratified contract, and provision limiting cost did not restrict lessee's rights.**
Where negotiations by the management of a corporation with a prospective lessee of part of a building, which the corporation contemplated constructing, had resulted in a draft of a lease, providing for an annual rent of $70,000, with an additional rental of 5 per cent. interest on any cost of the building above $700,000, a resolution of the directors, ratifying such negotiations, ratified this contract, and a further provision in the resolution, limiting the cost of the building to $740,000, did not lessen the prospective lessee's rights.

12. **Appeal and error ⟸1004(1)—Damages for breach of contract not reviewable, when no error in evidence or instructions.**
In an action for breach of contract to give a lease, the amount of damages are not reviewable on appeal, in the absence of any error in the admission of testimony or in the charge of the court.

13. **Courts ⟸405(16)—Motion for new trial not part of record or bill of exceptions.**
Under Rev. St. U. S. § 997 (Comp. St. § 1653), rule 14 of the Circuit Court of Appeals for the Second Circuit (235 Fed. vi, 148 C. C. A. vi), and Code Civ. Proc. N. Y. § 1237, on writ of error to judgment, a motion for new trial is not a part of the bill of exceptions, because made after the trial is ended, and not part of the record for review, because discretionary, and because the record consists of the pleading, verdict, and judgment.

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

Action by the Hotel Woodard Company against the Ford Motor Company. Judgment for plaintiff, and defendant brings error. Affirmed.

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

Crisp, Randall & Crisp, of New York City (A. Lucking, of Detroit, Mich., and James M. Beck and W. Benton Crisp, both of New York City, of counsel), for plaintiff in error.

Holm, Whitlock & Scarff, of New York City (Charles H. Tuttle, of New York City, Stephen C. Baldwin, of Brooklyn, N. Y., and Victor E. Whitlock, of New York City, of counsel), for defendant in error.

Before WARD, HOUGH, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is a writ of error to a judgment entered on the verdict of a jury in favor of the plaintiff in the sum of $600,000. The cause of action is for damages for breach of a contract to give the plaintiff a lease of certain premises to be constructed by the defendant in New York City. The defense is that there never was any meeting of the minds of the parties as to the terms of the proposed lease, and that there was no written memorandum of the contract, if contract there was, as required by the statute of frauds.

[1] The complaint was dismissed on a former trial. Hotel Woodward Co. v. Ford Motor Co., 258 Fed. 322, 169 C. C. A. 338. The conclusions of law of that appeal became the law of the case. They were: (1) That the statute of frauds of the state of New York, and not of the state of Michigan, applies. (2) That it was for the jury to determine whether there had been a meeting of minds of the parties. (3) That the letter of August 31, 1916, signed by Robertson, the defendant's general attorney, was a sufficient memorandum under the statute, if he was the defendant's "lawfully authorized agent." (4) That on the record then before the court there was a question for the jury to say whether the officers of the defendant who authorized Robertson to act in the premises were themselves acting with authority.

We have held in Johnson v. Cadillac Co., 261 Fed. 878, 8 A. L. R. 1023, that we are not absolutely bound by the conclusions of the court upon a former appeal; but we should depart from the rule only under extraordinary circumstances, and we are not at all disposed to do so in this case.

[2] On the second trial the defendant was allowed to plead section 242 of the Real Property Law (Consol. Laws, c. 50), and it contends that, as it was a part of the contract that the plaintiff was to execute a mortgage to secure payment of the rent, the memorandum of contract is invalid, because not signed by it as well as by the defendant. But the complaint is for breach of contract to make a lease, and we are of opinion that the only statutory requirement applicable is section 259 of the Real Property Law, which reads:

"Sec. 259. A contract for the leasing for a longer period than one year, or for the sale, of any real property, or an interest therein, is void, unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, subscribed by the lessor or grantor, or by his lawfully authorized agent."

[3, 4] The statute is a rule of evidence. If it be not pleaded, even a contract within its terms can be proved by oral testimony alone.

Matthews v. Matthews, 154 N. Y. 288, 292, 48 N. E. 531. Therefore such a contract is not void; but only voidable, and the word in the statute must be so understood.

Next, it is to be observed that the statute does not require the contract to be in writing, but only a memorandum of it, expressing the consideration, to be signed by the lessor or by his lawfully authorized agent. The letter of August 31, 1916, was as follows:

"Detroit, U. S. A., August 31, 1916.

"Hotel Woodward Company, 55th Street & Broadway, New York City—Gentlemen: Attention of Mr. Green. Confirming our conversation, will say that draft of lease as discussed is entirely acceptable to us, and same will be prepared immediately for execution. We have consented to the alterations suggested by your attorney, as they do not seem in any manner to have changed the intent of the lease. We leave the question of limitation of assignment of equity as security until lease is signed, but think this can be arranged to your entire satisfaction.

"As soon as the lease is ready we will come on to New York and close up the entire matter of the execution of the lease and the security as agreed. In the meantime you may go ahead with any plans you have in connection with this proposition, so that there will be no delay when the architects' plans are ready. Trusting this will be entirely satisfactory, we are,

"Yours very truly, Ford Motor Company,

"L. B. Robertson, Gen'l Attorney."

[5, 6] It was written by the defendant's general attorney, Robertson, in the presence of the plaintiff's president, Green. It refers to a draft of lease then before the writer, which had been prepared by the defendant's attorney, and upon which the plaintiff's attorney had suggested certain emendations in writing. Thus the written draft as amended became a part of the letter, and defendant's general attorney declared it acceptable to the defendant. A memorandum under the statute is not necessarily one paper, but may consist of a series of letters, or telegrams, or written drafts. Ryan v. United States, 136 U. S. 68, at page 83, 10 Sup. Ct. 913, at page 918 (34 L. Ed. 447). Mr. Justice Harlan said:

"Did the papers which passed between the parties, constituting the memorandum of the transaction, contain such a description of the lands in dispute as was sufficient, in connection with extrinsic evidence not contradictory of nor adding to the written description, to meet the requirements of the Michigan statute of frauds? We say 'the papers,' because the principle is well established that a complete contract binding under the statute of frauds may be gathered from letters, writings and telegrams between the parties relating to the subject matter of the contract, and so connected with each other that they may be fairly said to constitute one paper relating to the contract. Beckwith v. Talbot, 95 U. S. 289, 292; Ridgway v. Wharton, 6 H. L. Cas. 238; Coles v. Trecothick, 9 Ves. 234, 250; Cave v. Hastings, 7 Q. B. D. 125, 128; Long v. Millar, 4 C. P. D. 450, 456."

But it is contended by the defendant that the letter plus the draft of lease shows that the minds of the parties had not met, because of this sentence in the letter:

"We leave the question of limitation of assignment of equity as security until lease is signed, but think this can be arranged to your entire satisfaction."

[7-9] Quite obviously this sentence needs explanation, and Green and Robertson, who were the parties present when the letter was written by Robertson and delivered to Green, were properly permitted to testify on the point. Both agree that what was referred to was the provision in the draft lease that the mortgage to be given by the plaintiff to secure payment of the rent should cover all its equity "in the furniture, fixtures, furnishings, etc., placed by it in the building hereby leased." Both agree that the lessee wanted this to be altered, because likely to affect its credit in financing its hotel. But the provision was in the draft lease, and had been accepted by the plaintiff, which draft, as amended, was declared acceptable to both parties. Green testified that this was only a suggestion by the plaintiff for the defendant's consideration; but Robertson testified that he told Green that Klingelsmith, the defendant's vice president and treasurer, would not make the lease at this time, and that the letter was written merely to enable Green to go ahead with his plan to finance the hotel. This was a question for the jury (Rankin v. Fidelity Trust Co., 189 U. S. 242, 252, 23 Sup. Ct. 553, 47 L. Ed. 792), and manifestly the jury has adopted Green's story. The fact that subsequent modifications were made in the contract is no evidence that the minds of the parties had not met August 31, 1916, but it is significant that the defendant subsequently agreed to grant what the plaintiff asked.

Judge Augustus N. Hand instructed the jury that they could not give a verdict for the plaintiff unless they found that the defendant had agreed to make the lease, irrespective of the cost of construction, and that the plaintiff had agreed to give security for payment of the rent on its furniture, etc., in the new building. The verdict establishes both of these points in favor of the plaintiff.

The importance of cost of construction is that both parties supposed, at the time the letter of August 31, 1916, was written, and until early in 1917, that the building could be erected for about $700,000, 10 per cent. upon which represented the rent of $70,000. But the lessor subsequently refused to sign the lease, upon the ground that the cost would be nearer $1,250,000. The question of cost, however, was fully covered by the draft lease, which provided that—

"In addition to the sum above provided to be paid [i. e., on the estimated cost of $700,000], if the cost of the building is in excess of $700,000, the lessee will pay to the lessor an additional rental on a basis of five (5%) per cent. interest per annum of such excess cost."

[10] This brings us to the question of Robertson's authority to sign the letter of August 31, 1916. Klingelsmith, the vice president, after a conversation with Green upon the subject, sent him up to Robertson's office on the same day with the draft lease "to fix the matter up." At least so Green testified; Klingelsmith merely saying that he had referred the matter to Robertson. Klingelsmith had certainly charge of the whole negotiation, and Henry Ford, the president, and Edsell Ford, the secretary, were also conversant with it. This established a prima facie authority in the managing officers to authorize Robertson to do what he did.

"The president or other general officer of a corporation has power, prima facie, to do any act which the directors could authorize or ratify [citing authorities]." Hastings v. B. L. Insurance Co., 138 N. Y. 473, 479, 34 N. E. 289.

November 2, 1916, the following resolution was offered at a meeting of the defendant's directors:

"Whereas, this company owns a parcel of land on Broadway and Fifty-Fourth street, New York, suitable for New York offices and salesroom;

"And whereas, the land is very valuable, and to construct simply an office and salesroom would result in an exorbitantly high cost for offices and salesrooms;

"And whereas, the management of this company, on account thereof, has entered into preliminary negotiations with the Hotel Woodward to occupy part of a suitable building on such site:

"Therefore, resolved, that this company proceed with the erection of the proposed building suitable to that site, for the use of this company as offices and salesroom, and that the negotiations of the management looking to the lease of the balance thereof to the Hotel Woodward Company for a period of 21 years be and they are hereby ratified and confirmed, and the management is authorized to erect the building at an approximate cost of $740,000, and enter into said lease.

"After some discussion further consideration of this resolution was deferred until the next meeting."

[11] At the next meeting this resolution was ratified. The resolution ratified the negotiations of the management with the plaintiff, and that negotiation was expressed in the draft lease with some subsequent modifications. It provided that the rent should be $70,000 on an estimated cost of construction of $700,000, with an additional rental of 5 per cent. interest on any cost above that sum. This was the contract which was ratified and the plaintiff's rights could not be lessened by the provision in the resolution that the management was authorized to erect the building at an approximate cost of $740,000.

[12] The last question is as to the damages. If there was no error in the admission of testimony or in the charge of the court upon this subject, it is wholly without our jurisdiction on appeal. The defendant does not complain of the court's instructions to the jury. It rests its right to review on the refusal of the court to grant a motion for a new trial, on the ground that the verdict was evidently the result of passion and prejudice upon the jury's part.

[13] All that is before us on this writ of error is the bill of exceptions, covering so much of the evidence at the trial as is necessary to present the exceptions taken in the course of it. A motion for a new trial is not a part of the bill of exceptions, because it is made after the trial is ended. It is not part of the record for review, because it is discretionary, and because the record consists of the pleadings, process, verdict and judgment, like the judgment roll in the state court. Code of Civil Procedure, § 1237; Clune v. United States, 159 U. S. 590, 593, 16 Sup. Ct. 125, 126 (40 L. Ed. 269).

"An appellate court considers only such matters as appear in the record. From time immemorial that has been held to include the pleadings, the process, the verdict, and the judgment, and such other matters as by some statutory or recognized method have been made a part of it. There are, for instance, in some states, statutes directing that all instructions must be re-

duced to writing, marked by the judge 'Refused' or 'Given;' and attested by his signature, and that when so attested and filed in the clerk's office they become a part of the record. But in the absence of that or some other statutory provision, a bill of exceptions has been recognized as the only appropriate method of bringing onto the record the instructions given or refused. Struthers v. Drexel, 122 U. S. 487, 491; Supreme Court rule No. 4, 108 U. S. 574; Insurance Company v. Radding, 120 U. S. 183, 193; McArthur v. Mitchell, 7 Kansas, 173; Moore v. Wade, 8 Kansas, 380; Kshinka v. Cawker, 16 Kansas, 63; Lockhart v. Brown, 31 Ohio St. 431; Pettett v. Van Fleet, 31 Ohio St. 536."

Section 997 of the U. S. Revised Statutes (Comp. St. § 1653) provides:

"Sec. 997. *Procedure on Error and Appeal—Removal of Causes by Writ of Error.* There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal, with a citation to the adverse party."

Our rule 14 (235 Fed. vi, 148 C. C. A. vi) provides:

"1. The clerk of the court to which any writ of error may be directed shall on demand of any party and payment of the clerk's fees, make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court."

In Railway Co. v. Heck, 102 U. S. 120, 26 L. Ed. 58, Chief Justice Waite said:

"We have uniformly held that, as a motion for a new trial in the courts of the United States is addressed to the discretion of the court that tried the cause, the action of that court in granting or refusing to grant such a motion cannot be assigned for error here. Schuchardt v. Allens, 1 Wall. 359; Insurance Company v. Barton, 13 Wall. 603."

In Mattox v. United States, 146 U. S. 140, 13 Sup. Ct. 50, 36 L. Ed. 917, the trial court on a motion for a new trial excluded affidavits showing that a newspaper containing an account of the trial prejudicial to the defendant, charged with and convicted of murder, had been sent into the jury room and read by the jurors after they had retired to consider their verdict. The Supreme Court held that this was reviewable, on the express ground that the trial court, having excluded the affidavits, had exercised no discretion whatever as to their contents. No such charge is made here. The trial judge did exercise his discretion. What is complained of is that the conclusion of the jury was erroneous and that the trial judge erred in not granting a new trial.

We have constantly followed the case of Railway Co. v. Heck, supra, in this circuit. Morning Journal Association v. Rutherford, 51 Fed. 513, 2 C. C. A. 354, 16 L. R. A. 803; Smith v. Sun Printing & Publishing Association, 55 Fed. 240, 5 C. C. A. 91. See, also, Ramsdell v. Goumis, 228 Fed. 864, 867, 143 C. C. A. 262, and Suravitz v. Pristasz (C. C. A. 3d) 201 Fed. 335, 119 C. C. A. 573.

The judgment is affirmed.

STOCKLEY et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 24, 1921.)

No. 3521.

1. **Public lands ⇐29—Executive can withdraw land from entry without special authority from Congress.**
   The executive has the right to withdraw lands from entry, settlement, or other form of appropriation without special authority from Congress.
2. **Public lands ⇐96—President may act through Secretary of Interior in withdrawing land from entry.**
   Action by the Secretary of the Interior is a proper method of exercising the power of the President to withdraw public lands from entry, and is to be taken as the act of the President.
3. **Public lands ⇐98—Approval and certificate essential to final entry, which starts limitations.**
   There is no final entry of public lands, within Act March 3, 1891, making the right of the entrymen to such lands absolute when two years have elapsed since final entry without any contest or protest, until the entry has been approved by the register and his final certificate issued; it being insufficient that the fees therefor were received and a receipt given for them, subject to further determination of the rights of the entrymen.
4. **Public lands ⇐98—Final entry held not to have been made two years before rejection of application.**
   Under Rev. St. § 2302 (Comp. St. § 4591), providing that mineral lands are not subject to entry as a homestead whenever that fact becomes known, a homestead on lands which had been withdrawn from entry as oil lands subsequent to settlement, but before entry, so that the authority of the receiver to accept final entry had been withdrawn, was not finally entered by payment and receipt of the fees, subject to future determination of the applicant's rights, at least before the receiver accepted the entry and issued his certificate, so that the entry could be attacked by the United States within two years after the certificate was issued, though that was more than two years after the entry was filed and the fees paid.
5. **Public lands ⇐29—Oil withdrawal held not to except unentered homestead.**
   A withdrawal of oil lands from entry, "subject to existing valid claims," withdraws from homestead entry a tract on which a settlement had been made in good faith, but which had not then been finally entered, and which in fact was subsequently found to contain oil.
6. **Public lands ⇐96—Appeal unnecessary to supervision by Commissioner or Secretary.**
   The power of the Secretary of the Interior and the Commissioner of the General Land Office to supervise the disposal of the public lands, under Rev. St. §§ 441, 453, 456 (Comp. St. §§ 681, 699, 703), can be exercised by them, though no appeal was taken from the decision of the register approving the final entry.
7. **Public lands ⇐108—Finding of Secretary, supported by evidence, is binding on courts.**
   Unless there is an absence of evidence to support them, the findings of fact of the Secretary of the Interior in a matter properly before him are binding on courts.
8. **Appeal and error ⇐1022(2)—Findings of master, approved by court, almost controlling, if substantially supported.**
   Findings of fact by the master, approved by the trial court, are well-nigh controlling on appeal, if there is any substantial evidence to support them.

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

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

Suit by the United States against Thomas J. Stockley and others. Decree for complainant, and defendants appeal. Affirmed.

J. A. Thigpen and S. L. Harold, both of Shreveport, La., for appellants.

Robert A. Hunter, Sp. Asst. Atty. Gen., for appellee.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. On August 2, 1917, the United States filed a bill in equity in the United States District Court for the Western District of Louisiana, at Shreveport, against Thomas J. Stockley, and certain persons claiming under an oil lease executed by him, seeking a decree declaring the United States to be the owner of lot 5 of section 5 in township 20 N., range 16 W., situated in the parish of Caddo, La., containing 29.87 acres, as per plat of survey approved March 28, 1917, by Clay Tallman, Commissioner of the General Land Office, and ex officio Surveyor General for the state of Louisiana, for an accounting for the oil and gas taken from said lot, and for injunction.

The defendants denied the title of the government, and asserted that the land was a homestead owned by said Stockley; that he had made entry on November 13, 1905, and on January 5, 1909, final proof, and had received the receiver's receipt upon final entry on January 16, 1909; that more than two years had elapsed since said final entry, without any contest or protest being initiated, wherefore under the act of Congress approved March 3, 1891 (26 Stat. 1095, c. 561), he had become the absolute owner and entitled to patent thereto; that on March 17, 1910, he had executed a mineral lease to the Gulf Refining Company of Louisiana. The defendants admitted the production of oil from said lands by the Gulf Refining Company, and the amount thereof, and the payment of royalties to Stockley, to W. H. Henderson, Jr., a transferee of Stockley, and to Natalie Oil Company, another transferee of Stockley.

The facts showed: That in 1897 Stockley settled on said land. That on November 13, 1905, he filed his first homestead entry. He lived on said land until a few months before making his final entry. He built a two-room house thereon and cultivated a part of the land. On December 15, 1908, this land, with others, was, "subject to existing valid claims, withdrawn from settlement and entry, or other form of appropriation," by executive order. On the same day, referring to this order, the local register and receiver were instructed by the General Land Office that no rights could be obtained by any proceeding or claim initiated thereafter and that they must reject all such applications, selections, or entries, subject to appeal. That all such applications, selections, entries, and proofs based upon selections, settlements, or rights made prior to the date of withdrawal—

"may be received by you and allowed to proceed under the rules up to and including the submission of final proofs. You must not, however, in such cases receive the purchase money or issue final certificates of entry, but

must suspend the entries and proofs pending investigation as to the validity of the claims with regard to the character of the land and compliance with the law in other respects. You will place such suspended cases in a file in your office, and for the information of this office prepare and forward a schedule thereof with your monthly returns. * * *"

On January 16, 1909, Stockley filed the nonmineral affidavit prescribed to be made for final entry, in which among other things he swore:

"That the land is essentially nonmineral land; that this application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes."

At the time of filing this affidavit he paid to the receiver of public moneys the sum of $3.01 and received a receipt reciting its payment—

"in connection with Hd. Final, Serial No. 1088, for [describing land] 71.25 acres at 1.25 per acre, $———.

Fees	
Commissions	$1.76
Testimony fees, etc.	1.25
	$3.01
Less com's suspended in unofficial mys. (moneys)	1.76
	$1.25

"C. J. Greene, Receiver of Public Moneys."

No certificate of the register accepting the final proofs was made. On February 27, 1912, a contest of Stockley's entry was ordered by the Commissioner of the General Land Office on the ground that the land was mineral, being chiefly valuable for oil and gas, and that Stockley knew facts sufficient to charge him, as an ordinarily prudent man, with notice that the tract contained deposits of oil and gas and was chiefly valuable therefor. On such hearing the register and receiver recommended that the patent issue, but the Commissioner reversed this holding, and on Stockley's appeal the Secretary of the Interior sustained the Commissioner's ruling.

The lapse of two years from the date of Greene's receipt was urged as preventing the denial of the patent. But the Secretary ruled that under the withdrawal order of December 15, 1908, and the instructions forbidding the receiver to receive a final payment, and in the absence of a certificate from the register, there had been no final entry, nor payment on final entry, so as to bring this case within the operation of the Act of March 3, 1891.

The Secretary, however, found that the entry of Stockley had been made in 1905 in good faith, and therefore ordered that he be issued a surface patent under the provisions of the Act of July 17, 1914 (Comp. St. §§ 4640a–4640c), reserving all minerals to the United States. Stockley declined the surface patent. The District Court overruled the plea that the United States was barred by the two-year limitation of the Act of March 3, 1891 (26 Stat. 1095–1099).

The case was referred to a master, who found the facts in favor of the contention of the United States and recommended a decree adjudging the title to the lands in them, and also finding mesne profits against the defendants respectively in certain sums. The court has so decreed.

The defendants appeal, insisting: (1) That under the Act of March 3, 1891, Stockley is entitled to a patent and consequently has complete equitable title to the property. (2) That his homestead entry was never affected by the order of withdrawal. (3) That the orders of the Secretary of the Interior and Commissioner of the General Land Office were illegal, null, and void, the decision of the legal register and local receiver not having been appealed from. (4) That said decisions are null and void because the land in question was not mineral at the time of final entry, and that there was no evidence so showing.

[1] 1. The rights of the Executive to withdraw lands from entry, settlement, or other forms of appropriation, without special authority from the Congress, is no longer open to question. Sustaining the power of the Executive, the Supreme Court of the United States has said:

"The Executive, as agent, was in charge of the public domain. By a multitude of orders, extending over a long period of time and affecting vast bodies of land, in many states and territories, he withdrew large areas in the public interest. These orders were known to Congress, as principal, and in not a single instance was the act of the agent disapproved. Its acquiescence all the more readily operated as an implied grant of power, in view of the fact that its exercise was not only useful to the public, but did not interfere with any vested right of the citizen." United States v. Midwest Oil Co., 236 U. S. 459, 475, 35 Sup. Ct. 309, 314 (59 L. Ed. 673.)

[2] The action of the Secretary of the Interior is a proper method of exercising the power of the President, and is to be taken as his act. United States v. Morrison, 240 U. S. 192, 36 Sup. Ct. 326, 60 L. Ed. 599.

[3] 2. We do not think that this case falls under Act of March 3, 1891, or that there had ever been issued a receipt of the receiver on final entry. According to the testimony in this case, to constitute a final entry, the papers are submitted to the local register and local receiver. If approved by them, the register issues a certificate and the papers are sent to the General Land Office.

That the final entry is not made until the certificate of the register is issued is apparent from the ruling of the Interior Department:

"The proviso has reference solely to entries upon which final certificate has issued. Hence, any action that was taken with reference to this entry prior to the issuance of the final certificate cannot be considered as affecting the question whether the entry was or was not confirmed, as the action contemplated by the statute must be taken with reference to the final entry. No case is brought within the terms of the act until after the final certificate has been issued. That fixes the period within which action must be taken to defeat confirmation under the proviso." Ira M. Bond, 15 Land Dec. 228.

"The language of the statute is, 'After the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry,' and when there shall be no pending contest or protest against the validity of 'such entry' the entryman shall be entitled to a patent. This case was not brought within the terms of the act until the issuance of the final certificate March 6, 1893. To defeat the confirmation it was necessary that some action should have been taken against that entry, within two years from that date." Azariah W. Colburn et al., 29 Land Decisions, 539.

"It is too much to say that the mere offering of final proof by an entryman, together with the final commissions or the price of the land, constitutes a final entry. As stated, final entry presupposes an adjudication and acceptance by the register of the proof submitted, and the final certificate thereupon

issued constitutes a formal declaration that the claimant is entitled to patent. It cannot be contended that the proviso to the act of 1891 relieved the register of his adjudicating power, and final entry is in no case allowed by him until and unless from the showing submitted he is satisfied that the law has been complied with." Veatch Case (decision rendered November 26, 1918) 46 Land Dec. 496.

This is in harmony with the practice recognized by the United States Supreme Court in Orchard v. Alexander, 157 U. S. 372, 383, 15 Sup. Ct. 635, 639 (39 L. Ed. 737):

"Again, one of the instructions issued by the Land Department to the registers and receivers, and which has been in force for half a century, is this: 'Final proof in preemption cases must be made to the satisfaction of the register and receiver, whose decision, as in other cases, is subject to * * * review by this office.'"

That the mere receipt of the money by the receiver, until the papers are accepted as a final entry by the register and receiver and the register's certificate issued, is not a "receipt on final entry," is made manifest by the instructions of the Commissioner of the General Land Office issued June 1, 1908, as follows:

"28. The issuance of a receipt by a receiver of public moneys does not mean that the application, entry, proof, etc., in connection with which it is issued, is allowed or approved, or will be allowed or approved. It merely means that he has received the money and that it is in his custody until it is applied or returned.

"29. If, after a receipt has been issued, the application, entry, proof, etc., with which the money was tendered cannot be allowed or approved, or the transcripts of records, plats, etc., cannot be made, you will notify the party to whom the receipt issued, and, with this notification, the money tendered must be returned in the following way: * * *

"31. If, after a receipt has issued, the application, entry, proof, etc., can be allowed or approved, no further receipt for the money paid in connection therewith will be issued; but notice of such allowance or approval will be given the person to whom the receipt issued. Such notations as "Application not yet allowed," or "Certificate not yet issued," are not necessary on the receipts nor the abstracts."

It is evident, therefore, that this case is wholly unlike that of Lane v. Hoglund, 244 U. S. 174, 37 Sup. Ct. 558, 61 L. Ed. 1066. In that case the land was fully open to entry, although covered with forest, at the time when entered. The case of one in Hoglund's condition was expressly excepted by the withdrawal order. It expressly excepted any land—

"embraced in any legal entry or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make the filing of record has not expired."

Hoglund had complied with every requirement of the law, and had secured the approval of his papers from the local officers, a receipt from the receiver, and a certificate from the register; the certificate stating that on presentation thereof to the General Land Office he was entitled to a patent for the land mentioned therein. Here a nonmineral affidavit was made, which was essential to the making of a final entry, and it

has been ruled that the facts within Stockley's knowledge at the time charged him with notice that it was not true.

[4] In this case, these lands, being mineral, were not subject to being entered as a homestead whenever that fact became known. Rev. Stat. § 2302 (Comp. St. § 4591). Prior to the presentation of any final entry they had been withdrawn from entry. The right of the receiver to accept any money from an entryman had been withdrawn by the letter of December 15, 1908. Payment of the moneys due was made to an officer then forbidden to take it.

No approval of the local officers was ever made until March 1, 1913, when the local register and receiver rendered a decision in favor of Stockley. On review by the Commissioner he reversed this finding in December, 1913, and ordered the homestead entry held for cancellation, subject to appeal to the Secretary. Such appeal was taken, and the Secretary affirmed the Commissioner's finding, holding that the effect of the order of the department, made on December 15, 1908—

"was to suspend this and other entries in like situation, and the receipt issued by the receiver in this case was merely an evidence of the payment of fees and commissions, and did not and could not relieve the entry from the suspension created by said order of December 15, 1908."

The Secretary further found:

"The investigation made and the evidence submitted convince the department that the lands are, and were at date of final proof, valuable for their deposits of oil and gas, and that consequently this department is, under the circumstances, without authority to issue final certificate and patent for said land, including the said mineral deposits. If patent be issued to the entryman, it must be under the provision of the act of July 17, 1914, supra, reserving to the United States the deposits of oil and gas in the land. The decision of the Commissioner, finding the lands to be mineral in character, is therefore affirmed; but under the circumstances the department finds no evidence of bad faith existent at the time of the original entry in 1906, and is of the opinion that the entryman may be given a limited patent under the Act of July 17, 1914. As thus modified, the Commissioner's decision is affirmed, and, should this decision become final, the entryman will be permitted to take patent under the provisions of said Act of July 17, 1914."

It thus appears that in this case no payment on final entry was made to the receiver, that no final entry was made until March 1, 1913, and that therefore the Act of March 3, 1891, did not, if applicable, prevent the rejection of the application. Further, what was really decided by the Secretary was that the entryman was entitled to receive a patent restricted to the surface of the land, reserving the minerals to the United States. This vested in him all agricultural rights—that for which he said he was entering the land.

[5] 3. It is insisted that Stockley's right to his homestead is excepted from this order of withdrawal of December 15, 1908, by its terms, whereby the withdrawal is made "subject to existing valid claims." But at the time of this withdrawal Stockley had not presented any claim for final entry. The withdrawal order was based on the belief that these lands contained oil and were not agricultural. Until the issuance of a patent the United States has the right to ascertain if the

lands are in fact mineral or not. Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; Parsons v. Venzke, 164 U. S. 89, 17 Sup. Ct. 27, 41 L. Ed. 360.

"In other words, the power of the department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed." Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 18 Sup. Ct. 208, 209 (42 L. Ed. 591).

The cases relied on by the appellants are cases of conflicting rights between an entryman and third parties, and are not in point in defining the relative rights of an entryman before final entry as against the government. This is clearly shown by the decisions. In the Yosemite Valley Case, where one had purchased the improvements of an older settler and taken possession, prior to the passage of the act of Congress granting the valley as a park to the state of California, with the intention to take up a homestead, it was held:

"The simple question presented for determination is whether a party, by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. * * * The question here presented was before this court, and was carefully considered, in the case of Frisbie v. Whitney, reported in 9 Wallace, and it was there held that under the pre-emption laws mere occupation and improvement of any portion of the public lands of the United States, with a view to pre-emption, do not confer upon the settler any right in the land occupied, *as against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper; and that the power of regulation and disposition, conferred upon Congress by the Constitution, only ceases when all the preliminary acts prescribed by those laws for the acquisition of the title, including the payment of the price of the land, have been performed by the settler. When these prerequisites have been complied with, the settler for the first time acquires a vested interest in the premises occupied by him, of which he cannot be subsequently deprived. He is then entitled to a certificate of entry from the local land officers, and ultimately to a patent * * * from the United States. Until such payment and entry the acts of Congress give to the settler only a privilege of pre-emption in case the lands are offered for sale in the usual manner; that is, the privilege to purchase them in that event in preference to others. The United States by those acts enter into no contract with the settler, and incur no obligation to any one that the land occupied by him shall ever be put up for sale. They simply declare that in case any of their lands are thrown open for sale the privilege to purchase them in limited quantities, at fixed prices, shall be first given to parties who have settled upon and improved them. The legislation thus adopted for the benefit of settlers was not intended to deprive Congress of the power to make any other disposition of the lands before they are offered for sale, or to appropriate them to any public use. * * * The whole difficulty in the argument of the defendant's counsel arises from his confounding the distinction made in all the cases, whenever necessary for their decision, between the acquisition by the settler of *a legal right to the land* occupied by him as against the owner, the United States, and the acquisition by him of a *legal right as against other parties to be preferred in its purchase*, when the United States have determined to sell." The Yosemite Valley Case, 15 Wall. 77, 86, 87 (21 L. Ed. 82).

These cases are cited with approval in the case of Shiver v. United States, 159 U. S. 491, 496, 16 Sup. Ct. 54, 56 (40 L. Ed. 231), where it is also said:

"The right which is given to a person or corporation, by a reservation of public lands in his favor, is intended to protect him against the actions of third parties, as to whom his right to the same may be absolute. But, as to the government, his right is only conditional and inchoate."

Here the entryman was applying for an agricultural homestead. The statutes regulating such homesteads expressly provided:

"Nor shall mineral lands be liable to entry and settlement under this provision." Rev. St. § 2302 (Comp. St. § 4591).

He applied, after withdrawal, for final entry, filing the required nonmineral affidavit, which was, as held by the Land Department and found as a fact, untrue. He cannot be considered as one having a legal valid claim to this homestead against the United States.

[6] 4. That no appeal was taken from the finding of March 1, 1913, made by the register and receiver, does not deprive the General Land Commissioner and the Secretary of the Interior of jurisdiction to review the same. Supervision of the action of the local register and receiver in accepting or rejecting final entries of homesteads is vested in the Commissioner of the General Land Office and the Secretary of the Interior, who can review and reverse the action of such registers and receivers. Revised Statutes, §§ 441, 453, and 456 (Comp. St. §§ 681, 699, 703), provide:

"Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: * * * Second. The public lands, including mines. * * *"

"Sec. 453. The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands, and, also, such as relate to private claims of lands, and the issuing of patents for all grants of land under the authority of the government."

"Sec. 456. All returns relative to the public lands shall be made to the Commissioner of the General Land Office."

The Supreme Court of the United States has affirmed the power to exercise this supervision, in the absence of an appeal:

"The phrase 'under the direction of the Secretary of the Interior,' as used in these sections of the statutes, is not meaningless, but was intended as an expression in general terms of the power of the Secretary to supervise and control the extensive operations of the land department of which he is the head. * * * As was said by the Secretary of the Interior on the application for the recall and cancellation of the patent in this Pueblo Case (5 Land Dec. 494): 'The statutes in placing the whole business of the department under the supervision of the Secretary, invest him with authority to review, reverse, amend, annul or affirm all proceedings in the department having for their ultimate object to secure the alienation of any portion of the public lands, or the adjustment of private claims to lands, with a just regard to the rights of the public and of private parties. Such supervision may be exercised by direct orders or by review on appeals. The mode in which the supervision shall be exercised in the absence of statutory direction may be prescribed by such rules and regulations as the Secretary may adopt. When proceedings affecting titles to lands are before the department the power of supervision may be exercised by the Secretary, whether these proceedings are called to his attention by formal notice or by appeal. It is sufficient that they are brought to his notice. The rules prescribed are designated to facilitate the department in the despatch of business, not to defeat the

supervision of the Secretary. For example, if, when a patent is about to issue, the Secretary should discover a fatal defect in the proceedings, or that by reason of some newly ascertained fact the patent, if issued, would have to be annulled, and that it would be his duty to ask the Attorney General to institute proceedings for its annulment, it would hardly be seriously contended that the Secretary might not interfere and prevent the execution of the patent. He could not be obliged to sit quietly and allow a proceeding to be consummated, which it would be immediately his duty to ask the Attorney General to take measures to annul. It would not be a sufficient answer against the exercise of his power that no appeal had been taken to him and therefore he was without authority in the matter." Knight v. United States Land Association, 142 U. S. 161, 177, 178, 12 Sup. Ct. 258, 262 (35 L. Ed. 974).

See, also, Orchard v. Alexander, 157 U. S. 372, 15 Sup. Ct. 635, 39 L. Ed. 737; Plested v. Abbey, 228 U. S. 42, 33 Sup. Ct. 503, 57 L. Ed. 724; Hawley v. Diller, 178 U. S. 481, 488, 20 Sup. Ct. 986, 44 L. Ed. 1157; Kirk v. Olson, 245 U. S. 225, 228, 38 Sup. Ct. 114, 62 L. Ed. 256.

5. The findings of the General Land Commissioner and the Secretary of the Interior are not without evidence to support them and are valid. Here the General Land Commissioner and the Secretary of the Interior, on appeal, after hearing from the entryman, found as facts that at the date of application for final entry the land was mineral in character and that the applicant when making his nonmineral affidavit had knowledge of facts, which put a man of ordinary intelligence on notice that it was mineral. It is conceded that, not long after making such affidavit, he leased the land to an oil company, for the purpose of its raising oil, reserving royalties.

[7] Unless there is an absence of evidence to support them, the findings of fact of the Secretary of the Interior, in a matter properly before him, are binding on the courts. Johnson v. Riddle, 240 U. S. 467, 36 Sup. Ct. 393, 60 L. Ed. 752. The master has found on the facts that the land was mineral in character and that the entryman was charged with notice of its character at the time he made his application for final entry and his non-mineral affidavit. The trial court has approved these findings of fact.

[8] It cannot be said that there is a want of evidence upon which to base them. The findings of fact of the master approved by the trial court are well-nigh controlling on appeal, if there is any substantial evidence to support them. Osley et al. v. Adams (C. C. A.) 268 Fed. 114, 117; In re Schwab-Kepner Co., 203 Fed. 475, 121 C. C. A. 597; Greey v. Dockendorff, 231 U. S. 513, 34 Sup. Ct. 166, 58 L. Ed. 339.

The decree of the District Court is affirmed.

GILLESPIE v. BOBO et al.

(Circuit Court of Appeals, Fifth Circuit. March 16, 1921.)

No. 3619.

1. **Mines and minerals ⇐78(2)—Provision in lease for extension by payment of rental held an option, failure to exercise which terminated lease.**
In an oil and gas lease, giving lessee the right to drill within one year, otherwise the lease to terminate, a provision that on payment of a stated sum within the year the time for drilling should be extended for six months *held* to give lessee an option, of which time was of the essence, and on failure to exercise the option within the year lessee's rights *held* terminated, not by forfeiture, but by termination of the lease in accordance with its terms.

2. **Mines and minerals ⇐79(4)—Mailing check incorrectly addressed not valid exercise of option to extend lease by payment.**
Under an oil and gas lease, giving lessee the right to drill for the term of one year, with an option to extend the term by payment of a stated sum within the year, the mailing of a check for the sum within the year, which was not received by lessor because incorrectly addressed, *held* not a valid exercise of the option.

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

Suit in equity by Arinda Bobo and husband, against E. N. Gillespie and others. Decree for complainants, and defendant Gillespie appeals. Affirmed.

Alexander S. Coke, of Dallas, Tex., and William A. Sipe, Jr., of Tulsa, Okl., for appellant.

R. W. Flournoy, of Fort Worth, Tex., and F. O. McKinsey, of Weatherford, Tex. (Power, Dryden & Rawlings and Flournoy & Smith, all of Fort Worth, Tex., F. O. McKinsey, of Weatherford, Tex., and Stuart & Rattikin, of Fort Worth, Tex., on the brief), for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

WALKER, Circuit Judge. By a written instrument executed on the 30th day of October, 1917, the appellees, Arinda Bobo and her husband, J. W. Bobo, for a stated cash consideration, and for a named share in the oil or other minerals that might be produced, did "grant, demise, lease and let" to C. L. Garrett a described 80-acre tract of land in Eastland county, Tex., "for the sole and only purpose of operating for and producing oil, gas, coal and other minerals thereon and therefrom," with rights of way and other specified privileges necessary, incident to, or convenient for the economical operation of said land for oil, gas, coal or other minerals. The instrument, which will be referred to as the lease, contained the following provision:

"If operations for the drilling of an oil or gas well are not begun on said land on or before the 30th day of October, 1918, this lease shall terminate as to both parties, unless the lessee on or before that date shall pay or tender to the lessor, or send to Arinda Bobo, the sum of $80.00, which payment or tender may be made by the check or draft of the lessee, and, however made,

shall operate to confer on the lessee the privilege of deferring the commencement of such well, for six months from said date Thereafter, in like manner and upon like payments or tenders of said amount, the commencement of said well may be further deferred for additional periods of six months successively, provided always that this lease cannot be kept in force by such payments in the absence of drilling operations for a longer period than ten years from the date last above set forth, if within said time, oil or gas is not found in paying quantities, but if so found, this lease shall continue in full force and effect so long as oil or gas is found in paying quantities."

On May 3, 1918, Garrett assigned the lease to Burford-Brimm Oil & Gas Company. On May 7, 1918, Burford-Brimm Oil & Gas Company assigned the lease to the appellant, E. N. Gillespie. Based upon allegations to the effect that operations for the drilling of an oil or gas well were not begun on said land on or before the 30th day of October, 1918, and that the above-quoted provision of the lease was not complied with according to its terms, the appellees, the lessors, asserted in this suit the claim that the lease had ceased to be effective. The appellant admitted that a well was not commenced on the leased land on or before October 30, 1918, but set up the following state of facts as support for the asserted claim that the rights conferred by the lease had not expired:

Appellant is a citizen and resident of Pennsylvania. Since prior to May, 1918, he has maintained an office in Tulsa, Okl., from which has been transacted such business as he has transacted in Texas. The headquarters of appellant's assignor, Burford-Brimm Oil & Gas Company, are in Tulsa. About two weeks prior to the 30th day of October, 1918, one Funk, appellant's representative at Tulsa, who was charged with the duty of paying rentals on leases held by appellant, examined the lease and found that it gave no information as to the address of the appellee Arinda Bobo. Thereupon Funk applied at the office of Burford-Brimm Oil & Gas Company for information as to the whereabouts or address of Arinda Bobo. The persons connected with Burford-Brimm Oil & Gas Company, from whom Funk expected to get the desired information, were not then in Tulsa, and Funk awaited the return of such persons until October 28, 1918, on which day he telegraphed to C. L. Garrett, the original lessee, at Eastland, Tex., for the address of Arinda Bobo. Failing to get a prompt response to that telegram, Funk, on the evening of October 28, got into communication with Garrett over the long-distance telephone from Tulsa. Garrett then promised to secure the desired address at once and advise Funk thereof by wire. During the afternoon of the next day Garrett sent to Funk at Tulsa a telegram stating, "Arinda Bobo's address Box 43 A, Fort Worth, Texas." Funk received that telegram during the same afternoon. Immediately upon receipt of it Funk, by registered letter addressed to "Mrs. Arinda Bobo, Box 43, Fort Worth, Texas," sent appellant's check to her order for $80 in payment of rental under the lease. As in the telegram the letter "A" was separated by spaces of equal length from the figures preceding it and the word following it, Funk, according to his testimony, construed the insertion of that letter as a typographical error. The registered letter was received at the Fort Worth post office on October 30th. It was not called for in re-

sponse to notices mailed to the address found on the letter. Before that letter was returned to the sender, Funk learned that the appellees were claiming that, because of nonpayment of $80 pursuant to the above set out provision, the lease had ceased to be effective. Thereupon he promptly tendered that amount, and the tender was refused. The failure of appellant to comply strictly with the terms of the quoted provision was attributed to mistake, misunderstanding, or accident.

The following was disclosed by evidence adduced:

Arinda Bobo lived in the country near Fort Worth, on a rural route. Her correct address was "R. F. D. 1, Box 43 A, Forth Worth, Texas." At Fort Worth city post office boxes are designated by numbers only, but some rural boxes are designated by a number followed by a letter. The address "Box 43 A, Fort Worth, Texas," suggests that the addressee is on a rural route. The custom as to mail so addressed is for a directory clerk to make inquiries of rural carriers to ascertain on what route the addressee lives. The carrier on route 1 knew Arinda Bobo, and that her box on that route was 43 A.

One of the court's findings, upon which was based its decree disallowing the claim asserted by the appellant, was to the effect that he was negligent in the tender or sending to the appellee Arinda Bobo of the $80 required to be paid, tendered, or sent to her on or before the 30th day of October, 1918, to prevent the termination of the privilege conferred by the lease.

Even if the assertion by the appellees of the claim that the lease ceased to be in force in consequence of a noncompliance with the terms of the provision above set out amounted to claiming a forfeiture, it seems that appellant would not be entitled to relief against such forfeiture, if his failure to comply was due to his own negligence, and not to unavoidable accident, fraud, surprise, or excusable ignorance. Pomeroy's Eq. Juris. (4th Ed.) § 451. It cannot well be said that the evidence furnished no support for the court's finding that the appellant was negligent in the matter of tendering or sending the money to Mrs. Bobo. It is not a strained inference from the evidence adduced that, if due diligence had been exercised, or even if the address given had been used, the $80 could have been got to Mrs. Bobo in time to prevent her raising any question about the acceptance of it. But the court's decree may be sustained on grounds other than the negligence of the appellant in the matter of sending the $80.

[1] There was no forfeiture within the meaning of the equitable rule or doctrine on that subject. A result of a forfeiture is a loss or divestiture of something previously acquired or vested conditionally. 10 R. C. L. 329. The consequence of a failure to do what is required to acquire a right or thing is not a forfeiture of it. A forfeiture by a debtor is frequently prescribed or provided for as a means of securing the payment of the debt, the subject of the forfeiture being of greater value than the amount of the debt. In such case, equity, recognizing that the main purpose is to afford security to the creditor, relieves the debtor from the forfeiture upon his paying the debt, with interest; the payment of interest being full compensation for the debtor's failure to pay

the debt when it was due. 1 Pomeroy's Eq. Jur. (4th Ed.) § 381. It was no part of the purpose of the above set out provision of the lease to secure the payment of any sum due to the appellees or either of them. The appellant was under no obligation to pay the $80. There was no debt to be secured. The quoted provision stated the condition to be complied with by the lessee to obtain an extension of the time allowed for beginning drilling operations. Compliance with that condition would have been the exercise of an option given to the lessee.

Such instruments as the one in question have been passed on frequently by the courts of Texas. It is well settled by the decisions of those courts that such an instrument confers on the so-called lessee a privilege for the specified time, with the option to secure the extension of the privilege for an additional period upon complying with the prescribed condition, and that time is of the essence of such a provision as the one above set out. Ford v. Barton (Tex. Civ. App.) 224 S. W. 268; Bailey v. Williams (Tex. Civ. App.) 223 S. W. 311; Young v. Jones (Tex. Civ. App.) 222 S. W. 691; Ford v. Cochran (Tex. Civ. App.) 223 S. W. 1041. The equitable rule as to relieving against forfeitures has no application to the case of a failure of a holder of an option to do, within the time fixed, what is required to acquire the thing which is the subject of the option. Equity does not undertake to dispense with compliance with what is made a condition precedent to the acquisition of a right. Kelsey v. Crowther, 162 U. S. 404, 16 Sup. Ct. 808, 40 L. Ed. 1017; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; 1 Pomeroy's Eq. Juris. (4th Ed.) § 455.

The contract states the terms on which the appellees agreed that a termination, on October 30, 1918, of the privilege of drilling or exploring for oil or other minerals, could be prevented. It conferred no right to prevent such termination, otherwise than by a compliance with those terms.

[2] It may be conceded or assumed that the provision would have been complied with if the check for $80 had been duly mailed to Arinda Bobo on or before the 30th day of October, 1918, though not in time to reach her on that day. But if a sending by mail was in the contemplation of the parties it must also have been intended that the address used would be such a one as to give some assurance that the check would, in due course of the mail, reach Arinda Bobo. We think the incorrectness of the address made use of kept the mailing of the check from being a sending of it to Mrs. Bobo within the meaning of the contract. The result would not have been different if the name stated in the address had been that of another person, a stranger to the contract.

The evidence did not show that the appellant did what was required to constitute an exercise of his option within the time allowed by its terms. The court properly ruled against the claim he asserted.

The decree is affirmed.

HINES, Director General of Railroads, v. HOOVER.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1921.)
No. 3633.

1. **Railroads ⇐312(15)—Duty to exercise care required by circumstances when approaching crossing.**
   It is the duty of those in charge of a train in approaching a road crossing, in addition to compliance with statutory requirements, to perform any other acts required by the circumstances of the case and dictated by the rules of ordinary care and diligence.
2. **Railroads ⇐350(16)—One approaching crossing not bound as matter of law to stop, look, and listen.**
   It is not the general rule that one approaching a railroad crossing is bound, as a matter of law, always and under all circumstances to stop, look, and listen.
3. **Railroads ⇐301—Duty of care at crossings mutual and reciprocal.**
   The obligations, rights, and duties of railroads and travelers on intersecting highways are mutual and reciprocal. It is the duty of the railroad to give such warning as is reasonable and timely under the circumstances of the case, and of those crossing the track to exercise ordinary care and diligence to ascertain whether a train is approaching, and whether such care has been exercised by either party under the particular circumstances of the case is usually a question for the jury.
4. **Railroads ⇐346(6)—One approaching crossing presumed to have looked and listened.**
   In the absence of evidence, the presumption is that one approaching a railroad crossing looked and listened.
5. **Railroads ⇐350(9)—Liability for killing person at crossing question for jury.**
   In an action for the death of a person killed while crossing a railroad track in an automobile by a train running 50 miles an hour, which could not be seen from the highway until within 20 feet from the track, where the bell was not being rung, and whether the statutory whistle signal was given was in dispute, the case *held* properly submitted to the jury.

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

Action at law by Sarah Ann Hoover against Walker D. Hines, Director General of Railroads, operating the Atlantic Coast Line Railway. Judgment for plaintiff, and defendant brings error. Affirmed.

A. A. Lawrence, Edmund H. Abrahams, and F. R. Youngblood, all of Savannah, Ga., for plaintiff in error.

F. M. Oliver and Edgar J. Oliver, both of Savannah, Ga., for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. This suit was brought by defendant in error, herein called plaintiff, against the Director General of Railroads, to recover damages for the death of her husband.

Plaintiff's decedent was killed by a passenger train of the Atlantic Coast Line Railroad Company at Drakie's road crossing in the village of Monteith, Ga. The railroad extends in a north and south line through this village. About 375 feet south of the Drakie road cross-

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

ing, a public highway 20 feet in width, called the Augusta road, crosses the railroad obliquely, and bears away from it north of the public crossing in a straight line, and at a distance of 900 feet is approximately 300 feet west of the railroad track. Drakie's road begins and leads away from the Augusta road at a point about 50 feet west of the railroad track, which it intersects at right angles. Although Drakie's road is not a public road, it was in common use many years before the railroad was built, and Drakie's crossing has been maintained and kept in repair by the railroad company. There is another private road, leading eastward from the Augusta road, which crosses the railroad about 325 feet north of the Drakie road crossing. Between these two private crossings, and lying between the Augusta road and the railroad, are two houses, a fence, a tree, and a grape arbor, extending up to the railroad right of way and within 35 feet of the track. At the time of the accident the right of way was grown up in weeds so high, according to some of the witnesses, that it was impossible for a man riding in an automobile to see a train coming from the north until he was within 15 or 20 feet of the railroad track. There was some testimony that the view was obstructed by the weeds as close as 5 feet of the track. On the right of way, also, was a small station house which further obstructed the view to the north.

Just immediataely before the accident, plaintiff's husband started his automobile from the intersection of the Drakie and Augusta roads, and was proceeding to cross the track on Drakie's road when a train coming from the north struck the automobile which he was driving and killed him. The train was at least half an hour behind its schedule, and no train was due at that time. The schedule called for an average speed of 35 miles per hour, with the privilege of running as high as 50 miles per hour to trains making up lost time. The evidence was in conflict as to the speed of the train at the time of the accident; some of the witnesses testifying to a rate not exceeding 35 miles per hour, and others estimating the speed at from 50 to 65 miles per hour. The witnesses agreed that two short blasts of the whistle were sounded at the moment of the collision, but there was conflict as to whether the whistle was blown before that. The engineer testified that he did not see plaintiff's husband until he was within 15 feet of the track, and that after that he made every possible effort to stop the train, and that in fact he did stop within less than 500 feet south of the point of the accident. It is not claimed that the bell was rung, or that any other warning was given. There is not much, if any, doubt that the weeds were high enough to obstruct the view of one on the railroad right of way until he was within 15 or 20 feet of the track.

At the close of the evidence the court denied defendant's motion to direct a verdict, and also refused his request to charge the jury as follows:

"It was the duty of the deceased to use his senses to avoid injury, and if you find that he did not stop, look, and listen, and that he could have avoided the injury by stopping, looking, and listening, you should find for the defendant."

The jury found for the plaintiff and assessed the damages at $5,000. No complaint is made as to the correctness of the court's charge, and the only assignments of error are based upon the denial of the motion for a directed verdict, and upon the refusal to give the request to charge above set out.

There was sufficient evidence of defendant's negligence. Upon proof of the injury alleged, a presumption of the negligence charged arose under the Georgia Code of 1910, § 2780. It was also the statutory duty of the railroad company to maintain a blow post 400 yards north of the public or Augusta road crossing, and of the engineer to begin sounding the whistle upon reaching the blow post, and to blow two long and two short blasts at intervals of five seconds between each blast, and to keep a lookout along the track ahead of the engine, and otherwise to exercise due care in approaching the public crossing in order to avoid injury to persons or property on or within 50 feet of it. Acts of Georgia Legislature of 1918, p. 212.

It is true that plaintiff's decedent was not at the public crossing or within 50 feet of it, but the court charged the jury, without objection or exception, that if there was a failure to comply with the statute as to the sounding of the whistle, that fact might be considered in connection with the other evidence as bearing upon defendant's negligence; and this charge appears to be in accord with the opinion of the Supreme Court in Atlanta & Charlotte Railway Co. v. Gravitt, 93 Ga. 369, 20 S. E. 550, 26 L. R. A. 553, 44 Am. St. Rep. 145.

[1] In addition to compliance with statutory requirements, it was the duty of defendant to perform any other acts required by the circumstances of the case and dictated by the rules of ordinary care and diligence. 2 Shearman & Redfield on Negligence (6th Ed.) § 463a; Acts of Georgia Legislature of 1918, p. 214. It can hardly be doubted that the obstructions caused by the buildings, fence, grape arbor, tree, and weeds made the question of defendant's negligence one of fact for the jury.

Defendant's chief reliance to defeat recovery is that plaintiff's decedent was himself guilty of such contributory negligence as ought to bar a recovery. Upon this subject are these two Georgia statutes:

"*Consent or Negligence.* No person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him.

"*Diligence of Plaintiff.* If the plaintiff by ordinary care could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover. But in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained."

Georgia Code of 1910, §§ 2781, 4426

As to the effect of the just quoted sections upon the doctrine of contributory negligence unaffected by statutory provisions, see Western & Atlantic Railroad Co. v. Ferguson, 113 Ga. 708, 39 S. E. 306, 54

L. R. A. 802; Alabama G. S. Ry. Co. v. Coggins, 88 Fed. 455, 32 C. C. A. 1; Shearman & Redfield on Negligence (6th Ed.) § 103; I Thompson on Negligence, and Supplement, § 268.

[2] Whatever the true construction of these comparative negligence statutes may be, it cannot be doubted that they were intended to render less harsh the common-law doctrine of contributory negligence. Defendant takes the position that it is the duty of one about to cross a railroad to stop, look, and listen for approaching trains. It is impossible to reconcile all of the cases, and it need not be denied that many can be found to sustain that contention.

We are of opinion that it cannot be said that the invariable rule in the Supreme Court of the United States is that one approaching a railroad crossing is bound, as a matter of law, always and under all circumstances to stop, look, and listen. That is said to be the unbending rule in Pennsylvania, and it is stated by Shearman & Redfield on Negligence, §§ 476, 477, that only in Pennsylvania is this the established and invariable rule, but that generally such failure only becomes contributory negligence as a matter of law where there are no excusing circumstances.

[3] In Continental Improvement Co. v. Stead, 95 U. S. 161, 24 L. Ed. 403, the facts were very similar to the facts in this case. The plaintiff was in his wagon, and was injured while crossing a railroad at right angles in a cut about 5 feet deep. There was evidence that he could not see because of the cut and intervening obstructions; that his wagon was making much noise; that his hearing was impaired; that he did not stop, and did not look toward the north from which direction a special train was coming. In affirming a judgment for the plaintiff, the court 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. * * *

"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. They are the authors of their own misfortune. These propositions are so indisputable, that they need no reference to authorities to support them. We think the judge was

perfectly right, therefore, in holding that the obligations, rights, and duties of railroads and travelers upon intersecting highways are mutual and reciprocal, and that no greater degree of care is required of the one than of the other. 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 charge of the judge was in substantial accordance with these views.

"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 railway companies have to run trains on the railroads."

In Flannelly v. Delaware & Hudson Co., 225 U. S. 597, 32 Sup. Ct. 783, 56 L. Ed. 1221, 44 L. R. A. (N. S.) 154, it is said:

"The law requires of one going upon or over a railroad crossing the exercise of such care for his own protection as a reasonably prudent person ordinarily would take in the same or like circumstances, including the use of his faculties of sight and hearing. And, generally speaking, whether such care has been exercised is a question of fact for the jury, especially if the evidence be conflicting or such that different inferences reasonably may be drawn from it."

In Grand Trunk Railway Co. v. Ives, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, it is said:

"The policy of the law has relegated the determination of such questions to the jury, under proper instructions from the court. It is their province to note the special circumstances and surroundings of each particular case, and then say whether the conduct of the parties in that case was such as would be expected of reasonable, prudent men, under a similar state of affairs. When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only where the facts are such that all reasonable men must draw the same conclusion from them, that the question of negligence is ever considered as one of law for the court."

[4] In this case there was no evidence that plaintiff's husband did not look and listen, and the presumption is he did. Continental Improvement Co. v. Stead, supra; Texas & Pacific Railway Co. v. Gentry, 163 U. S. 353, 16 Sup. Ct. 1104, 41 L. Ed. 186; Baltimore & Potomac R. R. Co. v. Landrigan, 191 U. S. 461, 24 Sup. Ct. 137, 48 L. Ed. 262. Defendant relies on the following cases decided by the Supreme Court: Railroad Co. v. Houston, 95 U. S. 697, 24 L. Ed. 542; Schofield v. Chicago, M. & St. Paul Railway Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Northern Pacific R. R. Co. v. Freeman, 174 U. S. 379, 19 Sup. Ct. 763, 43 L. Ed. 1014—in all of which it was held there could be no recovery.

In the Houston Case, the party killed was a trespasser on the right of way; it was bright moonlight, and the headlight of the engine was

burning and could be seen for a distance of three-fourths of a mile. In the Schofield Case, plaintiff had an unobstructed view from a point within 600 feet of the crossing. In the Freeman Case, the uncontradicted testimony of three witnesses was that the person killed at the crossing did not look, and that the train was running at a speed not exceeding 20 miles an hour.

The opinion of this court in Lancaster v. Foster, 260 Fed. 5, 171 C. C. A. 41, is also relied on by the defendant. In that case the accident happened in the daytime, and the train was in plain view for more than a mile. It is evident from the statement of facts that the deceased could have seen the train if he had looked, on account of which the inference was drawn that he did not look, but was engrossed in attempting to stop an interurban car.

We are also cited to the opinion of Judge Shelby, delivered in denying a motion for a new trial, while acting for the District Judge, in the case of Gipson v. Southern Railway Co. (C. C.) 140 Fed. 410. It needs but slight attention to the facts in that case to discover that Gipson knew the train was coming and deliberately attempted to cross the track ahead of it.

[5] In the instant case, the train was not in sight until it rounded the curve 2,145 feet north of the Drakie road crossing. The testimony warrants the conclusion that it was running at the rate of 50 miles per hour, or over 70 feet per second, because that rate of speed was permissible in order to make up for lost time. At that rate of speed the train would have been upon the crossing in 30 seconds from the time one at the crossing could have seen it. But plaintiff's husband was not at the crossing when the train came in sight of it. In order for him to see it as he approached the track, it was necessary for him to get within 20 feet of the crossing, and then the train would have been visible only as far as the station shed, 200 feet away; and this distance would have been covered in less than three seconds.

Under the state of facts shown by the evidence, whatever precautions ordinary care and diligence would suggest to the railroad company should have been observed and exercised. Whether the whistle was sounded is in dispute, but it is admitted that the bell was not rung. To ring the bell would have been an easy and prudent thing to do while passing through this village at a rate of speed that was high, according even to defendant's witnesses. Without some warning, considered in connection with the various obstructions, we are of opinion that it cannot safely be asserted that plaintiff's husband would have been able fully to protect himself by looking and listening, and that reasonable men might well differ as to whether he was in the exercise of ordinary and reasonable care; and that, therefore, the case was properly submitted to the jury.

The judgment is affirmed.

ROSEN et al. v. UNITED STATES.

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

No. 62.

1. **Criminal law ⇐1090(19)—Transcript of record is not bill of exceptions.**
A transcript of the reporter's notes made during the trial does not constitute a bill of exceptions, nor is it made such by a stipulation of counsel, and the practice of printing such a record for the appellate court is strongly disapproved.

2. **Criminal law ⇐1048, 1129(1)—Judicial Code, § 269, does not relieve of the necessity of exceptions and assignments of error.**
Judicial Code, § 269, as amended by Act Feb. 26, 1919 (Comp. St. Ann. Supp. 1919, § 1246), does not require appellate courts to review cases without regard to the taking of exceptions and the usual assignments of error, nor relieve counsel from the necessity of calling the attention of the trial judge to errors or mistakes at the time they are made.

3. **Receiving stolen goods ⇐7(2)—Indictment need not allege knowledge of interstate character of transit.**
In an indictment under Act Feb. 13, 1913 (Comp. St. § 8603), for buying and receiving property stolen while being transported in interstate commerce, knowing the same to have been stolen, it is not necessary to allege that defendant knew that it was stolen while in course of transportation in interstate commerce.

4. **Receiving stolen goods ⇐8(4)—Presumption of guilt arises from possession.**
Proof that defendant was in possession of property recently stolen raises a presumption of guilty knowledge which in the absence of explanation may warrant conviction.

5. **Criminal law ⇐508(9)—Testimony of accomplices may warrant conviction.**
An instruction that the testimony of accomplices should be considered very carefully, but there was no rule of law in the federal courts which prevented conviction on the testimony of accomplices if the jury believed it, *held* correct.

6. **Criminal law ⇐377—Evidence of good character admissible.**
Evidence of good character is to be considered in connection with all other evidence in the case in determining the guilt or innocence of the accused, and it is to be given such weight as under all the circumstances it is entitled to in the judgment of the jury.

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

Criminal prosecution by the United States against Louis Rosen and Jacob Rosen. Judgment of conviction, and defendants bring error. Affirmed.

This cause comes here on writ of error to the United States District Court for the Western District of New York.

The plaintiffs in error, who were defendants below, are hereinafter referred to as defendants.

The defendants were indicted together with Eugene Hanavan, Paul Vogel, Henry Weber, and Joseph Pfeiffer and were charged with the crime of receiving property stolen from a shipment of copper, knowing that the copper had been stolen. The crime was charged to have been committed at Buffalo, in the state of New York. The property consisted of 40,000 pounds of copper ingots which constituted a part of an interstate shipment of freight from the

Calumet & Hecla Smelting Company at Hubbell, in the state of Michigan, to the Seymour Manufacturing Company at Seymour, Conn. At the time the copper was stolen it was in the custody and possession of the Erie Railroad Company, a common carrier of freight.

The defendants were indicted on July 29, 1919, and the trial was had at Canandaigua, N. Y., on September 15, 1919. The indictment contained a single count. The two Rosens were tried alone. At the trial Vogel, who was confined in the state prison at Auburn, having been convicted of another offense of a somewhat similar character, was examined as a witness on behalf of the government, having been brought from Auburn for the purpose under a writ of habeas corpus. Weber pleaded guilty to the indictment and was also sworn as a witness for the government. The two Rosens took the stand and testified on their own behalf.

The jury returned a verdict on September 17, 1919, finding the defendants Rosen guilty as charged.

Aaron Fybush, of Buffalo, N. Y. (Frank C. Ferguson, of Buffalo, N. Y., of counsel), for plaintiffs in error.

Stephen T. Lockwood, U. S. Atty., and John T. Walsh, Sp. Asst. U. S. Atty., both of Buffalo, N. Y. (Carl Sherman, Asst. U. S. Atty., of Buffalo, N. Y., on the brief), for the United States.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). Before looking into the facts of this case upon the merits, we shall dispose of a preliminary matter of consequence to the court, the parties, and their counsel.

[1] We have been presented with what is entitled "bill of exceptions." It contains all the testimony taken at the trial, all that was said between court and counsel, the whole of the argument to the jury on behalf of the government, covering some 20 printed pages (although exception was taken to only two sentences covering some 6 or 7 lines), the whole of the charge (to which one exception was taken), and various other matters. It is followed by a "stipulation" signed by the attorneys for both parties. This is followed by an "order settling case" which states that—

"On the above stipulation the foregoing record * * * containing all of the evidence given and proceedings had upon the trial of this action is hereby ordered settled and placed on file in Erie county clerk's office."

This is signed by the District Judge.

It is hardly necessary to say that this is not a bill of exceptions. In Linn v. United States, 251 Fed. 476, 483, 163 C. C. A. 470, this court stated what constitutes a bill of exceptions, and we declared that in that case the bill should have never been signed by the trial judge, and that the court would not be subject to just criticism if we declined to consider the errors assigned. In Fraina v. United States, 255 Fed. 28, 166 C. C. A. 356, we again spoke plainly on this subject, and said:

"There is no bill of exceptions. Both parties have agreed to call what is probably a transcript of the stenographer's minutes by that name; but giving it the requisite name does not make it the lawful thing. The consent was worthless, and it is of grace only that we consider the points argued."

The Linn Case was referred to approvingly. In Buessel v. United States, 258 Fed. 811, 170 C. C. A. 105, we declared that the parties are not at liberty to substitute a written stipulation or agreed statement of

facts as to what occurred at the trial in lieu of a bill of exceptions. And it is only through a bill of exceptions duly authenticated as such that the rulings of a judge made at the trial become a part of the record to be reviewed. We take occasion to say once more that what we find in the present record is not a true bill of exceptions as such bills are understood in the federal courts, and that the practice of printing the whole of the stenographer's minutes, arguments and all, is, under the federal practice, a waste of a client's money, which is strongly disapproved. As has been said it "is neither lawyerlike nor just to the court or to client." We have several times before pointed out that bills of exceptions are not governed by the rules of the state courts under the Conformity Act (Comp. St. § 1537). Buessel v. United States, supra, and Rothman v. United States, 270 Fed. 31, decided at this term.

[2] 'We shall go into this case more fully than the record required, and in doing so we wish it understood that this case is not to be regarded as a precedent binding this court to examine into assignments of errors where no exceptions have been reserved. In a proper case we may consider errors not excepted to and which are not assigned for error. But we do not understand that Congress in passing the act of February 26, 1919 (40 U. S. St. at L. pt. 1, c. 48, p. 1181 [Comp. St. Ann. Supp. 1919, § 1246]), intended that cases could be reviewed in the appellate courts without regard to the taking of exceptions and the usual assignments of error. Whatever that act may mean, it certainly was not intended, among other things, to relieve counsel from the necessity of calling the attention of a trial judge to his mistake at the time an erroneous instruction or ruling is given in order that he may correct it then and there and avoid the necessity of setting a verdict aside and securing a new trial if a conviction improperly follows. This court has recently said in Storgard v. France & Canada S. S. Corporation (C. C. A.) 263 Fed. 545, 546, in reference to the act of Congress now under consideration:

"We do not construe the section as authorizing appellate courts to decide on the whole record whether exceptions have been taken or not. The mischief it was intended to correct is just the opposite of overlooking defects due to negligence, ignorance, or inadvertence, viz. the reversal of judgments because of errors, defects, or exceptions which, though raised with technical accuracy, do not affect substantial rights."

And also see Goldfarb v. Keener (C. C. A.) 263 Fed. 357.

The defendants Rosen have been convicted of the crime of receiving property stolen from a shipment in interstate commerce knowing that the property had been stolen. They have been sentenced to imprisonment at hard labor—Louis Rosen's term of imprisonment being for two years and Jacob Rosen's for three. They are described in the testimony as being engaged in the junk business. Vogel at the time the crime was committed was a clerk in the office of the Lehigh Valley Railroad Company and had charge of the making up of the grain sheets. At the time of the commission of the crime Weber had a coal yard adjoining the East Buffalo yards of the Lehigh Valley Railroad Company where he was engaged in the coal business. Vogel and Weber testified that the car containing the copper in question was put on the latter's

siding, and that they, with Hanavan and Pfeiffer, unloaded it and buried the copper in Weber's coal yard, where it remained until Vogel told him that he had a customer for it, explaining that the Rosens wanted it. The Rosens came on the same day and wanted to get samples of the copper to send to Rochester to a prospective purchaser, and in the presence of the two Rosens samples were taken from the spot where the copper was buried and handed to them. The Rosens, a few days later, came into the yard, the copper was dug out of its place of concealment, and was, by their help, placed in the car. Then after the loading was finished Jacob Rosen said to Vogel that he was afraid to bill the car and asked Vogel to bill it, which Vogel refused to do. And it was finally agreed that Jacob should bill it out as scrap metal, and the copper was covered over with fenders upon Louis Rosen's suggestion, who stated it was a good thing to do to cover up the identity of the shipment. The bill of lading was signed by Louis Rosen. There is no question as to the good faith of the parties in Rochester to whom the copper was consigned. There was much other testimony, 13 witnesses testifying for the government and 10 for the defendants.

[3] The indictment is based on an act of Congress passed February 13, 1913 (Comp. St. § 8603). That act provides as follows:

"That whoever shall unlawfully break the seal of any railroad car containing interstate or foreign shipments of freight or express, or shall enter any such car with intent, in either case, to commit larceny therein; or whoever shall steal or unlawfully take, carry away, or conceal, or by fraud or deception obtain from any railroad car, station house, platform, depot, steamboat, vessel, or wharf, with intent to convert to his own use any goods or chattels moving as, or which are a part of or which constitute, an interstate or foreign shipment of freight or express, or shall buy, or receive, or have in his possession any such goods or chattels, knowing the same to have been stolen; * * * shall in each case be fined not more than five thousand dollars or imprisoned not more than ten years, or both, and prosecutions therefor may be instituted in any district wherein the crime shall have been committed."

The indictment charges that the defendants did—

"knowingly, wrongfully, unlawfully, and feloniously have in their possession, buy, receive and conceal certain goods, and chattels, to wit, 40,000 pounds of copper ingots, * * * and each of them then and there knowing said goods and chattels to have been stolen, which goods and chattels had theretofore, to wit, on the 10th day of June, 1917, at the city of Buffalo, state of New York, been unlawfully and feloniously stolen from a certain railroad car known and described as follows, to wit: C., H. & D. car No. 4523—while said goods and chattels did move as and constitute a part of an interstate shipment of freight in course of shipment in interstate commerce," etc.

To sustain a conviction under the act it must be shown:

(1) That the goods and chattels involved were stolen.

(2) That at the time they were stolen they were articles of interstate transportation and in course of such transportation.

(3) That defendants came into possession of them.

(4) That they received them knowing them to have been stolen.

While the indictment charges that defendants knew at the time the goods and chattels are alleged to have been in their possession that they had been stolen, it does not charge that they knew they had been stolen from interstate commerce. But such an allegation is certainly unnec-

essary. A person who receives stolen chattels knowingly does so at the peril of their having been stolen while in course of interstate transportation. He cannot escape conviction because he did not know whether they were stolen in intrastate or in interstate commerce. Kasle v. United States, 233 Fed. 878, 882, 147 C. C. A. 552.

[4] That the copper came into the possession of the defendants cannot be doubted. Indeed by the admission of the defendants themselves the copper came into their possession. That they received it knowing that it had been stolen is equally clear. The possession of stolen property, standing alone, does not establish guilt. But the possession of property recently stolen raises a presumption of guilt which in the absence of explanation may authorize a jury to infer a criminal connection with its acquisition. Wilson v. United States, 162 U. S. 613, 620, 16 Sup. Ct. 895, 40 L. Ed. 1090; People v. Weldon, 111 N. Y. 569, 576, 19 N. E. 279. And in the instant case the possession of the copper by the defendants required them to make an explanation of their possession. And it was for the jury to say whether their explanation was satisfactory. The jury was instructed:

"The rule of law in the state of New York, and the rule in this court is now well settled, that recent possession, united with other circumstances of a peculiar and suspicious character, as, for instance, the failure to give a satisfactory explanation of possession, may warrant the presumption of guilty knowledge if it may reasonably be inferred from the circumstances that the possessor did not commit the larceny himself. * * * They claim they have explained, and, I repeat, if they have explained satisfactorily, if the account they have given of the manner in which they obtained possession of the property is truthful and satisfactory to you, they are entitled to an acquittal."

The instruction was right and was not excepted to at the trial.

Counsel for defendants, appreciating fully the fact that it was necessary for the government to show that the copper which the Rosens received into their possession was copper which had been shipped in interstate commerce, strenuously argued in this court that the government utterly failed to show that the copper was a part of the copper which was in course of interstate transportation. In the summing up to the jury counsel on behalf of the government stated that the charge was that defendants had feloniously received the copper "knowing it to have been stolen while in the course of shipment in interstate commerce." The court in his charge to the jury stated that defendants were indicted "for receiving goods stolen in interstate commerce." The court went on to say:

"That it is necessary that you should determine the preliminary question of fact, namely, you must determine that the controversy in which we are engaged is a controversy arising out of an interstate commerce shipment, and that the jurisdiction of the court depends upon that finding, and the burden of proof is upon the government to establish that we are here concerned with an interstate commerce shipment as distinguished from a local shipment, that is, a shipment between two points within the state."

The jury could not have misunderstood that it was necessary that the government should show that the copper the defendants received was an interstate commerce shipment, and, as there was evidence from which the jury were entitled to find that the copper was a part of the

shipment sent from the Calumet & Hecla Smelting Company at Hubbell, Mich., and which was on its way to Seymour, Conn., there is no necessity for inquiring further concerning it.

[5] Then it is said that all of the testimony which tends in any way to establish the charge against the defendants of having received stolen copper knowing it was stolen rests on the testimony of the witnesses Vogel and Weber alone, who confessed on the stand that they had stolen it. The testimony of these two witnesses, if believed, made it clear beyond doubt that the defendants knew that the property was stolen when they received it. The court in his charge told the jury that Vogel and Weber were accomplices, and instructed as follows:

"I do admonish you to scrutinize the testimony of these two witnesses with the utmost care. Compare it with other testimony in the case, compare it with all the facts and circumstances surrounding this transaction, to the end that you may satisfy your minds and consciences whether they testified to the truth or not. If, in your judgment, there are no surrounding circumstances tending to corroborate them, you will be justified in rejecting their testimony. But it is also the rule of law in the courts of the United States that there is no absolute rule of law preventing a conviction on the testimony of accomplices if juries believe them. Such is the rule in this court. Testimony of accomplices should be considered very carefully; it should be scrutinized with the utmost circumspection, especially if uncorroborated, although their testimony should not be rejected if it is believed, if it sustains the contention of the government, if there are facts and circumstances from which it can be plainly perceived by the jury that these men, criminals though they may be, participants in this crime though they may be, nevertheless have told the truth."

At common law a jury can convict upon the testimony of an accomplice, although it is not corroborated, if it satisfies the jury beyond a reasonable doubt. In many of the states statutes have been passed which expressly provide that a person cannot be convicted of crime on the uncorroborated testimony of an accomplice. But no such statute has been passed by Congress. It is, however, usual in the federal courts to caution juries in reference to such testimony. And in Holmgren v. United States, 217 U. S. 509, 510, 511, 524, 30 Sup. Ct. 588, 592 (54 L. Ed. 861, 19 Ann. Cas. 778), the court, speaking through Mr. Justice Day, said:

"It is undoubtedly the better practice for courts to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them."

The charge of the judge in the instant case was proper. And there was much outside of the testimony of Vogel and Weber to convince the jury of the guilty knowledge of the Rosens. The purchase for 16 cents a pound from a railroad clerk of a carload of new ingot copper, having an established market value of 29 cents per pound, and the subsequent concealment from the railroad company by the Rosens of the true character of their shipment of it under the designation of it in the bill of lading as "scrap metal," although they invoiced it to the purchaser as copper ingots, and their covering the copper with 1,500 pounds of scrap auto fenders to prevent a discovery of the identity of the shipment, and other circumstances afforded evidence which the jury might well regard as convincing corroboration of the testimony of the accomplices.

[6] The court instructed as follows as to the testimony of the defendants' character witnesses:

"Testimony has been given by credible witnesses tending to show that their character as business men in the community in which they live is good, and I instruct you, gentlemen, that, this being a criminal case, you should take into consideration such testimony, especially if there is a doubt in your minds as to their guilt. If there is a doubt in your mind as to the credibility of the two witnesses regarding whose testimony I have said so much, then you may have recourse to the testimony regarding their good reputation. Indeed, the courts say that a man's good reputation in a case like this may often, of itself, create a reasonable doubt."

Counsel for defendants objects to the above instruction on the ground that the jury might well have understood the court to mean that, if they were inclined to believe Vogel's and Weber's testimony, they need pay no attention whatever to the evidence of the defendants' character witnesses, and we are told that a jury should always take into account the evidence of character witnesses, and that that testimony alone may be sufficient to prevent the jury from reaching a verdict of guilty. We might dispose of this objection by saying that, as no exception was taken to it, when given, the matter is not properly before us, and might very properly be ignored. We will, however, say that the jury could not have been misled by it. In Edgington v. United States, 164 U. S. 361, 366, 17 Sup. Ct. 72, 73 (41 L. Ed. 467), the court stated the rule on this subject as follows:

"Whatever may have been said in some of the earlier cases to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing."

Evidence of good character is to be considered in connection with all the other evidence in the case in determining the guilt or innocence of an accused person, and it is to be given such weight as under all the circumstances it is entitled to in the judgment of the jury. We do not think the accused in this case were prejudiced by the instruction.

This court is satisfied that defendants had a fair trial and were properly convicted of the crime for which they were indicted.

Judgment affirmed.

BISSO TOWBOAT CO., Inc., v. ALABAMA & NEW ORLEANS TRANSP. CO. et al.

ALABAMA & NEW ORLEANS TRANSP. CO. et al. v. JAHNCKE NAVIGATION CO. et al.

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

Nos. 3562, 3599.

Towage ⇐11(2)—Towing companies liable for negligent loss of tow.

A towing company, which contracted for towing, and a second company, which it employed to complete the towage when its own tug broke down, both *held* in fault for loss of the tow, consisting of three seaworthy barges with deck loads of clamshells, which capsized and sunk while being towed down the Mississippi at night, on evidence showing that, when the second tug came to take charge of the tow at night, the watchmen of the barges were absent, but that on instructions of the agent of the first company the tug made up the tow and proceeded without any one on board, and that the capsizing was due to the excessive speed of the tug, which caused the cargoes to shift, and the absence of watchmen on board, whose duty it would have been to report the fact and to keep the cargoes trimmed.

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

Suit by the Jahncke Navigation Company against the Alabama & New Orleans Transportation Company, the Alabama & New Orleans Canal Company and the Bisso Towboat Company, with cross-libel by the Bisso Towboat Company. Decree for libelants and respondents and cross-libelant appeal. Affirmed.

In No. 3562:

John D. Grace, of New Orleans, La., for appellant.

Henry P. Dart, Jr., George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellees.

In No. 3599:

George Denegre, Victor Leovy, and Henry H. Chaffe, all of New Orleans, La., for appellants.

Henry P. Dart, Jr., and John D. Grace, both of New Orleans, La., for appellees.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. These cases come before this court on two appeals from a decree rendered in a proceeding by libel in personam brought by the Jahncke Navigation Company, in the United States District Court for the Eastern District of Louisiana, against the Alabama & New Orleans Transportation Company (hereinafter styled Transportation Company), the Alabama & New Orleans Canal Company (styled the Canal Company), and the Bisso Towboat Company (styled the Towboat Company), to recover damages claimed to have been sustained by the capsizing of the barges Kansas, Illinois, and Amite, and the loss of their cargoes, in towing the same from the

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

mouth of the Lake Borgne Canal on the Mississippi river to Pointe-a-la-Hache located about 35 miles down the river.

The District Court found as follows:

"Libelant made a contract with the Transportation Company to tow a number of barges loaded with clamshells through the Lake Borgne Canal down to Pointe-a-la-Hache. It is admitted in the answer that the contract was for the benefit of the Canal Company. On March 23, 1913, libelant delivered said three barges loaded with clamshells at the lake end of the Lake Borgne Canal. They were taken through the canal by one of the tugs owned by the Transportation Company and moored in the Mississippi river near the mouth of the canal. Owing to the breaking down of the tug owned by the Transportation Company, that company employed the Towboat Company to complete the voyage with the barges. The Towboat Company sent their tug Independent to tow them to Pointe-a-la-Hache. There is no doubt the barges were staunch and seaworthy for the purposes for which they were intended. They were approximately 97 feet long by 28 feet beam. On the deck of the barges was erected a cargo bin for practically the entire length and width of the deck space. This bin rose about 4 feet above the deck line with a space all around on the bottom of about 3 inches intended to act as a scupper to allow any water shipped to be drained off. It is customary when encountering rough weather to close up these spaces with wooden battens. The barges were equipped with lines and pumps and connections for steam syphons. It is customary for each barge to be in charge of a watchman whose duty it is to keep the barge pumped out, nail on the battens in case of need, to prevent any listing of the barge by the shifting of the cargo or washing out of same, to keep the barge in trim, and to generally look out for the safety of the barge while towing. The tug Independent arrived at the river end of the Lake Borgne Canal at about 8:30 p. m. on the night of the trip from there to Pointe-a-la-Hache. There were only two watchmen employed on the fleet and these two men were absent at the time. They doubtless had reasons to believe that the trip would not start until the next morning and had absented themselves for proper purposes. Serpas, superintendent of the canal and the Transportation Company was on shore when the Independent arrived. He was hailed by Lamb, captain of the tug, and told him to proceed with the barges. Lamb advised him that there were no watchmen on the barges at the time, and Serpas told him to go ahead with them anyway as it was necessary for them to be promptly delivered. Lamb then went on board the barges, inspected them, found that there was no water in their holds, and that the hatches were properly closed and battened down, and that the barges were in good condition. There is some conflict in testimony as to the amount of cargo they each carried. The cargoes were entirely on deck. The evidence of a number of witnesses shows that the decks of the barges were about 6 inches out of the water amidships, the lowest point. Lamb and other witnesses testify that the decks of the barges amidships were about 6 inches under water, but it is also shown that even this condition would be safe under ordinary circumstances, and that it was not unusual to load barges and tow them in that condition across Lake Pontchartrain and Lake Borgne. I am inclined to think the preponderance of the evidence shows that the barges were loaded light and that the decks were in fact entirely out of the water, but this is comparatively immaterial. The tugboat then hooked up to the barges, towing them in tandem fashion with about 8 or 10 feet of space in between the stern of the preceding barge and the bow of the barge following. The crew of the tugboat made up the tow. When they had proceeded down the river some distance the two rear barges broke adrift. The tug did what it could to salvage them and rearrange the tow. Subsequently, however, all of the barges capsized, and the eventual result was that the cargo of each was entirely lost and all were badly damaged in the attempt to save them. The libel alleges that the loss was caused by the improper method of arranging the tow, and that the tug proceeded down the river at full speed after dark, which was negligent and not safe under the circumstances.

"I am convinced that the tug proceeded at a high rate of speed and that this was the primary cause of the accidents to the barges. The crew of the tug was undoubtedly in a hurry. They had been working all the preceding day around the harbor of New Orleans. The captain and mate had been on duty since 6 o'clock of the morning of that day, and, though the mate had had some sleep, apparently the captain had gotten little or no rest. Before leaving her moorings in the city of New Orleans the captain advised the crew that they would have to be back in the city by 6 o'clock the next morning. (See testimony of Grusich, p. 71.) This was manifestly impossible if the tow proceeded at slow speed. There was no food on board, and there was every incentive for the crew of the tug to make the trip as rapidly as possible. Lamb testifies that the tug was proceeding under a slow bell, but he had no idea as to what the rate of speed was, and it is evident from his entire testimony that the speed of the tow under a slow bell might vary according to the amount of steam pressure and the general running of the engines. There is some effort to show a gale of from 15 to 20 miles an hour was blowing when the tow reached the point where the accidents occurred, but it is doubtful to my mind that there was any unusual or unexpected weather sufficient to make the loss of the barges inevitable, and there is no question that the tug was competent to handle the fleet in any situation, if they had proceeded with due care.

"The fact that there were no watchmen on board was known to all the defendants before the voyage was started and it is clear that the danger of this was assumed by the Transportation Company. Serpas knew it and instructed Lamb to go ahead with the tow and under these circumstances the Transportation Company assumed the risk of the barges being without watchmen. It was the duty of the tug and the duty of the Transportation Company to see that the tow was in condition for towing before starting. The barges were seaworthy in every way, properly equipped except as to the watchmen. I believe that the absence of the watchmen contributed greatly to the subsequent loss of the barges. Had the watchmen been on board they could have trimmed the cargo and nailed down the battens or they could have notified the tug of the impending danger. Therefore, as between the defendants, the damages should be divided.

"There will be a decree in favor of libelant for the full amount of the damages suffered in solido as against the defendants and as between the defendants the damages to be equally divided, each to have judgment over against the other for one-half of the award, in the event of paying the whole judgment.

"The Bisso Tugboat Company has filed a cross-libel praying for compensation for extra services rendered in salvaging the barges. This demand will be rejected."

The case was referred to a commissioner to ascertain the amount of damages and he reported the amount of $5,537.35, with interest from the date of the decree fixing the liability, and a decree was entered against all of the defendants in solido, but divided the damages inter sese, one-half against the Towboat Company and one-half against the Transportation and Canal Companies.

The barges were proceeding apparently safely down the stream while being towed behind the tug. In his evidence the captain states that, the river being rough:

"I started out with them, thinking that that would be a better way to tow them on account of the swells in the river. You always tow barges according to the condition of the weather; but after this barge broke loose I decided to take them alongside. I thought I could care for them better alongside the tug * * * where they could be watched by the crew of the boat."

There is no evidence to indicate why they broke loose or that they could not have been taken in tow behind the tug again. After a very

careful review of the record we are unable to find any error in the findings of the District Court which would call for a reversal of its decree.

There is evidence from which it can be inferred that, after the time lost in picking up the barges which broke loose and rearranging the tow, the tug was proceeding at a greater speed than was prudent, in view of the change in this arrangement of the barges and the head wind coming up the river against the current. When brought alongside they were subjected to the wash of the water in a different way, the tug and barges being fastened abreast, and evidently the washing out of the shells was thus caused. The captain and crew knew that there were no watchmen on the barges. This called on them for the exercise of greater watchfulness. The barges traveled nearly 10 miles before any notice seems to have been taken of their listing and it appears that it was then too late to save them. They capsized very shortly after they were first noticed.

With the exercise of ordinary care in observing the effect of the change in the method of towing the barges, it would seem their listing should have been discovered in time to prevent their capsizing. After the Kansas and Amite capsized, several hours elapsed before the Illinois turned over, and nothing seems to have been done to prevent on her a like shifting of cargo which had capsized the other barges. On the whole we think the evidence warrants the finding that the respondents were at fault.

So far as the libelant is concerned, the Transportation and Canal Companies were equally liable with the Towboat Company for the proper towing of these barges, and as the act of the Transportation and Canal Companies in directing the Towboat Company to proceed on the trip without watchmen on the barges contributed substantially to the disaster, we think the District Court did not err in holding them ultimately responsible for one-half of the damages.

The costs on appeal in the two cases are ordered to be paid, one-half by Bisso Towboat Company and one-half by the Alabama & New Orleans Transportation Company and Alabama & New Orleans Canal Company.

The decree of the District Court is affirmed.

AHLBERG v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1921.)

No. 3428.

1. Constitutional law ⊂=30—Amendment of state Constitution effective as law of state by its own force, though it called for legislative act.

Const. Ohio, art. 15, § 9, as amended at the general election in November, 1918, providing that "the sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited," and that "the General Assembly shall enact laws to make this provision effective," and which by the terms of its submission took effect May 27, 1919, became on and

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

after that date the law of the state, within the meaning of Reed Amendment, § 5 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 8739a), regardless of whether or not the General Assembly had enacted laws for its enforcement.

2. **Courts ⟸366(1)—Construction of state laws by state court followed by federal courts.**

A federal court will follow the decision of the court of last resort of a state, construing its own Constitution or laws, where no claim is made that such Constitution or law violates any provision of the federal Constitution.

In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; John M. Killits, Judge.

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

C. E. Mellen, of Cleveland, Ohio (Orgill, Maschke & Mellen, of Cleveland, Ohio, on the brief), for plaintiff in error.

Jos. C. Breitenstein, Asst. U. S. Atty., of Cleveland, Ohio (E. S. Wertz, U. S. Atty., and Joseph C. Breitenstein, Asst. U. S. Atty., both of Cleveland, Ohio, on the brief), for the United States.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. In the District Court of the United States, Eastern Division of the Northern District of Ohio, the plaintiff in error was convicted on both counts of an indictment. The first count charged him with the violation of the Act of March 3, 1917, commonly known as the Reed Amendment (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 8739a, 10387a–10387c). The second count charged a violation of section 240 of the Criminal Code (Comp. St. § 10410).

This proceeding in error presents two questions: First, whether the laws of Ohio on June 28, 1919, prohibited the manufacture and sale therein of intoxicating liquors for beverage purposes. The second question involves the application of the provision of section 240, Criminal Code to the facts proven in this case.

[1] There can be little doubt but that the first question must be answered in the affirmative. At the regular election in November, 1918, the voters of Ohio adopted an amendment to section 9 of article 15 of the state Constitution, which amendment, among other things, declared that "the sale and manufacture for sale of intoxicating liquors as a beverage are hereby prohibited," and that "the General Assembly shall enact laws to make this provision effective." The schedule attached to this amendment contained the following provision:

"If the proposed amendment be adopted, it shall become section 9 of article 15 of the Constitution and it shall take effect on the 27th day of May of the year following the date of the election at which it is adopted, at which time original sections 9 and 9a of article 15 of the Constitution and statutes inconsistent with the foregoing amendment shall be repealed."

It is insisted upon the part of plaintiff in error that, notwithstanding this provision in the schedule attached to this constitutional amendment, it did not take effect on the 27th day of May, 1919, for

the reason that the General Assembly had not at that time enacted any laws, as provided by the amendment itself, to make this provision effective. It would seem, however, that in the case of State ex rel. v. Donahey, 100 Ohio St. 104, 125 N. E. 908, the Supreme Court of Ohio has determined this question adversely to the contention of plaintiff in error. In that case the first paragraph of the syllabus, which under the rule in Ohio is the law of the case, regardless of what may be said in the opinion, reads as follows:

"1. Sections 1261—16 to 1261—73, inclusive, General Code, are repugnant to the provisions of section 9, article XV, of the Constitution, adopted November 5, 1918, and were repealed upon its taking effect midnight, May 26, 1919."

[2] This court will follow the decision of the court of last resort of a state, construing its own laws or its own Constitution, where no claim is made that such law or such state Constitution violates any provision of the federal Constitution.

It is insisted, however, that this holding by the Supreme Court of Ohio that this amendment went into effect at midnight May 26, 1919, does not determine that it became operative as a prohibitory law at that time, but on the contrary, that it did not become operative within the meaning of the Reed Amendment until the General Assembly passed the necessary legislation providing for its enforcement. There is nothing in the opinion in that case to indicate that it was the intention of the Supreme Court of Ohio to hold that this constitutional amendment became effective to repeal all statutes in Ohio regulating the traffic in intoxicating liquor, and not effective to prohibit that traffic. On the contrary, the court declared, in no uncertain and ambiguous language, that this amendment went into effect at midnight May 26, 1919. In the absence of any qualifications or limitations, this language is not subject to any construction other than that it went into effect at that time for all purposes that it was intended to serve.

However, if this decision were wholly disregarded, this amendment to the Ohio Constitution speaks for itself. It is written in substantially the same language as section 1 of the Eighteenth Amendment to the federal Constitution, which section reads as follows:

"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."

The Supreme Court of the United States (State of Rhode Island v. Palmer, 253 U. S. 350, 40 Sup. Ct. 486, 588, 64 L. Ed. 946) held that the prohibition of the manufacture, sale, transportation, importation and exportation of intoxicating liquors for beverage purposes, as embodied in this amendment—

"is operative throughout the 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. * * *"

Also that—

"The second section of the amendment—the one declaring 'the Congress and the several states have concurrent power to enforce this article by appropriate legislation'—does not enable Congress or the several states to defeat or thwart the prohibition, but only to enforce it by appropriate means."

Mr. Chief Justice White, concurring in this judgment, said:

"The power which it gives to state and nation is, not to construct or perfect or cause the amendment to be completely operative but as already made completely operative, to enforce it."

While the judgment entered in this case was by a divided court, nevertheless the dissents were predicated upon other grounds; each of the dissenting justices expressly concurring in paragraphs 6 and 7, as above copied.

This judgment of the Supreme Court of the United States, holding that national prohibition under the Eighteenth Amendment became effective upon the date fixed in the amendment itself, regardless of legislation either by Congress or the several states, and that neither Congress nor the several states could defeat or thwart prohibition by failure to legislate, is particularly applicable, if not conclusive, of the question here presented.

Paraphrasing the statement of Chief Justice White, to make it applicable to the instant case: The power given to the General Assembly of Ohio, to enact laws to make the provisions of this amendment effective, is not to construct or perfect or cause the amendment to be completely operative, but as already made completely operative, to enforce it.

The disposition of this question makes it unnecessary for this court to consider the other question in this case.

The defendant was convicted upon both counts of this indictment, and was sentenced to pay a fine of $1,000 and costs of prosecution, which penalty the court was authorized to inflict on defendant upon a verdict of guilty upon either count of the indictment.

For this reason, and for the further reason that there is another case pending in this court that will shortly be reached, which involves this one question only, that is raised upon the second count of the indictment, it is thought best not to dispose of this question at this time, for it is no longer of importance in this case, but to delay doing so, in order that counsel in that case may have full and fair opportunity to be heard, and that the court may have the advantage of such further argument.

Judgment affirmed.

SCHULTZ et al. v. JACKSON CUSHION SPRING CO.

(Circuit Court of Appeals, Sixth Circuit. March 18, 1921.)

No. 3493.

1. **Patents ⇐168(2)—Scope limited by rejection of claims by Patent Office.**
A patentee, who acquiesced in the rejection of claims by the Patent Office, is estopped to claim any element of such claims not retained in some claim allowed.

2. **Patents ⇐168(1)—Patentee bound by voluntary limitation of claim.**
A patentee, who voluntarily limits a claim, is bound by such limitation, though it may not have been necessary.

3. **Patents ⇐178—Equivalency determined by terms of claim.**
In determining the question of equivalency, nothing can be held to infringe which does not fall within the terms the patentee has himself chosen to express his invention.

4. **Patents ⇐328—999,678, for seat-back springs for vehicles, void for lack of novelty.**
The Schultz & Sweeney patent, No. 999,678, for seat-back springs for vehicles, *held* void for lack of novelty, and also not infringed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by Richard E. Schultz, administrator of the Estate of Charles W. Schultz, deceased, and Edward A. Sweeney, against the Jackson Cushion Spring Company. Decree for defendant, and complainants appeal. Affirmed.

Edw. N. Pagelsen, of Detroit, Mich. (Edward N. Pagelsen, of Detroit, Mich., on the brief), for appellants.

E. J. Stoddard, of Detroit, Mich. (R. A. Parker, of Detroit, Mich., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. This appeal involves the questions of the validity and the infringement by appellee of letters patent 999,678, issued August 1, 1911, to C. W. Schultz and E. A. Sweeney. The United States District Court for the Eastern District of Michigan found this patent invalid, and that, even if valid, it was not infringed by the defendant. The original bill of complaint also averred infringement by the defendant of patent 999,677, issued to the same inventors, but plaintiff voluntarily dismissed the action as to this patent.

The patent in suit relates to seat-back springs for vehicles, especially for automobile tonneaus, and the object of the invention is to provide means whereby particularly the upper part of the seat back may be rendered soft and resilient. It appears from the Patent Office record that the original application for this patent contained four separate claims, all of which were rejected·

"On Warner, 279,998, June 26, 1883. and Bonnell, 630,967, August 15, 1899, in view of German patent 150,293, of 1904, spring seats. See also German patent 99,707, of 1908, and Carre. 54,828, May 15, 1866, spring seats."

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

The inventors then canceled claims 2, 3 and 4, and substituted claim 2, which reads as follows:

"A seat-back spring construction comprising a frame formed of longitudinal and upright bars secured together, coil springs mounted on the same to project forward, and a series of upright spring ribbons formed by bending resilient wire to form flat sinuous curves, said ribbons connecting to the frame at their lower ends, extending upward over the fronts of the coil springs, and then forming loops at the top of the frame, their ends connecting to the frame, and small coil springs connecting the upper portion of the adjacent spring ribbons."

The application then contained two claims; claim 1 reading exactly as No. 2, except that No. 2 contained the following statement not found in No. 1:

"And small coil springs connecting the upper portion of the adjacent spring ribbons."

The Patent Office against rejected claim 1, and allowed the new claim 2. The attorneys for the applicants then canceled original claim 1 and renumbered the new claim 2 as claim 1. That patent as issued contains this single claim. No change was made in the original specification.

The inventors accepted as final the adjudication of the Patent Examiner that claims 2, 3, and 4 of the original claims were anticipated by Warner and Bonnell, and amended their claims in accordance with this finding, but still retaining claim 1. Thereafter they accepted as final the rejection of claim 1, canceled the same, and requested that a patent be issued covering the single claim 2, renumbered as 1.

[1] In view of this Patent Office history the inventors are not now in position to claim that the patent as issued protects them to the extent of the scope and breadth of all or either of these four rejected claims, further than as retained and indicated by the construction described in the sole claim of the patent as issued, embodying small coiled springs connecting the upper portion of the adjacent spring ribbons. Campbell v. American Shipbuilding Co., 179 Fed. 498, 103 C. C. A. 122.

[2] If, however, we accept the plaintiff's contention that the inventor could as well have met and overcome the references by adding to claim 1 the broad term "connectors," instead of "coil springs connecting," then the question presented is one of voluntary limitation, and not of estoppel. The fact that such limitation was unnecessary, or was self-imposed, is of no importance, if such limitation was intentional. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Ohmer Fare Register Co. v. Ohmer (C. C. A. 6) 238 Fed. 182, 193, 151 C. C. A. 258; McCallum v. P. & C. C. Co. (C. C. A. 6) 268 Fed. 835.

[3] The law is settled that, in determining the question of equivalency, "nothing can be held to be an infringement which does not fall within the terms the patentee has himself chosen to express his invention." McClain v. Ortmayer, supra; Cimiotti Co. v. American Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; McCallum v. P. & C. C. Co., supra. This rule must be construed in connection with

the rule that a form equivalent to a specified form is an infringement. The possible conflict between these rules and the cases relating to that subject were fully considered and discussed by this court in the case of D'Arcy v. Marshall Ventilated Mattress Co., 259 Fed. 236, 238, et seq., 170 C. C. A. 304, 308, and the conclusion reached expressed in this language:

"From a review of these and other familiar cases, we think it is safe to deduce the proposition that where the claim defines an element in terms of its form, material, location or function, thereby apparently creating an express limitation, where that limitation pertains to the inventive step rather than to its mere environment, and where it imports a substantial function which the patentee considered of importance to his invention, the court cannot be permitted to say that other forms, which the inventor thus declared not equivalent to what he claimed as his invention, are nevertheless to be treated as equivalent, even though the court may conclude that his actual invention was of a scope which would have permitted the broader equivalency."

[4] The defendant's construction is substantially the same as plaintiff's, except that the small coil springs are not used to connect the upper portion of the adjacent ribbons, but, on the contrary, a rigid wire fastener is substituted.

It is the claim of the appellants that these wire connectors used by the defendant accomplish the same purpose, in the same manner, as the small coil springs specified in the claim in that patent; that in their specifications the only duty ascribed to these small coil springs is that of connectors, which transmits stresses from one arch to the next, and which prevents the upholstering from slipping through between arches; that this is exactly what is accomplished by the wire loops of the seat-back springs now being manufactured by the defendant. It is evident, however, that these coil springs have a resiliency of their own, wholly independent of the resiliency of the wavy wire ribbon springs to which they are attached, and which they connect. That fact is suggested in the specifications in this language:

"The adjacent ribbons *15*, may be connected by small coil springs *17*, thus forming a soft, resilient cushion for the upper portion of the body and the head."

This feature, of course, is wholly lacking in the wire loops used by the defendant, and to that extent, at least, these wire loops or connectors are not the equivalent of the small coil springs. However that may be, this record very clearly discloses that these small coil springs are by no means new to the art. In Osborne, 199,096, issued 1878, these small coil springs are used for a substantially identical purpose. The same is true of Hamilton, 208,591, issued the same year, and Edgar, 237,679, issued 1881.

It is therefore apparent that the use of these coil springs to connect the springs of the plaintiff's construction, and which the Patent Office found to be the sole novelty in the claimed invention, was, at the time plaintiff's application was filed, old in the patent art, and presented no novelty whatever, either in the character of the springs or the use to which they were applied.

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

EMPIRE REFINERIES, Inc., v. GUARANTY TRUST CO. OF NEW YORK et al.*

(Circuit Court of Appeals, Eighth Circuit. March 17, 1921.)

No. 5697.

1. **Commerce ⇐89—Court, and not Interstate Commerce Commission, has jurisdiction of suit against railroad for breach of contract of bailment.**
   A claim against a railroad company for breach of a contract of bailment is not a matter within the jurisdiction of the Interstate Commerce Commission, but of the courts.
2. **Carriers ⇐64—Railroad held liable as bailee for departure from contract of hiring.**
   A tank car, owned by the shipper, filled with gasoline, was delivered to a railroad company for the transportation of gasoline to a consignee under a bill of lading which entitled the owner to payment for the use of the car on a mileage basis. The car was not delivered to the consignee, but diverted, and was not returned to the owner for three months. *Held*, that the railroad company was a bailee for hire of the car, and that the contract of bailment was for its use only in accordance with the bill of lading; that its diversion was a breach of the contract, and, whether intentional or through negligence, rendered the railroad company liable for all damages sustained by the owner, including the value of its use while detained.

Appeal from the District Court of the United States for the Eastern District of Missouri; William C. Hook, Judge.

Suit in equity by the Guaranty Trust Company of New York and others, trustees, against the Missouri Pacific Railway Company and others. The Empire Refineries, Incorporated, appeals from an order disallowing its claim against the receiver. Reversed.

George A. Henshaw, of Oklahoma City, Okl. (A. Carey Hough, of Oklahoma City, Okl., and Warren T. Spies, H. O. Caster, Hayes McCoy, and S. N. Hawkes, all of Bartlesville, Okl., on the brief), for appellant.

Thomas T. Railey, of St. Louis, Mo. (Edward J. White, of St. Louis, Mo., Lansing P. Reed, of New York City, and Allen C. Orrick, of St. Louis, Mo., on the brief), for appellees.

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

CARLAND, Circuit Judge. January 17, 1917, appellant shipped on revenue billing from Cushing, Okl., to St. Louis, Mo., a tank car load of gasoline routed over the lines of the A., T. & S. F. Ry. and Missouri Pacific Ry. The tank car in which the gasoline was shipped was owned by appellant, and under the tariff provisions of the railways it was entitled to receive three-fourths of a cent per mile on loaded movements of the tank car. Instead of delivering the car and contents to the consignee at St. Louis, the Missouri Pacific Railway, then being operated by a receiver, tendered the car to the Wiggins Ferry at St. Louis, on March 18, 1917, which in turn delivered the same to the Clover Leaf Railway, with copy of waybill of another car showing destination Avondale, N. J. The car and contents were transported to Avondale, and

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*Rehearing denied June 13, 1921.

the car was not returned to St. Louis till June 17, 1917. Appellant presented a claim to the receiver in the sum of $297.70 for the rental value of the car for the time it was deprived of its use. The claim was heard by the special master and disallowed, and his action was confirmed by the court.

[1] The measure of damage or the amount thereof is not questioned. It does not appear from the record that the railway company had any authority to use the tank car except for the transportation of the gasoline to St. Louis. Appellant contends that the railway company was a special bailee of the car for hire for the purpose of transporting the contents thereof to the consignee at St. Louis, and is liable for any damages resulting from an unauthorized use of the same. Appellees admit that they would be liable if the car in question had been transported under revenue billing at the tariff rate of 10 cents per mile, but contend that under the facts of this case they are only liable for the amount fixed by the tariff provision above mentioned. It is also contended that the question as to whether the railway company is liable or not under the circumstances above detailed is a question for the Interstate Commerce Commission to decide, and therefore this court has and the court below had no jurisdiction of the case.

[2] The cause of action is one to recover damages for a breach of the contract of bailment, a matter over which it is clear the Commission has no jurisdiction. We are of the opinion that the tariff provision of three-fourths of a cent per mile was not intended to apply and did not apply, except as the car moved pursuant to instructions of appellant; that is, from Cushing to St. Louis. We now come to the liability of the railway company for the unauthorized use of the car. In this connection we must bear in mind that the car, so far as the record shows, was not delivered to the railway company for its general use as is frequently done by corporations and associations owning private tank cars. The car was bailed for a specific purpose for the mutual benefit of appellant and the railway company usually called a bailment for hire. The terms of the contract of bailment, express or implied, determine the rights, duties, and liabilities of the parties. In the absence of a special contract defining the relative rights of the bailor and bailee, the law of bailment lays down certain general rules of liability which control their relationship. Section 21, R. C. L. vol. 3; 6 C. J. p. 1110.

"The bailee is liable for loss resulting from breach of his contract to keep the property in a particular manner or at a particular place, or to use it only for a particular purpose or to a specified extent, or in a particular manner, or to return it at a particular time, or other special stipulation in regard to the property, without regard to whether he has been negligent." 6 C. J. § 42. Kennedy v. Portman, 97 Mo. App. 253, 70 S. W. 1099; Lilley v. Doubleday, 7 Q. B. D. 510; Butler v. Greene, 49 Neb. 280, 68 N. W. 496; Ferguson v. Porter, 3 Fla. 27; Evertson v. Frier (Tex. Civ. App.) 45 S. W. 201; Cartlidge v. Sloan, 124 Ala. 596, 26 South. 918; Carll v. Goldberg, 59 Misc. Rep. 172, 110 N. Y. Supp. 318; Cochran v. Walker (Tex. Civ. App.) 49 S. W. 403; J. T. Stark Grain Co. v. Automatic Weighing Mach. Co., 99 S. W. 1103.[1]

[1] Reported in full in the Southwestern Reporter; reported as a memorandum decision without opinion in 81 Ark. 609.

In Ferguson v. Porter, supra, bailee received a shipment of arrowroot, which he agreed to send to New Orleans for sale, but instead sent it to Charleston, and it was lost en route. He was held liable for the loss consequent upon his departure from instructions. In Butler v. Greene, supra, the bailee was compelled to move the property by the owner of the place at which he had agreed with the bailor to keep it. It was held that he was not relieved from liability for such removal. In Evertson v. Frier, supra, a bailee was held liable, regardless of the exercise of care, for the death of a horse driven 12 miles further than he represented that he intended to drive.

"The circumstance that the property is in the hands of the bailee, with the license of the owner to use it for one purpose, gives no right to use it for another; and the invasion of the owner's right of property is as complete when the bailee goes beyond his license and duty as if the control over the property were usurped without any bailment. Consequently, it may be stated generally, that if the thing is used for a different purpose from that which was intended by the parties, or in a different manner, or for a longer period, the hirer is not only responsible for all damages, but if a loss occurs, although by inevitable casualty, he will generally be held liable therefor." 3 R. C. L. p. 109. State v. State Journal Co., 75 Neb. 275, 106 N. W. 434, 9 L. R. A. (N. S.) 174, 13 Ann. Cas. 254; Woodman v. Hubbard, 25 N. H. 67, 57 Am. Dec. 310; Klug v. Sheriffs, 129 Wis. 468, 109 N. W. 656, 7 L. R. A. (N. S.) 362, 116 Am. St. Rep. 967, 9 Ann. Cas. 1013; McCurdy v. Wallblom Furniture & Carpet Co., 94 Minn. 326, 102 N. W. 873, 3 Ann. Cas. 468; Cobb v. Wallace, 5 Cold. (Tenn.) 539, 98 Am. Dec. 435; Swift v. Moseley, 10 Vt. 208, 33 Am. Dec. 197; Towne v. Wiley, 23 Vt. 355, 56 Am. Dec. 85; Ray v. Tubbs, 50 Vt. 688, 28 Am. Rep. 519; Crocker v. Gullifer, 44 Me. 491, 69 Am. Dec. 118; Graves v. Smith, 14 Wis. 5, 80 Am. Dec. 762; Stewart v. Davis, 31 Ark. 518, 25 Am. Rep. 576; Palmer v. Mayo, 80 Conn. 353, 68 Atl. 369, 15 L. R. A. (N. S.) 428, 125 Am. St. Rep. 123, 12 Ann. Cas. 691.

The bailee of a horse for hire has been held liable in an action of trover, when, after hiring him to be driven to one place, he drives him to a different one, without the consent of the owner. Rotch v. Hawes, 12 Pick. (Mass.) 136, 22 Am. Dec. 414; Woodman v. Hubbard, supra; Malaney v. Taft, 60 Vt. 571, 15 Atl. 326, 6 Am. St. Rep. 135. In the case at bar as the property bailed was returned, there is no question of trover or conversion. There is no defense made by the railway company that its action in sending the car to Avondale, N. J., instead of St. Louis, was not due to the want of ordinary care on its part. Both sides seem to treat the case as if the railway company was negligent, although from the authorities heretofore cited the question of negligence would seem to be immaterial. We are of the opinion that the record clearly shows a liability on the part of the railway company for the damages claimed.

The judgment below therefore is reversed, with directions to the trial court to enter judgment in favor of appellant.

CAMPBELL v. FETTY.

(Circuit Court of Appeals, Fifth Circuit. March 5, 1921.)

No. 3594.

1. **Contracts ⇐211—Option must be exercised within time fixed by contract.**
Where an option contract fixes the time for exercise of the option, an election to accept, not made until after expiration of such time, is not binding on the optionor; time being of the essence of option contracts.

2. **Corporations ⇐82—Contract held to limit time for exercise of option by subscriber for stock; "then."**
Where defendant, on a sale of stock to plaintiff, made an offer that, "should you carry this stock for twenty-four months and then desire to dispose of it I will take it off your hands," the word "then" *held* to mean "at that time," and not "afterwards," and to fix the time when the option must be exercised.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Then.]

3. **Estoppel ⇐58—Must have misled adverse party to his injury.**
An estoppel to set up a defense presupposes liability at the time of the act creating the estoppel, and that the party relying on it has been misled into such action that he will suffer injury if the estoppel is not declared.

In Error to the District Court of the United States for the Southern District of Georgia; Beverly D. Evans, Judge.

At Law. Action by Roy R. Campbell against I. H. Fetty. Judgment for defendant, and plaintiff brings error. Affirmed.

Jacob Gazan, of Savannah, Ga. (Sam D. Snodgrass, of Temple, Tex., on the brief), for plaintiff in error.

Robert M. Hitch and Remer L. Denmark, both of Savannah, Ga. (Hitch, Denmark & Lovett, of Savannah, Ga., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

BRYAN, Circuit Judge. Plaintiff in error sued to recover judgment for $20,000, which was the par value of stock of the East Oregon Lumber Company purchased by him December 10, 1915, through defendant in error, who at that time was president of the said company. Judgment was also prayed for interest at the rate of 8 per cent. per annum from the date of purchase of the stock.

The suit is based upon a promise by defendant in error, contained in a letter written by him to plaintiff in error December 3, 1915, as follows:

"In consideration of this subscription, as I stated to you, should you carry this stock for 24 months, and then desire to dispose of it, I will take it off your hands and allow you 8 per cent. carrying charge. You understand that, should any dividends be paid in the meantime, they would, of course, be deducted from the carrying charge."

The petition alleges that plaintiff in error, on January 23, 1918, tendered the stock to defendant in error, who declined to accept and pay for it, and further alleges that on June 19, 1918, defendant in

error admitted liability, and stated that he would purchase the stock even then if he were able to do so. The court sustained a demurrer to the petition, and dismissed it.

The language quoted above from the letter conferred upon plaintiff in error an option to sell. Strictly speaking, it did not create, upon acceptance, a contract of sale or return, for the reason that the East Oregon Lumber Company, and not defendant in error, was the owner of the stock sold to plaintiff in error. The difference is not important, except as it may serve to distinguish some of the cases relied upon by plaintiff in error. In contracts of sale or return, a reasonable time, after the expiration of the time stipulated for the exercise of an election to return, is usually allowed for physical delivery; but the time within which election to return is required is usually enforced strictly, in both contracts of sale or return and option contracts.

[1] By the great weight of authority, time is of the essence of option contracts. If the parties themselves fix the time for the exercise of the option—that is, for the acceptance of the offer therein contained—an election to accept, not made until after the expiration of the time so limited, is not binding upon the optionor. In the event a definite time is not fixed by the parties, the law allows a reasonable time within which the option must be exercised, or the offer accepted. 20 R. C. L. 428; Taylor v. Longworth, 14 Pet. 172, 10 L. Ed. 405; Waterman v. Banks, 144 U. S. 394, 12 Sup. Ct. 646, 36 L. Ed. 479; Lord Ranelagh v. Melton, 2 Drewry & Smale, 278; Magoffin v. Holt, 1 Duv. (Ky.) 95; note to Brooks v. Trustee Co., 50 L. R. A. (N. S.) 599.

Plaintiff in error contends that in the state of Georgia, where it is claimed the alleged breach of contract occurred, time is not considered as of the essence of option contracts, and relies upon Newburger v. Hoyt, 86 Ga. 508, 12 S. E. 925, and Rogers v. Burr, 97 Ga. 10, 25 S. E. 239, and thereupon insists that the rule prevailing in Georgia should be adopted as the law of the case. If the local rule were as stated, it is by no means conceded that it would be controlling in the decision of this case, since the question under consideration is one of general as distinguished from local law. Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865. However, the cases relied upon by plaintiff in error do not appear to be in harmony with the more recent opinions of the Supreme Court of Georgia, such as Larned v. Wentworth, 114 Ga. 208, 39 S. E. 855, and Hughes v. Holliday, 149 Ga. 147, 99 S. E. 301. In the case last cited it is said:

"In the case of Larned v. Wentworth, 114 Ga. 208, 39 S. E. 855, an option contract was under consideration. At page 222 of the opinion in that case it was said: 'It is peculiarly a contract of which time is of the essence.' Because of the one-sided nature of an option contract, time of the election by the optionee is of the essence of the contract in equity as well as in law, whether the contract expressly so stipulates or not. James on Option Contracts, § 862. The failure of the optionee to elect and to give notice of his election within the time limited in his contract, if there be stipulation as to time, and within a reasonable time implied by law in the absence of stipulation, ends his option rights."

[2] The next question raised is whether the language quoted from the letter of defendant in error fixed a definite time for plaintiff in

error's election to return the stock. Upon the authority of the cases already cited, and in view of the connection in which it is used, we are of opinion that the word "then" does not mean "thereafter," as contended by plaintiff in error, but is equivalent to the expression "at that time." It is not apparent or reasonable that defendant in error contemplated binding himself to allow plaintiff in error to speculate upon the rise or fall of the stock, or upon the prosperity or adversity of the company, for an indefinite time beyond the period plaintiff in error was required to keep the stock. To give to defendant in error's obligation the construction sought to be placed upon it would in effect be to substitute language which was not used, and which it cannot be said it was the intention of the optionor to use. In holding that "then" means "at that time," effect is given to the sentence following, in which it is provided that dividends "paid in the meantime" should be deducted. In using the last-quoted phrase, it is apparent that defendant in error had in mind a definite rather than an indefinite period of time. Lord Ranelagh v. Melton, supra.

The allegations in the petition that defendant in error, about six months after the expiration of the option, admitted his liability, and stated that he would be willing to take the stock at that time if he were able to do so, are made the basis for the contention that defendant in error waived or estopped himself from setting up the defense that the option had expired. There was no waiver, because the alleged admission of inability to pay is not at all inconsistent with the defense that there was no liability. Neither does it appear that there was an intention to relinquish an existing right. 27 R. C. L. 908.

[3] An estoppel also presupposes liability, and that the party relying upon it has been misled into such action that he will suffer injury, if the estoppel is not declared. 10 R. C. L. 697. The case of Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693, relied upon by plaintiff in error, is not in point. The doctrine of that case forbids a litigant to mislead his adversary by basing conduct upon one ground and then defending upon another. Here the rights and obligations of the parties had already expired by limitation. A mere erroneous opinion as to a liability which had long since ceased is not sufficient to revive or restore it.

We are of opinion that the demurrer should have been sustained, and the judgment is therefore affirmed.

WEINSTEIN v. ATTORNEY GENERAL OF THE UNITED STATES et al.

(Circuit Court of Appeals, Second Circuit. March 1, 1921.)

No. 122.

1. Searches and seizures ⇐5—In proceeding to compel return of books and papers, service on United States attorney insufficient to affect other representatives of the government.

In a proceeding against the United States attorney, a deputy Attorney General, immigration officials, and the chief of the Bureau of Investigation of the Department of Justice, for an order requiring them to return

books and papers illegally seized, service on the United States attorney, who did not have possession or control of any of the books or papers, did not affect the other representatives of different branches of the government.

2. **Searches and seizures ⟸5—Papers illegally seized cannot be ordered returned, when officers having custody are not concerned in any proceeding in the District Court.**

The courts cannot summarily order officers of the government to return books and papers illegally seized, where the purpose of the application was to prevent their use at a hearing by executive officers in deportation proceedings, and there is no indictment or other suit, action, or proceeding pending in the District Court, in which such officers are concerned or affected.

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

Proceeding by Gregory Weinstein against the Attorney General of the United States and others. From an order discharging an order to show cause (271 Fed. 5), the petitioner appeals. Affirmed.

By affidavit and extracts from the records of the District Court Weinstein showed that he was an alien residing in Brooklyn, and pursuant to a warrant issued by the Acting Secretary of Labor had been arrested as being found in the United States in violation of the Immigration Act of 1918 (Comp. St. Ann. Supp. 1919, § 4289¼b[1]), in that he was a member of or affiliated with an organization believing in the overthrow by force and violence of the government of the United States, etc. Pursuant to this warrant he was taken to Ellis Island, and subsequently released on bail pending hearing. The affidavits then assert, on information and belief, that persons believed to be "agents of the Department of Justice" seized and removed from his Brooklyn residence certain books, magazines, papers, and letters belonging to him, which books, etc., had not been returned, but had remained "in the custody of the agents of the Department of Justice under the guidance of the deputy Attorney General thereof, or in the custody of the Commissioner of Immigration or his subordinates or agents." The books and papers aforesaid are not alleged to have been seized under search warrant therefor, but the seizure was (apparently) contemporaneous with the aforesaid arrest of Weinstein on executive warrant.

On this showing Weinstein procured an order to show cause, directed specifically to the attorney for the Southern District, Mr. Hoover, a deputy Attorney General, Mr. Uhl, Commissioner at Ellis Island, Mr. Schell, inspector of immigration, and Mr. Scully, chief of the Bureau of Investigation of the Department of Justice, requiring them severally to show cause "why an order should not be entered directing that they return to the petitioner the books and papers" above referred to. Service of the order was made upon the United States attorney alone. On the return day that attorney appeared "specially" and moved that the order be discharged (1) as having been ineffectively served, and (2) because it had been improvidently granted, in that the court was without power to grant the relief demanded. After argument, the order was discharged, and Weinstein took this appeal.

Charles Recht, of New York City (Isaac A. Hourwich and Rose Weiss, both of New York City, of counsel), for Weinstein.

Francis G. Caffey, U. S. Atty., and Theodore Megaarden, Sp. Asst. U. S. Atty., both of New York City, opposed.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] There is not even a suggestion that the books sought to be recovered

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by Weinstein are now or ever have been in the possession or under the control of the United States attorney for the Southern district of New York. Under such circumstances the service of the order to show cause was, to say the least, insufficient, in that it did not bring before the court any of the parties accused of alleged wrongdoing. It may have been thought (though not argued at bar) that service on the attorney somehow affected or was sufficient in respect of all the other enumerated representatives of divers branches of the government of the United States. If this was the thought underlying the application, it is wholly erroneous.

[2] In response, however, to earnest argument, we shall notice the matters raised by the second branch of the objection (in the nature of a demurrer) lodged by the United States attorney on the return of the order in question. That this proceeding bears no analogy to those exemplified by 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, and Silverthorne v. United States, 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, is too plain for exposition.

Applications for the return of books, papers, etc., said to have been unlawfully seized, have hitherto been made (so far as reported cases show) during the progress of and as incidental to such judicial proceedings as indictments, or after the issuance of a search warrant (United States v. Hee [D. C.] 219 Fed. 1019; In re Chin K. Shue [D. C.] 199 Fed. 282; United States v. Maresca [D. C.] 266 Fed. 713), or after some process had issued returnable to the court in which such application was made (United States v. McHie [D. C.] 194 Fed. 894), or when criminal prosecution was in actual progress in such court (United States v. Friedberg [D. C.] 233 Fed. 313). We have held that applications of this nature are interlocutory, and therefore not appealable (Coastwise, etc., Co. v. United States, 259 Fed. 847, 170 C. C. A. 647), and this proceeding must be regarded (as it confessedly is) as an original, independent application bearing no relation to any proceeding in or process of the District Court for the Southern District of New York.

It may be supposed (although it is not definitely so stated) that the object of the application is to prevent the use of the books and papers referred to at the hearing accorded by the executive in deportation proceedings. Whether the power of the court to restore on motion books and papers illegally seized be thought to rest upon the official character of the parties in possession; i. e., on the fact that they hold positions under the United States government (as in most cases above stated), or on the fact that the party in possession is an officer of the court, viz. an attorney at law (as in the Maresca Case, supra), need not be decided, because in this instance the United States attorney possesses nothing that petitioner wishes, and none of the other parties mentioned is concerned in or affected by any suit, action, or proceeding in the District Court other than this application for an order.

To sustain such a proceeding as this it must be held that the court below is clothed with plenary power to investigate on motion all unconstitutional searches or seizures, without regard to the question

whether or not they bear any relation to proceedings pending in such District Court. For this doctrine no authority exists, and none ought to exist, and the court below was right in refusing to entertain the application, even had the service been effective.

Order affirmed, with costs.

UNITED STATES ex rel. GEORGIAN v. UHL, Acting Com'r of Immigration.*

(Circuit Court of Appeals, Second Circuit. February 2, 1921.)

No. 121.

1. **Aliens ⇐54—Review of deportation proceedings limited.**
Deportation proceedings are reviewable by the courts only on habeas corpus, and such review extends only to the inquiry whether the powers of the executive have been exceeded.

2. **Aliens ⇐54—Review of deportation proceedings limited.**
While the courts may inquire on habeas corpus as to whether deportation proceedings have been fair, the rules of evidence do not in strictness apply, and the hearing, though it must be fair, may be summary, and the finding of facts made by the executive department is conclusive.

3. **Aliens ⇐53—Advocating overthrow of government ground for deportation.**
An alien resident, who is opposed to the government of the United States, and who publishes propaganda intended to eventually result in or facilitate its overthrow, *held* subject to deportation under the statute, though he does not advocate its immediate overthrow by violence.

Ward, Circuit Judge, dissenting.

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

Habeas corpus by Alexis Georgian against Byron H. Uhl, Acting Commissioner of Immigration at the Port of New York. From an order discharging the writ, petitioner appeals. Affirmed.

Georgian is an alien, born a Russian subject, resident in the United States since 1900, and in Minneapolis since about 1908. His occupation is that of a publisher and bookseller. Deportation proceedings having been instituted against him by the Department of Labor, a hearing was had, throughout which he was represented by counsel, and at which he personally testified at length, and the publications put out by him, or sold by him, were to a considerable extent put in evidence.

As the result of the hearing he was ordered deported on the grounds: (a) That he had been found advocating the overthrow by force or violence of the government of the United States; (b) that he had been found advocating or teaching the unlawful destruction of property. He thereupon took out this habeas corpus, after hearing was remanded, and took this appeal.

Royal W. France and Charles Recht, both of New York City, for appellant.

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

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1, 2] That deportation proceedings are wholly administrative is settled.

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 623, 65 L. Ed. —.

The Japanese Immigrant Case, 189 U. S. 86, 23 Sup. Ct. 611, 47 L. Ed. 721; United States v. Ju Toy, 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040. Review by the District Court, or on appeal by this court, is limited to habeas corpus (United States v. Sing Tuck, 194 U. S. 161, 24 Sup. Ct. 621, 48 L. Ed. 917); and such review extends only to the inquiry whether the discretionary powers of the executive (large as they are) have been exceeded. There is no judicial power to review or reverse a finding of fact based upon evidence. Low Wah v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165; Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114. And this court has recently pointed out that, while we may inquire on habeas corpus as to whether the deportation proceedings have been fair, the rules of evidence do not in strictness apply (Diamond v. Uhl [C. C. A.] 266 Fed. 34), and the hearing, though it must be fair, may be summary, and the findings of fact made by the Executive Department are conclusive (Rakics v. Uhl [C. C. A.] 266 Fed. 646).

[3] This petitioner is obviously a man of education, and by his command of languages and acquaintance with affairs well able both to defend himself and to lead others. But mere personal abstention from violence, or even from violent language, does not secure immunity, if the result of the gentlest and most guarded speech is to advocate or teach that which the statute condemns. The "philosophic" anarchist is an anarchist nevertheless. Lopez v. Howe, 259 Fed. 401, 170 C. C. A. 377. Since in this or in any similar case we cannot be concerned with the weight of the evidence, but only with the existence thereof, it is not useful to state or comment upon what Georgian was proved to have done, what he admitted having done, or what he himself said of his own teachings, advocacy, or opinions.

We express no opinion as to the result upon our minds of the evidence adduced at the deportation hearing, beyond this, viz. there was evidence, indeed it was admitted, that though he did not and does not believe in the immediate overthrow of the government of the United States that position is not the result of any affection for the same or approval of this republic, nor of any objection to force and violence per se, but only results from an opinion that the time is not ripe. Ripeness is to be attained by teaching, and by the dissemination of the style of literature which it is his business to circulate; when the time is ripe, it is to be hoped that force and violence will not be necessary, but they will be appropriate as soon as they are likely to prevail.

However fantastic the above-outlined social program may seem, it is impossible to say that a professed and avowed effort to hasten its consummation is not evidence of that which the statute forbids.

On these grounds the order below is affirmed.

WARD, Circuit Judge (dissenting). While I think the relator had a fair trial, I am sure there was no proof whatever of the charges upon which he is being deported, viz. that he advocated the overthrow of the United States government by force or violence, or that he advocated or taught the unlawful destruction of property. There was proof of conversations with various government witnesses before his

arrest as to his beliefs, but they admitted that they had never heard him advocate the things for which he is being deported.

In the deportation proceeding, after his arrest, he was minutely examined as to his beliefs, and admitted that in his opinion the soviet form of government would be the best form for this country, but advocated bringing it about by persuasion and absolutely repudiated the use of force or violence. His examination throughout displays, in my opinion, a perfectly frank and conscientious statement of his beliefs, which, whether the immigration authorities like them or not, cannot be used to sustain the charge for which he is being deported.

Knowledge of the contents of all the books he sells in his book store cannot be imputed to him, much less approval of all they contain.

I think the order should be reversed.

CHICAGO BONDING & INS. CO. v. CITY OF PITTSBURG, KAN.*

(Circuit Court of Appeals, Eighth Circuit. March 17, 1921.)

No. 5665.

1. **Appeal and error ⊂=1054(1)—Admission of immaterial evidence in trial to court harmless error.**
   Evidence *held* immaterial to the issues, and its admission harmless error, in an action tried to the court.
2. **Trial ⊂=420—Motion for directed verdict waived by introduction of evidence.**
   A motion by defendant for a directed verdict, made at the close of plaintiff's evidence, is waived by the introduction of evidence by defendant.

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

Action at law by the City of Pittsburg, Kan., against the Williams Construction Company and the Chicago Bonding & Insurance Company. Judgment for plaintiff, and defendant Bonding Company brings error. Affirmed.

Paul R. Stinson, of Kansas City, Mo. (J. J. Campbell, of Pittsburg, Kan., and John T. Harding, Buckner F. Deatherage, and David A. Murphy, all of Kansas City, Mo., on the brief), for plaintiff in error.

C. O. Pingry, of Pittsburg, Kan. (Arthur Fuller, of Pittsburg, Kan., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This is an action brought by the city of Pittsburg, Kan., against the Williams Construction Company and the Chicago Bonding & Insurance Company to recover damages for the failure on the part of the Construction Company to perform a paving contract. A jury was duly waived and the case tried to the court, which after hearing the evidence rendered a judgment against the Construc-

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

*Rehearing denied June 21, 1921.

tion Company and the Insurance Company for the sum of $10,625. The following is a copy of the specification of errors relied on by the Insurance Company:

Specification of Errors.

The following is the assignment of errors relied on and intended to be urged:

(1) The judgment of the court herein, in favor of the plaintiff and against this plaintiff in error, is contrary to the law, is contrary to the evidence and against the weight of the evidence, and is unsupported by any evidence.

(2) The court erred in not setting aside its judgment for the reason that there was no evidence upon which to sustain its judgment.

(3) The court erred in overruling the motion of the defendant, Chicago Bonding & Insurance Company, to set aside the judgment and grant a new trial.

(4) The court erred in admitting evidence on behalf of the plaintiff and against the defendant (this plaintiff in error), over its objections and exceptions, tending to prove that the plans and specifications for National pavement in question were not the plaintiff city's, were a patented pavement, and that such plans and specifications came through the defendant Williams Construction Company, and that the Williams Construction Company and the patentee were promoting the pavement; such evidence being as follows:

"By Mr. Pingry: Q. Do you know where these plans and specifications and formula for this National pavement came from, or who prepared it? * * *

"By Mr. Stinson: The defendant objects to that question for the reason that the pleadings, the admissions of plaintiff contained in the exhibits already offered, show conclusively that the plans and specifications were those of the city. * * * That any evidence as to who might have prepared them, in conflict with the recitals in the contract, resolution and ordinance, is not binding on the defendant bonding company."

Objection overruled—exception allowed.

"A. The question cannot be answered by yes or no. The plans and specifications came to me through the agent of the patentee and the Williams Construction Company, who were promoting this pavement together at the time, and the specifications were the result of experimentation and development on the part of the patentee, and I think he was assisted by a consulting engineer."

[1] The evidence taken at the trial is contained in the record in what is called a bill of exceptions. This bill of exceptions does not show anywhere that any ruling was requested or made upon which to base specifications 1 and 2. No request was made of the trial court to find the facts or declare the law in favor of the defendants. So far as specification No. 3 is concerned, it raises no question reviewable in this court. The error complained of in specification No. 4 is without merit. The answer of the witness in a trial to the court could not have prejudiced the defendants. The question as to whether National pavement mentioned in the contract was a patented pavement, or whether the specifications under the contract were furnished by the city, the Williams Construction Company, or anyone else, was immaterial. The court could probably take judicial notice as to who furnishes the specifications in applications for patents.

[2] Counsel for the Insurance Company did make a motion for a directed verdict at the close of the evidence for the plaintiff, but this was waived by introducing evidence after the same was overruled, and the motion was not again renewed. There is in the bill of exceptions

what is called an agreed statement of facts. This was introduced as Exhibit No. 15. There were 14 exhibits which preceded it, and both parties to this statement reserved the right to offer such other and supplemental testimony on any of the issues of the case as they might see fit. Exercising this privilege the plaintiff introduced in evidence 14 exhibits and the testimony of Mr. Curfman, consisting of about 20 printed pages of the record. The defendant called and had sworn five witnesses, whose testimony covers about 32 printed pages of the record, so that the case is not here on an agreed statement of facts.

No error appearing in the record, the judgment below is affirmed.

STOFFREGEN v. MOORE, Collector of Internal Revenue.

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

No. 5710.

1. **Appeal and error ⊜854(2)—Opinion of court below cannot be assigned as error.**
   Assignments of error cannot be based on the opinion of the court below, since the opinion may be wrong and still the judgment be right.

2. **Appeal and error ⊜733—Assignments of error to judgment held too indefinite.**
   An assignment that the court erred in rendering judgment for defendant for the reason that under the law and the facts judgment ought to have been entered for plaintiff, is too indefinite to present anything for consideration.

3. **Appeal and error ⊜237(6)—On writ of error after trial to court, only rulings on law can be reviewed.**
   Under Rev. St. § 1011 (Comp. St. § 1672), forbidding reversal of a judgment for errors of fact, assignments of error to the assumption of facts by the trial court are not reviewable, in absence of ruling by court; the proper practice for preserving questions for review, under Rev. St. §§ 649, 700 (Comp. St. §§ 1587, 1668), being to make some request to the trial court to find the facts or declare the law.

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

Action by Charles Stoffregen against George H. Moore, as Collector of Internal Revenue. Judgment for defendant (264 Fed. 232), and plaintiff brings error. Affirmed.

Theodore Rassieur, of St. Louis, Mo. (Morton Jourdan and Thomas M. Pierce, both of St. Louis, Mo., on the brief), for plaintiff in error.

John M. Sternhagen, of New York City (James E. Carroll, U. S. Atty., of St. Louis, Mo., and Carl A. Mapes and A. L. Boulware, both of Washington, D. C., on the brief), for defendant in error.

Before CARLAND, Circuit Judge, and LEWIS and COTTERAL, District Judges.

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CARLAND, Circuit Judge. The parties to this litigation will be referred to as they were in the trial court. The plaintiff commenced this action at law against the defendant to recover certain income taxes paid under protest. After issue joined a jury was duly waived and the action tried to the court. The court, after hearing the evidence, found the issues generally for the defendant, and entered judgment accordingly. The plaintiff brought the case here on writ of error.

Counsel for plaintiff assigns three errors. The first two assignments of error are to the effect that the court erred in making certain assumptions of fact. The third assignment of error is to the effect that the court erred in rendering judgment for the defendant, for the reason that under the law and the facts judgment ought to have been entered for the plaintiff.

[1] The assumptions of fact complained of in assignments of error 1 and 2 are found, if anywhere, in a memorandum opinion of the trial court incorporated for some reason in what is called a bill of exceptions. These two assignments of error present nothing for review: First, because they are based upon the opinion of the court, which cannot be the basis of an assignment of error. The opinion may be wrong, and still the judgment be right. Second, we are by statute forbidden from reversing a judgment for error of fact on writ of error. Rev. St. § 1011; Comp. Stat. § 1672.

[2] None of the assignments present anything for this court to review, for the reason that they are not based upon any ruling of the trial court, and in addition assignment No. 3 is too indefinite to present anything for consideration here. U. S. v. A., T. & S. F. Ry. Co., 270 Fed. 1, decided January 12, 1921; Mercantile Trust Co. v. Wood et al., 60 Fed. 346, 8 C. C. A. 658; United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, Kan., 145 Fed. 144, 76 C. C. A. 114; Webb et al. v. Nat. Bank of Republic of Chicago, 146 Fed. 717, 718, 719, 77 C. C. A. 143; Morris et al. v. Canda, 80 Fed. 739, 26 C. C. A. 128. As to using the memorandum opinion of the court as a basis for assignments of error see Roger v. Goldfield, Colo., 249 Fed. 39, 161 C. C. A. 99; U. S. v. Porter Fuel Co., 247 Fed. 769, 159 C. C. A. 627.

[3] As to the proper practice to preserve questions for review in cases tried to the court without a jury see sections 649 and 700, Rev. Stat. (Comp. St. §§ 1587, 1668); also Mason v. U. S., 219 Fed. 547, 135 C. C. A. 315, and cases cited. The fundamental rule that on writ of error only questions of law may be reviewed will serve as a guide to counsel in the trial of actions at law without a jury. The court at its discretion may make findings of fact either general or special. If they are special, the question of law as to whether the special findings support the judgment may be reviewed; also objections to the omission or exclusion of evidence during the trial. If it is sought to test the sufficiency of the evidence to support the judgment, some request to the trial court to find the facts or declare the law must be made, and, if the requests are denied, then the denial presents a question of law; but no such procedure was had in this case. There is a bill of exceptions which purports to contain the evidence taken at the trial; but such bill

of exceptions is not an agreed statement of the case, and it contains no ruling of the trial court upon which the assignments of error can be based.

In this state of the case, we have nothing to do but to affirm the judgment below; and it is so ordered.

THE BJORNEFJORD.

(Circuit Court of Appeals, Second Circuit. March 2, 1921.)

No. 132.

Shipping ⇐42—Owner of chartered vessel has reasonable time to repair machinery.

Under a time charter party requiring the owner to maintain the vessel in a thoroughly efficient state in hull and machinery for and during the service, but fixing no time within which she must be restored to such state in case of accident to machinery, he is required to exercise reasonable and ordinary care only in that respect and fulfills his duty by employing a reputable and fully equipped concern to make the repairs, and is not liable, beyond loss of charter hire, for delay caused by such concern.

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

Suit in admiralty by George Flint and others, doing business as Flint, Goering & Co., Limited, against the steamship Bjornefjord. Decree for respondent, and libelants appeal. Affirmed.

Burlingham, Veeder, Masten & Fearey, of New York City (R. H. Hupper, of New York City, H. Alan Dawson, of Philadelphia, Pa., and G. Noyes Slayton, of New York City, of counsel), for appellants.

Haight, Sandford, Smith & Griffin, of New York City (Wharton Poor, of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a libel in rem by the charterer to recover damages for being deprived of the use of the steamer Bjornefjord for two weeks while a new propeller was being installed. The material provisions of the charterparty are:

"1. That the owner shall * * * maintain her in a thoroughly efficient state in hull and machinery for and during the service."

"16. That in the event of loss of time from * * * breakdown of machinery, or damages preventing the working of the vessel for more than 24 consecutive hours, the payment of hire shall cease until she be again in an efficient state to resume her service. * * *

"17. * * * The act of God, * * * and all dangers and accidents of * * * machinery * * * throughout this charter party, always mutually excepted."

"22. That as the steamer may be from time to time employed in tropical waters during the terms of this charter, steamer is to be docked, bottom cleaned and painted, whenever charterers and master think necessary, at least once in every six months, and payment of the hire to be suspended until she is again in proper state for the service."

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The steamer had been withdrawn under article 22 to be docked, her bottom cleaned and painted by the Robins Dry Dock & Repair Company of Brooklyn. In the course of this operation a crack was discovered in the propeller, and it was condemned by the Lloyds and Veritas Classification services. The owners employed the Robins Company to install the spare propeller, which in doing so was negligently let fall and so injured that a new propeller had to be cast. This caused the additional delay of two weeks. The charterer has paid no hire for any part of the time the steamer was withdrawn, and the claimant asks for none; but the charterer filed a libel in rem to recover damages in the sum of $33,068.98, the estimated value of the use of her for 14 days, of which it had been deprived.

Judge Learned Hand dismissed the libel on the ground that the delay was caused either by a "breakdown of machinery," within article 16, or by "an accident of machinery," within article 17, which article in either case completely defined the charter's remedy, viz., to be relieved from payment of hire "until the steamer was again in an efficient state to resume her service."

The owners, on the other hand, contend that admitting this would have been so, if the delay had been caused by the break in the original propeller, it was not so caused. They say the delay was due to a new and independent cause, viz. the negligence of the Robins Company in letting the spare propeller fall while installing it. For this reason they say the rights of the charterer depend upon article 1 of the charter party, which requires the owners to maintain the steamer in an efficient state for the service.

Without passing on this question at all, we are of opinion that the libel was properly dismissed, even upon the charterer's theory. If article 1 had defined the time within which the owners were obliged to restore the steamer to a "thoroughly efficient state in hull and machinery," they would not have been excused for any additional delay due to the negligence of an independent contractor employed by them, even if he were entirely competent and properly equipped. There being no such limitation, all they were required to do was to exercise reasonable and ordinary care to restore the vessel to a thoroughly efficient state for her service. In our judgment they did this, even if the negligence of an experienced, reputable, and fully equipped ship repair concern employed by them prolonged the delay.

The decree is affirmed.

RUSSELL v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. April 4, 1921.)

No. 3598.

1. **False personation ⟸2—Defendant held to have impersonated officer authorized to search for liquor.**
Defendant, by going to the apartment of prosecuting witness, showing a badge, stating that he understood the witness had liquor in his apartment, and starting to search the place, represented that he was an officer acting under the authority of the government to search premises for intoxicating liquors, within Criminal Code, § 32 (Comp. St. § 10196).

2. **False personation ⟸2—That one representing himself as authorized to search for liquor was employé of Navy Department not defense.**
Under Criminal Code, § 32 (Comp. St. § 10196), relative to falsely pretending to be a United States officer, and in such pretended character demanding or obtaining anything of value, where defendant represented that he was authorized to search for intoxicating liquors, and by such representation obtained money from the prosecuting witness, it was no defense that he was an employé of the Navy Department, as an employé of one department may be guilty of falsely impersonating an officer of another department.

3. **False personation ⟸1—Statute should be construed in harmony with aim.**
Criminal Code, § 32 (Comp. St. § 10196), relative to the offense of falsely pretending to be a United States officer, should be construed in harmony with its aim which is not merely to protect innocent persons from actual loss, but to maintain the general good repute and dignity of the federal service itself.

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

James A. Russell was convicted of falsely assuming and pretending to be a United States officer, and he brings error. Affirmed.

John F. Dore and J. L. Finch, both of Seattle, Wash., for plaintiff in error.

Robert C. Saunders, U. S. Atty., and Francis C. Reagan, Asst. U. S. Atty., both of Seattle, Wash.

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

GILBERT, Circuit Judge. The plaintiff in error was convicted of violation of section 32 of the Criminal Code (Comp. St. § 10196). The indictment charged that, with intent to defraud Julius Taylor, the plaintiff in error on a day named—

"did then and there falsely assume and pretend to be an officer acting under the authority of the United States, to wit, a revenue officer and employé, and in such pretended character did falsely demand and obtain from him, the said Julius Taylor, a sum of money, to wit, $80."

There was evidence that, in company with another, the plaintiff in error went to the apartment of Julius Taylor and said, "We are from the federal government," and that the plaintiff in error pulled back his

coat and showed a badge, and stated that he understood that Taylor had liquor in his apartment, that the plaintiff in error and his companion then started to search the place, that Taylor, after laying $80 on the table, told the plaintiff in error that if that would do them any good he would call the thing square, and that the plaintiff in error took the $80 and left. The plaintiff in error testified that at the time of the alleged offense he was employed by the United States Navy Department as a timber inspector, and the badge which had been issued to him as such inspector was placed in evidence.

[1, 2] It is assigned as error that the trial court overruled the motion of the plaintiff in error for a directed verdict of acquittal. The argument is that, inasmuch as the plaintiff in error was in fact an officer employed by the United States Navy Department, he could not be held guilty of the offense of assuming or pretending to be an officer and employé acting under the authority of the United States. But the clear meaning of the representation which he made to Taylor was that he was an officer acting under the authority of the government to search premises for intoxicating liquors, and the evidence leaves no doubt that he intended so to be understood, and that he was so understood by Taylor, and that he obtained the $80 in consequence of that representation. It is no defense to him that he was employed in some other department of the government. There can be no question but that an employé of one department of the government may be held guilty of falsely impersonating an officer of another department.

[3] Section 32 should be construed in harmony with its aim, which is—

"not merely to protect innocent persons from actual loss through reliance upon false assumptions of federal authority, but to maintain the general good repute and dignity of the service itself." United States v. Barnow, 239 U. S. 74, 80, 36 Sup. Ct. 19, 22 (60 L. Ed. 155).

The judgment is affirmed.

MARTIN v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. February 28, 1921. Rehearing Denied May 12, 1921.)

No. 5647.

1. **Criminal law ⇐201—Acquittal of offense against state does not bar prosecution by federal government.**
   An acquittal of defendant in the state court on the charge of transporting intoxicating liquor into a county, to be kept stored and sold to other persons therein, is not a bar to his trial and conviction in the federal court for transporting the same liquor in interstate commerce, since the two offenses were different and committed against different sovereignties.

2. **Criminal law ⇐382—Acquittal in state court not competent evidence for defendant in federal prosecution.**
   In a prosecution in the United States court for unlawfully transporting intoxicating liquor in interstate commerce, a judgment of the state court, acquitting defendant of transporting the liquor into a county to

be illegally kept, stored, or sold, which was rendered upon a general verdict without any special finding of facts, is not admissible as evidence of defendant's innocence, since defendant could have been innocent of the offense against the state law, and yet have been guilty of the offense against the federal statute.

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Clifford K. Martin was convicted of transporting intoxicating liquor in interstate commerce, and he brings error. Affirmed.

J. E. Willits, of Hastings, Neb., for plaintiff in error.

T. S. Allen, U. S. Atty., of Lincoln, Neb. (F. A. Peterson, Asst. U. S. Atty., of Omaha, Neb., on the brief), for the United States.

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

CARLAND, Circuit Judge. Plaintiff in error, hereafter defendant, was indicted, convicted, and sentenced for causing to be transported on June 29, 1919, in interstate commerce from St. Joseph, Mo., to and into the Hastings division of the district of Nebraska, certain spirituous and intoxicating liquors, not for medicinal, sacramental, mechanical, or scientific purposes, and not by virtue of a prescription of a licensed or practicing physician as provided by the laws of the state of Nebraska. The only point properly raised and argued by counsel for defendant to obtain a reversal of the judgment below is in regard to the refusal of the trial court to admit in evidence the record of a proceeding before a justice of the peace of Adams county, Neb., in the case of State of Nebraska v. Clifford K. Martin.

The record offered showed that on October 22, 1919, before C. N. Nash, justice of the peace, defendant was tried and acquitted upon a complaint, the first count of which charged the defendant with having on or about the 29th day of June, 1919, then and there being in said county did then and there unlawfully and knowingly transport and cause to be transported, carry and cause to be carried intoxicating liquors, to wit, whisky, for said defendant to be by him the said defendant, kept, stored, sold, and furnished to other persons in Adams county, Neb.

[1] Counsel for defendant does not claim that the judgment of acquittal in the state court would be a bar to defendant's trial and conviction in the federal court, but that the judgment was admissible upon the question of transportation to be considered with all the other evidence in the case. Of course the defendant could not claim the judgment of acquittal in the state court to be a bar to his trial and conviction in the federal court, for the reason that the two offenses were different, and committed against different sovereignties. The defendant could be convicted of one offense and acquitted of the other.

[2] We are of the opinion that the admission by counsel that he does not claim that the judgment of the state court was a bar ends all discussion. The judgment was a general judgment upon a general verdict, without any special finding of facts. The defendant might very

well be guilty of transporting intoxicating liquors from St. Joseph into the Hastings division, and not be guilty of the crime charged against him in the state court. In the state court the transportation of intoxicating liquors had to be for a certain purpose. In the federal court the transportation must not have been for an entirely different purpose. The jury in the state court might have found the purpose lacking.

The ruling of the trial court was right, and the judgment should be affirmed. It is so ordered.

FIRST NAT. BANK OF LAKE BENTON v. GALBRAITH.

(Circuit Court of Appeals, Eighth Circuit. March 7, 1921.)

No. 5477.

Bankruptcy ⟸166(4)—Alleged preference not recoverable, where defendant had no reasonable cause to believe preference would be effected.

A trustee in bankruptcy cannot recover an alleged preferential payment under Bankruptcy Act, § 60b, as amended (Comp. St. § 9644), where there is no sufficient evidence that defendant had reasonable cause to believe that the enforcement of the payment would effect a preference.

In Error to the District Court of the United States for the District of Minnesota; Page Morris, Judge.

Suit by John P. Galbraith, as trustee in bankruptcy, against the First National Bank of Lake Benton. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

Louis P. Johnson, of Ivanhoe, Minn., for plaintiff in error.

Charles W. Sterling, of St. Paul, Minn. (Todd, Fosnes & Sterling, of St. Paul, Minn., on the brief), for defendant in error.

Before HOOK and CARLAND, Circuit Judges, and VAN VALKENBURGH, District Judge.

HOOK, Circuit Judge. The trustee in bankruptcy sued the bank to recover an alleged preferential payment by the bankrupt. A trial to a jury resulted in a verdict for the plaintiff, and a judgment followed accordingly. The defendant's motion at the close of the trial for a directed verdict in its favor was denied by the trial court. The ruling raises the question of the sufficiency of the evidence to support the verdict.

It was necessary for the plaintiff to prove, not only that the bankrupt was insolvent when the payment was made, but also that the defendant had at the time reasonable cause to believe that the enforcement of the payment would effect a preference. Bankruptcy Act, § 60b, as amended (Comp. St. § 9644). It was a very close question whether the bankrupt was in fact insolvent when he made the payment to defendant. The jury had considerable trouble over it, once returning to the court for further instructions, and again with a statement that they were unable to agree. However, we take the verdict finally rendered as estab-

lishing the fact of insolvency. We refer to the doubt about it simply for its reflexive light upon the situation as it appeared to defendant when it received the payment. The trial of the issue of insolvency developed facts about the bankrupt's financial condition which would not ordinarily have been known, and were not known by defendant; and even then, as we have said, the question was a close one.

As to the second part of the plaintiff's burden of proof—that is to say, to show that defendant had reasonable cause to believe that the enforcement of the payment would effect a preference—we are clear that there was not sufficient evidence to sustain the verdict. The transaction was an ordinary one, under the circumstances as they appeared and without the attendance of features that would excite suspicion, much less afford reasonable ground for the belief required.

The judgment is reversed, and the cause is remanded for a new trial.

THE BOSTON.

(District Court, E. D. New York. February 21, 1921.)

1. **Maritime liens ⇐16—Libel for state lien must show vessel was not foreign.**
   A libel to enforce against a vessel the lien given by the New York Lien Law, for advances for insurance, must show that, when the debt was contracted, the vessel was a domestic vessel, since a state cannot create liens against foreign vessels.
2. **Maritime liens ⇐64—Libel must plead compliance with requirements as to notice.**
   A libel to enforce a lien given by a state statute against a vessel must plead everything that libelant must prove, and therefore must allege compliance with the statutory requirements as to filing of notice of lien, which is a necessary part of the proof.
3. **Maritime liens ⇐34—State lien ceases after 12 months.**
   Lien Law, N. Y. § 83, providing that every lien for a debt shall cease in a case of vessels not navigating the Lakes at the expiration of 12 months after it was contracted, clearly shows that there can be no lien after the expiration of that period, so that a libel to enforce such lien, which shows that more than 12 months had expired since the debt was contracted, must be dismissed.

In Admiralty. Libel by Frank B. Hall & Co., Incorporated, against the dredge Boston for advances for insurance. On exceptions by interveners to the amended libel. Exceptions sustained, and libel dismissed.

Delancey Nicoll, of New York City, for the motion.
Alexander & Ash, of New York City, opposed.

GARVIN, District Judge. [1] Interveners have filed exceptions to amended libel, which is based upon a claim for advances made by libelant to the dredge Boston for insurance on that vessel. The second exception is based upon the proposition that the lien claimed in the libel which is asserted under chapter 38, Laws of New York 1909 (Lien

Law [Consol. Laws, c. 33]), may be enforced in admiralty only upon domestic vessels, and that it does not appear upon the face of the libel that when the debt was contracted the dredge was a domestic vessel. This exception is well taken and must be sustained. A state cannot by law create liens against foreign vessels. The Roanoke, 189 U. S. 185, 23 Sup. Ct. 491, 47 L. Ed. 770.

[2] The third exception is upon the failure to allege in the libel the statutory requirements respecting the filing of notice of lien. The libelant must plead everything that he must prove. That notice of lien was filed is a necessary part of the proof. The Athinai (D. C.) 230 Fed. 1017. This exception is sustained.

[3] The fourth exception is that it appears from the libel that when the libel was filed the debt sued upon had ceased to be a lien under the Laws of New York, because more than 12 months had expired since the debt was contracted. Section 83 of the New York Lien Law reads as follows:

"Every lien for a debt shall cease if the vessel navigates the western or northwestern lakes, or either of them, or the St. Lawrence river, at the expiration of six months after the 1st of January next succeeding the time when the debt was contracted, and in case of any other vessel, at the expiration of twelve months after the debt was contracted. If, upon the expiration of the time herein limited in either of such cases, such vessel shall be absent from the port at which the debt was contracted, the lien shall continue until the expiration of thirty days after the return of such vessel to such port. If proceedings are instituted for the enforcement of the lien within the time herein limited, such lien shall continue until the termination of such proceedings."

It clearly appears, I think, that there can be no lien after the expiration of 12 months, and the exception is therefore sustained. If the foregoing conclusions are correct, it is unnecessary to consider the first exception.

The libel is dismissed.

JAMES HEDDON'S SONS et al. v. RUSH et al.

RUSH v. PALTZ.

(District Court, N. D. New York. April 14, 1921.)

Nos. 241, 254.

1. Patents ⇐114—Complainant, suing for patent after priority was awarded to another, must produce new evidence.

A complainant, suing for a decree adjudging him to be entitled to a patent for a design as to which priority had been awarded by the Court of Appeals of the District of Columbia to defendants, has a heavy burden to establish his right to relief, and cannot succeed unless the evidence shows to the satisfaction of the court that there is new or additional and convincing evidence that complainant, and not defendant, was the first inventor.

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2. Patents ⇐114—Evidence held to show patentee of design for wooden fish bait was not original inventor.

In a suit to have complainants decreed to be entitled to a patent for a design for a wooden fish bait, issued to defendants, evidence *held* to show sufficiently by testimony not before the Court of Appeals of the District of Columbia in interference proceedings that complainants' predecessor in title was the original inventor of the design, and that defendants acquired knowledge of such design from him.

3. Patents ⇐328—1,101,223, claim 5, for wooden fish bait, held not infringed, when construed to be valid.

The Welles patent, No. 1,101,223, claim 5, for a wooden fish bait, when construed, as it must be, to be valid under the prior art, as limited to the specific construction shown, for the purpose of causing the bait to travel in a horizontal position and on a substantially straight path, *held* not infringed by a bait which traveled in an oblique position and a zigzag path.

4. Patents ⇐328—1,101,223, claim 1, for wooden fish bait, held not valid or infringed.

The Welles patent, No. 1,101,223, claim 1, for a wooden fish bait, the novelty in which was asserted to arise from the so-called throat, *held* not valid, in view of evidence that the throat performed no useful function, and, if valid, not infringed by a bait having no throat.

In Equity. Separate bills by James Heddon's Sons and another against Joseph K. Rush and another, to secure a decree that complainants were entitled to a design patent, and by Joseph K. Rush against Albert K. Paltz, doing business under the firm name of the W. A. Able Company, for the infringement of a patent. Decree for complainants in first suit, and for defendant in the second.

The first suit above entitled, No. 254, is brought by the complainants under section 4915 of the Revised Statutes (Comp. St. § 9460), the assignee of an application for a design patent of a fish bait, and which suit is based upon the claim that one Fillmore M. Smith, of Syracuse, N. Y., now deceased, was the first inventor thereof. The design patent, No. 46,794, granted to Joseph K. Rush on the alleged invention of one Leroy Yakeley, of Syracuse, N. Y., was placed in interference with the Smith application. The Examiner of Interferences decided in favor of Yakeley. The Board of Examiners in Chief and the Assistant Commissioner of Patents decided in favor of Smith, and the Court of Appeals, District of Columbia, decided in favor of Yakeley. Thereupon the bill of complaint in this suit, No. 254, was filed.

The defendant Rush counterclaimed, alleging infringement by the plaintiff of the Welles patent, No. 1,101,223, dated June 23, 1914, and of which he had become the owner. Rush brought suit in equity (Equity No. 241, the second case above entitled), charging infringement by the plaintiff of the said Welles patent. Paltz, defendant in the second action above entitled, No. 241, is the selling agent of James Heddon's Sons, complainant in the first action above entitled, No. 254.

These suits in equity by stipulation were tried together. The Welles patent shows a fish bait made of wood, with the front end cut away at an angle, so as to provide and present an inclined surface, so that, when drawn through the water, the bait will dive beneath the surface.

Donald F. McLennan, of Syracuse, N. Y. (W. Clyde Jones, of Chicago, Ill., C. W. Hendryx, of Dowagiac, Mich., and Leroy B. Williams, of Syracuse, N. Y., of counsel), for plaintiffs in first and defendant in second suit.

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

Howard P. Denison and Eugene A. Thompson, both of Syracuse, N. Y. (Stewart F. Hancock, of Syracuse, N. Y., of counsel), for defendants in first and complainant in second suit.

RAY, District Judge. [1] The Court of Appeals of the District of Columbia having decided in favor of Yakeley, and the suit No. 254 having been brought to secure the grant of a patent on the theory that Smith was the first inventor, a heavy burden was thrown upon the complainant James Heddon's Sons and its associate complainant. In short, the complainants in that suit are not entitled to succeed, unless the evidence is such as to establish to the satisfaction of the court that there is new or additional and convincing evidence that Smith and not Yakeley was the first inventor.

[2] The trial of these actions occupied several weeks, and quite a number of witnesses were sworn in open court, and the court had the benefit of hearing them testify and noting their appearance, etc. Certain depositions and evidence taken in interference and other proceedings were put in evidence, so that the court has before it a voluminous and somewhat intricate record. The case calls upon the court to decide the question of fact whether Yakeley or Smith was the first inventor, and the correct decision of this question of fact has called for a careful examination of the evidence in the case.

In view of the prior art, especially the Welles patent, there was no invention in producing a diving wooden fish bait; that is, one which, when drawn through the water, would dive beneath the surface and zigzag more or less as drawn along, thus giving to it, it is claimed, the motion of a fish moving through the water. It cannot be denied that, with the Welles patent in the prior art, Yakeley and Smith and others worked upon a wooden fish bait with the object and purpose of improving on the Welles bait. I think the proofs in the case establish that Smith conceived the design in the fall of 1913, and experimented with the bait during that fall and the following winter, and that he perfected his design in the spring of 1914, and sold specimens of his bait to various fishermen during that spring and the following summer. This improved fish bait was reduced to practice by Smith in the fall of 1913, and professional fishermen at Sandy Pond or that vicinity gained knowledge of this bait through Smith in the spring of 1914, and Smith sold specimens of the bait to other fishermen, so that public use in the spring of 1914 is established. Dealers in and salesmen of fishing tackle at Syracuse, N. Y., acquired knowledge of this new bait through Smith in the early spring and summer of 1914.

The testimony of the witnesses who corroborate Smith in these regards seems to be disinterested and credible. Attorneys and court officials, who had and have no interest in the matter, and who were and are expert in fishing, testified that they first gained knowledge of this particular type of bait through Smith in the spring and summer of 1914. I think the evidence establishes beyond question that Smith conceived and reduced to practice the design in issue in the fall of 1913, and that there was public use and sale of the same in the spring of 1914, and that

Yakeley and those succeeding to his rights, if any, have failed to establish that he (Yakeley) was an independent prior inventor. Yakeley testified that he conceived this invention in the spring of 1913, and that he had samples of the bait turned at the factory of one Lyons, in the city of Syracuse, early in June, 1913, and that Lyons' factory turned a quantity of the bait in July and August, 1913, and also that he (Yakeley) and certain companions of his fished with some of these baits at Sandy Pond in the month of August, 1913.

In the design interference proceedings it was contended on the part of Yakeley that the bait was used openly and publicly at Sandy Pond, and it was claimed that Smith acquired his knowledge of the bait from Yakeley's use thereof at Sandy Pond in August, 1913. There can be no doubt that both Yakeley and Smith were at Sandy Pond in the month of August, 1913; but there is no evidence of any sale or public use by Yakeley until August, 1914, which was a year later. There was and is a sharp conflict in the evidence as to whether certain events took place in 1913, or a year later, in 1914. I think the evidence establishes, and I was satisfied on the trial, that Yakeley and his witnesses had placed and were placing certain important events in 1913, when they actually occurred a year later; that is, in 1914.

Mr. Lyons exhibited considerable bias as a witness, and the evidence establishes that he was mistaken in certain important matters. Sworn as a witness, he was disinclined to produce his books and papers, and, taking his evidence as a whole in connection with the other testimony, it appears certain that he was mistaken in several important matters. His testimony given on the trial differs to quite an extent from that given in the interference proceedings had in the Patent Office. In the interference proceedings Mr. Lyons testified that an order for 1,000 baits received in 1913 were for Yakeley baits, and on this statement Mr. Lyons based his claim that the Yakeley bait was devised in 1913. The testimony on the trial showed, and establishes to my satisfaction, that the order to which Mr. Lyons referred was for 1,000 Welles baits, and not for the Yakeley baits, and that such order was received by Lyons in 1914, instead of 1913, as claimed by Lyons. On the trial the ledger sheet of the Lyons factory was finally produced, and shows an order of 65 cents on June 6, 1914. This sheet was not before the Patent Office or the Supreme Court, District of Columbia, and is quite persuasive evidence in favor of complainants' contention that the first baits turned at the Lyons factory for Yakeley were turned early in June, 1914, and not in June, 1913. I think Lyons and Yakeley were mistaken in testifying that there was a verbal order for 1,000 baits given by Yakeley to Lyons in 1913.

It was claimed that a trip to Shackleton's Point was made in June, 1913, before the opening of the bass fishing season. Mr. Yakeley and his witnesses testified and agreed that the trip to Shackleton's Point was made on a day during which there was considerable and quite frequent rain, and that they stopped fishing because of the rain. It was agreed by the witnesses that this trip was made on a Thursday in the early days of June, and prior to the 16th, on which day the bass season opened.

Weather Bureau reports put in evidence showed that the Thursdays in 1913 were bright, clear, sunshiny days, but that one of the Thursdays in 1914, June 12, was a rainy day, and, taking the evidence as a whole, I think it establishes that this trip to Shackleton's Point was in 1914, and not in 1913. The evidence establishes to my satisfaction that Mr. Yakeley acquired his knowledge of this invention from Smith, and that he so gained same in the spring and summer of 1914.

One of the credible witnesses testifies that in the spring of 1914 Smith exhibited to him the new bait, and that shortly afterwards he (the witness) described this new bait to Yakeley, and suggested to Yakeley, who was skilled in enameling, that he enamel the baits for Smith. Later that season Yakeley exhibited one of the Smith baits to this witness, and the witness said to him, "That is Fillmore Smith's plug." Yakeley said to the witness that he was getting ready to place the bait on the market; that Smith could not put them on the market, and that he (Yakeley) proposed to do so. Another witness testified that Yakeley offered the Smith style or type of bait for sale at the store where he was employed in the summer of 1914. This witness, who had seen the Smith bait, and knew of Smith's designing or invention of same, said to Yakeley, "That is Fillmore Smith's bait;" whereupon Yakeley said that he (Yakeley) had made arrangements to make and put these baits on sale. Three or four witnesses testified to conversations with Yakeley, in which they spoke of the bait as Fillmore Smith's bait, and Yakeley made no claim that he (Yakeley), and not Smith, was the inventor thereof. In short, I think the evidence shows that Yakeley recognized the fact, and impliedly admitted, that Smith was the inventor. Smith was a man of good character and entitled to credit, and the witnesses referred to, who testify to these conversations with Yakeley, are men of good character and to whose testimony credit should be given. They had no reason or interest to testify falsely, and there is nothing in the evidence in the case to indicate that they were mistaken.

Mr. Smith was in charge of the local office of the Society for the Prevention of Cruelty to Children, and is corroborated in his testimony by the testimony of two office assistants, both women, who were disinterested. One of these remembers that Yakeley came to Smith with the box containing 20 of the Smith baits, which had been enameled by Yakeley, each of which baits was wrapped in white tissue paper. Both of these witnesses identified the baits as the Smith baits that Yakeley had enameled. In the Patent Office proceeding Yakeley testified that he did not remember enameling any wooden baits for Smith, while at the trial he testified that he distinctly remembered enameling metallic spoons, and that it was enameled spoons, not wooden baits, that he enameled. The testimony of Yakeley is at variance with his testimony in the Patent Office interference and directly in conflict with the testimony of the two office assistants of Smith. In the interference proceedings Yakeley testified that the first bait which he made involving the issue was whittled by him with a knife from a piece of wood, while at the trial he testified that he made the first bait by taking an old Welles bait and whittling off an annular projection or ridge. The Welles bait

had been made by turning, and Yakeley testifies that it was delivered to him by Welles. These statements, made by Yakeley as to the making of the first bait, involving the issue, do not agree.

One witness testifies that he worked with Yakeley in working out the bait in evidence and marked "Exhibit 1–C." This bait does not involve the design of the issue, but has a piece of tin extending obliquely from the tip end of the bait to form a diving plane. This witness testifies to his discussion of this type of bait with Yakeley, and that later on Yakeley brought to the store and placed on sale a half dozen of the baits like Exhibit 1–C. This witness produced an account book, which shows that these baits were placed on sale for Yakeley June 30, 1913. None of these baits left at the store, 1–C, were sold, and demonstrations made at the trial showed that this bait was not successfully operative. If Yakeley had, as he claims, the design in controversy in the early part of June, 1913, and if he had demonstrated its success by use at Shackleton's Point prior to the middle of June, 1913, it seems very improbable that he would have been working in June, 1913, on this inferior form of bait embodied in Exhibit 1–C and in placing the same on sale in the latter part of the month of June, 1913.

The defendant Joseph K. Rush claims that he purchased the Yakeley invention. In August, 1914, he made a contract regarding the bait in issue. In the proceedings in the Patent Office both Rush and Yakeley testified in substance that Yakeley had parted with all interest in the invention, and had reserved no interest, right, or title of any kind, and had not received and did not intend to receive any payment of money as royalties or otherwise under or by reason of the contract and the transfer of Yakeley's rights. Rush and Yakeley refused to produce this contract during the interference proceedings, but it was produced upon subpœna at the trial. The account books of Rush showed that Yakeley had been paid under the contract $40,000 at the time of the trial. By the terms of the contract Rush sold the baits and Yakeley made them—the baits of the design in controversy. Rush had knowledge of Smith's bait, and had fished with it at Sandy Pond in the spring of 1914. He had his picture taken with a string of fish caught with one of the Smith baits. The Smith bait is shown in the picture in evidence. Rush acquired his interest in the alleged Yakeley invention, with a full knowledge of Smith's accomplishments in the spring of 1914.

It is impossible, of course, without using too much time and space, to go through with and analyze all the proofs and testimony; but, taking it altogether, I find new and persuasive proofs, which were not before the court of the District of Columbia in the design interference. I find that Yakeley was not an independent inventor of the design in issue, but that he derived his knowledge of the invention from Smith, and the finding should be and is that Smith, and not Yakeley, was the first inventor of the design in issue.

[3] The Welles patent shows a fish bait made of wood, with the front end cut away at an angle to provide an inclined diving surface. This inclined surface forces the bait, when drawn through the water beneath the surface, as has already been stated. Welles was looking

for a form of bait which would move in a straight line and occupy a horizontal position when diving, and he undertook to secure this horizontal movement by placing a boss at the rear end of the bait with an inclined forward surface. The pressure of the water against this inclined surface would tend to keep the tail or rear end of the bait depressed, so that the body of the bait would be horizontal in traveling through the water. The straight line movement he proposed to secure by providing a channel lengthwise of the boss. He also proposed a so-called throat beneath the bait near the forward end, to assist in keeping the body of the bait horizontal when drawn through the water. The proofs and the demonstrations made before the court showed that the Welles bait acts the same, whether this so-called throat be present or absent. I do not see that the throat performs any practical or serviceable function.

The Tad-Polly bait, which is charged to infringe, has a body of substantially cigar-shaped formation and a head or nose, so called, which inclines downwardly and is ellipsoidal in shape when viewed from the front. This inclined head or nose forms the diving surface to cause the submersion of the bait when drawn through the water. There is also a narrow or restricted neck, which joins the cigar-shaped body to the inclined head or nose. The testimony and the demonstrations made at the trial show and showed that the Tad-Polly bait, when drawn through the water, travels with the body in an oblique position, with the tail inclined upwardly; the body standing at an angle. The body zigzags back and forth laterally, with a motion which is quite uniform, and it is claimed simulates the swimming movement of a minnow. I think there is a distinct difference in the mode of operation of the Welles bait and the Tad-Polly bait. The Welles bait has special means to bring about the horizontal position of the body when diving, and a movement in substantially a straight line, while the Tad-Polly bait moves through the water with its body oblique, and, instead of moving in more or less of a straight line, has a distinctive and regular lateral zigzagging motion.

Oblique diving planes at the forward ends of wooden baits are old in this art. The Rhodes patent, the Heddon "900 bait," and the Wilbur and Ball patent are instances. This inclined diving plane is shown, also, in the Stewart, Bowersox, Alger, and Lockhart patents of the prior art. The Rhodes patent is one of the earliest patents in this art, and shows an oblique diving plane of metal attached at the forward end, to aid, at least, in causing the bait to submerge. Demonstrations with this bait in open court showed that it would travel substantially in a straight line, with the body horizontal. The Heddon "900 bait" has been on the market since 1909, and the forward end is cut away at an angle, evidently to provide a diving surface. The Wilbur and Ball patent shows a bait of conical formation, with the forward or larger end cut away obliquely, and demonstrations at the trial showed that it would dive with the body occupying a somewhat oblique position, and that the bait, when drawn through the water, would have a laterally wavy motion.

The testimony of Wilbur and Ball was to the effect that they first

made baits of the type shown in the patent in 1911. Their evidence on this subject is corroborated. Thirteen disinterested witnesses testified to the successful use, reduction to practice, and testing of the bait during 1911. I think the evidence is overwhelming, from credible witnesses, that the Wilbur and Ball invention was prior to the invention of the Welles bait. Claim 5 is anticipated by the prior art, unless this claim is narrowly and strictly construed, to contemplate and include the special means provided by Welles to keep the body of the bait horizontal, and to cause the same to travel in more or less of a straight line. Giving to these patents and claims a proper construction, it does not seem to me that infringement is made out.

[4] It is asserted that the novelty of claim 1 resides in the employment of the so-called throat. Claim 1 of the patent cannot be sustained, as the proofs given and the demonstrations made at the trial show that the so-called throat does not perform the function claimed for it in the patent. The bait operates and performs the same, whether the throat be present or absent; but, conceding that the throat performs the function alleged—the keeping of the body in a horizontal position—this claim is not infringed by the Tad-Polly bait, inasmuch as the body occupies an oblique position when diving.

I think the counterclaim and bill of complaint filed in the second above-entitled action should be dismissed for want of equity, and that in the first suit above entitled, as already stated, priority of invention must be awarded to Smith.

There will be a decree accordingly.

SNELL et al. v. FRANK SNELL SAWMILL CO. et al.

(District Court, S. D. Georgia, S. W. D. March 12, 1921.)

1. **Corporations ⊜557(6)—In suit for a receiver and sale of assets by persons interested in profits from the sale, complainants' attorneys not entitled to fees, in absence of profits.**

   Where a contract between complainants, defendant, and a corporation, under which defendant purchased all the stock and bonds of the corporation, provided that complainants were to be officers of the corporation and receive a certain share of the net profits on the common stock, and on an attempt to remove one of them from the management of the corporation's business complainants sued for a receivership and sale of the assets, and by consent a sale was made, but there were no proceeds distributable on the common stock, complainants' solicitors were not entitled to fees out of the fund.

2. **Corporations ⊜560(5)—Under decree in suit for receiver and sale of assets, court held to have jurisdiction to fix fees of attorneys and enter judgment therefor on bond of purchaser.**

   In a suit for a receivership and sale of corporate assets, in which a sale was made by consent and the property was purchased by a new corporation formed by one of the defendants, and a decree required the purchaser to give bond to pay any compensation allowed the receiver, which bond was to take the place of a sufficient amount of money to pay any claims of that character, the court had jurisdiction to fix a reasonable sum as attorney's fees for such defendant's solicitors and enter judgment therefor on the bond.

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

3. **Attorney and client ⇐140—Attorney, by accepting less than reasonable fee, cannot affect rights of other attorneys.**
Where a number of attorneys were associated in the conduct of litigation, one of them could not, by accepting from their joint client less than a reasonable fee, deprive the other attorneys of a reasonable fee.

Suit by Frank N. Snell and another against the Frank Snell Sawmill Company and another. On interventions by solicitors for an allowance of fees. Allowance to complainants' solicitors denied, and allowance to defendants' solicitors granted.

W. M. Toomer, of Jacksonville, Fla., for complainants and for Toomer & Dickerson.

Max Isaac, of Brunswick, Ga., for interveners Wilson & Bennett.

W. H. Rogers, of Jacksonville, Fla., and Max Isaac, of Brunswick. Ga., for interveners Reynolds & Rogers.

Samuel Silbiger, of Brooklyn, N. Y., and E. K. Wilcox, of Valdosta, Ga., for respondents.

BEVERLY D. EVANS, District Judge. A tripartite agreement was made between the Frank Snell Sawmill Company, a Florida corporation, party of the first part, the J. C. Turner Lumber Company, a New York corporation, party of the second part, and Frank N. Snell and Jay E. Rice, parties of the third part, in substance as follows:

The Turner Company was to purchase all the first mortgage bonds of the Snell Company for $170,000, the issued second mortgage bonds for $70,000 (the latter sum to be used in the payment of outstanding indebtedness, not to exceed $55,000, balance to be used for working capital), all the preferred and common stock of the Snell Company for a sum not to exceed $57,500 and to advance operating expenses of the Snell Company for a period of three months. The Snell Company agreed to pay the Turner Company $1.50 per 1,000 by scale for all timber manufactured and received by it. The Turner Company was made the exclusive selling agent of the Snell Company on a stated commission. The directors of the Snell Company were to resign, and to be replaced by others named, including Frank N. Snell and Jay E. Rice; Snell was to be president and treasurer, and Rice was to be assistant secretary and treasurer, at the monthly salary which was stated, to be charged up as a part of the cost of manufacturing the lumber. In addition to this compensation, Snell and Rice were to receive 42 per cent. of the net profits of the Snell Company, after the payment of the first and second mortgage bonds, the retirement of preferred stock at par, and the payment of all loans, advances, and expenses incurred in the manufacture of the timber. It was stated that—

"It is not the intent hereby to give to said parties of the third part a contract of permanent employment, but such employment shall continue as long as the business is efficiently managed and conducted to the satisfaction of the party of the second part, and it is the intent by the payment of the 42 per cent. net profit to the said parties of the third part, to distribute the compensation between them in such proportion as will enable the said Frank N. Snell to realize the equivalent of dividends on $120,000 worth of common stock, and the said Jay E. Rice to realize the equivalent of dividends on $25,000 worth of common stock, all the parties herein realizing and agreeing that at the

present time the common stock of said corporation, the party of the first part, has no value."

The Frank Snell Sawmill Company operated a sawmill in Clinch county, Ga. A little over a year after the making of the foregoing contract, Frank N. Snell and Jay E. Rice filed an equitable petition in the superior court of Clinch county against the Frank Snell Sawmill Company and the J. C. Turner Lumber Company, pleading the foregoing contract, and alleging that on account of the advance in cypress and pine lumber the assets of the Snell corporation were sufficient to pay its bonded indebtedness and all other liabilities, and to almost, if not quite, liquidate its common stock. When it became apparent to the Turner Company that the Sawmill Company would probably realize handsome returns from the manufacture and sale of lumber, it determined to arbitrarily remove Frank N. Snell from the presidency and management of the Sawmill Company by corporate action of the Sawmill Company's stockholders and directors in the manner set out in the petition, which action was alleged to be illegal. The relief prayed was for the appointment of a receiver, for an accounting from the J. C. Turner Lumber Company for advances made to the Sawmill Company, and—

"That the entire business of the said Frank Snell Sawmill Company be liquidated, and a distribution of its net profits applicable to common stock be made on a basis of 58 per cent. to said J. C. Turner Lumber Company and 42 per cent. to your petitioners in the proportion that $120,000 bears to $25,000."

A temporary receiver was appointed by an ex parte order. The case was removed to the United States District Court for the Southern District of Georgia.

The respondents filed an answer, admitting the contract, and denying all charges of illegal conduct alleged against them. After averring, inter alia, that Frank N. Snell had refused on demand to deliver the proper officer of the Sawmill Company possession of the keys to the office, the combination to the safe, and the possession of the Sawmill Company's papers, the respondents prayed an injunction against Frank N. Snell from taking control of the office, etc., and for the vacation of the order appointing a receiver, or, in the alternative, that Snell be required to give bond to answer damages accruing by reason of the receivership.

The issues as made by the pleadings were informally discussed by counsel for the parties before me, the discussion resulting in an agreement upon a form of a decree which was entered with the consent of attorneys for all parties. This decree provided for the sale of the assets of the Frank Snell Sawmill Company. A receiver was appointed (the same in personnel appointed by the state court) to conduct the sale and report same for confirmation. In the decree it was adjudged that—

"After the payment of all costs of this administration, to be hereafter taxed and fixed by this court, the proceeds of said sale be distributed as follows:" (1) Payment of first mortgage bonds; (2) payment of second mortgage

bonds; (3) unsecured creditors; (4) holders of preferred stock; and, "finally, the surplus, if any, to J. C. Turner Lumber Company, of one part, and the complainants, Frank N. Snell and Jay E. Rice, of the other part, in the following proportions: 58 per cent. thereof to J. C. Turner Lumber Company and 42 per cent. to Frank N. Snell and Jay E. Rice, complainants, said latter 42 per cent. to be divided between Frank N. Snell and Jay E. Rice in the ratio of 120 to 25."

The decree contains this clause:

"Eleventh. It is further ordered and decreed that the court hereby retains jurisdiction over this cause for further direction of said receiver, action upon any sale made as herein provided, the ascertainment and fixing payment of costs of administration, and other matters essential or material to the administration of said properties."

The receiver reported that he had sold the property for $390,958. Motions were made for the confirmation of the sale and an allowance of fees to complainants' solicitors. A decree was entered confirming the sale, and the proceeds of sale were ordered to be distributed as follows: (1) To J. P. Lynch, as expenses of administration, $25,641.83. (2) To J. C. Turner Lumber Company, to retire first mortgage bonds, $184,100. (3) To J. C. Turner Lumber Company, to retire second mortgage bonds, $87,746.66. (4) The sum of $93,469.51, the balance, ratably among J. C. Turner Lumber Company, Florida National Bank, and John P. Lynch, creditors, as their respective interests shall appear. It was further decreed that—

"the said purchaser file in this court a good and sufficient bond, in the sum of twenty thousand dollars ($20,000.00), to be approved by the deputy clerk of the United States District Court at Savannah, Ga., conditioned for the payment by it of any moneys hereinafter directed by the court to be paid to the receiver for his compensation, and the attorneys for the plaintiffs or the receiver, or any complainant permitted by the court to intervene and prove a claim herein, and judgment may be entered on said bond on summary motion."

The bond was given, and interventions filed by the solicitors for the complainants, and by Messrs. Wilson & Bennett, and Messrs. Reynolds & Rogers, solicitors for J. C. Turner Lumber Company, for an allowance of fees. These interventions are resisted by J. C. Turner Lumber Company, and are now before the court.

[1] 1. The complainants, Snell and Rice, insist that it was through their suit that the sale was made and the fund was produced, and hence they should be allowed compensation for their solicitors, as the fund was awarded to others. I do not think they stand in relation to the fund so as to have their counsel fees included in the cost of administration. The gist of the complainants' bill was to prevent Snell's removal from the management of the Snell Sawmill Company, and to have its assets applied to admittedly superior claims, on the theory that a surplus would remain for division between themselves and the J. C. Turner Lumber Company, under the clause of the tripartite agreement which provided for a distribution of profits. The Turner Lumber Company were the holders of the bonds and most of the unsecured indebtedness, and consented to a decree of sale. The complainants in the original bill filed in the state court did not attack the management of the Snell Sawmill Company up to the filing of their bill. Indeed, they

could not, because the management was their own. It was admitted in the bill that the indebtedness of the company and the two mortgages, as well as the liquidation of the preferred stock, were claims of superior dignity to their own.

Their claim was not based on the mismanagement of the Sawmill Company, but on an alleged recent development of a purpose on the part of the respondents to remove Snell from the management of the Sawmill Company, whereby complainants would lose a profit under their contract. It was not a creditors' bill, nor in the nature of one; it was not a stockholders' suit, nor in the nature of one. Its primary purpose was to prevent the removal of Snell and to have immediate ascertainment of complainants' alleged interest in the profits, and to have a decree for same. The appointment of a receiver and a sale of the property was ancillary to this primary purpose. Complainants and defendants owned all the stock of the Sawmill Company. Most probably the Turner Lumber Company took the view that the quickest and best way to dispose of the complainants' claim was to consent to a sale, and discover by that means whether in fact the assets of the company were sufficient to discharge their prior claims. At all events, they consented to a sale, and that sale disclosed that the common stock had not changed its money value since the contract, namely, it was still without any value. The complainants thus brought to an issue by a sale of the property of the Sawmill Company the crux of their controversy; i. e., whether they had a profit distributable to them under their contract. The sale demonstrated that they had none. There is no equitable principle, of which I am cognizant, which will allow compensation to attorneys of a complainant under the circumstances above set forth. Accordingly I deny the application for fees of complainants' counsel.

[2] 2. At the very outset of the litigation the J. C. Turner Lumber Company employed Samuel Silbiger, Esq., of New York, and Messrs. Wilson & Bennett, of Waycross, Ga. These counsel associated with them Messrs. Reynolds & Rogers, of Jacksonville, Fla. All the attorneys engaged in conducting the litigation for the respondents. After the termination on the litigation, Mr. Samuel Silbiger accepted from the Turner Lumber Company $5,000 as a fee for the services of all counsel, and proposed to his associates to give them 20 per cent. of it as their part. This offer was declined. My intention was, and I construe my order to mean, that in the distribution of the fund the bond was to take the place of a sufficient amount of money to pay any just claim of this character against the properties of the Sawmill Company.

I do not think that, if the actual money was in court, there could be any question that the attorneys and the Turner Lumber Company would be entitled to a lien on such fund for their reasonable attorney's fees. The order of the court considered that the purchaser was a new corporation, formed by the Turner Lumber Company for their convenience. The court did not require of them to pay over to the receiver the purchase price, on this idea. I am therefore of the opinion that I have the jurisdiction, and that it is proper that I should fix a reasonable sum as attorney's fees for respondents' solicitors for services rendered

in bringing about the sale, and the realization of the Turner Lumber Company because of their services, and that judgment for same should be entered on the bond.

[3] I think a conservative and reasonable fee for all of respondent's counsel would be $7,500. Mr. Silbiger could not, by accepting a less sum from the J. C. Turner Lumber Company, deprive Messrs. Wilson & Bennett or Messrs. Reynolds & Rogers of their reasonable fee by an agreement with their joint client. I consider the offer of 20 per cent. of $5,000, offered by Mr. Silbiger to his associates, as wholly inadequate to compensate them for their services.

I therefore fix as reasonable compensation for all counsel of the J. C. Turner Company the sum of $7,500; the manner of the distribution of this allowance amongst the attorneys is for them, and not for the court in this proceeding.

Let appropriate orders be presented to carry in effect these views.

WALSH CONST. CO. v. CITY OF CLEVELAND et al.

(District Court, N. D. Ohio, E. D. November 12, 1920.)

No. 9406.

1. **Equity ⇐409—Master's findings of fact after jury is waived are binding, if supported by evidence.**
   Where a jury is waived and the issues referred to a master by consent of the parties, under authority of Rev. St. § 649 (Comp. St. § 1587), findings of fact by the master are conclusive on exceptions to report, unless not supported by substantial evidence.

2. **Municipal corporations ⇐868(3)—Requirement of certificate that fund is available before contract is valid does not apply to contract not payable from general taxation.**
   The provisions of Cleveland Charter, §§ 122, 123, and 125, requiring the director of finance to certify funds are available before a contract is valid, which are substantial counterparts of Gen. Code Ohio, §§ 3806, 3797, 3807, except that section 123 of the charter describes the sources from which the anticipated funds are to be derived with greater particularity than the General Code, which, however, includes them in the expression "all other sources of revenue," are to be given the construction which had previously been given to the sections of the statute, and so construed do not require a certificate from the director of finance that funds are available for the completion of a contract unless the contract price was to be paid from revenues raised by general taxation.

3. **Statutes ⇐226—Adoption or re-enactment of law of another state includes prior construction as part of it.**
   When a lawmaking body either re-enacts a statute or adopts a statute made by another state which the courts have previously given a definite construction, the construction is likewise adopted as part of the new law.

4. **Statutes ⇐231—Sections of revision or codification given same construction as received before.**
   New sections in revision or codification of statutes should receive the same construction after revision or codification as they had received theretofore.

5. **Municipal corporations ⇐868(3)—Inadequacy of certified funds does not invalidate contract on unit basis.**
The fact that the funds available, as certified by the director of finance for the work under a municipal contract on the unit basis, proved to be insufficient for the completion of the contract, does not invalidate the contract, since to so hold would prevent the making of unit contracts by cities where the amount of the work cannot be accurately foreseen, and would render invalid a contract which was valid at the time it was entered into.

6. **Municipal corporations ⇐363—Contractor not liable for defects due to plan.**
A contractor, who constructed a city reservoir in accordance with plans and specifications prepared by the city, is not liable for the insufficiency of the work for the purpose intended, due to defects in the plan in view of the character of the soil on the site selected by the city.

7. **Municipal corporations ⇐359—Performance in good faith is substantial notwithstanding deviations from plan.**
If the contractor performs in good faith and without intentional violation of his contract, mere deviation from the plans does not prevent his recovery from the city on the theory of substantial performance.

8. **Municipal corporations ⇐374(2)—Arbitrary refusal of engineer to accept substantial performance does not prevent recovery by contractor for substantial performance.**
Where a contract with the city was substantially performed by the contractor, the refusal of the engineer to accept the work, even when such acceptance is made a condition precedent to the contractor's right to recovery, is unreasonable and arbitrary and does not bar recovery.

9. **Municipal corporations ⇐375—Reconstruction necessitated by faulty plans does not entitle city to recover all money paid contractor, because of slight defects in work.**
Where the reconstruction of a city reservoir on different plans was made necessary by defects in the plans prepared by the city and the slight amount of defective work by the contractor could have been replaced with little expenditure if the plans had been proper, the city is not entitled to recover from the contractor the entire amount paid for the reservoir.

10. **Contracts ⇐320—Measure of recovery for defective work stated.**
Where the contractor has substantially performed his contract but defective materials or faulty workmanship have entered into the work, the contractor is entitled to recover the contract price diminished either by the difference between the value of the building to the owner in its defective condition, and its value if perfectly constructed, if it is neither fair nor reasonably practicable to remedy the defects, or by the reasonable cost of remedying the defects where that is practicable.

11. **Municipal corporations ⇐375—Cost of repairing defective work held not measure of damages where structure was worthless.**
Where a contractor for the construction of a city reservoir substantially performed his work with slight defects of workmanship therein, but because of the defective plans prepared by the city the reservoir, if completed in accordance with the plans or if the defective work had been repaired, would have been worthless, so that the city elected to rebuild on a different plan, the city cannot recover from the contractor the amount it would have cost to repair the defective work.

12. **Municipal corporations ⇐375—City allowed to recover from contractor amount paid for defective work.**
Where a city reservoir had to be reconstructed on different plans after substantial completion of the original contract because of defects in the plans prepared by the city, the city can recover from the contractor for the defective work incorporated in the reservoir as originally constructed only the amount paid for such work as was defective on the basis of the contract price.

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

13. Damages ⟸80(2)—Stipulated damages for delay in completion of work held properly allowed.

A contract for the construction of a city reservoir of large size is of a kind in which liquidated damages may properly be stipulated for, and a stipulation of $50 as liquidated damages for each day's delay in completion of the work is not so unreasonable as to be void as for a penalty.

At Law. Action by the Walsh Construction Company against the City of Cleveland, in which the defendant City had the National Surety Company made a party defendant. On exceptions to the master's report. Judgment entered for plaintiff.

Klein & Harris, of Cleveland, Ohio, for plaintiff.

Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, and Alfred Clum, City Sol., of Cleveland, Ohio, for defendant city of Cleveland.

WESTENHAVER, District Judge. This action was brought originally against the city of Cleveland alone to recover a balance alleged to be due on a contract for constructing a clear water reservoir, upon a unit price basis and certain additional items of extra compensation. The city of Cleveland obtained an order making also a defendant the National Surety Company, surety on plaintiff's performance bond. See Walsh Construction Co. v. City of Cleveland (D. C.) 250 Fed. 137. The city thereafter filed an answer and also a cross-petition, seeking to recover judgment against the plaintiff and its surety for damages alleged to be due for defective work in building the reservoir. After the issues were made up, all parties, by consent, waived the right to a trial by jury, and by like consent the issues were referred to Robert L. Hoffman as special master to hear and decide the cause and all issues arising therein, with instructions to report separately his findings of fact and conclusions of law. His report having been made, certain exceptions thereto have been taken by the several parties, and the cause is now before me for decision upon the report and exceptions.

[1] A preliminary question is raised as to the legal force and effect of the master's findings of fact, which it is necessary first to determine in order to settle the scope of the inquiry arising upon these exceptions. Section 649, Rev. St. of U. S. (section 1587, U. S. Comp. St. 1916), authorizes the trial and determination by the court of issues of fact in civil cases whenever the parties waive a jury in writing, and provides that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury. When a jury is waived, the court may, by like consent, refer the issues to a master, with instructions to hear and determine the issues and to make findings of fact and conclusions of law. Whenever findings of fact are thus made, either by the court or by the special master, these findings can be reviewed only on exception for errors of law. Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764. Such seems also to be the law of Ohio. See sections 11470–11480, G. C. The master's conclusions of law are consequently always subject to review, but his findings of fact, whether general or special, if supported by substantial

evidence, are as binding upon the court as is the finding of a jury. Hence, in considering the present exceptions, the scope of our inquiry is limited to whether or not the master's findings respond to and are supported by the pleadings; whether the findings of fact as made support the conclusions of law; whether the findings of fact are supported by substantial evidence; and whether or not the conclusions of law are correct. A master's findings of fact become a question of law only when not supported by substantial evidence. See Tilghman v. Proctor, 125 U. S. 136, 149, 8 Sup. Ct. 894, 31 L. Ed. 664; Kimberly v. Arms, 129 U. S. 512, 9 Sup. Ct. 355, 32 L. Ed. 764; Davis v. Schwartz, 155 U. S. 631, 636, 15 Sup. Ct. 237, 39 L. Ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 Sup. Ct. 169, 61 L. Ed. 356.

Plaintiff has taken ten exceptions to the master's report, all of which purport to except to the master's conclusions of law; his findings of fact being accepted as conclusive. The city has taken two sets of exceptions, and the surety company has joined in the city's exceptions, and in addition thereto has taken an additional exception to the master's ruling that the surety is not discharged by reason of the changes and alterations made without its consent in the plans and specifications during the progress of performance. These several exceptions need not now be fully stated, but will sufficiently appear in the course of this opinion. Many of them raise the same question of law, and depend upon certain general legal principles. The most important questions thus raised are the following: (1) The legal force and effect of the exhaustion by previous payments of the amount certified by the city director of finance at the time the contract was made. (2) Whether the contract was substantially performed, and whether the refusal of the director of public utilities to accept was arbitrary and unreasonable, so that the plaintiff might recover if there had been a sufficient certification of funds. (3) The true measure of damages for faulty workmanship, and the amount of such damages. (4) The city's right to recover liquidated damages at the stipulated rate for plaintiff's delay in performance. (5) Whether on the facts as found, plaintiff is entitled to recover the amounts found due by the master on its third and fourth causes of action.

1. The contract is dated March 29, 1915, and the city director of finance certified thereon that there was the sum of $272,636 in the city treasury to the credit of the fund and not appropriated for any other purpose, from which payment to the contractor was to be made. The contract was for furnishing materials and performing labor in constructing a clear water reservoir as a part of a filtration plant for the city of Cleveland. This reservoir was approximately 1,000 feet long by 200 feet wide, divided into 2 basins, known as No. 1 and No. 2, covered by a concrete roof supported by side walls and 600 columns approximately 22 feet in height, with cross-walls and baffle walls. The contract was upon a unit basis, consisting of 21 separate items, of which 6 only were for lump sums, aggregating $15,900. The remaining 15 called for general excavation per cubic yard, excavation for back-filling per cubic yard, rolling foundations and embankments per ton mile,

concrete in foundations per cubic yard, concrete in solid walls in conduit sections and in piers and vaulting per cubic yard, steel reinforcement per pound; furnishing and placing special castings, furnishing and placing iron castings, furnishing and placing wrought iron, steel, and pipe, furnishing and placing cast-iron pipes, all per ton, brick masonry per cubic yard, furnishing and placing three-inch tile drains and twelve-inch drain pipe, per linear foot. The quantities of each class of work thus to be done upon a unit basis were approximate only and were given as a uniform basis for the comparison of bids. The city also reserved the right to increase or decrease the amount of any class or portion of the work as might from time to time be deemed necessary. The amount certified represents the price per unit bid by the plaintiff on the basis of this approximate estimate.

The master finds that the plaintiff had performed labor and furnished materials upon this unit basis in the amount of $301,739.40, extra work under the second cause of action $7,444.39, extra work under the fifth cause of action $793.58, and extra work under the sixth cause of action $1,090.04, aggregating $311,067.41. Of this amount, he finds that the city had paid during the progress of performance the sum of $272,188.20, and that the funds certified were wholly exhausted November 15, 1915. His conclusion of law is that notwithstanding the contract may have been fully performed, and the refusal to accept would be arbitrary and unreasonable, the plaintiff cannot recover because of the charter provisions of the city of Cleveland relating to the making of municipal contracts, and particularly that provision relating to the certificate of the director of finance.

[2] The city of Cleveland, prior to the making of this contract, had adopted what is known as a "Home Rule Charter." Under the heading "Department of Finance" are three sections, 122, 123, and 125, which are relied on as sustaining the master's conclusion. Section 122 provides, in substance, that no contract shall be entered into or authorized unless the director of finance shall first certify that the money required for such contract is in the treasury to the credit of the fund from which it is to be drawn, and not appropriated for any other purpose. Section 123 provides what shall be deemed to be moneys in the treasury to the credit of a fund and subject to certification. Moneys in the treasury are therein declared to include, not merely money actually in the treasury at the time, but money that is expected to come into the treasury before the maturity of the contract, whether from taxes or assessments, or from sales of services, products or by-products, or from any city undertakings, fees, charges, accounts, bills receivable, or other credits in process of collection, and the proceeds to be derived from bonds lawfully authorized to be sold and in process of delivery. Section 125 provides, in substance, that all contracts adopted contrary to the provisions of the preceding sections shall be void, and that no person shall have any claim against the city thereunder, nor shall the council or any officer of the city waive or qualify the limits fixed by any ordinance, resolution, or order, as provided in section 122, or fasten upon the city any liability whatever in excess of such limits. These sec-

tions are appropriated bodily from the General Code of Ohio, and have been in force for many years. Section 122 is the exact counterpart of section 3806, G. C. Section 123 is the substantial equivalent of section 3810, especially when that section is supplemented by section 3797, G. C. Section 123 combines the provisions of these two sections of the General Code and resorts to greater particularity in describing the sources from which funds that may be anticipated are to be derived. In section 3797, G. C., "all other sources of revenue" is the expression used; but, obviously, it is broad enough to include all the sources of revenue specifically mentioned in section 123. Section 125 is the exact counterpart of section 3807, G. C. The framers of the municipal charter in readopting these sections, G. C., inverted the order of two of them and made some changes in phraseology, the most material of which is the plural form of the word "section" in section 125, instead of the singular form in section 3807.

[3, 4] Considering the sections as a whole, the subheading under which they are found in the municipal charter, the purpose to be subserved by their re-enactment, and comparing them with the corresponding sections of the G. C. of Ohio, it seems obvious to me that no change in the law was intended, and that no new limitations or restrictions are placed on the contracting power of the city. A change in the law, especially a change so fundamental, is not to be inferred merely from a change in the order of the sections or from changes of language which appear to have been made only to fit the sections to a different scheme of organization and administration. This conclusion is supported by certain well-settled rules of statutory construction. Thus, when a lawmaking body either re-enacts a statute or adopts a statute made by another state, to which the courts have previously given a definite and settled construction, it is uniformly held that the construction thus given by the courts is likewise adopted as a part of the new law. Willis v. Eastern Trust & Banking Co., 169 U. S. 295, 18 Sup. Ct. 347, 42 L. Ed. 752; Endlich, Interpretation of Statutes, § 371; Gale v. Priddy, 66 Ohio St. 400, 64 N. E. 437. Also new sections in a revision or codification of statutes should receive the same construction after revision or codification as they had received before the revision or codification, unless a contrary intent is made to appear with reasonable clearness. Williams v. State, 35 Ohio St. 175; State v. Toney, 81 Ohio St. 130, 90 N. E. 142, 18 Ann. Cas. 395.

These sections of the General Code had, previous to their re-enactment in the municipal charter, received in Ohio a definite and well-settled construction. They were held to apply only in those cases in which a contract was to be paid from revenues raised by general taxation, and not to contracts which were to be paid from the proceeds of bonds lawfully issued, or other revenues of self-sustaining public utilities. In the cases last mentioned, a certificate is held not to be an essential condition precedent to a valid and binding contract. Kerr v. Bellefontain, 59 Ohio St. 446, 52 N. E. 1024; Comstock v. Nelsonville, 61 Ohio St. 288, 56 N. E. 15; Emmert v. Elyria, 74 Ohio St. 185, 78 N. E. 269; Akron v. Dobson, 81 Ohio St. 66, 90 N. E. 123; Frisbie v. East Cleveland, 98

Ohio St. 266, 271, 120 N. E. 309. In the present case, the improvement was to be paid for wholly from bond issues, the interest and sinking fund of which were to be provided from the revenues of a profitable and self-sustaining public utility. My conclusion is that the charter provisions in question must receive the same construction as the corresponding provisions of the General Code, and that the contract is not invalid because the funds certified proved to be insufficient.

[5] This conclusion is supported by other considerations. These sections of the municipal charter must be construed in connection with other provisions of the law which confer full and ample power upon the city to enter into contracts of this character, and should not be given a construction which would seriously impair, if not largely destroy, the city's power to contract. In making a contract upon a unit basis, especially one of this magnitude, it is impossible to do more than to make an approximate estimate, and this is what was done. It was expected and contemplated that these quantities might be exceeded. Likewise in a work of this character and magnitude, unforeseen conditions will arise during performance which make necessary changes and alterations in the plans in order to accomplish the main object and purpose of the contract. This also, the contract evidences, was contemplated by the parties, and provision is made therein for changing and altering the plans during performance and for extra work, the necessity for which it was expected would arise, but the nature and extent of which could not be determined in advance. If the master's conclusion is sustained, the city's power to make a contract upon a unit basis would be utterly destroyed.

Moreover, a contract if valid at all is valid when made and does not become invalid as a result of contingencies arising during the performance. The sections in question are directed primarily to the making of a valid contract, and do not contemplate that a valid contract may be terminated during performance because the funds then certified prove to be inadequate. It is no answer to say that if, in the course of performance, it appears that the funds certified will be or have been exhausted, the city can or should appropriate additional funds and furnish a supplementary certificate. The city's power so to do implies a like power to refuse so to do. New officials may then be in office. Both parties are equally at liberty to refuse to perform further. In any event, a contractor would be faced with the necessity of suspending performance, and perhaps abandoning the work, and then be confronted with the proposition that he could recover nothing because the contract had not been substantially performed. Obviously the proper construction of these sections, whenever applicable, must be one which will permit a valid contract to be made and will enable both parties to determine at the time of making it whether or not the contract is a valid one and susceptible of full performance. It is either valid at that time or it is invalid; if valid when made, it binds both parties until fully performed; it does not become invalid because of the failure to estimate correctly in advance the amount necessary to be certified. Granting the parties act in good faith and that the contract as made is free from fraud,

it seems to me that a contract upon a unit basis does not become invalid, and the contractor is not excused from performance nor barred from recovery because the amount estimated as necessary and duly certified, as is required, prove subsequently to be insufficient. In that situation, if the contractor has performed, he may have a judgment for the excess, but is remitted to the remedies provided by law for obtaining payment of a judgment against a municipal corporation.

2. The master finds that the contract was substantially performed in January, 1916; that the contractor was entitled to have a formal acceptance within a reasonable time thereafter, as provided in the contract, and that any refusal so to accept was unreasonable and arbitrary. This finding, it is not contended, is not supported by substantial evidence; but the city's contention, as I understand it, is that these findings are nullified and overthrown by certain other findings which show conclusively that the contract was not in fact substantially performed, and that hence no recovery can be had. This contention is raised by several exceptions.

The master's findings are very full and definite. He properly separates his findings of fact from his conclusions of law. It is not necessary to summarize or state them fully, but it will be sufficient merely to refer to such as are necessary to a disposition of this contention.

On January, 1916, the work called for by this contract was fully performed and acceptance of it was demanded in writing. All the work had been done under the supervision and direction of the city's engineer. It was subject to inspection and was, in fact, inspected during the entire course of performance. After its completion, a final estimate was prepared by the city engineer preliminary to a final acceptance by the director of public utilities, and certain meetings were held with the director in the early part of 1916, at which a final acceptance was the subject of discussion. The only questions then in dispute related to the contractor's claim for extra compensation, as is now claimed by him in some of the causes of action. The amended petition alleges, and the answer admits, that the engineer had made a final estimate; but, while it is claimed that the director of public utilities had in fact verbally accepted the work, no formal written acceptance by him had been given at the time the events happened out of which this controversy has arisen. The master's findings are not that there was an acceptance by the director, but that he should have accepted and his refusal so to do was unreasonable and arbitrary.

On July 9, 1916, a portion of the reservoir, consisting of four columns, together with part of the reservoir roof, collapsed. The fallen part of the roof consisted of four panels, comprising a total area only of about 31½ square feet, which had been supported by the four columns. An examination disclosed that the collapse of the columns was due to defective concrete. This led to an extensive examination and inspection by numerous experts, which continued during a period of many months. Demand was made upon the plaintiff, under paragraph AA of the contract, to make repairs, and upon his failure so to do the city entered into a contract with John F. Casey Company for a recon-

struction of the reservoir such as was deemed necessary to place it in proper condition to serve its purpose. The amount expended on this new contract is $326,377.35, and is made the basis of the city's second cause of action in its cross-petition.

This reconstruction plan, pursuant to which the Casey Company did the reconstruction work, was of an entirely different design from that of the original construction, and different from that according to which the plaintiff had been ordered to make repairs. It did not consist merely of the replacement of defective work or repairing parts of the original structure, but provided for the surrounding of each column with a concrete shell or jacket, and further provided for the placing of steel reinforced concrete inside of the lining at the bottom and sides of the reservoir and steel reinforced concrete covering the outside of the roof of the reservoir. All this construction was tied together by heavy steel concrete reinforcement.

The necessity for this plan of reconstruction, the master finds, was due to defects in the original design, and not to faulty work or defective materials. The effect of it was not merely to remedy or repair such faulty workmanship or defective material, but to remedy and overcome the defects in the original design. The walls of the original structure, as designed, were of the gravity type, relying upon their weight and shape for the strength required to resist the pressure of the outside surface and pressure of the water from within. The bottom and top were to be made of a large number of units, not tied together by steel and not having special construction to insure equal settlement of the structure or uniform loading upon the foundation soil. A reservoir of this type, the master finds, required a firm, unyielding foundation so that no unequal settlement or movement could take place. It was designed upon the assumption that a suitable soil would be encountered for the foundation. In brief, his finding is that the failure of the reservoir as originally constructed, and the necessity for the plan of reconstruction such as was adopted, was due to the nature and character of the original plans and specifications, for which the city, and not the contractor, was responsible. The only faulty workmanship of the contractor, the master finds, was due immediately to the use of excess water in the mixing of the concrete and to the use of a special kind of concrete mixer employed upon a part of the work; in fact, that substantially all the defects were those of workmanship, and not of materials. He further finds that the plaintiff showed at all times a willingness to comply with instructions; that it committed no serious breaches of the contract intentionally; that it did not willfully violate the specifications or depart therefrom to any extent except as was done with the knowledge of the city's engineers or inspectors; that the entire structure grew step by step from foundation to completion under city supervision; that each part of it, with the exception of the columns, was susceptible to examination and criticism before the portion resting upon it was placed. The faulty workmanship, he finds, was not large, but was present only in 2042.7 cubic yards of the concrete, the contract price of which on a unit basis amounted only to $14,635.68.

[8] If the master is correct in his view of the law that the contractor is responsible only for the faulty workmanship thus found, and not for the failure of the structure due to defects in the original design, then it seems to me that his conclusion that the contractor had substantially performed his contract, and that a refusal to accept would be unreasonable and arbitrary, is fully sustained by the evidence and is not overthrown by his specific findings of fact. No doubt is entertained by me that the theory of the law adopted by him is the correct one. The site was selected by the city. The plans and specifications were designed and prepared by the city. The entire design of the reservoir was prepared by the city. The contractor was bound to furnish materials and perform labor only in constructing a reservoir of that design and upon that site, without any power to modify the designs or plans to meet unexpected conditions. If the contractor should undertake so to do in order to produce a better structure, such, for instance, as providing pile foundations or making the concrete bottom or walls of additional thickness, the work would have been wholly outside of his contract and contrary to the plans and specifications. The contractor, neither expressly nor impliedly, guaranteed or warranted that a reservoir constructed on that site and according to the design and plans would answer the purpose for which it was intended. The city or its officials could make changes, if any were deemed necessary to correct the faults of the design; but the contractor was not at liberty so to do. The contractor was bound to build as had been agreed and as he was from time to time directed. The contractor here is not in the position of one who undertakes to construct a building or to produce a given result and has free choice of the means whereby that result may be accomplished. In cases of this character it is settled law that if a contractor performs his contract according to the plans and specifications, he is not responsible for the failure of the structure because of faulty design, or because the structure as designed and built will not answer the purpose for which it was intended. The law in this respect is so well settled, and has been so often stated, that it will be sufficient to refer to some of the most pertinent authorities. Filbert v. Philadelphia, 181 Pa. 530, 37 Atl. 545; Harlow v. Homestead, 194 Pa. 57, 45 Atl. 87; MacKnight Flintic Co. v. New York, 160 N. Y. 72, 54 N. E. 661; Schliess v. Grand Rapids, 131 Mich. 52, 90 N. W. 700; Conway Co. v. Chicago, 274 Ill. 369, 113 N. E. 703; Penn Bridge Co. v. New Orleans (5 C. C. A.) 222 Fed. 737, 138 C. C. A. 191; Huetter v. Warehouse Realty Co., 81 Wash. 331, 142 Pac. 675, L. R. A. 1915C, 671; Sutherland on Damages, § 701.

The cases most strongly relied upon by the city are the following: Trustees of Trenton v. Bennett, 27 N. J. Law, 513, 72 Am. Dec. 373; Dermott v. Jones, 2 Wall. 1, 17 L. Ed. 762; Creamery Package Co. v. Russell, 84 Vt. 80, 78 Atl. 718, 32 L. R. A. (N. S.) 135; Day v. U. S., 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219. All these cases belong to an entirely different class, and relate to contracts in which there is an absolute undertaking to do a particular thing or to insure a given result, or where the loss or failure is due to accident during the progress of

performance. They are sufficiently distinguished by the authorities already cited.

[7] This being the law, the master was plainly right in holding that the contract was substantially performed and that the plaintiff is not barred from recovery because of faulty workmanship of the kind and extent found by him. It is settled law that if a contractor performs in good faith, is guilty of no intentional violation of his contract, but has merely deviated from the plans, or was not guilty of allowing defective materials or faulty workmanship to creep in during performance, he is entitled to recover upon the theory of substantial performance. See Goldsmith v. Hand, 26 Ohio St. 101; Ashley v. Henahan, 56 Ohio St. 559, 47 N. E. 573; Nolan v. Whitney, 88 N. Y. 648; City of Elizabeth v. Fitzgerald (3 C. C. A.) 114 Fed. 547, 52 C. C. A. 321; MacKnight Flintic Co. v. New York, 160 N. Y. 72, 54 N. E. 661; and other cases above cited.

[8] It is also settled that if a contract is substantially performed, a refusal of the engineer or architect to accept, even when such acceptance is made a condition precedent to the contractor's right to recovery, is unreasonable and arbitrary, and will not bar recovery. See City of Elizabeth v. Fitzgerald (3 C. C. A.) 114 Fed. 547, 52 C. C. A. 321; Schliess v. Grand Rapids, 131 Mich. 52, 90 N. W. 700; Ashley v. Henahan, 56 Ohio St. 559, 47 N. E. 573.

3. The measure of damages adopted by the master for the faulty work done by plaintiff, and the amount of such damages, are also challenged by the city. The master finds that it would have been necessary to expend the sum of $56,350 to have removed the faulty concrete and to have replaced it with sound concrete. He makes no finding as to the difference in value between what would have been the value of the reservoir if constructed without this faulty work, and its value with the faulty work. His conclusion is that inasmuch as the sum of $56,350 was not expended in remedying the faulty work, the true measure of damages under all the circumstances is the amount paid by the city to the contractor for that part of the work which was defective, amounting to the sum of $14,635.68, and in addition thereto, the sum of $346.40, for replacing the collapsed portion of the reservoir. Plaintiff does not except to the master's finding or conclusions in this respect, and upon this hearing announced a willingness to accept and stand thereon.

The city's cross-petition is framed on the theory that it has the right to recover the amount paid to the John F. Casey Company on the reconstruction contract. This, obviously, could be true only on the view that the contractor undertook to construct and deliver in completed condition a reservoir suitable and fit to answer the desired purpose. As already said, this view of the contract and of the law is not sustainable. Treating, however, the city's cross-petition as adequate to justify a recovery of damages upon any proper measure due to faulty workmanship, the question arises as to what, under all the circumstances, is the proper measure of damages.

[9] In some cases, where the structure is a total loss, due to the defective materials or faulty workmanship of the contractor, and the own-

er elects not to reconstruct according to the original plans and specifications, but in another location and upon new and different plans, the measure of damages is held to be the amount paid to the contractor for the original structure. See U. S. v. McMullen, 222 U. S. 460, 32 Sup. Ct. 128, 56 L. Ed. 269; U. S. v. U. S. Fidelity & Guaranty Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; Lincoln County v. Coast Bridge Co. (D. C.) 231 Fed. 468. Upon the facts here found, this rule obviously is not applicable, because, if the location and design of the original structure had been sufficient, the loss from faulty workmanship would have been slight and easily remedied.

[10] The measure of damages properly to be applied is that applicable to a contract which has been substantially performed but into the performance of which has entered defective materials or faulty workmanship, or departures from the plans and specifications. In cases of this character, two rules have been applied, depending somewhat upon the circumstances of each case. One is that the contractor is entitled to recover the contract price diminished by the difference between the value of the building to the owner in its defective condition, and its value if perfectly constructed. This rule is applied whenever the structure or building is useful to the owner in its defective condition and it is neither fair nor reasonably practicable to remedy the defects by the making of repairs. In other cases where there is a failure to complete the work, and such failure may reasonably be remedied by the expenditure of additional labor and materials, or where the defects are of such a character that they may be fairly and reasonably remedied by the expenditure of labor and materials, the proper rule seems to be to deduct from the contract price such sums as would be reasonably necessary to complete the work according to the contract or to make such repairs. Sutherland on Damages, § 699; Stillwell Mfg. Co. v. Phelps, 130 U. S. 520, 9 Sup. Ct. 601, 32 L. Ed. 1035; Gleason v. Smith, 9 Cush. (Mass.) 484, 57 Am. Dec. 62; Pelatowski v. Black, 213 Mass. 428, 100 N. E. 831. No finding, as has been said, is made by the master as to the difference in value between the reservoir in its defective condition, and the contract price, nor how much less valuable the reservoir is to the owner by reason of faulty workmanship. No evidence seems to have been offered on this proposition. The burden of proof in that situation is apparently on the owner. Filbert v. Philadelphia, 181 Pa. 530, 547, 37 Atl. 545; District of Columbia v. Clephane, 110 U. S. 212, 3 Sup. Ct. 568, 28 L. Ed. 122. Apparently the master's conclusion is that the reservoir, except as to the collapsed portion, was worth as much with the faulty workmanship as it would have been with perfect workmanship, and that by reason of its original defective design it was worth practically nothing in either condition, except as it served as a basis for the new and different reconstruction work provided for in the Casey contract.

[11] The sum of $56,350, found by the master to be necessary to remedy the faulty workmanship, would undoubtedly be the true measure of the city's damages, if the structure had otherwise been adequate. Such expenditure would have been a reasonable and practical way of

making repairs within the rules of law stated in the cases above cited. Moreover, it is the method of making repairs and the measure of damages provided in the contract for defects in material or workmanship, whether the necessity therefor arises before acceptance or afterwards and within the guaranty period of one year from the date of such acceptance. The difficulty in applying this rule is that the repairs were not made, for reasons for which the city alone was responsible. It would have been useless and unnecessary to make them in view of the method of reconstruction adopted by the city, and it is likewise true, upon the master's finding, that it would have been useless to have made them if some such plan of reconstruction had not been adopted, for a reservoir would not thereby have been produced fit for the purposes for which this one had been designed and built. The original structure, with these defects, was just as valuable under the plan of reconstruction as would the original structure have been with perfect workmanship. In view of all these circumstances, the master was right in holding that the cost of repairs which were not made, and the making of which would have served no useful purpose, is not to be taken as the true measure of the city's damage.

[12] In this situation, and in the absence of any finding of how much less the original reservoir in the defective condition was worth to the owner than the original contract price, or if perfectly built, the city is not entitled to complain of the measure of damages actually adopted by the master. The plaintiff does not complain. This measure, as already stated, is to deduct from the contract price all that was paid by the city to the contractor for that portion of the concrete work which was found to be defective by reason of faulty workmanship. The contractor ought not in equity to have or retain money paid to him for good work that was not done but was faulty or defective. If the contractor is required to surrender all compensation for that part of the work which was thus found to be defective, it would seem to me that substantial justice is done.

[13] 4. The master finds that the contractor was responsible for 119 days' delay in the completion of the work, which, at the rate of liquidated damages stipulated in the contract for each day's delay, amounts to $5,950. Plaintiff's exception to this finding is that it is not as a conclusion of law justified by the facts found by the master. This exception is not well taken. The contract is of that kind, in which liquidated damages may properly be stipulated for, and the amount of damages fixed thereunder, for each day's delay, is not so unreasonable as to be void as for a penalty. The master's conclusion of law is supported by the facts found, and these findings of fact appear to be supported by substantial evidence. See Wise v. U. S., 249 U. S. 361, 39 Sup. Ct. 303, 63 L. Ed. 647; Doan v. Rogan, 79 Ohio St. 372, 87 N. E. 263.

5. The master's findings that the plaintiff is entitled to recover on its second cause of action $7,444.39, on its fifth cause of action, $793.58, and on its sixth cause of action, $1,090.04, are not excepted to by the city. The correctness of these findings need not therefore be consider-

ed. It is sufficient to say that his conclusions of law from the facts found as to each cause of action appear to be in accordance with the authorities. See City of Cincinnati v. Cameron, 33 Ohio St. 336; Wyandotte, etc., Ry. Co. v. King Bridge Co. (6 C. C. A.) 100 Fed. 197, 40 C. C. A. 325; Wood v. City of Fort Wayne, 119 U. S. 312, 7 Sup. Ct. 219, 30 L. Ed. 416; Bridge Co. v. McGrath, 134 U. S. 271, 10 Sup. Ct. 730, 33 L. Ed. 934.

6. Plaintiff's fourth and fifth exceptions to the master's findings and conclusions of law that under the third and fourth causes of action, respectively, plaintiff is not entitled to recover, are not urged before me, and need not, therefore, be considered at length. Upon the facts found, it is sufficient to say that the master's conclusions of law appear to be in accord with the authorities. See Day v. U. S., 245 U. S. 159, 38 Sup. Ct. 57, 62 L. Ed. 219.

Applying these conclusions to the master's report, and sustaining and overruling the several exceptions in accordance therewith, judgment should be entered as follows: Plaintiff is entitled to recover the sum of $38,879.21, with interest on $32,657.86 from June 19, 1916, and interest on $6,221.35 from April 15, 1917; and the city is entitled to recover against plaintiff $5,950 liquidated damages, with interest from June 19, 1916, $14,635.68, with interest from November 1, 1916, and $346.49 with interest from May 15, 1917. A journal entry embodying these conclusions may be prepared and submitted by counsel.

The exceptions of the defendant the National Surety Company, in view of these conclusions, become immaterial. Its contention that it is released because of changes made in the plans and specifications without its consent, during the progress of the work, seems to me not to be well taken, and its exceptions on that ground should, if it becomes material, be overruled. See U. S. v. U. S. Fidelity & Guarantee Co., 236 U. S. 512, 35 Sup. Ct. 298, 59 L. Ed. 696; U. S. v. McMullen, 222 U. S. 460, 32 Sup. Ct. 128, 56 L. Ed. 269.

BENEDICT v. UNITED STATES et al.

(District Court, E. D. New York. January 14, 1920.)

1. **Statutes ⇐159—Repugnancy must be positive to establish an implied repeal.**
   To establish an implied repeal of an earlier by a later statute, positive repugnancy must exist between the statutes, and, if they can be construed so as to be reconcilable, that construction should be adopted rather than one which effects repeal of the earlier law.

2. **Courts ⇐426—Giving jurisdiction to Court of Claims does not prevent concurrent jurisdiction of District Courts.**
   The fact that the Court of Claims is given jurisdiction over certain claims against the United States does not prevent concurrent jurisdiction over such claims being granted to the District Courts.

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

3. Courts ⟸426—Provision continuing jurisdiction of District Court under war statute after termination of war does not prevent earlier repeal of statute.
The provision of Act Aug. 10, 1917, § 24 (Comp. St. 1918, Comp. St. Ann. Supp, 1919, § 3115⅛pp), that litigation thereunder begun before the termination of the war might be concluded after such termination, does not of itself establish that Congress did not repeal the provision of that statute giving jurisdiction to the District Courts by subsequent statutes adopted after the Armistice.

4. War ⟸14—Statute authorizing settlement of agreements does not repeal provision for payment of property taken without agreement.
Act March 2, 1919, § 1 (Comp. St. Ann. Supp. 1919, § $3115^{14}/_{15}$a), authorizing the payment of property taken by the Secretary of War or the President under agreements made before the Armistice, if limited to claims arising upon an agreement for the acquisition or use of property, does not impliedly repeal an earlier statute providing for the recovery of claims not based upon any agreement expressed or implied.

5. War ⟸14—Claims not otherwise payable must be filed within time fixed to be paid by Secretary of War.
Claims for property taken for war purposes, which could not be paid except under Act March 2, 1919, § 1 (Comp. St. Ann. Supp. 1919, § $3115^{14}/_{15}$a), authorizing such payment by the Secretary of War, cannot be enforced, unless the claims were filed with the Secretary of War before the date fixed by that statute.

6. War ⟸14—Delay in filing claims with Secretary of War affects only those payable on his certificate.
Failure to file with the Secretary of War within the time fixed by Act March 2, 1919, § 1 (Comp. St. Ann. Supp. 1919, § $3115^{14}/_{15}$a), claims for property taken prior to the Armistice prevents recovery on claims for such property only if they were such as could be paid on the certificate of the Secretary of War under the authority of that act.

7. War ⟸14—Property requisitioned is not taken under agreement.
A requisition of property under the war power, like a taking by eminent domain, is not a taking under agreement, even if the owner, as a loyal citizen, acquiesced in such taking.

8. Courts ⟸426—Statute authorizing District Court to determine claims for property requisitioned held not impliedly repealed.
Act Aug. 10, 1917, § 10 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ü), giving the District Courts jurisdiction over claims by owners of property requisitioned for war supplies or storehouses for the same, was not impliedly repealed by Act March 2, 1919 (Comp. St. Ann. Supp. 1919, §§ $3115^{14}/_{15}$a–$3115^{14}/_{15}$e), authorizing payment on approval by the Secretary of War for property taken under agreements made before the Armistice, section 2 of which gave the Court of Claims jurisdiction to determine controversies regarding those claims.

9. War ⟸14—Authority to requisition property for army and navy did not terminate with Armistice.
The authority of the officers of the United States to requisition property for the maintenance of the army and navy under the war power of the government continued after the signing of the Armistice.

Action by George F. Benedict, as sole surviving trustee of the trusts created by the last will and testament of William C. Langley, deceased, against the United States of America and the City of New York, to recover compensation for lands requisitioned by the United States for storehouses of military supplies. On motion by plaintiff to strike

out the defense that the District Court was without jurisdiction to entertain the action. Motion granted.

See, also, 270 Fed. 267.

Gannon, Seibert & Riggs, of New York City (Royal E. T. Riggs, of New York City, of counsel), for plaintiff.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y. (Charles J. Buchner, Asst. U. S. Atty., of Brooklyn, N. Y., of counsel), for the United States.

William P. Burr, Corp. Counsel, of New York City, for defendant City of New York.

CHATFIELD, District Judge. The plaintiff has sued the United States for an amount approximating $2,000,000 over and above the amount already paid by the United States, for certain real estate taken over by the army for use during the War as a site for storehouses for military supplies. This property was requisitioned under the following statute:

"Sec. 10. 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," etc. Section 10, Act of August 10, 1917, 40 Stats. at Large, p. 276 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ii).

By sections 10, 12, 16, and 25 of this law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115⅛ii, 3115⅛jj, 3115⅛ll, 3115⅛q), the United States District Courts were granted jurisdiction to hear and determine controversies arising thereunder. In all the sections, except section 10, this jurisdiction was limited to amounts not exceeding $10,000. Admittedly under all of the sections, a claimant could have recourse to the Court of Claims concurrently with the District Court. Where the amount in controversy exceeds the sum above specified, the jurisdiction of the Court of Claims is exclusive, unless the cause of action arises under section 10, when the jurisdiction is concurrent for all amounts.

It appears without dispute that three-quarters of the amount allowed by the government has been paid to and received by the owners, and the present suit is brought to recover the balance of the amount at which they value the property taken. The government has interposed an answer containing a separate defense to the effect that this court is without jurisdiction over the particular cause of action. The government does not contend that the original statute did not, by section 10, confer the necessary jurisdiction to institute the present suit, but it alleges that by the Act of March 2, 1919 (40 Stats. at Large, p. 1272

[Comp. St. Ann. Supp. 1919, §§ 3115¼/15a–3115¼/15e]), the provision giving jurisdiction to the United States courts, under the law of August 10, 1917, has been repealed.

Section 1 of the Act of March 2, 1919 (Comp. St. Ann. Supp. 1919, § 3115¼/15a), is as follows:

"That the Secretary of War be, and he is hereby, authorized to adjust, pay, or discharge any agreement, express or implied, upon a fair and equitable basis that has been entered into, in good faith during the present emergency and prior to November twelfth, nineteen hundred and eighteen, by any officer or agent acting under his authority, direction or instruction, or that of the President, with any person, firm, or corporation for the acquisition of lands, or the use thereof, or for damages resulting from notice by the government of its intention to acquire or use said lands, or for the production, manufacture, sale, acquisition or control of equipment, materials or supplies, or for services, or for facilities, or other purposes connected with the prosecution of the war, when such agreement has been performed in whole or in part, or expenditures have been made or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November twelfth, nineteen hundred and eighteen, and such agreement has not been executed in the manner prescribed by law. * * * Provided further, that this act shall not authorize payment to be made of any claim not presented before June thirtieth, nineteen hundred and nineteen," etc.

By section 2 the Court of Claims is given jurisdiction to hear the claim in the event that the Secretary of War can make no satisfactory adjustment of the matter, and the other sections of the law recite kindred grants of authority with which we are not concerned in the present action. The United States contends that the law of March 2, 1919, repeals by implication the Act of August 10, 1917, without any express statement of such repeal.

[1] To find such repeal, that implication must be the necessary deduction from the later statute. Wilmot v. Mudge, 103 U. S. 217, 26 L. Ed. 536. Positive repugnancy must exist between the statutes. Frost v. Wenie, 157 U. S. at page 58, 15 Sup. Ct. 532, 39 L. Ed. 614. If they can be construed so as to be reconcilable, that construction should be taken rather than one which effects repeal of the earlier law. United States v. Greathouse, 166 U. S. 601, 17 Sup. Ct. 701, 41 L. Ed. 1130.

[2] Before considering in particular the language of the statute, it will be advantageous to discuss one or two contentions which may throw light upon the purpose of Congress in enacting each law. The fact that the Court of Claims is given jurisdiction does not, of course, prevent concurrent jurisdiction being granted to the District Courts.

[3] The law of August 10, 1917, in section 24 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛pp), provides for the conclusion of such litigation as may have been begun at the time war between the United States and Germany shall have terminated, as fixed by the proclamation of the President. As the Act of August 10, 1917, known as the Fuel and Food Act, was a war measure, provision for the extension of jurisdiction to dispose of claims was necessary. This law is still in force so far as termination of the war is concerned, but this does not of itself show that Congress did not repeal parts of that law by the subsequent statute. It shows merely that protection can be

had if the law be not repealed up to the present, and even after the termination of the war.

But the taking away of this protection, in the case of the termination of the war, is of particular significance at the present time, when considered with relation to claims as to which no adjustment has been accomplished by the Secretary of War, or which have not been filed with the Secretary of War within the time limited by the Act of March 2, 1919.

The question at issue really comes down to three propositions:

First. If a cause of action like the present is within the terms of section 1 of the Act of March 2, 1919, is that statute limited to the giving of an authority to pay those which are adjusted?

Second. If the claim at bar is within the provisions of section 1 of the Act of March 2, 1919, and has not been adjudged, and therefore has not been authorized to be paid, can claim still be made, either to the Court of Claims or the United States District Court? In other words, has this section repealed the statutes giving general jurisdiction to the Court of Claims, or such jurisdiction as is conferred by the Act of August 10, 1917?

Third. If the claim be not within the express language of section 1 of the Act of March 2, 1919, are all claims against the United States, of the sort or kind which may be adjusted and paid under section 1, rendered invalid unless presented by the date fixed, upon the theory that the inclusion of certain claims in this particular statute has intentionally excluded the allowance of any other claims of a similar nature?

The third proposition will answer itself, dependent upon the construction of section 1 of the statute under the other two points.

[4] If the language of section 1 is to be limited to such claims as arise upon an "agreement" by an officer or agent, acting under the authority of the Secretary of War or of the President, for the acquisition or use of lands or for damages resulting from notice of such use, or for the production, etc., of equipment, material, or supplies, or services, or facilities, or other purposes connected with the prosecution of the war, then certainly claims arising outside of any agreement, just as claims arising outside of any exercise of authority by the Secretary of War or the President, in the conduct of the war, would not be repealed by this statute, which provides for the payment of such "adjustments" as might be made respecting these particular sorts of "agreement." An "implied" agreement evidently means an "implied" contract based on an "agreement" for the transaction. The other language of the section contradicts the idea that the words refer to an entire obligation, into which no element of the meeting of minds as to the contract has entered at any stage.

Nor does the first point need much discussion. Section 1 authorizes *payment* of such claims (of the nature covered by the section) as may be adjusted by the Secretary of War. The evident purpose of this statute was to protect those parties who had entered into contracts with the government, that had been undertaken in good faith and for immediate needs, but which had not been expressly authorized by act

of Congress, or which had not been contracted in exact accordance with the statute law.

[5] Contracts of this sort were thus validated and payment provided for, when in effect agreed upon and approved by the Secretary of War and recommended for payment. Such claims could not be paid, except under this statute. Decisions of the Comptroller of the Treasury, vol. 25, part 2, p. 398. In order to come under this statute they must be filed with the Secretary of War before July 31, 1919.

[6] Similar construction to that just expressed as to the third point makes it plain that failure to file such claims would foreclose only those claims which would not be paid under this law, unless allowed by the Secretary of War. If other statutes provide for a method of collection, then the parties would not be foreclosed from all chance of recovery, but they would be foreclosed from taking these claims up with the Secretary of War and obtaining payment from the Treasurer of the United States upon *his* certificate.

We must therefore pass to a consideration of the real question at issue, as suggested in the second objection which has been stated: Does the language of section 1 include only claims for materials or property taken by or supplied to any department for the conduct of the war, under a contract not authorized by law, or on some requisition entirely outside of the legal authority of the requisitioning officer to bind the United States therefor, and as to which a later agreement has been made?

As has been said, general jurisdiction of the Court of Claims includes matters from many other branches of the government than the War Department. Section 10 of the Fuel and Food Act relates to supplies for the army and navy. Section 1 of the Act of March 2, 1919, is limited to settlements by the Secretary of War for matters occurring under his authority, or that of the President, in conducting the war. The general authority of the President in the conduct of the war would include the maintenance of the navy or any other public use connected with the common defense. Thus the Secretary of War may have been given authority by section 1 to adjust the requisitioning of supplies by an officer of the navy, or even by an officer of some other department, as, for instance, the Department of State, in connection with the prosecution of the war, for the purpose of the common defense. But all such claims are for property obtained under an "agreement" which "has not been executed in the manner prescribed by law."

[7] A requisition, like a taking by eminent domain, is not a taking under agreement. Acquiescence on the part of a loyal citizen to the taking of his property by the sovereign is not the equivalent of the making of a contract, or the entering into of an agreement, in the legal sense of that term, for the obtaining of the property in question. A requisition is a one-sided exercise of authority, which depends either upon force or the acquiescence and loyalty of the owner of the property requisitioned, in order to accomplish the taking. Whether protest be entered or not, the obligation to repay is the same.

[8] If property taken by requisition should later by agreement be put in the category of those contracts which have been perform-

ed in whole or in part, or expenditures have been made, or obligations incurred upon the faith of the same by any such person, firm, or corporation prior to November 12, 1918, even though the acquiescence in the taking and participation in the furnishing has not been reduced to the form of a legal contract, the claim might have been presented under the Act of March 2, 1919; but unless so reduced to an agreement (unenforceable in the form of the agreement itself) the parties would not be foreclosed by a failure to present their claim on or before June 30, 1919. Where the claim of the party is based upon a requisition or an exercise of eminent domain, for which provision has been made, and where payment may be collected through appropriate legal proceedings, no agreement "not executed in the manner prescribed by law" is presented, and no repeal of the obligation of the United States to pay for such properties is included in the Act of March 2, 1919.

[9] The earlier statute has left jurisdiction to dispose of such matters to the District Court or the Court of Claims, as the case may be. The argument of the defendant as to the imminence of a declaration that the war has been terminated has no bearing upon the presentation of obligations incurred prior to November 12, 1918. Judicial notice may be taken of the fact that no contracts of the sort could legally be entered into after that date. No contracts actually made without legal authority could be paid under this law, if entered into after that date. But, on the other hand, the use of property requisitioned for the maintenance of the army or navy has continued up to the present time, and the war powers of the government have not terminated, in so far as the Fuel and Food Act is concerned.

Surely the passage of the law relating to contracts made before the Armistice should not be held to limit the government in its authority to lawfully requisition supplies after the signing of the Armistice and during the time in which the need of the Fuel and Food Act is still necessarily great. Nor is there any intent shown to limit the method of recovery for requisition by any department before that date, when the requisition has not been made outside of the letter of the law. The Act of March 2, 1919, is in addition to, rather than in contradiction or repeal of, the existing statutes.

The motion to strike out the defense that the District Court is without jurisdiction to entertain this particular action upon the grounds stated should be granted.

TIMMONS v. MORRIS, Sheriff.

(District Court, W. D. Washington, S. D. February 14, 1921.)

No. 3001.

1. **Constitutional law ⟸275(1)—Health ⟸21—System of grading barbers held contrary to due process.**
The system of grading adopted by the Washington Board of Barber Examiners, under Laws Wash. 1901, p. 349, valid under the police power only as a measure for the health and safety of the public, under which system a very large percentage of the credits were given for matters which did not affect the health or safety of the people, but were merely matters of skill, is so arbitrary and capricious as to justify the presumption that it was intended thereby to leave it within the power of the board to refuse arbitrarily a license, which amounts to deprivation of liberty without due process of law, and violates Const. Amend. 14.

On Rehearing and Reargument.

2. **Constitutional law ⟸81—Health ⟸21—Barbering can be regulated only to protect health and safety.**
In so far as the practice of barbering is concerned, the public welfare and comfort—outside of what is included in its health and safety—are so insignificant as not to lend color to any right of regulation claimed under the police power of the state.

3. **Health ⟸21—System of grading barbers held not to effectuate purpose to protect health and safety.**
The system of grading applicants for barbers' licenses adopted by the Washington Board of Barber Examiners, under which the great preponderance was given to matters of mere mechanical skill, so that an applicant who displayed no knowledge essential to the protection of the health and safety of the public might be licensed if he displayed sufficient skill, while full knowledge would be insufficient to obtain a license if the applicant were not skilled, has no substantial relation to the public health, and therefore cannot be sustained under the police power.

Habeas corpus proceeding by Frank Timmons against Thomas Morris, as Sheriff of Pierce County, Wash. On demurrer to the amended petition. Demurrer overruled.

Browder Brown and J. W. A. Nichols, both of Tacoma, Wash., for petitioner.

William D. Askren, Pros. Atty., of Tacoma, Wash., for respondent.

CUSHMAN, District Judge. Petitioner is imprisoned for practicing the trade of a barber without a license, and sues to obtain his discharge from such imprisonment by the present habeas corpus proceedings.

Petitioner avers he is a barber, and has practiced his trade for 17 years, and has no other means of livelihood, and by his amended petition he attacks the constitutionality of chapter 172 of the Session Laws of the state of Washington of 1901, entitled:

"An act to regulate the practice of barbering, and licensing persons to carry on such practice, and providing punishment for its violation."

The respondent orally demurs to amended petition. In two decisions the constitutionality of this law has been upheld by the Supreme Court of the state of Washington, viz.: 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893; 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257. Upon the authority of these decisions, relief must be denied for the petitioner upon this ground, and petitioner further avers:

"That the said board, acting under said statute and by authority thereof, have established a system of examination for applicants for license or certificate to practice barbering, under which system applicants are given credits, marks or points, graded from poor to excellent on the several subjects listed in said examination as follows, to wit:

Haircut,	Poor	10	Excellent	24
Shaving,	Poor	10	Excellent	24
Cleanliness,	Poor	0	Excellent	8
Razor honing,	Poor	6	Excellent	12
Condition of Tools,	Poor	0	Excellent	8
Time,	Poor	4	Excellent	10
Deportment,	Poor	0	Excellent	6
Written examination,	Poor	2	Excellent	8
		32		100

—which examination petitioner was required to pass. * * *

"That after the examination taken by petitioner in November, 1919, the said board served the following notice upon petitioner, to wit: 'State Board of Barber Examiners of Washington. Tacoma, Washington, Nov. 20, 1919. Mr. Frank Timmons—Dear Sir: You are hereby notified that you have failed to pass the examination prescribed by law for a certificate of registration as a barber in the state of Washington. Your credits on such examination were: Haircut, 14; shaving, 17; cleanliness, 6; razor honing, 10; condition of tools, 6; time, 10; deportment, 6; written examination, 7—total, 76. Necessary to pass, 80. You are hereby notified because of your failure that you no longer hold a permit to work as a barber in the state of Washington. State Board of Barber Examiners, A. A. Ciersch, President. M. B. Bdigford, H. C. Pickering, Sec. Treas.' And after examination before said board in May, 1920, the board served upon petitioner a like notice, in which petitioner was given the following credits: Haircut, 10; shaving, 17; cleanliness, 7; razor honing, 10; condition of tools, 7; time, 10; deportment, 6; written examination, 6—total, 73. Necessary to pass, 80.

"And petitioner shows to the court that, of all the said matters upon which said examination were had, two only of said items affect even remotely, if at all, the public morals, health, or safety, namely, the items of cleanliness and such matters of health as are embraced in said written examination, and that upon those two items, to wit, cleanliness and written examination petitioner was given each time 13 credits out of the 16 allowed for those two subjects, being more than the 80 per cent. required by the rules, notwithstanding which the said board marked petitioner down on the other seven subjects of the examination, in no manner affecting the public, so as to bring his average below the 80 per cent. and give excuse for refusing his license, and all in accord with and under the power and authority of the said statute so purporting to give to said board an autocratic right to grant or withhold at their pleasure and without any right of appeal."

[1] The effect of the foregoing is not only to aver the unconstitutionality of the statute, but the arbitrary exercise by the board of barber examiners created by it of the power conferred upon them under the act. Regulations and examinations of the board must be restricted within the limits of that having to do with health and safety; it cannot be and it has not been contended that the public morals are affected by such trade.

Under the system of marking established by the board it appears that the credits obtainable on the first two subjects, "hair cutting" and "shaving," are 48 per cent. of the total, and that the range of markings for the two between "poor" and "excellent" is 28 per cent. of the total obtainable, and a loss of 20 per cent. of the total credits results in a denial of a license.

In view of the other matters considered upon such an examination, covering "cleanliness," "razor honing," "condition of tools," "time," "deportment," and "written examination," it is only reasonable to assume that the board, in considering the credits earned by the person examined on the first two matters, "hair cutting" and "shaving," eliminates from consideration those matters covered by the other headings, which include "cleanliness" and "condition of tools."

Eliminating all these other subjects from consideration, apparently there are only left to be included within the first two subjects "hair cutting" and "shaving," matters at most, if at all, of only minor importance, in so far as health and safety are concerned, which show that the percentage allowed for those two subjects in this scale adopted is out of all proportion to the importance reasonably to be attached thereto, and compels the conclusion that the system which has been so adopted under the act is arbitrary and capricious, and justifies the presumption that the practice established in the present instance is the one foreseen and pointed out by Judge Rudkin in his dissenting opinion in the foregoing cases as bound to grow up under such a statute.

The preponderating effect given the percentages under the first two subjects, prima facie, upon this demurrer, justifies the conclusion that by the adoption of such a scale it was intended to leave it within the power of the board to arbitrarily refuse a license upon occasion. Such a result and practice is the deprivation of liberty without due process of law, and violates the Fourteenth Amendment to the Constitution.

The demurrer to the amended petition is overruled.

On Rehearing and Reargument.

Browder Brown and J. W. A. Nichols, both of Tacoma, Wash., for petitioner.

J. W. Selden, Pros. Atty., and Rex. S. Roudebush, Asst. Pros. Atty., both of Tacoma, Wash., for respondent.

A former decision was rendered in the present case, in which the Barbers' License Law was upheld upon the authority of State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893, and State v. Walker, 48 Wash. 8, 92 Pac. 775, 15 Ann. Cas. 257. But it was further held by this court that the regulations adopted thereunder by the board of barber examiners, created by the act, were arbitrary and capricious, and in no way calculated to protect the health of the public. Upon the representation that respondent had not presented legal authorities upon the former hearing touching the police power of the state, a rehearing and reargument has been had. In ruling upon the present motion, an attempt will be made to avoid restatement of matters set out in the former memorandum decision.

[2] The court is convinced that, in so far as the practice of barbering is concerned, the public welfare and comfort—outside of, and beyond what is included in its health and safety—are so insignificant as not to lend color to any right claimed under the police power of the state. The Barber Law was first upheld in State v. Sharpless, 31 Wash. 191, 71 Pac. 737, 96 Am. St. Rep. 893, by the Supreme Court of this state, on the ground that it was a health measure. It was therein stated:

"The right of the Legislature to enact laws for the promotion of health is now universally sustained as a police regulation." 31 Wash. 195, 71 Pac. 738, 96 Am. Rep. 893.

"Other questions, going more to the wisdom of the act, are presented by appellant; but these questions are for the Legislature, and not for the court. For example, it is urged that the act is for the protection of the health of the people of the state; that the people outside of cities and incorporated towns are as much entitled to be treated by qualified and cleanly barbers as those people who live in incorporated cities and towns. * * * There may be some good reason why barbers in larger cities should be more careful and cleanly than barbers in smaller places. * * *" 31 Wash. 200, 201, 71 Pac. 740, 96 Am. Rep. 893.

Thereafter the Supreme Court of this state, in State ex rel. Richey v. Smith, 42 Wash. 237, 84 Pac. 851, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577, in holding the act regulating plumbing in said state unconstitutional, after reviewing certain Washington state decisions, said:

"Some of the acts considered in the above cases were manifestly needful and proper for the protection of the public health; others were on the border line." 42 Wash. 242, 84 Pac. 852, 5 L. R. A. (N. S.) 674, 114 Am. St. Rep. 114, 7 Ann. Cas. 577.

In reviewing this case in State v. Walker, 48 Wash. 8, at page 9, 92 Pac. 775, at page 776 (15 Ann. Cas. 257), the court said:

"By these last words (that is, 'others were on the border line') the writer of that opinion evidently referred to the act relating to barbering."

The above parenthesis is inserted by this court in explanation of the words referred to.

It again clearly appears, in the latter case, that the Barber Law was only upheld as a health measure, and that the Plumbing Law was held unconstitutional because not a health measure, for the court quoted from its plumbing decision:

"We are satisfied that the act has no such relation to the public health as will sustain it as a police or sanitary measure, and that its interference with the liberty of the citizen brings it in direct conflict with the Constitution of the United States." 48 Wash. 9, 10, 92 Pac. 776, 15 Ann. Cas. 257.

—and then said:

"We adhere to the rule and reasoning of that case. But there is a clear distinction between that case and this. The business of plumbing only remotely affects the public health. The skill or cleanliness of the plumber himself does not immediately affect the public, any more than the skill or cleanliness of the ordinary scavenger affects it, because the business of plumbing does not bring the plumber in personal contact with the public. But the physician, the surgeon, the dentist, and the barber operate directly upon the person, and therefore affect directly the health, comfort, and safety of the public. We

think this marks the principal distinction between that class of trades, professions, or callings which may be regulated by law for public health, comfort, and safety, and that class which cannot be so regulated without depriving a citizen of his natural rights and privileges guaranteed him by fundamental law." 48 Wash. 10, 92 Pac. 776, 15 Ann. Cas. 257.

Petitioner, in his amended petition, avers:

"That the said Board (of Examiners) acting under said statute and by authority thereof, have established a system of examination for applicants for license or certificate to practice barbering under which system applicants are given credits, marks or points, graded from poor to excellent on the several subjects listed in said examination as follows to wit:—

Haircut,	Poor	10	Excellent	24
Shaving,	Poor	10	Excellent	24
Cleanliness,	Poor	0	Excellent	8
Razor honing,	Poor	6	Excellent	12
Condition of tools,	Poor	0	Excellent	8
Deportment,	Poor	0	Excellent	6
Time,	Poor	4	Excellent	10
Written examination,	Poor	2	Excellent	8
		32		100

—which examination petitioner was required to pass."

An applicant under the regulations, in order to obtain a license, must receive at least 80 points out of a possible 100. Contrasted and compared with the other subjects, the first two above—hair cutting and shaving—contemplate mere style and mechanical skill.

The following parallel columns show, in the one column, the only provisions of the state Barber Law that can be held to affect the public health, including those providing for an examination of applicants, and, in the other column, the regulations of the board of examiners created under the act, and the system of markings provided by them, which regulations have heretofore, by this court, been held to be so arbitrary and capricious as to entitle the petitioner herein to his discharge upon habeas corpus. The latter are placed opposite those provisions of the statute to which they can alone refer.

Provisions from the State Law.	Marking of Applicant upon Examination.
Section 14 provides for the revocation of certificates for the conviction of crime, drunkenness, or having or imparting any contagious or infectious disease.	There is nothing in the system of markings under this, except: "Cleanliness—Poor 0. Excellent 8."
Section 15 provides a penalty for using or allowing towels to be used on more than one person before such towels have been laundered, or razors, lather, or hair brushes on more than one person before the same have been sterilized.	There is nothing in the system of marking under this, except: "Cleanliness—Poor 0. Excellent 8." "Condition of tools—Poor 0. Excellent 8."
Section 10 provides that, before issuing a certificate of registration as a barber, the board shall be satisfied that the applicant is	
(1) Above the age of 18 years.	There is nothing touching this in the regulations before the court.
(2) Of good moral character.	There is nothing touching this in the regulations before the court.

(3) Free from contagious or infectious disease.

(4) Has studied the trade for two years as an apprentice under or as a qualified and practicing barber in this state or other states.

(5) Is possessed of the requisite knowledge to properly perform all duties including an ability to prepare the tools used in shaving, cutting hair and beard, and all the various services incident thereto.

(6) Has sufficient knowledge concerning the common diseases of the face and skin to avoid the aggravation and spreading thereof in the practice of his trade.

There is nothing in the system of marking under this, except: "Cleanliness—Poor 0. Excellent 8."

This provision of the law was held unconstitutional by the state court, that court saying: "The Legislature or the board of examiners, when authorized so to do, may make and enforce reasonable rules and regulations in order to determine the qualification of applicants to practice that occupation. Unreasonable, arbitrary provisions cannot be enforced. We think the provision quoted is both unreasonable and arbitrary. What the public is interested to know is that the barber is competent." State v. Walker, 48 Wash. 8, at pages 10 and 11, 92 Pac. 775, at page 776 (15 Ann. Cas. 257).

"Haircut—Poor 10. Excellent 24. Shaving—Poor 10. Excellent 24. Razor honing—Poor 6. Excellent 12. Time—Poor 4. Excellent 10. Deportment—Poor 0. Excellent 6. Written Examination—Poor 2. Excellent 8."

"Written examination—Poor 2. Excellent 8."

Subdivision 5, above, is a very vague and indefinite provision. Properly construed, it should be narrowed to matters affecting the public health; but the board has evidently under it sought to grasp power beyond that which the Legislature could confer, and to exercise it in an arbitrary and capricious manner; for under this provision alone can be grouped most of the subjects upon which applicants are examined and the great majority of the marks that can be obtained on such examination.

[3] If it be conceded that, in this method of examination and scale of rating upon such examination, the written examination provided for has solely to do with matters affecting the public health, and that such regulation was made under that subdivision of section 10 requiring the board to examine and determine whether the applicant had sufficient knowledge concerning the common diseases of the skin to avoid the aggravation and spreading thereof in the practice of his trade, it comes to this: That, in the ratings provided for only 24 points out of 100 have to do with the public health.

It is possible, under this scale, for a man to pass and be licensed, though he has only got 4 points out of the 24 in those subjects affecting the public health, provided he is excellent in the nonessentials, in so far as health is concerned; while the applicant who is perfect in so far as matters affecting health are concerned, and yet "poor" in deportment, razor honing, and time taken in work—matters that can in no sense be held to touch the public health or safety—would be deprived of the right to practice barbering.

That the system of marking is such as to thwart, rather than carry out the provisions of the law, is not only shown by the large percentages allowed in the markings for the nonessentials, but is further shown by the fact that, in the nonessentials, there is a substantial amount allowed as a minimum in the markings, while, in the essentials of cleanliness and condition of tools, the minimum is "0," and on the written examination only "2." The total of the minimum marks allowed even the poorest on these nonessential subjects is 30, which constitutes practically one-third of the possible 100 obtainable, a number exceeding the largest total obtainable on the combined essentials, which is 24.

It is therefore palpably clear that these regulations have no real or substantial relation to the public health, but are rather designed to defeat those statutory provisions in the Barber Law for the protection of the public health, to subordinate essentials to nonessentials, and to allow the board scope for purely arbitrary action. Under these regulations, any purpose to protect the public health, manifestly, has become so highly attenuated "that nothing lives 'twixt it and perfect silence."

Upon re-consideration, the former decision, overruling respondent's oral demurrer to the amended petition, is adhered to, and respondent's written demurrer is overruled.

PLEWS v. BURRAGE et al.

(District Court, D. Massachusetts. March 28, 1921.)

No. 999.

1. **Pleading ⇐34(1)—Allegations in replication construed in connection with letter in answer admitted by replication.**
   A broad allegation in a replication, that plaintiff had not authorized another to bring action as his agent as alleged by the answer, must be limited by construing it with a letter annexed to the answer, which the replication admitted was written by plaintiff, in which the institution of the other suit was discussed, and, so construed, the allegation merely challenges defendant's interpretation of the letter.

2. **Pleading ⇐217(3)—On demurrer to replication, plaintiff held required to satisfy court of right to maintain action.**
   In an action at law, the trial of which would be protracted and would occasion great expense, both to the public and to the opposite party, plaintiff, at the hearing on demurrer to his replication, must satisfy the trial court that his right to maintain the action is sufficiently certain to warrant the expense of the trial, or the demurrer will be sustained.

3. **Judgment ⇐713(2)—Party who allowed former suit to continue after discovering fraud is barred from subsequent action based on the fraud.**
   A party who permitted an action instituted on his behalf by an agent to continue to final judgment, after the evidence in that action had given him information of fraud not relied on in that action, is precluded by the final judgment therein from thereafter bringing a second action based on the fraud so discovered.

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

At Law. Action by Arthur S. Plews against Albert C. Burrage and others. On demurrer to the replication. Demurrer sustained.

See, also, 260 Fed. 1018.

Whipple, Sears & Ogden and Sherman L. Whipple, all of Boston, Mass., for plaintiff.

Boyd B. Jones, of Boston, Mass., for defendants.

MORTON, District Judge. This is a question of pleading of a somewhat unusual sort. It can best be approached through a statement of the underlying facts of the controversy, as to which there is no dispute.

The plaintiff called the defendant's attention to certain deposits of copper ore in Chili, and the defendant became sufficiently interested to obtain options or contracts controlling the property. He agreed with the plaintiff that the latter should receive for his service in calling the deposits to the defendant's attention 5 per cent. of the stock of any company which might be formed to take them over, or of the defendant's profit from so doing. The form of this agreement is not in dispute; it was put into letters which constitute the contract in suit, the so-called "commission note."

Some months later one Ross secured from the plaintiff an option to buy this commission note for £500. Having got the option, Ross passed it along to Burrage, by whom it was exercised, and the commission note was purchased from Plews for £500. Burrage interested other parties in the ore properties, and a corporation was formed to investigate, explore, and eventually to acquire them, in which Burrage received one-half the capital stock, 5,000 shares. According to the commission note, as construed by the plaintiff, Plews would have been entitled to 5 per cent. of these shares, which became of large value.

In that situation Ross brought a suit in equity against Burrage in the Massachusetts Supreme Judicial Court to enforce the commission note and to secure from Burrage an accounting under it, contending that Burrage had procured the transfer of the note to himself by fraud, and that said transfer was voidable by Ross. In the entitlement of the bill the suit was expressed to be brought by Ross, for the benefit of himself and Plews, as the latter's interest might appear. After full hearing, it was decided in favor of Burrage. The decision determined finally that as between Ross and Burrage the latter was not guilty of actionable fraud in acquiring the commission note and is entitled to the benefit of it.

The present action at law is brought by Plews in his own name and for his own benefit; Ross is not a party to it. It sounds in damages for breach of the contract between Burrage and Plews contained in the commission note. The declaration makes no reference to any assignment or transfer of the note.

The defendant has answered that the plaintiff is not entitled to recover, because the plaintiff sold the commission note to the defendant, whereby it—or the plaintiff's interest in it—has been extinguished, and that the consideration for the commission note, paid to the plaintiff by

the defendant upon the alleged sale of it, has not been returned or tendered by the plaintiff to the defendant. The defendant has also pleaded the suit in the state court above referred to as constituting an adjudication in his favor which bars the present action.

To this answer the plaintiff has filed an elaborate replication (under the act authorizing equitable defenses—Judicial Code, § 274b [Comp. St. § 1251b]) having many of the characteristics of a bill in equity to set aside a conveyance for fraud. It admits the assignment of the commission note from Plews through Ross to Burrage. But it alleges that, in obtaining the option from Plews, Ross acted as an agent for Burrage and defrauded Plews; that Burrage and Plews were joint adventurers under circumstances which imposed upon Burrage the duty of disclosing to Plews material facts concerning the joint adventure; that not only was no such disclosure made, but that Burrage, through Ross, fraudulently concealed from Plews facts which Plews was entitled to know in dealing with Burrage; that after Burrage had acquired the option from Ross, and was dealing direct with Plews for the transfer of the commission note, Burrage was guilty of direct fraudulent misrepresentations; and that by reason of such concealment and fraud the transfer of the commission note from Plews to Burrage was voidable at Plew's option, and has been rescinded by him. The replication admits that Plews has never returned the £500 which he received for the commission note, but it offers to return it.

As to the suit in the state court, the replication admits the correctness of the copy of the record therein and of certain letters and other documents annexed to the answer, including a letter from the plaintiff to Ross, dated January 17, 1913, in which the plaintiff says:

"You [Ross] will take at your own expense all such steps as you may deem necessary, either legal or otherwise, to obtain from Mr. Burrage the transfer to you of my 5 per cent. commission on the deal, and against delivery by Mr. Burrage of the commission due to me under the agreement with him, viz.," etc. "You will nominate or cause to be allotted or transfer to me 33⅓ per cent. of said commission as and when received by you," etc.

The replication denies that the plaintiff "bought or took any part in bringing" the suit in the state court, or authorized said suit, or was a party thereto. It alleges that the plaintiff was ignorant of the facts on which his present claim of fraud is based "until the evidence was brought in the hearings before the master and until he received information concerning them from that source." (Clause 16.)

[1] The broad allegations as to not authorizing the suit in the state court, and not being a party to it, are to be construed in connection with the recitals in the last paragraph of clause 13. Withers v. Greene, 9 How. 213, 13 L. Ed. 109. The pleader's intention obviously is not to repudiate the letter of January 17, 1913, but to challenge the defendant's interpretation of it. Various other facts are alleged, bearing upon the question of res judicata.

To this replication the defendant has demurred, and the question is whether the pleadings state a case on which the plaintiff is entitled to recover. The facts on which this question is to be determined consist

(1) of the allegations in the declaration, in connection with (2) such allegations in the answer as are admitted in the replication, and (3) the facts properly alleged in the replication. The pleadings seem to have been drawn with the thought in mind that it might be possible to present through them in advance of a jury trial, and without the expense of one, which would be unusually large, certain basic facts which lie at the threshold of this case. In view of the defective federal practice, under which there is no other way to secure that result, this effort, which might perhaps have gone farther, should receive favorable consideration and co-operation from the court as far as is possible.

Many points have been argued, but those which seem to me the most important are: (1) Whether the plaintiff could bring this action without first having tendered back the consideration which he received from the defendant upon the sale, which he now repudiates, of the commission note; (2) the effect of the decision of the suit in the state court, in connection with the plaintiff's conduct in permitting that suit to go forward for his benefit after the disclosure during the hearings before the master of the facts on which the present charges of fraud are based; and (3) whether the facts set up in the replication to avoid the sale of the commission note can now properly be availed of in an action at law. This question is not, I think, foreclosed by the decision of the Circuit Court of Appeals (Plews v. Burrage, 266 Fed. 347) in the equity proceeding of Burrage v. Plews. The plaintiff's contentions as now made and the issues which they involve go much beyond what was presented by Burrage's bill.

[2] A decision favorable to the defendant's contention on any of these underlying questions would end the plaintiff's case. The first and third are pure matters of law. As to the second, the facts as they stand may, or may not, be sufficient to deal with it as a matter of law. In this situation I think it devolves upon the plaintiff to satisfy the trial court that his right to maintain the action is sufficiently certain to warrant the expense to the public and to the other party of a long jury trial in advance of a final determination of it. This the plaintiff has failed to do; all the questions above stated seem to me close and doubtful. I incline to the opinion that, under the decisions of the United States Supreme Court which have been referred to, the plaintiff was premature in bringing this action before making a complete rescission of the contract whereby he sold the commission note, and returning or offering to return the consideration which he received therefor.

[3] If Plews, during the progress of the hearings before the master in the state court, became aware of the facts on which he now bases his right to set aside his sale of the commission note, and, with such knowledge, kept silent and allowed that suit to go forward in the hope that he might benefit by the decision of it, his conduct, whether it be called ratification or estoppel, was such as must bar him from prosecuting this action. A party cannot be permitted to experiment with the courts in that way, nor to repudiate a choice which he made for his own benefit. See Amos v. U. S. (Feb. 28, 1921) 254 U. S. ——, 41 Sup. Ct. 266, 65 L. Ed. ——. Whether the facts which now stand admitted are

sufficient to bring the case within the principle just stated is not entirely certain. But I incline to think that they do, and that on this ground also the plaintiff is not entitled to maintain the present action.

The scope of section 274b is still uncertain. There is wide divergence of judicial opinion about it. See Keatley v. U. S. Trust Co., 249 Fed. 296, 161 C. C. A. 304; Union Pacific Railroad Co. v. Syas, 246 Fed. 561, 158 C. C. A. 531. It was not passed upon in Manchester Street Railway v. Barrett, 265 Fed. 557 (C. C. A. 1st Cir.), that action having been begun before section 274b was enacted. The question is obviously of much importance, because if the plaintiff's replication is allowable the distinction between law and equity will, in effect, be abolished in a large and important class of cases. There are difficulties, under our practice, in splitting the trial of an action at law, as suggested in the opinion in Union Pacific Railway v. Syas, supra, part being heard by the judge and part tried to a jury, and there are great difficulties in the way of a satisfactory jury trial of the complicated issues presented by this replication, such as res judicata, ratification, or estoppel, fraud by direct misrepresentation, fraud by failure to disclose, fraud by misrepresentations made by the defendant's agent, fraud by silence or failure to disclose on the part of the agent, etc. In matters of this sort the distinction between law and equity rests on solid practical reasons. See Reid v. Shaffer, 249 Fed. 553, 161 C. C. A. 479.

Demurrer sustained.

BIRMINGHAM TRUST & SAVINGS CO. v. ATLANTA, B. & A. RY. CO.

(District Court, N. D. Georgia. March 26, 1921.)

No. 156.

1. **Receivers ⟸31—Friendly proceedings held not collusive or fraudulent.**
Where the creditor asking for the appointment of a receiver had a valid debt, though it was not yet due nor reduced to judgment, and it appeared that the proceedings were suggested by the president of the defendant railway company, and that the defendant admitted the allegations in the bill and joined in the prayer for relief, the friendly nature of the proceedings does not render it collusive or fraudulent, especially when there is no one seeking a revocation of the receivership, and the parties objecting to the court's orders to the receiver would probably have no standing to seek revocation.

2. **Railroads ⟸207—Cannot be compelled to operate at loss.**
Since railroad property, though devoted to public use, cannot be taken without due process of law, nor without compensation, so that the railroad cannot be compelled to operate at a continuous loss, or even without a reasonable return on the investment, a court appointing a receiver for the railroad for the primary object of preserving the property until the rights of all concerned in it can be ascertained and effectuated, cannot require the railroad to be operated at a continuous loss.

3. **Railroads ⟸207—Receiver should not operate, when consuming the corpus.**
When it appears that the operation of a railway by a receiver under existing conditions is consuming the corpus of the property, and there is

no prospect of an early change for the better, it is the duty of the court to change the conditions by reducing operating expenses, since it cannot raise rates nor compel patronage, or, as a last resort, to cease operations.

4. **Receivers ⟸90—Not bound by executory contracts until accepted.**
While a receiver takes the property subject to all existing liens on it, he is not bound by the executory contracts of the owner, but may, under the authority of the court, adopt them, if it appears to the benefit of his trust, or decline to adopt them and leave the original contracting parties to their legal remedies.

5. **Receivers ⟸90—Continuing performance of contract for reasonable time not an adoption.**
A receiver has a reasonable time after his appointment within which to elect whether to adopt executory contracts, and the mere continuance of the execution of a contract pending election within such time is not an adoption of it.

6. **Receivers ⟸90—Held not bound by corporation's contracts with employees.**
A contract with railway employees stands on the same footing as other contracts in receivership proceedings, and where the order authorizing the receiver to operate the railway expressly provided that no contracts of the company were to be considered adopted by him without authority from the court, and within three days of his appointment the receiver applied to the court for an order reducing the wages of the employees, there can be no contention that he had adopted the existing wage contracts of the railway.

7. **Receivers ⟸113—Administrative order may be granted, with leave to apply for subsequent hearing.**
In receivership proceedings, an administrative order, which affects numerous persons not parties to the cause, may properly be granted on the receiver's application, with leave to parties affected thereby to bring on a hearing thereafter, since such order is the most practical way of getting the hearing, and adjudicates nothing, but merely permits the receiver to act thereon at his own risk of the result of the subsequent hearing.

8. **Receivers ⟸96—Labor Board has jurisdiction over wages of receiver's employees; "carrier."**
Though the Transportation Act, in the portion establishing the Labor Board, does not expressly mention receivers, its definition of carriers dealt with as including any carrier by railroad subject to the Interstate Commerce Act, with certain exceptions, is sufficiently broad to cover a receiver operating an interstate railroad.

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

9. **Receivers ⟸96—Court has jurisdiction to determine whether receiver can pay current wages.**
Where there is no dispute as to the reasonableness of the existing wage scale of railway employees, but the receiver claimed the operating revenues were insufficient to pay such scale, the question of whether the wages should continue to be paid or not was one for the final determination of the court appointing a receiver, as was also the question whether the wages fixed by the Labor Board deprived the railway of its property without compensation, so that the court can determine those questions on an application by the receiver for a reduction of wages, even though the Labor Board might also have jurisdiction to determine them subject to review by the courts.

10. **Receivers ⟸96—Newlands Act, delaying wage reduction, applies to railroad receivers.**
Under Newlands Act, § 1 (Comp. St. § 8666), defining carriers and employees affected thereby, and section 9 (section 8674), providing that, whenever receivers are in control of the business of employers covered by the act, the employees of such employers had a right to be heard

before wages were reduced, after at least 20 days' notice of the proposed hearing, clearly includes all persons operating railroad trains at the time the receiver takes possession, so that the reduction of the wages of such persons under the act can only be made after 20 days' notice.

11. **Receivers ⊂=96—First order fixing wages is subject to Newlands Act.**
Since the receiver ordinarily continues the business of a railroad without interruption, and tentatively, at least, continues the employees of the owner as his employees, the contention that the first order of the receiver establishing wages of employees was not within the intent of Congress in adopting Newlands Act, § 9 (Comp. St. § 8674), forbidding reduction of wages without 20 days' notice, cannot be sustained.

12. **Receivers ⊂=96—Newlands Act, requiring hearing before wage reduction, is valid regulation.**
The provision of Newlands Act, § 9 (Comp. St. § 8674), requiring a hearing after 20 days' notice before the reduction of wages by a railway receiver appointed by the federal courts, is justified as a statute of procedure in federal courts, under the implied power of Congress to regulate the exercise of the jurisdiction of the courts which it is authorized by the Constitution to establish.

13. **Commerce ⊂=58—Statute temporarily fixing wages to avoid strike is valid regulation.**
A law fixing the wages of certain classes of railway employees temporarily pending a hearing, for the purpose of avoiding a strike, is a valid regulation of commerce.

14. **Constitutional law ⊂=89(1)—Receivers have no guaranteed liberty of contract.**
A receiver, as such, has no general liberty of contract, so that a statute prohibiting him from reducing wages of his employees pending a hearing is not objectionable, as violating his liberty of contract, even if it were construed to prevent him from discharging employees to hire others at lower wages.

15. **Receivers ⊂=96—Can make wage reductions by contract without prior hearings.**
The reduction of wages by a railway receiver appointed by the federal court, forbidden by Newlands Act, § 9 (Comp. St. § 8674), without a hearing after 20 days' notice, is a reduction not consented to, since only such reductions provoke strikes, which it was the object of the act to prevent, and therefore that statute does not prevent the receiver from making contracts with the existing employees or with new employees for employment at reduced wages.

16. **Constitutional law ⊂=298(2)—Eminent domain ⊂=2(8)—Suit requiring maintenance of existing wages for 20 days not a deprivation of property without just compensation or due process of law.**
Newlands Act, § 9 (Comp. St. § 8674), forbidding wage reductions by federal receivers of interstate railways until after a hearing on 20 days' notice, is not unconstitutional, as taking property without due process of law or without just compensation, since it merely requires maintenance for a brief period, of the wage scale consented to by the owner of the property and if such maintenance is impossible the operation can be stopped.

17. **Receivers ⊂=96—Only employees actually operating trains are within Newlands Act.**
Under Newlands Act, § 9 (Comp. St. § 8674), requiring a hearing on 20 days' notice before reduction of wages of employees of a receiver of a railway appointed by a federal court, and section 1 (section 8666), defining employees affected by the act as persons actually engaged in train operation or train service, train operatives and train service men include only engineers, firemen, conductors, switchmen, train hands, and porters,

and these alone are covered by the act, though telegraphers, station agents, clerks, and track and shop men are necessary to the continued operation of trains.

18. **Receivers ⇐114—Employees held entitled to attack court order reducing wages.**

Employees of a railway when a receiver took it, who continued in such employment under protest after the receiver reduced the wages under an order of court invalid under Newlands Act, § 9 (Comp. St. § 8674), because not rendered after a hearing of which 20 days' notice had been given, were entitled to claim the compensation previously paid them for the time they so served under protest, and therefore have a standing in court to attack the validity of the order reducing the wages, though thereafter they terminated their employment by striking.

In Equity. Suit by the Birmingham Trust & Savings Company against the Atlanta, Birmingham & Atlantic Railway Company, in which a receiver was appointed for the defendant. On motion by N. H. Evans and others, as employees of the receiver and as representatives of the other employees, to rescind an order previously entered reducing the wages of the employees. Order reducing wages modified, by excepting therefrom train employees.

See, also, 271 Fed. 743.

Reuben R. Arnold, of Atlanta, Ga., for complainant.
Brandon & Hynds, of Atlanta, Ga., for defendant.
Branch & Howard, of Atlanta, Ga., for employees.

SIBLEY, District Judge. A creditor, holding a debt not due, but secured by bonds having past-due coupons, filed a bill in behalf of itself and other creditors against the Atlanta, Birmingham & Atlantic Railway Company, alleging insolvency and continued inability to earn operating expenses, whereby statutory liens for materials and labor were being accumulated in large amounts having preference over the mortgages securing the bonds, and whereby numerous suits were about to be filed and the property likely to be dismembered by the foreclosure of mortgages on its various parts, and praying for the appointment of a receiver.

The company answered, admitting the facts, and joined in the prayer for a receiver, and one was appointed on February 25, 1921, and directed to carry on the business of the defendant company "in the same manner as at present," until the further order of the court, it being expressly provided that "contracts by the railway company shall not be considered as adopted by the receiver unless he is expressly authorized by the court to adopt them."

On February 28, 1921, the receiver reported that since December 31, 1918, and especially since the establishment of a wage scale, July 26, 1920, under Labor Board Decision No. 2, at a much higher rate of pay than had ever before prevailed, the company had been unable each month to earn operating expenses, and that the deficit, exclusive of interest on bonds and other indebtedness, was about $1,000,000 per year, and increasing; that while there was money available to pay the current pay roll he had no means of procuring money for paying other operat-

ing expenses then due of more than $300,000, and he would not be able to meet another similar pay roll; that all possible economies otherwise had been practiced and that the wages of unskilled labor should be made such as were made necessary by conditions prevailing in the various communities in which it was employed; and that all other wages and salaries should be put on a basis of those in effect December 31, 1917, plus one-half of the increases since that date, the same to be effective March 1, 1921. An order so authorizing was granted, providing:

"That any employee or employees will be permitted to be heard at any time hereafter on the question of wages and salaries paid by the receiver or on the terms of this order, on proper application to the court and notice to all parties concerned."

The receiver, on March 3d, reported that he had posted the notice of the new wage scale and in a conference with the representatives of the employees they had informed him that they continued to work only under protest. The receiver repeated the statements of his former report and made the contention that the payment of greater wages than were earned by the company would be to take the property without due process of law, and deprive the creditors of the company of the equal protection of the laws and take their property for a public use without adequate compensation being paid. The court thereupon passed an order as follows:

"Upon considering the foregoing petition, it is ordered that the question of wages and salaries be, and the same is, set for a hearing on the 26th day of March, 1921, at 10 o'clock a. m., at the federal courtroom at Atlanta, Ga., and all employees or any of them who wish to be heard, will be given a hearing at that time as to what wages and salaries the receiver shall pay from that date and until the further order of the court.

"It is further ordered that a copy of the foregoing petition and this order, or the substance thereof, be posted by the receiver upon all customary bulletin boards, in or upon the railway of the Atlanta, Birmingham & Atlantic Railway Company."

On March 5th the receiver reported that the employees had that day announced to him, through their representatives, that they would retire from the service on that day, and some had done so, and asked instructions as to the scope of the hearing set for March 26th, and his relations to the United States Labor Board. The following order was then passed:

"Upon the petition for instructions of the receiver this day filed, the following response is made: The order of February 28, 1921, authorizing a reduced scale of wages and salaries, follows a practice common in administrative orders which may affect numerous persons who are not parties to the case, whereby the order is passed with the right of any one affected to review it. An order so passed does not adjudicate, or even prejudice, the rights of any one who seasonably and orderly presents them to the court. The order in question does not cut off a hearing, but facilitates it for all who desire to be heard. The order of March 3, 1921, fixing a hearing on the question of wages and salaries for March 26th, was passed on the court's attention being called to section 9 of the Act of Congress of July 15, 1913, to comply with the procedure therein pointed out as to all employees affected by the section. At the hearing the order of February 28th will be given no other or further effect, as to any employee than it ought to have by law under the facts that may then be established.

"No question touching the action or jurisdiction of the Labor Board has been raised in or passed on by this court. The departments of the government will act in harmony to carry out the functions assigned them by law. If the powers of the Labor Board are invoked, their jurisdiction of the present aspect of this controversy will naturally be in the first instance for their determination. Whether any conclusion reached by them can or should be enforced by this court will then be for decision here. No more specific instructions are deemed necessary at this time.

"It is hoped that the employees will not, by refusing to operate the road, further jeopardize their own interests and complicate their rights by terminating their status as employees, or that they will make more uncertain and difficult the duty of the court in ascertaining the law and the facts by refusing to participate in said hearing. Should the employees cease to work, the receiver is directed to take all necessary steps to protect the property in his hands and to avoid incurring liability to shippers and others until the further order of this court.

"Let a copy of this order be posted on each bulletin board of said railway company as provided in the order of March 3, 1921."

On March 9th, complainant amended its bill, setting up that section 9 of the Newlands Act (Comp. St. § 8674), hereinafter discussed, was unconstitutional and void as applied to this case, because limiting the receiver's liberty of contract, denying him the equal protection of the laws, and taking the property in his hands without due process of law, to the injury of complainant and the other creditors, and that to continue for even 20 days the present scale of wages would be taking the property of said creditors without due process of law and without just compensation, in violation of the Fifth Amendment of the Constitution.

On March 14, 1921, N. H. Evans, W. M. Martin, and others, alleging themselves to have been employees of the Atlanta, Birmingham & Atlantic Railway Company at the time of the receivership, and to be representatives of the several classes of employees and committeemen of their several brotherhoods and authorized to represent them, petitioned the court for a rescission of the order of February 28th, and a restoration of the then status, on the grounds, generally stated, that the order was improvidently granted without a hearing, and that under the Transportation Act (Act Feb. 28, 1920, c. 91, 41 Stat. 456) the authority to reduce railroad wages was now exclusively in the Labor Board, and that the order violated the provisions of section 9 of the Newlands Act, requiring a hearing after 20 days' notice to precede a reduction of wages. This petition was answered by the receiver and the original complainant and defendant, wherein, among other things, the unconstitutionality of section 9 of the Newlands Act as applied to this case was insisted upon.

On the hearing the petitioners for rescission stated that they made no dispute at this time of the facts reported by the receiver, which were the basis of the order, but rested on their points of law. Evidence was submitted, showing that the telegraphers were necessary to move trains other than scheduled trains, that freight could not be handled without station agents and clerks, and that track hands and mechanics were necessary to keep the track and equipment in such repair as that trains could run, and that practically all employees were necessary to the continued operation of trains. The receiver produced evidence as to the

condition of the road's business supporting his report; showed that the court's orders had been duly posted on the bulletin boards; that persons only who were employed on trains were regarded in the railroad business as being in train service or as train operatives, the expressions being confined to engineers, firemen, conductors, switchmen, flagmen, and porters; that all members of the classes of petitioning employees had, on and after March 5th, refused when called to go on duty, and had been "bulletined," meaning their positions had been recognized as vacant thereafter; that train operations had ceased entirely for a week, but that a number of other employees had since been secured on the new schedule of wages, who were contented with the employment and desired to remain as permanent employees. Much evidence was also introduced touching the effort of the railroad to make a similar reduction in wages, beginning in a notice issued December 29, 1920, and culminating in a proceeding before the Labor Board, which on February 15, 1921, decided, at the instance of the employees, as was testified, after reciting that a conference between employers and employees had related only to the contention that the employer was financially unable to pay the wages, that:

"In view of the fact that the record clearly shows that no conference has been had between the parties with reference to the justness or reasonableness of the wages fixed by Decision No. 2 of this board, the board does not deem it necessary to decide to what extent, if at all, a carrier's financial condition is a factor in the determination of just and reasonable wages to be paid by such carrier.

"In the judgment of this board the conferences heretofore held do not constitute a compliance with section 301 of the Transportation Act, for the reason that no conference has been had between the parties with reference to the justness and reasonableness of the present wages.

"It is the decision of this board that it is without jurisdiction to determine the present dispute until section 301 has been complied with by conference of the parties, the subject-matter of which conference shall be whether the present wages are just and reasonable."

It was further testified that, although the employees were conferring among themselves with the purpose of holding further conferences with their employer, the employer did not know of this, and in fact no further conferences had been held at the time of the receivership. It also appeared that the move for a receivership had been suggested by the then president of the railway company to the moving creditor.

Treating the reports of the receiver as true for the purposes of this hearing, the following opinion is expressed upon the points agitated:

[1] 1. While it appears from the evidence that the receivership was sought by the railway company, and from the record that the creditor's principal debt was not due, and that the allegations of its petition were admitted and its prayer for a receivership joined in by the defendant company, the proceeding was not collusive. The debt was a real and valid debt, and its not being due nor reduced to judgment did not necessarily defeat the relief. The allegations as to the condition of the company were true and must have been admitted by a truthful answer. The friendliness of the proceeding did not render it fraudulent. Metropolitan Railway Receivership, 208 U. S. 91, 28 Sup. Ct. 219, 52 L.

Ed. 403. Besides, no revocation of the receivership is sought here, and it is not thought the petitioners would have any standing to revoke it.

[2] 2. The primary object of a receivership is to preserve the property, which is taken into custody of the court, until the rights of all concerned in it can be ascertained and effectuated. In the case of a railroad, such preservation usually implies that it be kept operating, and the duty of service to the public renders such operation ordinarily imperative. But a railroad, though devoted to a public use and affected with a public interest, and hence subject to public regulation and control, remains private property and protected by the constitutional guaranties made to such property, that it shall not be taken from its owner without due process of law, nor be taken for public purposes without just compensation. A devotion to public use does not mean devotion to public consumption or destruction. By no sort of regulation can a railroad be compelled to operate at a continuous loss (Brooks-Scanlon Co. v. Commission, 251 U. S. 396, 40 Sup. Ct. 183, 64 L. Ed. 323), or even without a reasonable return on the investment (Northern Pacific Ry. Co. v. State of North Dakota ex rel. McCue, 236 U. S. 585, 35 Sup. Ct. 429, 59 L. Ed. 735, L. R. A. 1917F, 1148, Ann. Cas. 1916A, 1; Norfolk & W. R. R. Co. v. Conley, 236 U. S. 605, 35 Sup. Ct. 437, 59 L. Ed. 745). If the owners cannot be required to consume it in operation, a fortiori the power of the court invoked for its preservation ought not to be used for its unconstitutional destruction.

[3-5] 3. It follows that when it appears that operation under existing conditions is consuming the corpus of the property, and the condition is not merely temporary and that there is no prospect of an early change, the duty of the court is imperative either to change the conditions for the better or to cease operations, the latter to be a last resort. Since the court cannot practically raise rates nor compel patronage, it is usually shut up to reducing operations and expenses. It has been long and well settled that a receiver, while he takes the property subject to all existing liens on it, is not bound by the executory contracts of the owner. He may, under authority of the court, adopt them where it appears to the benefit of his trust to do so, or he may decline to adopt them and leave the original contracting parties to their legal remedies. And he has a reasonable time to make his election, and the mere continuance of the execution of a contract pending election is not an adoption of it. 34 Cyc. 258, 259; U. S. Trust Co. v. Wabash R. R., 150 U. S. 287, 299, 14 Sup. Ct. 86, 37 L. Ed. 1085.

[6] The principles thus stated apply to contracts with railroad employees. The existence in this case of some sort of contracts between the railway company and the Labor Unions is referred to in the pleadings, but the contracts are not themselves exhibited nor put in evidence. Since the order of the court authorizing the receiver to operate the railroad expressly provided that no contracts of the company were to be considered adopted by him without authority from the court, and since the receiver's action on the matter of wages was taken within three days of his appointment, there can be no contention here that these contracts, whatever they were, had been adopted. Being unhinder-

ed by contracts, the receiver made a showing, the accuracy of which has not yet been contested, which indicated that only by reducing his wage scale could he escape suspension of operation. Thereupon he was authorized to establish a reduced scale of wages and salaries, whereby all persons of all ranks should receive compensation on a basis of their pay December 31, 1917, plus one-half of increases since made, with the right to any and all employees to be heard on application.

[7] Where an administrative order may affect numerous persons not parties to the cause, it is a common practice to grant such order as appears to be proper, with leave to bring on a hearing thereafter. Such an order does not deny a hearing, but invites it, and is the most practical way under such circumstances of getting it promptly. It adjudicates nothing, and the receiver and all others who act under it before a hearing do so at their own risk as to the result of the hearing. Union Trust Co. v. Ill. Midland R. R., 117 U. S. 435, 436, 6 Sup. Ct. 809, 29 L. Ed. 963. The order here in question was therefore, aside from special statutes, regular in its form. Impropriety in its matter is, as has been said, not contested; no contradiction of the facts on which it was based being made, and no other provisions as to the wages to be fixed being yet suggested.

[8] 4. Passing, then, to the questions of law made, has the United States Labor Board exclusive jurisdiction? Receivers are not expressly mentioned in the portion of the Transportation Act establishing the Labor Board, but its definition of the carriers dealt with as including "any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation" (41 Stat. 469), is sufficiently broad to cover a receiver operating an interstate railroad. See United States v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207. Many questions touching terms and conditions of railroad employment, in view of the superior information and wider experience of the Labor Board on such questions, might be better handled by it than by the court, and no objection is seen to a receiver submitting such to the board, with the approval of the court.

[9] But where, as is the case here, there is no dispute as to conditions of employment, nor as to the just and reasonable wage normally to be paid, but only a question as to the ability of the receiver to pay the wage that has been established, without violating the Constitution, it is not seen how a decision of the Labor Board would be helpful. Not only are the purse strings of the receivership in the hands of the court, but the interpretation and application of the Constitution is the function of the court as against all boards and commissions, and the court cannot abdicate that function. Its decision upon the question indicated is the only ultimately effectual decision, and to seek that of another tribunal would be barren of practical result. Questions between a receiver and his employees do not ordinarily involve matters of normal railroad operation or abstract desirability, but are always complicated by the peculiar condition of the business in his hands and are limited to short periods of readjustment. Frequently the expense and delay of seeking an ad-

visory decision from a Labor Board would be disastrous in the exigencies of the receivership.

Moreover, in this case the Labor Board has apparently held itself without jurisdiction of the subject-matter. After reciting conferences between the railway company and its employees, in which the contention was, as it still continues to be, financial inability to pay the wage, the board held that, until another conference should be had or refused on the question whether the wage was "just and reasonable," it was without jurisdiction. No such conference has been held or refused, and no such issue has been made, and according to the board's ruling its want of jurisdiction continues. It is not necessary, however, to express an opinion upon the jurisdiction of the Labor Board. It cannot be doubted that the ultimate decision of the question agitated here must be, and its initial decision may be, made by the court controlling the receivership.

[10] 5. Does the order violate section 9 of the Newlands Act? That section is a part of the provisions made by Congress to avoid interruption of train service by disputes between carriers and their employees; the remedy generally applicable being the good offices of a Board of Mediation and Conciliation. Section 9 deals with the case of federal receiverships and provides:

"Whenever receivers appointed by a federal court are in the possession and control of the business of employers covered by this act, the employees of such employers shall have the right to be heard through their representatives in such court upon all questions affecting the terms and conditions of their employment; and no reduction of wages shall be made by such receivers without the authority of the court therefor, after notice to such employees, said notice to be given not less than twenty days before the hearing upon the receivers' petition or application, and to be posted upon all customary bulletin boards along or upon the railway or in the customary places on the premises of other employers covered by this act." Comp. St. § 8674.

Without expressing an opinion as to whether in the case of such receiverships the Board of Mediation has any function, it may be said that the section, in granting a hearing before the court, clearly recognizes the right of the court to decide, and in prohibiting a reduction of wages before 20 days' notice is given, the right is clearly implied to reduce them after the giving of such notice. A special and unique mode of service by bulletin board is provided. The "employers covered by this act" are defined in section 1 as being the common carriers in whole or in part by railroad which are engaged in interstate commerce. The employees intended are defined as:

"All persons actually engaged in any capacity in train operation or train service of any description, and notwithstanding that the cars upon or in which they are employed may be held and operated by the carrier under lease or other contract." Comp. St. § 8666.

The "employees of such employers" therefore clearly includes all persons operating the railroad trains at the time the receiver takes charge, and a reduction of their wages is clearly dealt with by section 9.

[11] It is supposed, as is ordinarily the case, that the receiver will continue the business of the railroad without interruption, and that,

tentatively, at least, the employees of the owner will be continued as the receiver's employees. The contention, therefore, that the order in question, being the first establishment of wages by the receiver, was not within the intent of Congress, cannot be sustained. The aim of Congress, being to avoid the interruption of train service which may result from a decrease in pay without the human satisfaction of a prior hearing on the subject, would be defeated by the construction contended for. It must be held, therefore, that the order of February 28th, as to employees dealt with by the Newlands Act, was in violation of said act and to that extent illegal. The order of the court authorizing a reduction of wages of such employees, without the delay of 20 days and the hearing prescribed by the act, was without legal effect, and the action of the receiver under it also without effect, if the section is a valid law.

[12] 6. The validity of the section is attacked on several grounds. On its face it merely declares that the court must hear employees on questions affecting terms and conditions of employment, and where the question is of reducing wages must hear in advance, after 30 days' notice, and provides a mode of service. As a statute of procedure in federal courts it is justified by the constitutional power of Congress to establish inferior courts with the implied power to define their jurisdiction and regulate their exercise of it. It does no more in the matter of wages than direct the court and its receiver not to meddle with the established scale—established with the consent of the carrier—until an orderly hearing after the usual and reasonable time to prepare for it has elapsed.

[13-15] But if it be admitted that in practical operation it fixes wages for 20 days, a law so doing in avoidance of strikes, even where a classification is made of the employees, is a valid regulation of commerce. Wilson v. New, 243 U. S. 332, 37 Sup. Ct. 298, 61 L. Ed. 755, L. R. A. 1917E, 938, Ann. Cas. 1918A, 1024. But it is said the receiver's liberty of contract is violated, in that for 20 days he cannot make contracts for service with others or at a less wage than that formerly paid. The act does not in terms prohibit him from employing others at a less wage, but the court would doubtless not sanction the discharge of old employees solely for the purpose of such employment, contrary to the spirit of the act. But a receiver as such has no general liberty of contract. As an officer of the court he may make only such contracts as the law permits and the court allows. The forbidden reduction of wages is, however, one unconsented to, for such only provoke strikes. That he might, notwithstanding the act, make willing contracts with the old employees for a less wage, is substantially decided in Ft. Smith & Western Railroad Co. v. Mills, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. Ed. 862. A fortiori could he make such contracts with new employees, if the former ones ceased from their employment.

[16] And it is urged that, when a wage is compelled to be paid even for 20 days, which is beyond the power of the road to earn, the statute cannot be constitutionally applied, because it would take property without due process of law and for public purposes without just compensation. It is difficult to see how the maintenance for 20 days, and

until a hearing, of a wage inaugurated by consent of the carrier, could be a serious taking of property. In the case at bar it appears that three-fourths of the wages paid are not affected by the act and may be freely reduced. The amount of train service could no doubt have been cut down. The trainmen, if presented the option of taking less pay for 20 days or suspending entirely, might have agreed to the temporary reduction. As a last resort the operation of the road might have been stopped for the period, since it could not constitutionally be compelled. It does not sufficiently appear in this case that the application of the statute necessarily would have been confiscatory. The order of February 28th should be modified, by excepting from its operation the employees actually engaged in any capacity in train operation or train service of any description.

[17] 7. It is important to settle what employees are included in this description. The language of the Employers' Liability Act of April 22, 1908 (Comp. St. §§ 8657–8665), and of the Hours of Service Act of March 4, 1907 (Comp. St. §§ 8677–8680), and of the Adamson Act of September 3, and 5, 1916 (Comp. St. §§ 8680a–8680d), defining the employees subject to them, is somewhat different in each from that used in the Newlands Act, and little light can be had from a comparison of them or the decisions under them. Section 9 of the Newlands Act seems to restrict its application to those actually engaged in train operation and train service, and indicates that they were persons only who are "employed upon or in cars." The word "car," in the Safety Appliance Act (Comp. St. § 8605 et seq.), was held to include engines and tenders, and no doubt does here.

The common meaning in railroad circles of "train operatives" and "train service men" includes only engineers, firemen, conductors, switchmen, train hands, and porters, and these alone are intended to be covered by this act. They actually and directly operate and serve the trains. Scheduled trains can be run without the assistance of telegraphers, and freight trains may move without station agents and clerks. While all employees of the railroad, whether upon the track, or in the offices or the shops, are necessary to the continued operation of the business, they are not indispensable to an operation for 20 days, and their places are more readily filled and with less peril from inexperience than are those above mentioned as train operatives. These considerations may have guided Congress in drawing the line it did.

[18] 8. The contention is made that the petitioners here have no standing in the court, because they are no longer employees, having on March 5th voluntarily ceased to work. It appears from the evidence that after the order of February 28th was acted upon by the receiver, and his purpose of paying reduced wages to all employees after March 1st was announced by him, the employees at first continued at work under protest. This action on their part prevented any contention that they had agreed to the reduction, and, so long as they continued at work, those affected by the Newlands Act were entitled, notwithstanding the receiver's action, to claim the compensation previously paid them. Unquestionably they have a substantial interest in the correction of the

court's order, which would otherwise operate to control the receiver in his payments to them; and by the express terms of the order all employees, whether protected by the Newlands Act or not, had a right to make a showing to the court upon the question of reduction. Their present showing did not cover the necessity of the reduction or any matter of fact, but did properly bring in question the exclusive jurisdiction of the Labor Board. All these parties had a standing in court to make the points they did under the express provisions of the order and in protection of their rights during the period that they continued at work.

BIRMINGHAM TRUST & SAVINGS CO. v. ATLANTA, B. & A. RY. CO.

(District Court, N. D. of Georgia. March 26, 1921.)

No. 156.

1. **Master and servant ⇐1—"Employment" defined.**
Aside from statutory uses, "employment" means the existence of the relation of master and servant, consisting either in a binding contract for service, or in actual service without a definite contract.

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

2. **Specific performance ⇐73—Contract for service not specifically enforceable.**
The right of a person to refuse to serve, even though under a binding contract to do so, is part of the constitutional personal liberty of the land, and the failure or refusal to perform a contract of service may create a liability in damages, but no court will enforce the service.

3. **Injunction ⇐101(1)—"Strike," to assert right or obtain economic advantage, is lawful.**
A "strike," which is a concerted refusal to serve in an industry, either to assert a supposed right or to obtain an economic advantage, is lawful, if conducted for either purpose without violence or intimidation, though it may be a malicious tort if done for the sole purpose of injuring the employer, or an unlawful conspiracy if directed against interstate commerce, except as provided in Clayton Act Oct. 15, 1914.

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

4. **Master and servant ⇐8(1)—Strike terminates employment.**
A strike, even though lawful, terminates an employment, consisting either in a definite contract or merely an existing arrangement, even though the strike is a strategic move to force at last a better employment.

5. **Receivers ⇐96—Strike, after illegal reduction in wages, forfeits right to former pay and hearing on future wages.**
Where a railway receiver announced a wage reduction in pursuance of an order of court, which was invalid because made without hearing after 20 days' notice, as required by the Newlands Act (Comp. St. § 8674), the employees could either continue to serve and assert right to pay at the former wage, or they could treat the announcement as a breach of the relation and terminate the service. Where they struck when the reduction was announced, they forfeited their standing as employees, and are not entitled as a matter of right to be heard at the hearing to fix the future wages.

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6. Receivers ⊂=96—Not directed to re-employ striking workmen in body.

Where railway employees struck because of a reduction of their wages without hearing, contrary to the Newlands Act (Comp. St. §§ 8666–8676), and thereafter conducted their strike in a lawful manner, the receiver will not be directed by the court to re-employ the strikers in a body, where there is not sufficient business to justify the re-employment of all of them, and where substituted employees are rendering satisfactory service, but re-employment must be treated as an administrative detail, to be taken up with the receiver.

In Equity. Suit by the Birmingham Trust & Savings Company against the Atlanta, Birmingham & Atlantic Railway Company, in which a receiver was appointed for the defendant company. Hearing upon the question of wages and salaries to be paid by the receiver to the employees, at which N. H. Evans and others, for themselves and as representatives of certain labor unions, moved for a declaration of the status of striking employees at the hearing. Strikers held not to be employees entitled to be heard, and wages prescribed in preliminary order continued.

See, also, 271 Fed. 731.

The hearing upon the question of wages and salaries fixed by the order of March 3, 1921, came on before District Judges Clayton and Sibley on March 26, 1921. N. H. Evans, W. N. Martin, and others, for themselves and certain labor unions mentioned, moved in writing for a declaration of their status in the hearing, averring that they and those represented by them were employees of the Atlanta, Birmingham & Atlantic Railway Company at the time of the receivership, had left the service of the receiver on March 5, 1921, in a body, under circumstances and for reasons recited by them, and desired to re-enter the service, and, if permitted to do so in a body, they wished to participate in the wage hearing, but otherwise did not wish to participate. The court stated there appeared no reason why they should not be re-employed, so far as employment was open, and that that matter might be taken up with the receiver. In the question now before the court, they would be heard as parties interested, either singly or as a body; the court being desirous of all possible light upon the question to be decided. The movants insisted upon a decision of their status. After consultation the court made the decision hereafter set forth.

Reuben R. Arnold, of Atlanta, Ga., for complainant.
Brandon & Hynds, of Atlanta, Ga., for defendant.
Branch & Howard, of Atlanta, Ga., for employees.

Before CLAYTON and SIBLEY, District Judges.
BEVERLY D. EVANS, District Judge, unable to be present.

SIBLEY, District Judge (after stating the facts as above). [1, 2] Aside from statutory uses, employment means, in common-law language, the existence of the relation of master and servant. This may consist either in a binding contract for service or in actual service without a definite contract. One or the other is necessary. The right (with well-known exceptions) of one to refuse to serve, even though under a binding contract to do so, is a part of the constitutional personal liberty of the land. The failure or refusal to perform a contract of service may create a liability in damages, but no court will enforce the service.

[3] The right to refuse to serve may lawfully be asserted singly or in concert with others. A strike is a concerted refusal to serve in an industry, either to assert a supposed right or to obtain an economic advantage. For either purpose, if conducted without violence or intimidation, it is lawful, though if done, not in self-interest, but for the sole purpose of injuring the employer, it may be a malicious tort. Cases cited in dissent of Justice Brandeis in Duplex Printing Co. v. Deering et al. (decided January 3, 1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. ——. If directed against interstate commerce, it may be an unlawful conspiracy, except as provided in Clayton Act Oct. 15, 1914, c. 323, 38 Stat. 730. Loewe v. Lawlor, 208 U. S. 274, 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Duplex Printing Co. v. Deering, supra.

[4] A lawful strike, whether the employment consists in a definite contract or is merely an existing relation, involves generally an abandonment of the employment and a termination by the strikers of the employment so far as they are concerned. It may be a strategic move to force at last a better employment, but it definitely destroys the present one so far as the employees can destroy it. In this case the motion itself admits that there was a complete strike, a concerted refusal of all employees represented to do their customary work when summoned by the receiver. He accepted the situation and employed others to the number of 900, as many as he is at present able to pay. Evidently these, and not the old men, are now the employees.

[5] But it is said that as to the trainmen the receiver had improperly announced a reduction of pay, and this is true. But the rights of the trainmen, under the Newlands Act (Comp. St. §§ 8666–8676), may be analogized to those that would exist under a definite contract to serve for the 20 days involved, at the fixed wage. As in the case of a contract, the benefit of the act may be waived by the trainmen. Ft. Smith Railway Co., v. Mills, 253 U. S. 206, 40 Sup. Ct. 526, 64 L. Ed. 862. The wages here were not payable in advance of service, but were not due until about April 1st. The receiver's announcement was no more than an anticipatory breach of his duty to pay, like an anticipatory breach of a contract to pay, which gave the other party the choice of treating the relation as broken and abandoning it without incurring liability, or of denying the right to terminate it and performing or tendering the service and claiming the pay.

Both things may not be done. A contract could not be treated as broken and abandoned, and also treated as unbreakable and to be performed. To make a homely illustration, if A. hires B. for 20 days to work for $5 per day, payable after the work is done, and during the work A. announces he will pay only $4, B. may decline to work further for him, in view of this announced intention, and may even sue him for damages for the breach of the contract in addition to recovering full wages for the work done. But, if he would have wages for the future time, he must remain at work, unless A. actually prevents him from working, and B. must take the position that A. cannot refuse to pay him the correct wages. In this case, after the receiver announced his wage reduction, the trainmen, with the

others, conferred with him and insisted on the sole jurisdiction of the Labor Board, but made no mention of the Newlands Act; and as to the question discussed they were referred by the receiver to the provision in the court's order for a hearing at any time before the court. The men remained at work under protest. This was, as has been ruled, sufficient to reserve all rights, including those under the Newlands Act, and rebutted any inference of consent to the reduction.

The refusal to work further on March 5th, when summoned by the receiver, no matter what the reason or justification, terminated the employment. The invitation to present any contention to the court was extended by the original order of February 28th. A definite time for a hearing was set in advance of the next pay day on March 26th, without withdrawing the original invitation, which was open for any time. After the strike had commenced on March 5th, an order was made emphasizing the right to a hearing, and warning of this very complication, if the service should be abandoned.

[6] A strike, though a lawful and a valuable economic weapon, is not a substitute for orderly procedure in court, and cannot be allowed as a legal remedy for legal rights as against a receiver, without asserting that our courts cannot or will not do justice, which is to announce the failure of orderly government. Although the strike vote was taken January 28th, weeks before the receivership, and involved only a demand for a decision by the Labor Board, which it has held itself without authority to make, and although this only was agitated in the conference with the receiver, and as to this question the men have been held to be in the wrong, yet there was the aggravation of the oversight of the Newlands Act, and reason, perhaps, for misunderstanding about the hearing. The strike has been conducted without violence connected with the striking employees, and without personal bitterness between them and the receiver, and no reason appears why they should not be re-employed, so far as the receiver has employment for them. He testifies that he will be glad to give it to them. We do not, however, think it right to direct him to re-employ them in a body, not only because he has not now sufficient business, but also because it would not be right to discharge those who have taken some of the places and are proving acceptable and contented employees. Re-employment must be treated as an administrative detail, and to be taken up with the receiver.

2. After further hearing it was decided: Upon the question of the wages to be paid from this date, the standard set by the Labor Board is to be taken as presumptively correct, and to be disturbed only so far as the condition of the railroad demands. The evidence shows that the facts originally reported by the receiver are true, and that the deficit has been greater and the business more embarrassed in the period since January. The question now is whether the wage scale established on February 28th can be continued without destruction of the property. It is thought, however, that in view of the possibility of improving conditions, and because expenses are somewhat limited by reduced service, that the wage scale then established should be continued, if possible; and it will be so ordered.

UNITED STATES v. BOARD OF COM'RS OF McINTOSH COUNTY. SAME v. STUCKEY, County Treasurer. SAME v. RANSON, County Treasurer.

(District Court, E. D. Oklahoma. March 19, 1921.)

Nos. 2594, 2621, 3184.

1. **States ⇐9—Irrevocable ordinance required by Enabling Act relating to government lands is binding.**
The irrevocable ordinance inserted in the Constitution of Oklahoma and required by Enabling Act, § 3, par. 3, which disclaimed title to unappropriated public lands or lands held by Indians, is a continuing and binding obligation on the state after its admission into the Union, in so far as it may be a matter of federal cognizance.

2. **Taxation ⇐6—States cannot tax instrumentalities of federal government.**
The states cannot tax or otherwise impose burdens on the exclusive powers of the federal government or on its instrumentalities employed to carry such governmental powers into execution.

3. **Taxation ⇐18—Federal government cannot tax state instrumentalities.**
The national government cannot tax exclusive agencies of the states employed to carry their powers into execution except as such exemption may be modified by Const. U. S. Amend. 16, authorizing the income tax.

4. **Taxation ⇐181—Allotments to citizen Indians taxable, in absence of express restrictions.**
Tribal lands allotted in severalty to Oklahoma Indians who were then citizens of the United States are subject to taxation by the state in the same manner as other lands, unless such allotment has been specifically or by express and clear implication exempted or reserved from taxation.

5. **Taxation ⇐181—Oklahoma Constitution, exempting Indian lands from taxation, applies only to existing exemptions.**
Const. Okl. art. 10, § 6, exempting from taxation property exempt by reason of treaty stipulations existing between Indians and the government, or by federal laws during the force and effect of such treaties or laws, obviously exempts such lands only as were exempt under treaties and laws in existence when the state was admitted.

6. **Taxation ⇐181—Acts extending restrictions on alienation of Indian lands did not extend exemption from taxation to inherited lands.**
Act April 26, 1906, § 19, providing that all Indian lands upon which restrictions on alienation are removed shall be subject to taxation, and that other lands shall be exempt from taxation so long as the title remained in the original allottee, and Act May 27, 1908, § 4, providing that lands from which restrictions on alienation have been or shall be removed shall be subject to taxation with a proviso that allotted lands should not be subjected to any claim against the allottees arising prior to the removal of restrictions, did not operate to extend the exemption from taxation to lands inherited from the original allottees by full-blood Indian heirs in cases where such exemption was not given by the several allotment acts relating to the different nations.

7. **Constitutional law ⇐48—Exemption of Indian lands from taxation construed to conform to Oklahoma Constitution.**
Act May 27, 1908, § 4, relating to the exemption of Indian lands from taxation, which was enacted shortly after Oklahoma was admitted as a state, should not be construed so as to conflict with Const. Okl. art. 10, § 6, exempting only lands then exempt under existing laws, if as reasonable a construction can otherwise be reached.

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

8. Taxation ⊂=181—Lands purchased for Indians with proceeds from restricted lands not exempt.

Lands theretofore taxable, which were purchased for a Creek Indian by the Secretary of the Interior with the proceeds of oil royalties from restricted lands or of the sale of lands whose alienation was prohibited without the approval of the Secretary, the deeds to which purchased lands contained a clause declaring that no lease, deed, mortgage, power of attorney, contract of sale, or other instrument affecting the title thereto should be of any force without the approval of the Secretary of the Interior are not exempted from taxation by the state, by Act April 26, 1906, § 19, exempting Indian lands so long as the title remained in the original allottee, or Act May 27, 1908, § 4, exempting allotted lands from claims against allottees arising prior to the removal of restrictions on alienation, and also providing that such lands from which restrictions on alienation have been or shall be removed shall be subject to taxation.

9. Taxation ⊂=181—Oklahoma Enabling Act and Constitution do not exempt lands purchased for Indians.

The provisions of the Oklahoma Enabling Act and Constitution exempting from taxation property belonging to or thereafter purchased by the United States and all Indian property exempted by existing treaties or laws do not exempt from taxation lands theretofore taxable, after their purchase by the Secretary of the Interior for a full-blood Creek Indian, to be held under the same restrictions on alienation as were imposed on the lands from which the purchase price was derived as oil royalties or proceeds of sale.

Three separate suits by the United States against the Board of Commissioners of McIntosh County, against W. W. Stuckey, Treasurer of Tulsa County, and against J. P. Ranson, Treasurer of McIntosh County. Judgment rendered for defendant in each suit.

C. W. Miller, U. S. Atty., and L. K. Pounders, Sp. Asst. U. S. Atty., both of Muskogee, Okl.

N. A. Gibson and Jos. L. Hull, both of Muskogee, Okl., W. L. McPherson, of Eufaula, Okl., and W. R. Seaver, of Tulsa, Okl., for defendants.

WILLIAMS, District Judge. The following questions are involved in the above styled and numbered cause:

(1) Are lands theretofore taxable under the state laws, and afterwards purchased under the supervision of the Secretary of the Interior from their bona fide non-Indian owners with royalties accruing under such supervision to a full-blood Creek Indian from part of her restricted allotment, exempted or freed from state taxation by virtue of the clause inserted by the grantor in the deed to her under the direction of and at the instance of and requirement of the Secretary of the Interior, providing "that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification, unless made with the consent of and approved by the Secretary of the Interior"; the conveyance being dated December 28, 1914, and prior to its delivery and recording the following certificate of the Secretary of the Interior being thereto annexed:

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

"I hereby certify that the land described in the above deed was purchased for the said Ella Jones with funds held in trust by the United States for her benefit derived from oil royalty on leases covering lands allotted for her, restricted by virtue of her enrollment as a full-blood citizen of the Creek Nation, * * * and that said purchase was made and said deed was executed and the same is hereby approved pursuant to the regulations prescribed by the Secretary of the Interior under Act of Congress approved May 27, 1908, and the Act approved August 1, 1914."

(2) Are lands theretofore taxable under state statutes, and afterwards purchased under the supervision of the Secretary of the Interior from their non-Indian bona fide owners with funds accruing under his supervision to a full-blood Creek Indian as a part of the proceeds of the sale of the lands allotted and patented to her as a part of her allotment and restricted, so as to be inalienable without the consent of the Secretary of the Interior, prior to December 1, 1913, which were sold by her subject to the conditions, inserted under the direction and at the instance of the Secretary of the Interior in the deed from the grantors to her, that the purchase price paid therefor should be received by the Secretary of the Interior or his agents and by him held in trust as a trust fund and by him disbursed under the laws, rules, and regulations of the Secretary of the Interior for her benefit, the conveyances by which said lands thus acquired containing a clause inserted by the grantor under the direction of, and at the instance of and by said requirement of the Secretary of the Interior, provided "that no lease, deed, mortgage, power of attorney, contract to sell, or other instrument affecting the land herein described or the title thereto, executed during the lifetime of said grantee at any time prior to April 26, 1931, shall be of any force and effect or capable of confirmation or ratification unless made with the consent and approval of the Secretary of the Interior," and prior to its delivery and recording the following certificate of the Secretary of the Interior being thereto annexed:

"That the land described in the above deed purchased for ——— with funds derived from the sale of lands allotted to ——— on the final approved rolls of citizens by blood of that nation, and that said purchase was made and said deed approved pursuant to the Act of Congress of May 27, 1908, which authorized the Secretary of the Interior to remove restrictions from allotted lands of the Five Civilized Tribes 'wholly or in part, under such rules and regulations concerning terms of sale and Disposal of the Proceeds for the benefit of the respective Indians as he may prescribe'"

—thereby exempted or rendered free from state taxation?

[1] The people inhabiting the proposed state of Oklahoma, by the terms of paragraph 3 of section 3 of the Enabling Act (34 Stat. 267) were by irrevocable ordinance required to—

"agree and declare that they forever disclaim all right and title in or to any *unappropriated public lands* lying within the boundaries thereof, and to all lands lying within said limits *owned or held by any Indian, tribe, or nation*, and that until the title to any such *public land* shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States; that land belonging to citizens of the United States residing without the limits of said State shall never be taxed at a higher rate than the land belonging to residents

thereof; that *no taxes* shall be imposed by the State *on lands* or *property belonging to* or *which may hereafter be purchased by the United States or reserved for its use.*" (Italics mine.)

To the foregoing mandatory conditions the people of the proposed state, through their constitutional convention, by irrevocable ordinance agreed. A similar requirement has been imposed upon every state, except Vermont, Kentucky, Tennessee, Maine, and Texas, preliminary to admission into the Union. In so far as it may be a matter of federal cognizance, the same became a continuing and binding obligation on the part of the state after its admission into the Union. Coyle v. Smith, 221 U. S. 559, 31 Sup. Ct. 688, 55 L. Ed. 853; Id., 28 Okl. 121, 113 Pac. 944; Joplin Mercantile Co. v. U. S., 236 U. S. at page 547, 35 Sup. 291, 59 L. Ed. 705.

Section 1 of said Enabling Act contained the following proviso:

"*Provided, that nothing contained in the said Constitution shall be construed to limit or impair the rights of persons or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this Act had never been passed.*" (Italics mine.)

Said provision was not required to be accepted by irrevocable ordinance, such being not essential, as it related to a matter within the exclusive control of the Congress and so continues, unless remitted by the Congress to the state authority. Tiger v. Western Inv. Co., 221 U. S. at page 309, 31 Sup. Ct. 578, 55 L. Ed. 738. Said provision of section 3 of the Enabling Act was also in substance incorporated in section 3 of article 1 of the Constitution of the state.

[2, 3] That the states cannot tax or otherwise impose burdens on the exclusive powers of the federal government or its instrumentalities employed to carry such governmental powers into execution is beyond question. The same limitation rests upon the national government as to exclusive agencies of the states unless modified by the Sixteenth Amendment as to taxation which relates to incomes. Weston v. Charleston, 2 Pet. 449, 7 L. Ed. 481; McCulloch v. Maryland, 4 Wheat. 316, 431, 439, 4 L. Ed. 579; Bank of Commerce v. New York City, 2 Black. 620; Collector v. Day, 11 Wall. 113, 124, 20 L. Ed. 122; United States v. Railroad Co., 17 Wall. 322, 21 L. Ed. 597; Railroad Co. v. Peniston, 18 Wall. 5, 21 L. Ed. 787; Knowlton v. Moore, 178 U. S. 59, 20 Sup. Ct. 747, 44 L. Ed. 969.

Beginning with Ohio, it has been customary for the federal government, in admitting the new states into the Union, "to require from that state—though without necessity—a stipulation that the public domain lying within its limits shall not be taxed by the state." Cooley on Taxation, vol. 1 (3d Ed.) p. 135. The Ohio Enabling Act (Act April 30, 1802) provides that:

"Every and each tract of land sold by Congress * * * shall be and remain exempt from any tax laid by order or under the authority of the State * * * for the term of five years from and after the day of sale."

The Louisiana Enabling Act (Act Feb. 20, 1811), in addition, required an agreement on the part of the state, by irrevocable ordinance, that the people—

"agree and declare that they forever disclaim all right or title to the waste or unappropriated lands lying within the said territory, and that the same shall be and remain at the sole and entire disposition of the United States," and that "the lands belonging to citizens of the United States residing without the said state shall never be taxed higher than the lands belonging to persons residing therein."

The Illinois Enabling Act (Act April 18, 1818), in addition, required an agreement, by irrevocable ordinance, that the—

"bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees, or their heirs, remain exempt, as aforesaid, from all taxes, for the term of three years."

The Iowa Enabling Act (Act March 3, 1845), in addition, required that—

"the said State shall never interfere with the primary disposal of the soil within the same by the United States nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers thereof; and that no tax shall be imposed on lands the property of the United States," and that "the bounty lands granted, or hereafter to be granted, for military services during the late war, shall, while they continue to be held by the patentees or their heirs, remain exempt from any tax laid by order or under the authority of the state * * * for the term of three years."

The Nevada Enabling Act (Act March 21, 1864), in addition to the foregoing provided that—

"No taxes shall be imposed by said State on lands or property therein belonging to, or which may hereafter be purchased by, the United States."

The Enabling Act for the Dakotas, Montana, and Washington (section 4) seems to be a prototype of that of Oklahoma and contains substantially the same provisions.

When the original thirteen colonies obtained their independence from the king of England, each succeeded to the unappropriated public lands within its boundaries, the same prior to that time having been the property of the crown. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 138; Johnson v. McIntosh, 8 Wheat. 543, 5 L. Ed. 681; Pollard's Lessee v. Hagan, 3 How. 212, 11 L. Ed. 565; Shively v. Bowlby, 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331; De Weese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757.

Vermont succeeded to all the rights of the crown to the unappropriated public lands. Town of Pawlet v. Clark, 13 U. S. (9 Cranch) 292, 3 L. Ed. 735.

Kentucky, which was originally a part of Virginia, succeeded to such unappropriated public lands. Colson v. Lewis, 15 U. S. (2 Wheat.) 377, 4 L. Ed. 266; Boone and Talbot v. Helm, 34 Ky. (4 Dana) 403; Rollins v. Clark, 38 Ky. (8 Dana) 15.

Maine being erected out of the territory of Massachusetts by virtue of act of Massachusetts Legislature of June 19, 1819 (St. 1819, c.

161), one-half of the unappropriated public lands within its bounds were reserved by Massachusetts, and the other half granted to the state of Maine. Lapish v. Wells, 6 Me. (6 Greenl.) 175; Emerson v. County of Washington, 9 Me. (9 Greenl.) 88; Fisk v. Briggs, 12 Me. 373; Roberts v. Richards, 84 Me. 1, 24 Atl. 425.

Tennessee was erected out of territory ceded to the United States by act of Legislature of North Carolina February 25, 1790 (1 Scotts Laws Tenn. p. 435), without any reservations. By Act of Congress April 18, 1806 (2 Stat. 381), certain lands were surrendered to the state, the other lands by said act being retained. By Act of Congress Aug. 7, 1846 (9 Stat. 66), the lands thus retained were surrendered to the state. Burton's Lessees v. Williams, 5 Wheat. 529, 4 L. Ed. 452; Fogg v. Williams, 2 Head (Tenn.) 474.

Texas by joint resolution for annexation, approved March 1, 1845, retained her public lands. 5 Stat. 797; De Weese v. Reinhard, 165 U. S. 386, 17 Sup. Ct. 340, 41 L. Ed. 757.

As to the other states, when admitted into the Union, except where specifically granted to the state, the unappropriated public lands have been expressly retained by the federal government. Willow River Club v. Wade, 100 Wis. 86, 76 N. W. 273, 42 L. R. A. 305; Clements v. Anderson, 46 Miss. 581.

The controversies arising with the federal government relating to the unappropriated public lands obviously occasioned the incorporation of such requirements in Enabling Acts or acts of admission. In Ward v. Board of County Commissioners of Love County, Oklahoma, 253 U. S. 17, 40 Sup. Ct. 419, 64 L. Ed. 751, decided by the Supreme Court of the United States on April 26, 1920, it is said:

"In the act of 1906, enabling Oklahoma to become a state, Congress made it plain that no impairment of the rights of property pertaining to the Indians was intended (chapter 3335, § 1, 34 Stat. 267); and the state included in its Constitution a provision exempting from taxation 'such property as may be exempt by reason of treaty stipulations, existing between the Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws.' Article 10, § 6."

Section 1, Act of May 27, 1908 (35 Stat. 312), with reference to restrictions against alienation provided that the Secretary of the Interior—

"may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe."

This provision was construed by the Circuit Court of Appeals for the Eighth Circuit in United States v. Law, 250 Fed. 218, 162 C. C. A. 354, wherein it was held:

"Under Act May 27, 1908, c. 199, § 1, 35 Stat. 312, declaring that all allotted lands of enrolled full-bloods and enrolled mixed-bloods of three-quarters or more Indian blood, shall not be subject to alienation prior to April 26, 1931, but that the Secretary of the Interior may remove such restrictions wholly or in part, under such rules and regulations concerning the terms of sale and disposal of the proceeds for the benefit of the Indians as he may prescribe, where the Secretary of the Interior conditionally consented to a full-blood Cherokee's alienation of her allotment, and, reserving the right to

dispose of the proceeds of the sale, with the approval of the Indian Superintendent, invested the proceeds in other lands, which were conveyed to the allottee with a restriction against alienation prior to 1931, the date fixed in the act, such restriction was valid."

Can this case be said to be authority for the Secretary of the Interior, as a federal agency, to exempt or exclude such acquired lands from taxes laid under authority of the state, and if so is such act valid? In said opinion it is said:

"It is contended by the appellee that no power exists even in Congress to withdraw lands once subject to taxation by state authority from such status of taxability, and that the restrictions upon alienation imposed by the Secretary of the Interior upon the new land purchased for Amanda Perry undertake to effect such withdrawal of the new land. The question whether exemption from taxation was attempted to be created by the restriction provision contained in the deed of the new land to Amanda Perry, and the further question whether Congress could authorize the creation of such exemption as to this new land, or the transfer of the exemption from the old land to the new, are neither of them involved in the present case, and we express no opinion thereon."

"McCurdy v. United States, 246 U. S. 263, 38 Sup. Ct. 289, 62 L. Ed. —, is not opposed to the conclusion here reached. In that case the principal question decided was whether the Secretary of the Interior had authority to order inserted in a deed of land running to an Osage Indian the following clause: 'This conveyance is made and accepted with the understanding, and under the condition that the above described property is to be and remain inalienable and not subject to transfer, sale or incumbrance, for a period of eighteen years from the 1st day of July, 1913, except by and with the express consent and approval of the Secretary of the Interior, or his successor in office.' The facts in the case were that the United States held certain funds in trust for the Osage Indians and to their individual credit."

[4] After tribal lands have been allotted in severalty to members of the Tribe, and such members of the Tribe have become citizens of the United States, upon the erection of the state in whose bounds such lands are located, such allotment of such Indian citizens becomes subject to state taxation in the same manner as other lands located therein belonging to other citizens, unless such allotment has been specifically or by express and clear implication exempted or reserved from taxation. Goudy v. Meath, 203 U. S. 146, 27 Sup. Ct. 48, 51 L. Ed. 130.

The lands of the Seminole Tribe were allotted under agreement of December 16, 1897, which was ratified by Congress July 1, 1898 (30 Stat. 567; Laws Relating to the Five Civilized Tribes in Oklahoma, 1890–1914, page 266), and which provided that—

"All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void. * * * When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as

may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, *be made inalienable and nontaxable as a homestead in* perpetuity." (Italics mine.)

The Supplemental Seminole Agreement, dated October 7, 1899, which was ratified by Congress on June 2, 1900 (31 Stat. 250; Laws Relating to Five Civilized Tribes, Oklahoma, 1890–1914, p. 313), provides as follows:

"Second. If any member of the Seminole Tribe of Indians shall die after the thirty-first day of December, eighteen hundred and ninety-nine, the lands, money, and other property to which he would be entitled if living, shall descend to his heirs who are Seminole citizens, according to the laws of descent and distribution of the State of Arkansas, and be allotted and distributed to them accordingly: Provided, that in all cases where such property would descend to the parents under said laws the same shall first go to the mother instead of the father, and then to the brothers and sisters, and their heirs, instead of the father."

In said paragraph in the original Seminole treaty, that "each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity," the term "inalienable" is used as a restriction against voluntary alienation or conveyance, for, had it been intended to mean involuntary as well as voluntary inalienability, why add the words "and nontaxable," when it would be surplusage? Goudy v. Meath, supra; Betts v. Commissioner of Land Office, 27 Okl. 64, 110 Pac. 766. The provision in said original agreement, "all contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void," has no application as a restriction after issuance of patent.

By section 8 of the Act of March 3, 1903 (32 Stat. 982; Laws Relating to the Five Civilized Tribes in Oklahoma, 1890–1914, p. 440), it is provided that the tribal government of the Seminole Nation shall not continue longer than March 14, 1906, and that the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation, contained in the Act of July 1, 1898 (30 Stat. 567), and that said principal chief shall execute and deliver said deeds to the Indian allottees as required by said act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, with the proviso that the homestead referred to in said act shall be inalienable during the lifetime of the allottee not exceeding 21 years from the date of the deed for the allotment, and that a separate deed shall be executed for said homestead, and that during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof.

The Act of Congress approved April 21, 1904 (33 Stat. 189; Laws

Relating to the Five Civilized Tribes in Oklahoma, 1890-1914, p. 448), provides:

"All the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes except minors and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the five Civilized Tribes if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said allottee."

Said provision of said Act of April 21, 1904, had the effect of removing restrictions imposed by said clause, "all contracts for sale, disposition or encumbrance * * * of any allotment [Seminole] made prior to the date of patent shall be void," except as to homesteads and minors, where the allottee was not of Indian blood, and to permit the removal of such restriction against alienation prior to the issuance of patent by all other allottees except minors, and as to all allotments, except homesteads, with the approval of the Secretary of the Interior. Goat v. U. S., 224 U. S. 458, 32 Sup. Ct. 554, 56 L. Ed. 841; Godfrey v. Iowa Land & Trust Co., 21 Okl. 293, 95 Pac. 792. Prior to the passage of the Act of April 26, 1906 (34 Stat. 137; Laws Relating to the Five Civilized Tribes in Oklahoma, 1890–1914, p. 495), in cases where patents had issued, neither did any exemption as to taxation nor any restriction against alienation in cases of adults exist as to that part of the Seminole allotment not included in the homestead. Prior to and by the passage of said Act of April 26, 1906, inherited allotted tribal land in the Seminole Tribe to which patent had been duly issued and delivered to the allottee were freed from taxation, unless it be held that the clause; "be made inalienable and nontaxable as a homestead in perpetuity," comprehends a term beyond the period of the life of the allottee, and that the third proviso to section 19 of Act of April 26, 1906, which restricts the exemption as long as the title remains in the original allottee, is to that extent ineffectual. It is not essential here to determine the meaning of the words "as a homestead in perpetuity."

The Choctaw and Chickasaw Original Treaty under date of April 23, 1897, ratified by Congress on June 28, 1898 (30 Stat. 495; Laws Relating to the Five Civilized Tribes in Oklahoma, 1890–1914, p. 248), provides:

"All the lands allotted shall be nontaxable while the title remains in the original allottee, but not to exceed twenty-one years from date of patent, and each allottee shall select from his allotment a homestead of one hundred and sixty acres, for which he shall have a separate patent, and which shall be inalienable for twenty-one years from date of patent. This provision shall also apply to the Choctaw and Chickasaw freedman to the extent of his allotment. Selections for homesteads for minors to be made as provided herein in case of allotment, and the remainder of the lands allotted to said members shall be inalienable for a price to be actually paid, and to include no former indebtedness or obligation—one-fourth of said remainder in one year, one-fourth

in three years, and the balance of said alienable lands in five years from the date of the patent. * * *"

The original agreement with the Choctaws and Chickasaws under date of April 23, 1897, was ratified by the councils of both nations as required by law; the Chickasaw Council also submitting it to a referendum, which resulted in a majority against it of 112 votes. By said Act of Congress of June 28, 1898, with certain specified modifications to the original Choctaw and Chickasaw Treaty, it was again submitted to a referendum in both nations, and on August 24, 1898, it was ratified. Annual Report Commission to the Five Civilized Tribes in the Indian Territory to the Secretary of the Interior, 1898, p. 6.

In the Choctaw and Chickasaw Nations, on April 26, 1906, all allotted lands of every character being nontaxable "while the title remains in the original allottee, but not to exceed twenty-one years from date of the patent," the third proviso to said section 19 preserving said status, no inherited allotted tribal lands were exempted from taxation.

By section 16 of the Supplemental Creek Agreement dated September 1, 1902, and ratified by Congress on June 30, 1902 (32 Stat. 500; Laws Relating to Five Civilized Tribes in Oklahoma 1890–1914, p. 386), it is provided:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of his children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Each citizen being required to select a part of his allotment as a homestead, "which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear," the word "inalienable" as used in said provision, means a restriction against voluntary alienation or conveyance, and that of "nontaxable" an involuntary alienation or conveyance on account of taxes imposed.

In the same section it is provided, as to that part of the allotment not included in the homestead, "shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval" of said agreement. The term "inalienable," as to that part of the allotment in excess of homestead, is used in the same sense in which the term "inalienable" is used as to the homestead in said section; that is, to prohibit voluntary alienation or conveyances. By the words, "shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation," involuntary alienations or conveyances are meant. In Goudy v. Meath, supra, it is said:

"The original treaty provided that they should be exempt from levy, sale or forfeiture until the Legislature of the state should, with the consent of Congress, remove the restrictions. This of course, meant involuntary as well as voluntary alienation."

In the Creek Nation prior to April 26, 1906, the allotted tribal homestead being exempt from taxation for 21 years from the date of the patent, and that part of the allotment in excess of the homestead for 5 years from the date of the approval of the Supplemental Creek Treaty, which 5 years expired with August 7, 1907 (Baker v. Hammett, 23 Okl. 480, 100 Pac. 1114; Lanham v. McKeel, 244 U. S. 582, 37 Sup. Ct. 708, 61 L. Ed. 1331), during such periods such land was exempt from taxation, whether or not the title was in the original allottee. The third proviso to said section 19 of Act of April 26, 1906, had the effect of modifying and changing this status so that "all other land" except that from which restrictions were removed should be exempt from taxation as long as the title remained in the original allottee, if in that respect it was valid.

By Cherokee Allotting Act July 1, 1902 (32 Stat. 716; Laws Relating to Five Civilized Tribes in Oklahoma, 1890–1914, pp. 412–414), it is provided:

"Sec. 13. Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

"Sec. 14. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs before the expiration of five years from the date of the ratification of this act.

"Sec. 15. All lands allotted to the members of the said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent."

In said Allotting Act of July 1, 1902 (32 Stat. 716; Laws Relating to the Five Civilized Tribes in Oklahoma, 1890–1914, pp. 412 to 414), it is provided by section 13 that "during the time said homestead is held by the allottee the same shall be nontaxable" and shall

"not be liable for any debt contracted by the owner thereof while so held by him," and "inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment"; by section 14 that "lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act"; and by section 15 that "all lands allotted to the members of said tribe except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent."

By said section 13, the term "inalienable" means a prohibition against a voluntary alienation or conveyance, as in the same section the homestead is specifically made nontaxable for a period as long or longer than that for which it is specifically made inalienable. The term "nontaxable" thereby specifically carries a restriction against an involuntary alienation or conveyance on account of taxes imposed by governmental authorities. By section 14 all allotted lands in excess of the homestead "shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, or be inalienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act." The term "shall not be incumbered, taken or sold," as used in said section, prohibits an involuntary alienation or conveyance, and the term "alienated" a voluntary conveyance. Prior to the passage of the act of April 26, 1906, in the Cherokee Nation, the homestead was exempted from taxation so long as held by the allottee, and the allotted lands in excess of said homestead for the period of five years from July 1, 1902, and such period was to end with the close of June 30, 1907.

On April 26, 1906, inherited tribal lands in the Cherokee Nation, other than the homestead, were nontaxable, with the title in the heirs, until the said five years expired from the date of said allotting act, but the homestead, with the title in the heirs, was taxable. Gannon v. Johnston, 243 U. S. 108, 37 Sup. Ct. 330, 61 L. Ed. 622. The third proviso to said section 19 of Act of April 26, 1906, if in that respect valid, had the effect of modifying, and decreasing in some cases, and extending in others, the tax exemption period as to surplus allotments.

The enabling act for the proposed state of Oklahoma, which was pending and under consideration at the time of the passage of said act of April 26, 1906. was passed on June 16, 1906; the state being admitted into the Union by proclamation of the President on November 16, 1907. The said Act of April 26, 1906, passed preliminary to the erection of a state government including within its bounds that of the Five Civilized Tribes, declared:

"That all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the *original allottee*." (Italics mine.)

A few months subsequent to the erection of said state by Act of May 27, 1908, Congress declared:

"That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes."

Can it be reasonably said that Congress, in the reimposing of restrictions on inherited allotted tribal lands held by full-blood heirs of the Five Civilized Tribes and not being the original allottees, intended by implication to extend the exemption of taxation to such lands? If so, is it done by such legislative act (not a part of any treaty), by specific language, or by language from which the express implication is so strong as to make the meaning clearly manifest?

[5] Section 6 of article 10 of the Constitution of the state of Oklahoma provides:

"All * * * exempt by reason of treaty stipulations, *existing* [italics mine] between Indians and the United States government, or by federal laws, during the force and effect of such treaties or federal laws," shall be exempt from taxation.

Obviously this means as the same *existed* at the time of the erection of the state on November 16, 1907. Said section 1 of the Enabling Act, as heretofore pointed out, provides that nothing contained in the said Constitution shall be construed—

"to limit or affect the authority of the government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaty, agreement, or otherwise, which it would have been competent to make if this act had never been passed."

In Romine v. State, 7 Wash. 215, 34 Pac. 924, it was held:

"1. An act of Congress enabling a territory to become a state has no binding force on the people of the territory until they have adopted a Constitution, and the territory has been admitted into the Union; and then, if by their Constitution, the people have expressed no dissent from any proposition contained in the Enabling Act, they are bound by its provisions. But if the Constitution contains any modification of any of the provisions of the Enabling Act, and the state has been formally admitted by the President and Congress into the Union, the modified provisions are to be taken as the existing contract between the State and the Federal government.

"2. Act Cong. Feb. 22, 1889, enabling the territory of Washington to come into the Union, required (sections 10, 11) the public lands previously reserved by Act Cong. March 2, 1853, for school purposes to be disposed of by the state in a specified manner. The Constitution adopted by the people pursuant to such act contained a provision (article 16, § 2) empowering the state Legislature to confirm all previous sales of school lands made in good faith. Held that, whether or not it was the intention of Congress, by the Enabling Act, to repudiate, as unauthorized, all sale of school lands made by the territory, the state of Washington could not question the title of such purchasers, subsequently confirmed by the state Legislature since the above constitutional provisions, under which the state was admitted, modified the proposition in the Enabling Act."

In Tiger v. Western Investment Co., supra, it is said:

"On the other hand, it is contended that the Act of April 26, 1906, in the sections referred to, has undertaken to make new provision for the protection of full-blood Indians of the Five Civilized Tribes, and to place them, as to the alienation, disposition, and incumbrance of their lands, under restrictions such as shall operate to protect them, and to require the Secretary of the

Interior to approve such conveyances, in order that such Indians shall part with their lands only upon fair remuneration, and when their interests have been duly safeguarded by competent authority."

On page 306 of 221 U. S., on page 583 of 31 Sup. Ct. (55 L. Ed. 738), it is further said:

"We think a consideration of this act and of subsequent legislation in pari materia therewith demonstrates the purpose of Congress to require such conveyances by full-blood Indians to be approved by the Secretary of the Interior. The sections of the Act of April 26, 1906, under consideration show a comprehensive system of protection as to such Indians. Under section 19, they are not permitted to alienate, sell, dispose of, or incumber allotted lands within 25 years unless Congress otherwise provides. The leasing of their lands, other than homesteads, for more than one year, may be made under rules and regulations prescribed by the Secretary of the Interior. And in case of the inability of a full-blood Indian, already owning a homestead, to work or farm the same, the Secretary may authorize the leasing of such homestead."

Again following references to sections 20, 22, 23, and 29 of said act, at the bottom of page 309 of 221 U. S., at page 584 of 31 Sup. Ct. (55 L. Ed. 738), the court said:

"We agree with the construction contended for by the plaintiff in error, and insisted upon by the government, which has been allowed to be heard in this case. * * *"

In Brader v. James, 246 U. S. 95, 38 Sup. Ct. 286, 62 L. Ed. 591, it is said:

"As set forth in the opinion in the Tiger Case, the Act of April 26, 1906, was a comprehensive one, and intended to apply alike to all of the Five Civilized Tribes, and to make requirements as to conveyances by full-blood Indians and the full-blood heirs of Indians, which should take the place of former restrictions and limitations. The purpose was to substitute a new and uniform scheme controlling alienation in such cases, operating alike as to all the Civilized Tribes."

In Harris v. Bell, 254 U. S. 103, 41 Sup. Ct. 49, 65 L. Ed. ——, decided by the Supreme Court of the United States, on November 15, 1920, it is said:

"Section 19 of that act [April 26, 1906] materially revised the restrictions respecting lands of living allottees."

Also in the same opinion it is said:

"What is intended is to make sure that minor allottees receive the benefit of the restrictions prescribed in section 1 [Act of May 27, 1908], and not to impose others."

Whilst with the taking effect of the Act of April 26, 1906, restrictions were imposed, reimposed, or extended as to tribal lands where held by a full-blood member, whether by allotment or inheritance, for the period of 25 years from that date, the third proviso to said section is that all lands upon which restrictions are removed shall be subject to taxation, and *the other* lands shall be exempt from taxation as long as the title remains in the *original allottee*. No exemption from taxation is extended to the tribal lands held by inheritance by full-blood members. In cases of restricted tribal land held by full-blood members of the Five Civilized Tribes or heirs, same would not be exempt

from taxation unless under terms of existing treaties which remained unimpaired notwithstanding said Act of April 26, 1906.

Whilst section 1 of said Act of May 27, 1908, no portion of which relates to taxation, by revision in so far as it related to alienation had the effect of repealing said section 19 of the Act of April 26, 1906, yet said section 19 also in part relates to exemption from taxation.

[6] It cannot reasonably be contended that said Act of April 26, 1906, had the effect of extending the taxation exemptions to inherited allotted tribal lands; such exemption not theretofore existing, except as hereinbefore specifically pointed out (section 14, Cherokee Allotting Act; section 16, Supplemental Creek Agreement), as to inherited lands, held by full-blood members of said tribes for the third proviso to section 19 hereof, as a controlling limitation, stipulates that—

"All lands *upon which restrictions are removed shall be subject to taxation*, and the *other lands* shall be exempt from taxation as long as the title remains in the original allottee." (Italics mine.)

At the death of the original allottee the title of such tribal allotted lands passed to the heirs, and necessarily then and there became taxable with the exceptions heretofore noted (section 14, Cherokee Allotting Act; section 16, Supplemental Creek Treaty). While said Acts of May 27, 1908, and April 26, 1906, had the effect of extending to and continuing upon all inherited tribal allotted lands of the Five Civilized Tribes held by full-blood heirs restrictions against alienation (Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738; Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600), yet section 4 specifically provides:

"That all lands from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes," with the proviso which is a limitation "that *allotted lands* shall not be subjected or held liable to any form of personal claim, or demand against the *allottees* [italics mine] arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law."

No intention is disclosed to extend the taxation exemptions as prescribed by the third proviso of said section 19 of the Act of April 26, 1906, so as to grant additional exemptions, the context, time, and conditions are against such construction. To my mind the deduction follows that it was not the intention of Congress to constitute this as an additional grant or exemption against taxation, by which exemption was extended to such inherited tribal allotted lands, but a declaration as to what allotted tribal lands are subject to taxation.

In Marcy v. Board of Commissioners of Seminole County et al., 45 Okl. 1, 144 Pac. 611, the Supreme Court of the state held that:

"The power to tax inherited Indian land is coincident with and dependent upon the removal of restrictions upon alienation; and, prior to the approval of conveyances of full-blood Indian heirs under the provisions of said act by the proper court, the power to tax said lands does not exist."

In the opinion it is said:

"From the language of the act 'that all land from which restrictions have been or shall be removed shall be subject to taxation,' it is clear the power of the state to tax the lands in question is coincident with and dependent upon the unrestricted right of the owner to sell the same. The power to tax, and right to convey, are granted by the same act, become effective upon the same condition and at one and the same time; the former cannot exist without the latter."

Section 2 of the Act of June 28, 1906 (34 Stat. 540), passed less than two weeks after that of the Enabling Act for the erection of the state of Oklahoma, in whose boundaries were included the Osage Nation, evidently in contemplation of the erection of the state, provides:

"Each member of said tribe shall be permitted to designate which of his three selections shall be a homestead, and his certificate of allotment and deed shall designate the same as a homestead, and the same shall be inalienable and nontaxable until otherwise provided by Act of Congress. The other two selections of each member, together with his share of the remaining lands allotted to the member, shall be known as *surplus land*, and shall be *inalienable for twenty-five years*, except as hereinafter provided. * * *

"That the Secretary of the Interior, in his discretion, at the request and upon the petition of any adult member of the tribe, may issue to such member a certificate of competency, authorizing him to sell and convey any of the lands deeded him by reason of this Act, except his homestead, which shall remain *inalienable* and *nontaxable* for a period of *twenty-five years*, or *during the life of the homestead allottee*, if upon investigation, consideration, and examination of the request he shall find any such member fully competent and capable of transacting his or her own business and caring for his or her own individual affairs: Provided, that upon the issuance of such certificate of competency the lands of such member (except his or her homestead) shall become subject to taxation, and such member, except as herein provided, shall have the right to manage, control, and dispose of his or her lands the same as any citizen of the United States: Provided, that *the surplus lands shall be nontaxable for the period of three years from the approval of this Act, except where certificates of competency are issued or in case of the death of the allottee, unless otherwise provided by Congress.* * * *" (Italics mine.)

See Hudson v. Hopkins (Okl.) 183 Pac. 507.

The error in which the Supreme Court of Oklahoma was led in the Marcy Case was in not giving effect to the third proviso of section 19:

"That all lands upon which restrictions are removed shall be subject to taxation, and the *other* lands shall be exempt from taxation as long as the title remains in the *original* allottee." (Italics mine.)

[7] Under this proviso so far as effective all inherited tribal allotted lands then held by full-blood heirs of the Five Civilized Tribes as such were taxable. The said section 4 of the Act of May 27, 1908, "That all land from which restrictions have been or shall be removed shall be subject to taxation," with its proviso, must be read in the light of said third proviso to said section 19. It should not be construed so as to bring about a conflict with the exemption provision of section 6 of article 10 of the state Constitution, if as reasonable a construction can otherwise be reached. In addition said section 4 reasonably means that all lands from which restrictions have been or (now nontaxable and restricted against alienation) from which restrictions shall be removed

shall be subject to taxation. It is a far-fetched conclusion to say that section 4 by implication constitutes a grant of an exemption from taxation.

In Watkins v. Howard, County Treasurer (Okl.) 166 Pac. 706, the Supreme Court said:

"Following Marcy v. Board of County Commissioners, 45 Okl. 1, 144 Pac. 611, it is held, where the conveyance or deed of the interest of a full-blood Indian heir of the allottee of land allotted in the Choctaw Nation is invalid, unless approved by the Secretary of the Interior, or by the court having jurisdiction of the settlement of the estate of the deceased allottee, such interest in the land is not subject to taxation for any year prior to the execution and approval of the conveyance or deed by the heirs."

I am unable to give my assent to the soundness of these cases. To my mind they had the effect, not only of nullifying section 6 of article 10 of the Constitution of the state of Oklahoma, but also of giving an effect to the Acts of April 26, 1906, and May 27, 1908, not contemplated by the Congress of the United States.

The third proviso to said section 19, and section 4, Act May 27, 1908, rendering subject to taxation all such tribal lands upon which restrictions were removed in the Creek Nation has application when the act of alienation under such authorization for such removal of restriction was consummated by the conveyance. Fink v. Board of County Commissioners, 248 U. S. 399, 39 Sup. Ct. 128, 63 L. Ed. 324.

In the Seminole and Creek and Cherokee Nations it had the effect of extending such exemptions from taxation as to some of the lands to the life of the allottee. It is not essential here to determine whether the extension by said Act of Congress of April 26, 1906, carried to the members of said tribes the same continuing binding effect, and vested rights, as that granted to the members of the tribe by virtue of the treaties providing for allotment. Choate v. Trapp, 224 U. S. 665, 32 Sup. Ct. 565, 56 L. Ed. 941; Gleason v. Wood, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 947; English v. Richardson, 224 U. S. 680, 32 Sup. Ct. 571, 56 L. Ed. 949.

On April 26, 1906, the allotment of land to the Five Civilized Tribes had been practically completed. Section 2 of said Act of April 26, 1906 (34 Stat. 137, p. 137, c. 1876; Laws Relating to Five Civilized Tribes in Oklahoma, 496), provides:

"That for ninety days after approval hereof applications shall be received for enrollment of children who were minors living March fourth, nineteen hundred and six, whose parents have been enrolled as members of the Choctaw, Chickasaw, Cherokee, or Creek Tribes or have applications for enrollment pending at the approval hereof, and for the purpose of enrollment under this section illegitimate children shall take the status of the mother, and allotments shall be made to children so enrolled."

As said section is a part of the same act with said section 19, which contains the proviso, "that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee," and said provisions of said sections 2 and 19 are not a part of any original or supplemental treaty with any nation of the Five Civilized

Tribes, the question may arise as to whether the exemption from taxation as to allotted lands to members of the Five Civilized Tribes as contained in the Original and Supplemental Agreements has the same application to allotments made by virtue of said section 2 to what is known as "new-borns." If said proviso to said section 19 relating to taxation and this authorization for allotments to such "new-borns" in section 2 are to be construed together as parts of the same act, and allotments are accepted under said act, are such "new-born" allotments bound by the provisions as to taxation as are contained in the third proviso to said section 19 of the Act of April 26, 1906, and section 4, Act of May 27, 1908?

Section 1, Act of May 27, 1908, fixed the status as to restrictions against alienation of lands allotted to members of the Five Civilized Tribes; such restrictions thereby remaining on such lands when held by a full-blood heir as such. Brader v. James, 246 U. S. 88, 38 Sup. Ct. 285, 62 L. Ed. 591; Talley v. Burgess, 246 U. S. 104, 38 Sup. Ct. 287, 62 L. Ed. 600. Section 4 relates to allotted lands held by allottees. If not, why were the words "as though it were the property of other persons than allottees" used, and the restriction in the proviso thereto that "allotted lands shall not be subjected or held liable to any form of personal claim or demand *against the allottees* [italics mine] arising or existing prior to the removal of restrictions, other than contracts heretofore expressly permitted by law"? If this proviso was intended to relate to allotted lands *of allottees* and *also of full-blood heirs,* then the language used should have been "as though it were the property of other persons than allottees of the Five Civilized Tribes [or such heirs]," and the restriction in the proviso would read, "Shall not be subjected or held liable to any form of personal claim, or demand, against *the allottees or* [*such heirs*] arising or existing prior to the removal of restrictions other than contracts heretofore expressly permitted by law."

In the Choctaw and Chickasaw and Cherokee Nations heirs other than allottees and not of Indian blood could inherit such lands. In the Seminole Nation only enrolled citizen heirs could inherit, if such were in existence. Campbell v. Wadsworth, 248 U. S. 192, 39 Sup. Ct. 63, 63 L. Ed. 192. In the Creek Nation the enrolled Creek citizens and their Creek descendants, if such were in existence, inherited, to the exclusion of non-Indian heirs. Washington v. Miller, 235 U. S. 422, 35 Sup. Ct. 119, 59 L. Ed. 295; Jefferson v. Fink, 247 U. S. 288, 38 Sup. Ct. 516, 62 L. Ed. 1117; Parker v. Riley, 250 U. S. 66, 39 Sup. Ct. 405, 63 L. Ed. 847.

In the Creek and Cherokee Nations, on May 27, 1908, the period in which allotments other than homesteads were exempted from taxation by provisions in the treaties and allotting act had long prior thereto expired by limitation. If section 4 of Act of May 27, 1908, had the effect by implication, revision and substitution of repealing the taxation exemption as same existed when the third proviso to section 19, Act of April 26, 1906, became effective, then the surplus allotments of all Indians of the Seminole, Cherokee and Creek Tribes

having less than three-quarters of Indian blood with the passage of the act of May 27, 1908, then and there became taxable. The provision, "that all land from which restrictions have been or shall be removed shall be subject to taxation," relates to land held by allottees as such. This construction excludes the land here sought to be taxed from the language of said section 4, and the third proviso of said section 19, as to exemption from taxation.

[8] But if said section 4 should be held to apply to lands allotted to members of the Five Civilized Tribes, whether held by the allottees as such, or by the full-blood heirs of such allottees, still the lands in these cases sought to be taxed by the state would be excluded from the taxation exemption protection contained in said sections 4 and 19, for said lands are neither held as allotted or inherited land, and cannot reasonably be brought within its terms, so as to fall within the bounds of such tax exemption.

In United States v. Thurston County, Neb., et al., 143 Fed. at page 292, 74 C. C. A. 430, it is said:

"The proceeds of the sales of these lands [restricted Indian lands] have been lawfully substituted for the lands themselves by the trustee. The substitutes partake of the nature of the originals, and stand charged with the same trust. The lands and their proceeds, so long as they are held or controlled by the United States and the term of the trust has not expired, are alike instrumentalities employed by it in the lawful exercise of its powers of government to protect, support, and instruct the Indians, for whose benefit the complainant holds them, and they are not subject to taxation by any state or county."

In United States v. Rickert, 188 U. S. 432, 23 Sup. Ct. 478, 47 L. Ed. 532, where it was sought to tax property of Indians, title of which was in the United States, and which was held by it for the benefit of such Indians, it was held not to be subject to state and county taxes. In United States v. Pearson (D. C.) 231 Fed. 270, it was held by Elliott, District Judge:

"Personal property issued by the government to Sioux Indians, who live on separate allotments, but maintain their tribal relations, consisting of horses, cattle, and their increase, and farm implements and other property acquired by exchange of such property or otherwise, which is derived directly or indirectly from the government and is used by the Indians on their farms, is not subject to taxation by state authorities. Such property is not absolute property of the Indians, but is held in trust for their benefit by the government for the purpose of carrying out its policy of helping them to be self-sustaining, as is evidenced by Act July 4, 1884, c. 180, 23 Stat. 94 (Comp. St. 1913, § 4121), and Act March 2, 1889, c. 405, § 17, 25 Stat. 895, which restrict the sale of cattle issued, and their increase, by the Indians to members of their own tribe."

[9] Further, in view of the provision, "No taxes shall be imposed by the state on lands or property belonging to or which may hereafter be purchased by the United States or reserved for its use" (section 3, art. 1, Const. Okl.; section 3, Enabling Act), and that "all property * * * exempt by * * * treaty stipulations, *existing* [italics mine] between the Indians and the United States government, or by federal laws, *during the force and effect* [italics mine] of such treaties or federal laws" (section 6, art. 10, Const. Okl.), shall be exempt

from taxation, it cannot be reasonably determined that it was contemplated by the Congress that such taxable and unrestricted lands when so acquired should be such a federal instrumentality or agency as to be without the taxing power of the state. In Jones v. Whitlow (Okl.) 175 Pac. 753, it was held that—

"Lands, theretofore taxable, purchased from their private owners, with royalties accruing to a full-blood Creek Indian from her restricted allotment, are not exempted from state taxation by a clause in the deed from the grantor making the lands inalienable without the consent of the Secretary of the Interior."

Having reached the foregoing conclusions, it is not essential to pass on the contention that the exemption as claimed by plaintiff was not within the powers of Congress as limited by article 4, § 3, and amendments 9 and 10 of the federal Constitution. Lane County v. Oregon, 74 U. S. (7 Wall.) 76, 19 L. Ed. 101.

A judgment will be entered in favor of defendant in each case.

FARRELL v. EDWARD RUTLEDGE TIMBER CO. et al.

(District Court, D. Idaho, N. D. July 1, 1918.)

1. **Public lands ⟸106(1)—Department's finding description was sufficiently certain not disturbed.**
   Within reasonable limits, it is a question of fact whether the description of lands in a railroad company's selection list in terms of future survey designated the lands with reasonable degree of certainty, and the finding on such issue by the Land Department within such limits will not be disturbed by the courts.
2. **Time ⟸8—Publication of notice of state's application for survey of public lands held for 30 days.**
   Where the state's application for a survey of public lands under Act Aug. 18, 1894, was received by the Commissioner of the General Land Office on July 15th, before which it did not become effective for any purpose, a publication of the notice of such application in six weekly issues of a local paper, the first being on July 10th, and the last on August 14th was sufficient compliance with the requirement of publication for 30 days, since, assuming that the first effective publication is that of July 17th, the publication was made in every issue of the paper published during the 30-day period following the filing of the application.
3. **Public lands ⟸23—Commissioner can reject state's application for survey of excessive tract.**
   Under Act Aug. 18, 1894, authorizing application by the state for a survey of townships from which to make a selection of lands, the area to be surveyed must bear some reasonable relation to the area the state has the right to select, and where the application was for the survey of a vast area of land, of which the state had the right to select only a small portion, the Commissioner of the General Land Office had jurisdiction to refuse the application.
4. **Public lands ⟸81(3)—Survey application does not withdraw land before acceptance or recognition by department.**
   The rule that an invalid application for valid entry of public land segregates such land requires that such application must in some way be accepted or recognized by the Land Department, even though erroneously,

so that an application of the state for the survey of lands did not segregate such lands, preventing selection thereof by a railway company, where at the very outset the Commissioner of the General Land Office rejected the application.

5. **Public lands ⇐81(3)—State's application for survey does not prevent entry by another subject to state's preference right.**
An application by the state for a survey under Act Aug. 18, 1894, does not give the state a claim or right to any portion of the land, though the act does use the terms "reserved" and "withdrawn," but merely gives the state a preference right to select lands therefrom at its option, and in the meantime such lands can be entered by the filing of other applications, subject to such preference right.

6. **Public lands ⇐81(3)—Railroad can select subject to state's preference right.**
The provision of Act March 2, 1899 (Comp. St. §§ 5223–5226), authorizing a railroad company to select in lieu of relinquished lands an equal quantity of nonmineral public lands not reserved, and to which no adverse right or claim has attached or been initiated, does not deprive the railroad of the right to apply thereunder for lands included in an application by the state for a survey subject to the preference right of the state.

In Equity. Suit by Beldon M. Delaney, for whom was substituted Alra G. Farrell, against the Edward Rutledge Timber Company and another. Bill dismissed.

Decree affirmed 254 U. S. ——, 41 Sup. Ct. 328, 65 L. Ed. —— which reversed 258 Fed. 161, 169 C. C. A. 229.

A. H. Kenyon, of Spokane, Wash., and S. M. Stockslager, of Washington, D. C., for plaintiff.

Stiles W. Burr, of St. Paul, Minn., and Skuse & Morrill, of Spokane, Wash., for defendant Edward Rutledge Timber Co.

Cannon & Ferris, of Spokane, Wash., for defendant Northern Pac. Ry. Co.

DIETRICH, District Judge. The issues are greatly reduced by the decision in West v. Edward Rutledge Timber Co. (244 U. S. 90, 37 Sup. Ct. 587, 61 L. Ed. 1010; 221 Fed. 30, 136 C. C. A. 556; [D. C.] 210 Fed. 189), a case arising in the same locality and out of the same general conditions. The relief sought is of the same character in both cases, and the facts are so similar that they need not be stated in full. The land in controversy is the northeast quarter of section 20, township 43 north, range 4 east of Boise meridian. It was patented to the Northern Pacific Railway Company in 1916, and by it conveyed to its codefendant, the Edward Rutledge Timber Company. Plaintiff contends that in law her ancestor, Beldon M. Delaney, was entitled to patent by virtue of his homestead settlement, and that the defendants hold the title in trust for her. Prior to 1909 the land was unsurveyed. Delaney, having purchased the improvements erected by a preceding occupant, made settlement in 1903, and in 1909, when the land was surveyed, he made application to enter, and later, on November 20, 1912, submitted his final proof. Both the application and the tender of final proof were rejected by the Land Office.

1. Delaney's acts of settlement and residence are far from satisfactory, and I have great hesitancy in holding them sufficient. True, the showing is not radically different from that in the West Case, but in that case the amount cleared and cultivated was thought to be "pathetically small," and, however broad our sympathy for the settler, a line must be drawn somewhere. I am not at all sure that the land officials would have found the showing adequate had they considered the final proof, but inasmuch as their rejection was upon other grounds, I shall, in the further consideration of the case, assume that the residence and improvements met the requirements, under the liberal policy prevailing in the Land Department, and that the final proofs would have been accepted, but for other conditions upon which the land officials acted.

[1] 2. The description in the railroad company's selection list was in terms of future survey, as in the West Case, and, while the distance to the surveyed lands is a little greater, the difference is not such as to warrant a holding that as a matter of law the description was insufficient to designate the land "with a reasonable degree of certainty." Within reasonable limits, it is a question of fact in any case whether such a description is sufficiently certain, and a finding thereon by the Land Department within such limits will not be disturbed by the courts.

3. The remaining point, argued with great earnestness by both sides, was in no wise involved in the West Case, and requires a brief statement of fact. The defendant railway company filed its selection lists, under the exchange provision of Act March 2, 1899, c. 377, 30 Stat. 993 (Comp. St. §§ 5223–5226), on July 23, 1901, about a year before settlement by any person. A few days prior to such selection, however, the state of Idaho had made application for the survey of a large body of land, including that in controversy, under the provisions of Act Aug. 18, 1894, 28 Stat. 372, 394, and the question is whether the proceedings taken by the state prior to July 23d operated so far to withdraw the land from the public domain that it could not be selected by the railroad company, either absolutely or conditionally. By the Land Department the question was answered in the negative—first, because there was no valid, effective application for survey before the railroad company filed its selection list; and, second, because, by the settled construction of the department, lands, even though embraced in a valid application for survey by the state may be selected by a railroad company, subject to the state's preference right. Such preference right the state has here failed to assert, and no claim upon its part is presently involved.

Under the act of 1894 it is provided that (a) the application for survey must be made by the Governor of the state to the "Commissioner of the General Land Office"; (b) notice of the withdrawal or reservation of the land is to be immediately given by the Commissioner to the Surveyor General of the state, and to the district Land Office; and (c) within 30 days from the filing of the application the Governor of the state must give notice of the application by publication for 30 days in a local newspaper. The lands so to be surveyed "shall be reserved, upon the filing of the application for survey, from any adverse appropriation by settlement or otherwise, except under rights that may be

found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of filing the township plat" in the proper district Land Office.

[2] On July 8, 1901, the Governor of Idaho filed with the Surveyor General an application bearing date July 5th, for the survey of 18 townships, including township 43 north, range 4 east, and by the Surveyor General the application was sent to the Commissioner of the General Land Office, by whom it was received July 15th. It is clear, I think, that the application did not become effective for any purpose until it reached the General Land Office, and such is the holding of the Land Department. A notice bearing date July 6th was published in 6 weekly issues of a local paper; the first publication being on July 10th, and the last on August 14th. Assuming that the first effective publication was that of July 17th, two days after the receipt of the application by the Commissioner, I am inclined to the view that sufficient notice was given to meet the requirements of the law; the publication was made in every issue of the paper published during the 30-day period following the filing of the application.

As already stated, the application was for the survey of eighteen townships, or approximately 403,000 acres, and other applications of a similar character were pending. Taking cognizance of the vast area thus applied for, and of the limited right of selection remaining in the state, the Commissioner, on July 19, 1901, considered the application in question to be excessive, and declined to recognize it. No appeal having been taken by the state from his ruling, the same became final and binding, provided, of course, the Commissioner was acting within his jurisdiction. The application having been declined, no notice of its filing was given to the district Land Office, and no notation was ever made upon the township plats in that office, or upon any of its records, of the reservation or withdrawal of the land. Such was the status of the application and of the Land Office records, when, upon July 23d, the Railroad Company filed its selection lists. Later, in January, 1905, it seems that as a result of certain supplementary proceedings the General Land Office recognized the preference right of the state, but only from January 18, 1905, not from July 15, 1901, as appears from a letter of date January 20, 1905, from the Commissioner to the Register and Receiver of the district Land Office, by which the latter officers were directed to give notice of the reservation of certain townships, including 43—4, "from and after * * * January 18, 1905, and for a period extending from January 18, 1905, until the expiration of 60 days from the filing of the official plats of survey of the designated townships in your office, * * * during which time the state authorities may select any of the lands situated in said township, which are not embraced in any adverse claim."

[3] Upon the question of the power of the Commissioner to reject an application for survey, the act of 1894 is equivocal, and the rulings of the Land Department have not been entirely uniform, the later decisions, however, being in support of such jurisdiction. Northern P. R. R. Co. v. Idaho, 39 Land Dec. 583; Thorpe v. Idaho, 43 Land Dec.

168; State v. Roberson, 44 Land Dec. 448; also the decision herein involved.

The language of the act is thought to be more readily susceptible to the construction adopted in the first decision, but in practical administration such a meaning gives rise to the most serious difficulties. In that view a state with an unsatisfied grant of 1,000 acres could, by the very simple and inexpensive process of filing an application in the General Land Office and publishing a notice for 30 days, withdraw from entry the entire area of public land, however great, within the state. Is it possible that Congress contemplated or intended such a result? By the terms of the act, the application for survey must be made only "with a view to satisfying the public land grants * * * to the extent of the full quantity of land called for" by the granting acts. Is not the right, therefore, to be regarded as commensurate with the needs of the state? I am not suggesting that the amount applied for cannot in any case properly exceed the unsatisfied grant. The application must be for an entire township, whereas a smaller amount might be sufficient to satisfy the grant. But, giving consideration to the extent of the grant and the character of the lands, and the interest of the government in having its public lands disposed of and not needlessly withdrawn from entry, it is thought that the area to be surveyed must bear some reasonable relation to the area the state has the right to select. Such being the extent of the right or privilege conferred upon the state, it follows that an application for an excessive survey, being unauthorized, is ineffective, and it is for the officers of the Land Department, charged, as they are, with the sale and disposition of public lands, to determine whether in any given case the application is within the law. In any other view I am unable to see how the interest of the government can be protected. If, therefore, in fact the application under consideration was found to be excessive, the Commissioner of the General Land Office did not exceed his jurisdiction in declining to recognize it, and in refusing to take any steps to carry it into effect.

[4] It is further contended by the plaintiff that, defective though it may have been, the application served to withdraw the land from the operation of the act of 1899, reference being had to the familiar principle that the segregative effect of an entry or other selection is not necessarily dependent upon its inherent validity. Holt v. Murphy, 207 U. S. 407, 28 Sup. Ct. 212, 52 L. Ed. 271; McMichael v. Murphy, 197 U. S. 304, 25 Sup. Ct. 460, 49 L. Ed. 766; Hodges v. Colcord, 193 U. S. 192, 24 Sup. Ct. 433, 48 L. Ed. 677; Sturr v. Beck, 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761; Edith G. Halley, 40 Land Dec. 393. If, however, as is held, the Commissioner of the General Land Office had the power to reject it, the application never became operative for any purpose. To have segregative effect, an invalid application or entry must in some way be accepted or recognized by the Land Department; having been allowed, even though erroneously, it is binding upon and segregates the land. But here at the very outset there was a declination to recognize the application.

[5] If, however, we assume that the application was valid, and that the Commissioner was without power to reject it, it must be borne in mind that it constituted no offer to enter the land, but amounted only to a request to have it surveyed. The land was not entered or selected; the state made no specific claim, and it might ultimately decide not to select a single subdivision. True, the terms "reserved" and "withdrawn" are used in the act; but, when we consider its intent and purpose, clearly the only effect contemplated was to confer upon the state a preference right to select, at its option. By the filing of the application the state initiated no claim or right to any portion of the land. As has been very properly held by the Land Department, I think, the position of the state is closely analogous to that of a successful contestant after the cancellation of record of the contested entry. The land embraced in such entry is, as a result of the cancellation, fully restored to the public domain, and is no longer segregated or reserved, but the contestant possesses the preference right of entry. Accordingly, following the practice in relation to such contested entries, the department holds that the pendency of such preference right does not operate to prevent the filing of other applications, subject to such preference right. Stewart v. Peterson, 28 Land Dec. 515; Cronan v. West, 34 Land Dec. 301; Idaho v. Northern P. R. R. Co., 37 Land Dec. 70; Swanson v. Northern P. R. R. Co., 37 Land Dec. 74; Delaney v. N. P. R. R. Co. (unreported decision, Nov. 18, 1915). No good reason is apparent for holding such a practice illegal.

[6] Our attention is directed to the language of the Act of March 2, 1899, creating and defining the limits of the right of the railroad company to select, wherein it is authorized "to select [in exchange for lands relinquished by it], an equal quantity of nonmineral public lands * * * not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection," etc. But this language does not alter the question. Neither can a citizen rightfully settle upon or enter land, unless it be public land, not reserved, and to which no private rights have attached or been initiated, etc. And yet the plaintiff asserts the right of her predecessor to settle upon and claim the land in controversy long after the state filed its application, and after the railroad company filed its selection. The right of the railroad company to select is quite as broad as the right of the citizen to "homestead." As already suggested, by its application for survey the state initiated no claim to this land; it was merely given a certain length of time to determine whether it would make such claim, and while the term "reserved" is used, plainly there is no reservation in the ordinary sense, as for some governmental purpose. The moment the preferential period in favor of the state expires, the lands may be entered by any qualified person, the same as in the case of other public lands.

In view of these considerations, it is thought that the Land Department acted upon a proper construction of the law, and accordingly the plaintiff's bill will have to be dismissed, and such will be the order.

THE SOSUA.

THE HAINESPORT.

(District Court, E. D. Pennsylvania. March 15, 1921.)

No. 60 of 1920.

1. **Collision ⟸71(3)—Failure to keep lookout or give signals is fault.**
A loaded steamship, passing up Delaware river at night on a flood tide and without a lookout, which, after reaching Philadelphia, overtook and passed a tug with five barges in tow, going within 75 feet on the port side of the tug, and after proceeding a short distance further across the course of the tug anchored about mid-stream, allowing her stern to swing across the channel, all such maneuvers having been made without warning signals, *held* in fault for a collision with one of the barges of the following tow. The tug, which did all possible to avoid collision after discovering that the steamship had stopped in the fairway, *held* not in fault.

2. **Collision ⟸71(3)—Navigable waters ⟸23—Obstruction by anchoring in fairway.**
The anchoring of a steamship near the middle of Delaware river in the night, without warning signals and only a few hundred feet in front of a tug following with a tow, *held* a violation of Act March 3, 1899, c. 425, § 15 (Comp. St. § 9920), making it unlawful to anchor in navigable channels "in such a manner as to prevent or obstruct the passage of other vessels."

In Admiralty. Suit for collision by the Frugart Aktieselkabet, owner of the Norwegian steamship Sosua, against the steam tug Hainesport. Decree for respondent.

H. Alan Dawson, of Philadelphia, Pa., and Haight, Sandford, Smith & Griffin, of New York City, for libelant.

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

THOMPSON, District Judge. [1] The collision which is the subject of the present suit occurred about 11 o'clock on the night of April 19, 1920, in the Delaware river, between Philadelphia and Camden.

The Sosua is a Norwegian steamship, about 240 feet in length over all, and had come up the river loaded with a cargo of fruit, to be landed at the piers of the United Fruit Company at the foot of Arch street, Philadelphia. The tide was flood; the weather clear; the night dark. It being too late for the Sosua to be towed into her berth, she cast anchor in the channel slightly above the Arch street piers.

The Hainesport, having in tow five light barges in two tiers, three on the port and two on the starboard side, had proceeded up the river from Gloucester, and, directly after the Sosua had dropped her anchor, attempted to pass her stern, when the bow of the forward starboard barge came into collision with the Sosua, striking her starboard quarter underneath the stern and her rudder, causing injury to her plates and rudder.

The libelant's contention is that the collision was due to the negligence of the Hainesport in running too close to the Sosua without warning, after her anchor had been dropped and she was lying with her bow downstream, angling towards the New Jersey shore with

her stern about midstream. The respondent's contention is that the collision was due to the negligent and careless maneuvers of the Sosua in passing the Hainesport on her port side at or slightly below Walnut street without signal, crossing her bow at an angle, and proceeding to her anchorage without warning to the Hainesport, and, while in a position across the channel, backing into the barge.

One of the disputes of fact in the case concerns the point where the Sosua passed the Hainesport and her tow in coming up the river. The importance of this lies in its bearing upon the question whether the Sosua was lying at anchor at the time of the collision, or whether she was still swinging her stern into position to lie with her bow downstream. If, as claimed by the libelant, the Sosua passed the Hainesport opposite the New York Shipbuilding plant, some miles downstream, it is contended, because of the time she would have to get out of the way, that she had already anchored and come to rest some time before the Hainesport approached, and it therefore claimed the running down of an anchored steamship through the negligence of the Hainesport. If, on the other hand, the place of passing was opposite Walnut street, as claimed by the respondent, it strengthens the contention that the Sosua negligently anchored in mid-stream directly in the course of the Hainesport and her tow, and swung around and backed into the tow.

Upon this point the testimony of the respective sides has been closely examined. The master of the Sosua, Capt. Petersen, had no knowledge or recollection of passing the Hainesport and her tow, or any other vessels. Nilsen, the second mate, testified to the same effect. The testimony of these witnesses was taken by deposition over four months prior to the trial. The libelant's only witness at the trial was Pilot Preston Josephs, who was in charge of the vessel on the night in question. He testified that just above the Greenwich coal pier, about the New York shipyard, he passed a tug with some lighters, and that he thought it was the same tug. As against his uncorroborated and uncertain statement, we have the positive testimony of the respondent's witnesses that, as the Hainesport and her tow were coming up the river, the Sosua overtook her, and, without any signal, passed her about 75 feet off her port side at about Walnut street. The master of the tug testified that, after the steamer's stern had cleared the tug, he looked straight up Walnut street and saw the street lights. The lookout testified to passing at the same place as did also the fireman. This testimony, coming from those on board the smaller vessel, all to the same effect, is entitled to credence as against the uncorroborated testimony of the pilot of the Sosua.

Moreover, the Sosua, according to the admission of libelant's witnesses, had no lookout on watch with the duty of observing other vessels she passed, while the Hainesport's duty in that respect was complied with. Pilot Joseph's testimony is to the effect that, when he passed the Walnut street wharf, he was proceeding on the Pennsylvania side about the length of the courtroom from the Walnut street dock. The length of the courtroom is between 68 and 70 feet, although the witness estimated it first at 240 and then at 200 feet. His testimony as

to his proximity to the Walnut street dock corroborates to some extent the testimony of the respondent's witnesses.

It is found as a fact that the passing was immediately below the Walnut street dock, as Walnut street was not seen by those on board the Hainesport until after the stern of the Sosua had gone by. The Sosua, having passed the Hainesport, ported her helm, crossed the bow of the Hainesport at an angle, and, after crossing, kept on an oblique course in the channel towards the New Jersey shore. The Sosua's rate of speed was a knot or two faster than that of the Hainesport. Witnesses for the libelant testified that a Chestnut street ferryboat sounded her slip whistle, and the Sosua stopped her engines for two or three minutes to allow her to go by. Witnesses for the respondent testified that a Market street ferryboat passed in front of the tug and the steamer.

It is hardly probable a steamship would have to stop her engines for such a period of time to allow the passage of a ferryboat. If she did stop, however, it must have been a much shorter stop than two or three minutes. Having approached a point about opposite Arch street, the Sosua ported her helm, reversed her engines, swung around across the channel to starboard, and dropped her anchor. There is dispute in the testimony as to whether she dropped her anchor before reversing. It is improbable that a loaded vessel on a flood tide would have dropped her anchor without checking her speed. The witness for the Hainesport testified that the Sosua's engines were reversed and she was coming back when the collision occurred. Whether she was actually reversing or not, at the time of the collision, I do not regard as of special importance. The fact is uncontradicted that the Sosua was without a lookout, that she did reverse her engines and swing around across the channel without any signal of her whistle, and cast her anchor practically in mid-stream of the channel.

The respondent's counsel points to the fact that the Sosua's quarter and also her rudder were struck, to show that she must have been lying crossways of the stream, as, if she had been lying with her bow downstream the barge would have glanced off the quarter, and could not have run in close enough to strike the rudder. As the steamer was loaded so as to bring the overhang of the stern near to the water, and the barge was light, it is entirely improbable that the latter could have struck the rudder of the steamer, if she had been lying with her bow downstream, as claimed by the libelant. Whether at the time of the collision she was lying directly across the channel, or canted with her bow downstream towards the Jersey shore, the maneuvers executed in coming to anchor were careless, negligent, and in violation of the rules of seamenship.

[2] The Act of March 3, 1899, c. 425, § 15 (Compiled Statutes, § 9920), provides:

"It shall not be lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft."

This act imposes an affirmative and positive duty upon vessels coming to anchor in navigable channels to see that they do not under any

circumstances, accidents excepted, prevent or obstruct the passage of other vessels; not that they shall not anchor at all in such a channel, but that when they anchor therein, they shall so anchor and in such method, as not to close the channel or unduly or unreasonably prevent or obstruct, the passage of other vessels. The Margaret (D. C.) 203 Fed. 331; Id., 213 Fed. 975, 130 C. C. A. 381; The Hesperos (C. C. A.) 265 Fed. 921.

When a vessel intends, not only to stop in a channel in which she is moving, but to anchor and to swing around so that her length obstructs the channel, she is bound to give notice of her movement or intention, or warn others not to approach until she has completed her unusual maneuver. The maneuvers which the Sosua executed took up a large part of the channel upon a dark night. She passed the Hainesport without signal about 75 feet off the Walnut street docks, crossed her bow, and directly after passing Market street began to reverse her engines, all without warning signal and without a lookout.

She violated the statutory prohibition of the act of 1899, supra, in swinging around to come to anchor without any warning or indication of her intention. If she had had a lookout properly stationed, the close approach of the Hainesport would doubtless have been observed, and the master and pilot, whose attention was directed to bringing her into a proper position to anchor, would not have had to rely upon chance to observe the approach of the Hainesport with her tow. The very maneuver she executed was an obstruction to the channel. She was bound to refrain from maneuvers calculated to embarrass the vessel in her rear in an attempt to pass. The Governor, Fed. Cas. No. 5,645.

Finding, as I do, that the Sosua was guilty of gross negligence, the question is whether the Hainesport was also guilty of negligence. The vessels passed at Walnut street. Within the short distance of three city blocks, about one-third of a mile, the Sosua had passed the Hainesport on her port side, crossed her bow diagonally, reversed, and was swinging about when the collision occurred.

The contention on the part of counsel for the libelant is that the master of the Hainesport not only should have recognized the Sosua as a fruit steamer bound for Arch street piers, but should have divined her intention of reversing her engines, throwing her stern across the river, her bow to the Jersey shore, coming around, and anchoring. But the sailing rules provide the methods by which one vessel shall know of the intended movements of the other, and, where the rules are not observed, the vessel failing to observe them cannot place the burden of making a correct guess upon the one, and impute negligence for failure to guess correctly what the other should have made plain. While it is obvious that a loaded vessel the size of the Sosua would not literally "fly around," as stated by the master of the Hainesport, it is apparent that her reversing, swinging to starboard with a flood tide, and dropping her anchor caused the stern to swing out into the stream in the darkness in a manner unexpected by the master of the tug. Finding himself suddenly confronted by this situation, he put his wheel hard to starboard, successfully bringing the tug

past the stern of the Sosua, but, owing to the flood tide, was unable to get the forward barge entirely past.

It is conceded that, if he had pulled over a few feet more, the accident would have been prevented. If he had had any actual warning from the Sosua in time, he would have been guilty of negligence if he had not stopped and reversed. Under the circumstances, the result of his error in that respect is entirely a matter of speculation, as it is questionable whether he could have stopped the tug with her five barges in time to prevent a collision. If he was guilty of an error of judgment, it was an error of judgment in extremis, and not negligence. For him to have given a warning whistle at the same time would have been of no avail.

My conclusion, therefore, is that there was no negligence on the part of the Hainesport which would justify a division of damages.

A decree may be entered, dismissing the libel, with costs to the respondent.

LANGLEY v. PRUDENTIAL INS. CO. OF AMERICA.

(District Court, E. D. Washington, N. D. March 2, 1920.)

No. 3007.

1. **Insurance ⟸125(2)—Governed by law of state where delivered.**
   A life insurance policy, delivered in the state where insured resided, became a contract of that state, governed by its laws.
2. **Insurance ⟸367(2)—Amount of loan deducted before extended term insurance was computed.**
   A life insurance policy, governed by the laws of New York, which provided that the part of the annual premium remaining unpaid at the maturity of the contract and any other indebtedness to the company should be deducted from the amount payable by the company, and also provided for extended term insurance in case of nonpayment of the premium, which would be reduced by any indebtedness placed on the policy, permits the company, under the laws of that state, to deduct the amount of a policy loan before computing the term of extended insurance.
3. **Insurance ⟸146(1)—Construction of ambiguous provision adopted by parties will be followed.**
   Where a life insurance policy was ambiguous as to whether the amount of a policy loan should be deducted before the paid-up premium was computed, the construction placed on the contract by the parties when the loan was made, by providing for such reduction in accordance with the rule of the company, will be accepted by the courts.

At Law. Action by Cynthia Langley against the Prudential Insurance Company of America. Judgment directed for defendant.

E. Eugene Davis and Samuel Edelstein, both of Spokane, Wash., for plaintiff.

S. A. Keenan, of Seattle, Wash., for defendant.

RUDKIN, District Judge. This is an action on an insurance policy. The case was submitted to the court upon an agreed statement of facts from which the following appears:

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

On the 4th day of March, 1898, William Langley, a resident of Buffalo, N. Y., applied to the defendant for a life policy in the sum of $5,000, and on the 8th day of March following the policy issued pursuant to the application, payable to the wife of the applicant, who is the plaintiff in this action. The policy provided that the insured should be entitled to certain benefits, only two of which are material here:

(1) "After the premiums for three full years have been paid on this policy, the insured may borrow from the company, while the policy is in force, an amount computed according to the table of cash loans on the back hereof, by making written application therefor and assigning the policy to the company as security, in accordance with the company's rules."

(2) "In case of default in the payment of any premium on this policy, after the premiums for three full years have been paid, the company will issue, in lieu of this policy and without any action on the part of the insured, a paid-up term policy for the full amount insured by this policy, and to continue in force for the term indicated by the table of extended insurance on the back thereof: Provided, however, that in case of the death of the insured within three years from the date of such default there shall be deducted from the amount payable by the company the sum of all the premiums that would have become due on this policy if it had been continued in force; or, in lieu of such paid-up term policy, a nonparticipating paid-up life policy will be granted for an amount computed according to the table of paid-up policies on the back hereof, provided this policy is legally surrendered to the company within three months after said default."

On the back of the policy are contained the following provisions:

"Premiums are payable at the home office of the company, but may be paid elsewhere, on or before the dates when due, to authorized agents of the company in exchange for receipts signed by the president, secretary, or manager of the ordinary branch and countersigned by a general agent of the company. When not payable in one sum at the beginning of each policy year, that part of the annual premium remaining unpaid at the maturity of this contract, and any other indebtedness to this company on the part of the insured or any holder of this policy, shall be deducted from the amount payable by the company. If any premium be not paid when due, this policy shall be void and all premiums forfeited to the company, except as herein provided."

Also:

"The benefits stated in the following tables apply to the original sum insured only: If the sum insured is increased by dividends or otherwise, the benefits will be increased, but any indebtedness placed on the policy will operate to reduce the benefits."

On the 31st day of December, 1904, the insured and the beneficiary made application for a loan on the policy in the sum of $390, and assigned the policy to the company as security for the loan. The loan certificate contained this provision among others:

"That if said policy shall lapse or become forfeited in any manner, the amount of said loan, with interest accumulated and accrued thereon, shall be deducted from any cash surrender value of said policy, or the said loan, with interest accumulated and accrued thereon, shall operate to reduce the amount of any paid-up life or endowment policy, or to reduce the term of extended insurance guaranteed by the terms of said policy, in accordance with the rules of the company."

On the 8th day of March, 1905, default was made in the payment of premium. On the 9th day of June, 1905, the policy was forfeited for nonpayment of premium, and after deducting the loan extended insur-

ance was granted for the face of the policy for 4 years and 38 days, or until April 15, 1909. If the amount of the loan and interest had not been deducted, the insured would have been entitled to extended insurance for the period of 12 years and 85 days. On the 22d day of July, 1916, the insured died. It will therefore be observed that the extended insurance expired long prior to his death, because of the deduction of the loan and interest; whereas, if the extended insurance had been computed without such deduction it would have extended the policy beyond the date of death.

It will thus be seen that the sole question presented for decision is: Should the period of the extended insurance be computed after deducting the amount of the indebtedness or loan, or without such deduction? The plaintiff contends that inasmuch as it is provided on the back of the policy that,—"when not payable in one sum at the beginning of each policy year, that part of the annual premium remaining unpaid at the maturity of this contract, and any other indebtedness to the company on the part of the insured or any holder of this policy, shall be deducted from the amount payable by the company," the amount of the loan can only be deducted from the amount payable on the death of the insured, and in no manner affects the period of extended insurance to which the party may be entitled. And it is further contended that the provision of the loan certificate to the contrary is without consideration and void. Regardless of these questions, however, there are two all-sufficient reasons, in my opinion, why the plaintiff cannot recover.

[1] First. The application for the policy contains the provision:

"And it is further agreed that the policy herein applied for shall be accepted subject to the conditions and agreements therein contained, and the policy shall not take effect until the same shall be executed and delivered by the said company, and the first premium paid thereon, while my health is in the same condition as described in this application."

And inasmuch as the policy was delivered in the state of New York, where the insured resided, it thereby became a contract of that state. Equitable Life Ins. Co. v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497.

[2] And under the decisions of the courts of New York the term of the extended insurance was properly computed by the insurance company. Perry v. Prudential Ins. Co. of America, 144 App. Div. 780, 129 N. Y. Supp. 751; Taylor v. New York Life Ins. Co., 197 N. Y. 324, 90 N. E. 964. Indeed, regardless of this, the rule there stated would seem to be supported by the better reason and the weight of authority.

[3] Again, the utmost that can be said in favor of the plaintiff is that the terms of the policy are somewhat ambiguous and conflicting, and in such cases the practical construction placed upon the contract by the parties when the loan was made will be accepted by the courts and is controlling here. A general finding will therefore be made in favor of the defendant.

Let a finding and judgment be submitted accordingly.

In re TRACHSEL.

(District Court, S. D. Ohio, W. D. March 2, 1921.)

No. 4282.

Aliens ⇐68—Claim of exemption from draft operates as withdrawal of declaration of intention.

The claim of a neutral alien, who had declared his intention to become a citizen, to an exempt classification under the Selective Service Act (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), on the ground that he was still a citizen of his native country and obligated and willing to serve in its army if called, and his securing such exemption, though it was not authorized by the statute, *held* to operate as a withdrawal of his declaration of intention, which could not thereafter be made the basis of a petition for citizenship.

In the matter of the petition of Christian Trachsel for naturalization. Petition denied.

PECK, District Judge. This cause is heard upon the petition for naturalization of Christian Trachsel, a citizen of Switzerland. Upon September 24, 1914, he filed his declaration of intention to become a citizen of the United States and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to the Swiss Confederation. On the 27th of December, 1917, he filed his questionnaire, in compliance with the regulations of the President, under the Selective Service Law (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 2044a–2044k), claiming an exempt classification known as Division F of Class V; that is, as a "resident alien (not an enemy) who claims exemption." He therein stated that he claimed exemption from military service because he was not a citizen; that he had taken out his first papers, and that he was willing to return to his native country and enter its military service. He presented to the draft board his affidavit:

"To Whom It May Concern: In spite of the fact that I have taken out the first papers, I am still a citizen of Switzerland. I belong to the Swiss army, and I am liable to be called back to do military service there at any time; in case I should not answer the call, I would be considered a deserter and treated as such. Being a citizen of Switzerland, I am protected by the following treaty: 'Convention of Friendship, Commerce and Extradition between the United States and Switzerland concluded November 25, 1850. Article 11. The citizens of one of the two countries, residing or established in the other, shall be free from personal military service.' [11 Stat. 589.] Therefore I hereby respectfully claim exemption from military service in the United States."

He appears to have been originally put in Class 1-A, as a single man without dependent relatives, subject to service. This classification appears to have been canceled and the classification aforesaid determined upon.

The Selective Service Act then in force was that of May 18, 1917, declaring the draft to be based upon liability to military service of all male citizens or male persons not alien enemies who had de-

clared their intention to become citizens, between the ages of 21 and 30 years, both inclusive. No exemption was provided in favor of declarants for citizenship who were natives of neutral nations having treaties with the United States such as that relied upon.

It has been repeatedly decided that, so far as the judicial branch of the government is concerned, the act of Congress superseded such a treaty, and the treaty did not have the effect of exempting alien declarants of such neutral nations, but that they were subject to the Selective Service Law. Ex parte Larrucea (D. C.) 249 Fed. 981; Summertime v. Local Board (D. C.) 248 Fed. 832; Ex parte Blazekovic (D. C.) 248 Fed. 327. Trachsel was, however, exempted by the local board, and its action is not under review. The question now is whether his claim for exemption upon the grounds stated, and his asserted willingness to return to his native country and serve in its army, operated as a withdrawal of his previous declaration of intention to become a citizen of the United States.

It is to be noted that the Selective Service Law was subsequently modified July 9, 1918, by the proviso:

"That a citizen or subject of a country neutral in the present war who has declared his intention to become a citizen of the United States shall be relieved from liability to military service upon his making a declaration, in accordance with such regulations as the President may prescribe, withdrawing his intention to become a citizen of the United States, which shall operate and be held to cancel his declaration of intention to become an American citizen and he shall forever be debarred from becoming a citizen of the United States." Comp. St. Ann. Supp. 1919, § 2044b.

This amendment cannot, of course, control as to the effect of an exemption claim made prior to its enactment. However, if the act of the declarant in claiming exemption upon the ground stated was inconsistent with his declared intention to become a citizen of the United States, it must be held to operate as an abandonment.

A declarant for citizenship must so conduct himself in his relations with this government as to import a continuance of the intention which he has declared. This necessitates a continued readiness of mind on his part to comply with the laws of this country, including those imposing public duties upon aliens of his class. Willingness to abandon his previous rights as an alien resident and to comply with his legally prescribed duties as a declarant is a necessary concomitant of a sincere intention to renounce foreign allegiance and embrace American citizenship.

In Re Cameron (D. C.) 165 Fed. 112, it was held that a declaration will not support an application for admission to citizenship where, after making the declaration, the applicant returned to his native country with the intention of remaining there, and voted and otherwise participated in its local affairs, and that such action operated as an abandonment of his declared intention. The court said:

"The statute contemplates continuous inhabitancy, after the first step is taken, up to and including the time of admission, during which the intention to become a citizen must in fact continue. An applicant cannot hold a divided allegiance, in part to his native country, to be resumed at will, and in part to that of his adoption, to be availed of at pleasure. He owes undivided

allegiance during the probationary period; otherwise, he could continue his relations with the country of his citizenship unto the day of his final proof, which would neither be within the spirit of the statute regarding residence nor within its provisions as to the bona fide intention to become a citizen."

It must be borne in mind that Trachsel not only claimed exemption, but announced his willingness to return to his native country and enter its military service. This statement was in the nature of an election. It was the expression of a desire to be relieved of his obligation to duty as a neutral alien declarant under the Selective Service Law, and of a preference, if need be, to do military service in the country of his birth. He stood upon his alien citizenship, and got thereby the exemption which he sought. His position was inconsistent with the intention which he had theretofore declared of renouncing his foreign allegiance and becoming a citizen of this country. The fact that he may have received an exemption to which he was not entitled is immaterial. The present inquiry is whether his previously declared intention actually persisted at the time he made his exemption claim.

It is concluded that Trachsel, by seeking to be relieved of the obligation imposed upon him by the Selective Service Law to serve in the army of the United States, and by insisting upon and receiving exemption upon the ground of continuance of his foreign citizenship, abandoned his declaration of intention to become a citizen of the United States; and his petition must be, and is, dismissed.

THE HURON.

(District Court, E. D. Pennsylvania. April 15, 1921.)

No. 98.

1. **Maritime liens ⇐28—Claimant must exercise diligence to ascertain authority to bind vessel.**
   A claimant, who furnishes supplies for repairs to a vessel, must exercise diligence to ascertain whether the person who ordered the supplies had authority to bind the vessel.

2. **Maritime liens ⇐65—Evidence held not to show diligence which would have disclosed charterer's lack of authority.**
   On libel to enforce a maritime lien for a boom furnished to a hoisting barge, evidence that libelant knew before he furnished the boom that the one who ordered it was not the owner of the barge *held* to show that libelant did not exercise due diligence in ascertaining the authority to charge the vessel with liability for the boom, which was in fact ordered by a charterer of the barge to comply with the charter requirement that the barge be returned in the same condition as when it was chartered.

In Admiralty. Libel by the Delanco Shipbuilding Company against the barge Huron to enforce a maritime lien. On final hearing. Libel dismissed.

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

Lewis, Adler & Laws, of Philadelphia, Pa., for respondent.

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

THOMPSON, District Judge. The libelant claims a maritime lien under the Act of June 23, 1910 (Comp. St. §§ 7783–7787), against the hoisting barge Huron for furnishing a boom at an agreed price of $425. The barge at the time was under charter to the Downey Contracting Company. The charter party was in writing, and provided that upon its termination the charterer should return her in as good condition as when delivered. When the barge was delivered, it was equipped with a boom from 63 to 65 feet long that had broken off while in the service of the charterer, and had been replaced by a short boom about 45 or 50 feet long. The boom supplied was to replace the original boom, so as to return the barge in the same condition as when delivered, according to the terms of the charter party.

The facts are as follows:

On November 26, 1919, Mr. G. B. Lockhart, on behalf of the Thompson Lockhart Company, the owner of the barge, the respondent, wrote the libelant, asking for a quotation on the boom, fitted and installed complete on the Huron and asking the length of time required to perform the work. Prior to sending this letter, Mr. Lockhart had called up Mr. Harris, the vice president of the libelant, inquiring whether the libelant would do any work for him. Mr. Harris told him that undoubtedly it would, if he would communicate with the company and let it know his wants. Mr. Prouse, the superintendent, after the receipt of the letter, called Mr. Lockhart on the telephone and informed him that the boom would cost $425, upon which Mr. Lockhart told him that he would hear from him in a few days.

The Downey Contracting Company thereupon, on December 29, 1919, wrote the libelant as follows:

"We hereby accept your offer made to the Thompson Lockhart Company to install and furnish complete one Oregon pine boom cut to suit from a spar 85 feet long, 21 inches diameter at butt, floated to the dredge Huron and fitted at present location, for the sum of $425. Please send us formal bid, so that we can submit it to the insurance company."

The libelant thereupon wrote the Downey Contracting Company as follows:

"We agree to furnish and install one Oregon pine boom, 14"x14," 63 feet long, fitted and installed, using old fittings, on hoister Huron, belonging to the Thompson Lockhart Company for the sum of four hundred and twenty-five ($425) dollars. Thanking you for the order, we will proceed with this at once."

On January 30 the libelant sent a bill for installing the boom to the Downey Contracting Company, and received a letter in reference thereto on February 6, 1920, stating that the work had not been completed, and asking for an investigation and completion at once. To that letter the libelant replied on February 11, stating that the job had been completed. There was subsequent correspondence between the libelant and the Downey Contracting Company in relation to the bill, and the libelant was informed that the matter had been turned over to the Contracting Company's insurance broker, as the bill was to be paid by the insurance company.

While the inquiry as to the cost of the boom was made by Mr. Lockhart, of the respondent company, the offer to furnish it for $425, made to the respondent, was accepted by the Downey Contracting Company, and a formal bid and acceptance of the order was made by the libelant to that company. The contract which was in writing was therefore made with the charterer and not the owner, unless the charterer was authorized to act for the owner. There was no evidence that the charterer was acting as the authorized agent of the owner, and the question is whether the circumstances were such as to create a maritime lien against the barge under the act of Congress, and whether the case comes within the limitations upon the ordering of supplies contained in section 3 of the act, upon the ground that the libelant knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party the charterer was without authority to bind the vessel.

[1] That a boom is a necessary part of a hoisting barge is not open to discussion. But the barge was in its home port, was equipped with a shorter boom, and the new boom was only necessary to enable the charterer to comply with the terms of the charter party. If a claimant for necessaries knows that a vessel is under charter, he can by the exercise of reasonable diligence ascertain the terms of the charter party, and if, as in this case, a party, not the owner, attempts to obtain necessaries, reasonable diligence would require the furnisher to inquire of the one ordering concerning his relations to the owner of the vessel.

[2] The libelant knew that the respondent, and not the Downey Contracting Company, was the owner. Under these circumstances, no undue burden of diligence is placed upon the furnisher in requiring it to make inquiry. An inquiry of the Downey Contracting Company would have informed the libelant that it was a charterer of the vessel, and that, under its charter, it was liable for the replacing of the broken boom. Instead of making inquiry, Mr. Prouse seems to have relied upon a surmise that the Downey Company was in some other way connected with the libelant, and therefore was authorized to act for it.

Clearly the libelant did not exercise the due diligence, which would have informed him that the person ordering the boom was without authority to bind the vessel. The conduct of the libelant throughout indicates that it expected to hold the Downey Contracting Company responsible, and that it was only after it failed to collect from that company that it asserted its right to a maritime lien.

It is concluded that the libel should be dismissed, at libelant's costs; and it is so ordered.

WENATCHEE PRODUCE CO. v. GREAT NORTHERN RY. CO.

(District Court, E. D. Washington, N. D. March 18, 1921.)

No. 3382.

1. **War ⇐4—Congress may extend state statutes of limitation as war measure.**
   Congress may, as a war measure, extend the period of limitation fixed by the laws of the several states.
2. **Constitutional law ⇐107—Statute excluding period of federal control in computing limitation of actions against carriers constitutional.**
   The provision of Transportation Act Feb. 28, 1920, tit. 2, § 206(f), that "the period of federal control shall not be computed as a part of the periods of limitation in actions against carriers * * * for causes of action arising prior to federal control," *held* constitutional as applied to an action against a railroad company for damages for failure to furnish cars to a shipper, which would otherwise be barred by the general statute of limitations of the state.

At Law. Action by the Wenatchee Produce Company against the Great Northern Railway Company. On demurrer to complaint. Overruled.

Barrows & Hanna, of Wenatchee, Wash., for plaintiff.

Charles S. Albert and Ernest E. Sargeant, both of Spokane, Wash., for defendant.

RUDKIN, District Judge. This is an action against an interstate carrier to recover damages for failure to furnish cars for the shipment of apples. A demurrer has been interposed to the complaint, on the ground that the action was not commenced within the time limited by law. It is conceded on the part of the plaintiff that the claim in suit is barred by the state statute of limitations, independent of the following provision found in the Transportation Act of 1920 (41 Stat. 462, c. 91, tit. 2, § 206[f]):

"The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the Commission for causes of action arising prior to federal control."

On the other hand, it is conceded on the part of the defendant that the claim is not barred if the above provision is constitutional. The right of a state to repeal a statute of limitations, or extend the period within which actions may be brought, even after the bar of the statute has become complete, is well settled. Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483. The rule is, of course, subject to the limitation that the Legislature may not, by repeal or extension, divest property rights, as where the title to property passes from one person to another by adverse possession or by mere lapse of time. There may be other exceptions, but with these we are not now concerned.

[1] It is equally well settled that Congress may, as a war measure, extend the period of limitation fixed by the laws of the several states. Such was the decision of the Supreme Court in Stewart v. Kahn, 11

Wall. 493, 20 L. Ed. 176, based on the Act of June 11, 1864 (13 Stat. 123, c. 118), which provided that the time during which certain persons were beyond the reach of judicial process should not be taken as any part of the time limited by law for the commencement of actions. True, that act was limited to the zone of hostilities; but, when the existence of the power is once conceded, its limits cannot be circumscribed by the courts. As said by the court in that case:

"Congress is authorized to make all laws necessary and proper to carry into effect the granted powers. The measures to be taken in carrying on war and to suppress insurrection are not defined. The decision of all such questions rests wholly in the discretion of those to whom the substantial powers involved are confided by the Constitution. In the latter case the power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress. This act falls within the latter category. The power to pass it is necessarily implied from the powers to make war and suppress insurrections. It is a beneficent exercise of this authority."

[2] On the argument the court was furnished with a report or brief prepared by a special committee of counsel representing the Western Trunk Lines, which contains an able review of the authorities. It is there conceded that the act would be valid, if applicable to cases where the limitation affects the remedy only; but it is urged that, inasmuch as there are many cases within its terms to which the act cannot constitutionally apply, it is therefore void in its entirety. Some of the cases to which the act cannot be made applicable without bringing it in conflict with the Constitution are those arising under the federal Employers' Liability Act (Comp. St. §§ 8657–8665), Lord Campbell's Act, reparation cases, and perhaps others. In these latter cases it will be conceded that the time fixed is a part of the right granted or created, not a mere limitation only, and whether in such cases Congress could, after the expiration of the time, extend the period may well admit of question. In fact, I do not think that any such power exists in Congress or elsewhere.

But the fact that the act may not be valid when applied to every case that might possibly fall within its provisions does not necessarily invalidate it as to all other cases covered by it. Thus, in the case to which we have referred, the Supreme Court upheld the statute where the limitation applied to the remedy only and divested no property rights, but denied its efficacy in other cases, where property rights would be affected or titles divested. The time for bringing actions under the various death statutes, under the federal Employers' Liability Act, and other kindred statutes is not, strictly speaking, a statute of limitations at all, but is a mere limitation upon the right created by the statute, and follows that right into every other jurisdiction regardless of local statutes of limitations. It might well be said, therefore, that such cases do not fall within either the letter or the spirit of the statute; but in any event I am of opinion that the statute is clearly applicable to the case now before the court, and to that extent is constitutional and valid. The court is not at liberty to inquire into the motives of Congress or the reasons for the act; but, if permitted to do so, the fact that many rail-

roads refused to acknowledge the validity of process served on railroad agents in the employ of the Railroad Administration, because not agents of the company, and refused to acknowledge the validity of process served on statutory agents when the cause of action arose outside of the state for which the agent was appointed, thus hampering litigants in the prosecution of claims against the companies, may have induced Congress to enact the provision in question. But, as already stated, the reason is not a proper subject for judicial inquiry.

The demurrer is overruled.

SARANAC LAND & TIMBER CO. v. ROBERTS, State Comptroller.

(District Court, N. D. New York. April 5, 1921.)

New trial ⇐183—Order for statutory new trial vacated after 20 years without prosecution.

A formal order, granting a statutory new trial in ejectment, made by a federal court on motion of the plaintiff, will be vacated after 20 years, where plaintiff has taken no steps to proceed under the order, but in the meantime has prosecuted an action in the state courts on the same cause.

At Law. Action by the Saranac Land & Timber Company against James A. Roberts, as Comptroller of the State of New York. On motion by defendant to vacate an order granting a new trial. Motion granted.

This is a motion by the defendant, as comptroller of the state of New York, for an order declaring an order made by Judge Alfred C. Coxe, February 7, 1901, then sitting in the District Court and Circuit Court, Northern District of New York, and granting a new trial of the action, which is in ejectment, a fraud upon the law and abandoned, and also to reinstate the judgment as though such order granting a new trial had not been made; it appearing that the plaintiff has taken no proceedings whatever to avail itself of the benefits of such order, but instead has proceeded in another action brought in the state courts of the state of New York for the same cause and between the same parties.

Weeds, Smith & Conway, of Plattsburgh, N. Y., and Frank E. Smith, of New York City, for plaintiff.

Chas. D. Newton, Atty. Gen., and Wilber W. Chambers, Deputy Atty. Gen., of State of New York, for defendant.

RAY, District Judge. On a fair trial of this action in the United States Circuit Court in March, 1896, the defendant had judgment dismissing plaintiff's complaint on the merits. Judgment was entered February 17, 1898, accordingly. The plaintiff appealed, and by successive stages in the prosecution of such appeal reached the Supreme Court of the United States, in which court the judgment of the Circuit Court was in all things affirmed. 177 U. S. 318, 20 Sup. Ct. 642, 44 L. Ed. 786. The mandate of the Supreme Court of the United States was sent down, and its judgment made the judgment of the United States Circuit Court, and judgment was entered dismissing the plain-

tiff's complaint accordingly. This order and judgment was entered on the 7th day of February, 1901.

Thereupon, availing itself of the provisions of section 1525 of the Code of Civil Procedure of the state of New York, the plaintiff applied to the Circuit Court, Judge Coxe presiding, for an order granting a new trial, and this order was granted as matter of course, pursuant to statute. After the action was brought in the federal court, the plaintiff brought another action for the same cause in the Supreme Court, state of New York, but took no proceedings therein, but went to trial on the merits as hereinbefore stated in the federal court, where it was defeated as has been recited. Since the entry of the order of Judge Coxe granting a new trial in the Circuit Court, the plaintiff has done nothing in the federal court, but did revive its state court action in 1904, and proceeded to trial and had judgment in its favor. The defendant pleaded in that action the pendency of the prior action in the federal court for the same cause and between the same parties, and on appeal to the Court of Appeals of the state of New York the judgment rendered in favor of the plaintiff in the state court was affirmed. 195 N. Y. 303, 88 N. E. 753.

Thereupon the comptroller of the state of New York paid the costs and took a new trial under the statute referred to. Another trial was had in the state court, and defendant was defeated. The defendant appealed from this judgment to the Appellate Division, where the judgment of the state court was affirmed (152 App. Div. 918, 137 N. Y. Supp. 1141), whereupon the defendant appealed to the Court of Appeals of the state of New York, where the judgments of the state court, both at circuit and Appellate Division, were reversed and a new trial ordered (208 N. Y. 288, 101 N. E. 898). A new trial was thereupon had, and the defendant was again defeated. Thereupon the defendant moved for a new trial on the ground of newly discovered evidence, and this motion was granted, and alll judgments in the state courts vacated. 100 Misc. Rep. 511, 166 N. Y. Supp. 8. This order granting a new trial on the ground of newly discovered evidence was affirmed by the Appellate Division and by the Court of Appeals of the state of New York. 183 App. Div. 897, 169 N. Y. Supp. 1112; 224 N. Y. 377, 121 N. E. 99. In all of these proceedings in the state courts the defendant has urged and insisted upon the pendency of the action between the same parties for the same cause in the federal court.

The plaintiff has taken no further proceedings in its action in the federal courts, although about 20 years have elapsed since the granting of the new trial in the federal court by the order of Judge Coxe as above stated. The defendant now insists that, under the decisions of the courts to which attention will be called, the order of Judge Coxe granting a new trial in the federal court should be declared a nullity and a fraud upon the law and abandoned; no proceedings having been taken to bring the case to trial in the federal court by virtue of the leave granted under the provisions of such order.

Without reciting at length the cases to which reference is made, and which I think should control and determine the decision of this motion, I will say that I think the following cases are decisive of this motion:

Fraser v. Weller, 6 McLean, 11, 9 Fed. Cas. 725, No. 5,064 (Circuit Court and District Court of Michigan); Cunningham v. City of Milwaukee, 13 Wis. 120; Hyatt v. Challiss (C. C.) 55 Fed. 267; De Lancey v. Piepgras, 141 N. Y. 88, 35 N. E. 1089. It seems to me that, having procured an order for a new trial in the federal court some 20 years ago and not having proceeded thereunder, but having proceeded in the state court, the plaintiff has shown conclusively that it had and has no intention of availing itself of the order of Judge Coxe granting a new trial, and that the relief prayed for by this motion should be granted.

There will be an order accordingly.

In re ASSOCIATED OIL CO., Inc.

Petition of FROMHERZ.

(District Court, E. D. Louisiana. March 26, 1921.)

No. 2455.

Bankruptcy ⇐43—Corporation in hands of state receiver cannot become voluntary bankrupt.

After a receiver has been appointed for a corporation by a state court, under authority of the laws of the state, with power to take possession of and hold the property of the corporation, its directors are without power to authorize the filing of a petition in voluntary bankruptcy and the surrender of its property to the bankruptcy court.

In Bankruptcy. In the matter of the Associated Oil Company, Incorporated, bankrupt. On petition of Alvin M. Fromherz, state receiver, to vacate adjudication. Adjudication annulled, and petition in bankruptcy dismissed.

W. McL. Fayssoux, of New Orleans, La., for state court receiver.

Farrar & Woulfe, of New Orleans, La., for receiver in bankruptcy.

FOSTER, District Judge. In this case the facts are these:

A petition was filed in the civil district court for the parish of Orleans by 17 stockholders, holding over 2,700 shares, against the Associated Oil Company, Incorporated, hereinafter referred to as the Oil Company, December 28, 1920, praying for the appointment of a receiver. The petition alleged substantially that the funds of the company were being used to its detriment for the benefit of a corporation known as the Adey Johnson Company, Incorporated, the officers of which were the same as the officers of the Oil Company, and that the Adey Johnson Company was indebted to the Associated Oil Company in an amount exceeding $22,000. Other acts of mismanagement of the officers and directors, amounting to gross negligence, if not fraud, were also alleged.

On this petition a rule nisi issued, and, after answer filed, the civil district court appointed a receiver on March 2, 1921, with "full power to hold, administer, manage, and dispose of the property and income

of said corporation in such manner as the court shall direct." The receiver qualified on March 4, 1921, but has not as yet attempted to take possession of the property of the Oil Company. On the same day, March 4, 1921, the board of directors of the Oil Company adopted a resolution declaring that the affairs of the company were in a precarious state owing to the pendency of the suit for a receiver and directing that schedules in voluntary bankruptcy be filed.

The petition in bankruptcy and schedules were filed on March 7, 1921, and adjudication followed immediately. The schedules show liabilities of $21,936.55 and assets of $142,796. Only one ordinary creditor is shown, the Adey Johnson Company above referred to, in the amount of $17,963.59. At the same time, on petition of the Oil Company suggesting that litigation then pending in Caddo parish, La., necessitated such action, a receiver was appointed in the bankruptcy proceedings. A copy of the resolution above referred to was filed with the petition in bankruptcy, but was not called to the attention of the court, and the fact that a receiver had already been appointed in the state court was not disclosed.

On March 9, 1921, Alvin M. Fromherz, the receiver appointed by the state court, filed a petition in the bankruptcy proceedings, setting out the facts of his appointment and alleging the illegality of the resolution of the board of directors of the Oil Company and subsequent adjudication in bankruptcy and the appointment of the receiver in this court, and praying that the said adjudication and the appointment of the receiver be annulled and set aside. The company and the receiver in bankruptcy joined issue, alleging the absolute nullity of the judgment because of various irregularities in the proceedings in the state court and praying a dismissal of the petition. The case was submitted on the issues thus presented.

The state court undoubtedly had jurisdiction to appoint a receiver on the case presented to it under the law of Louisiana. See section 18 of Act 267 of 1914 and Act 159 of 1898. The irregularities complained of are not sufficient to render the judgment wholly void, and it is elemental that the judgment cannot be collaterally attacked. Had the previous appointment of a receiver been known, no receiver would have been appointed in this court, not only through comity, but also because unnecessary.

The question remains: Could the directors of the company make a surrender in bankruptcy after the appointment of a receiver? It seems to me this question should be answered in the negative. The appointment of a receiver certainly took the custody and control of the assets out of the corporation and its officers, so there was nothing to surrender. It is also the general rule that the appointment of a receiver over a corporation is equivalent to a suspension of its corporate functions and an injunction to its agents and officers from intermeddling with its property. See High on Receivers (4th Ed.) par. 290.

Furthermore, in the exercise of discretion, I think I should decline to interfere with the state court in this matter. To allow the adjudication to stand would undo all that has been accomplished in the state court. The receiver was appointed because of the mismanagement of

the officers. It was alleged and admitted that the officers of the Oil Company and the Adey Johnson Company are the same. That company is the sole ordinary creditor shown on the schedules. Necessarily, if the sworn schedules are true, it would elect the trustee. In that event the custody and control of the assets of the Oil Company would in effect be restored to the very men from whom the state court saw fit to take them. This would enable the officers of the Oil Company to perpetrate a fraud on the state court through the agency of the bankruptcy court, something unthinkable.

The order appointing the receiver herein will be recalled and avoided. The adjudication in bankruptcy will be annulled, and the petition dismissed.

UNITED STATES v. PEOPLE'S FUEL & FEED CO.

(District Court, D. Arizona. March 30, 1920.)

No. C-1091.

Criminal law ⟸13—Provision of Lever Act against profiteering invalid.

The provision of Lever Act Aug. 10, 1917, § 4 (Comp. St. 1918, Comp. St. Ann. Sup. 1919, § 3115⅛ff), that "it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge in handling or dealing in or with any necessaries," *held* invalid as a criminal statute, as providing no standard by which the guilt or innocence of any person charged with its violation may be determined.

Criminal prosecution by the United States against the People's Fuel & Feed Company. On demurrer to indictment. Demurrer sustained. Writ of error dismissed. 254 U. S. —, 41 Sup. Ct. 448, 65 L. Ed. —.

Thomas A. Flynn, U. S. Atty., and Joseph M. Holub, Asst. U. S. Atty., both of Tucson, Ariz.

Kingan & Campbell, of Tucson, Ariz., for defendant.

DOOLING, District Judge. The defendant demurs to an indictment which charges that it did—

"feloniously exact, demand, and receive the sum of six dollars as the purchase price of one-half of a load of wood, sold by it to the firm of Richey & Richey, which wood was a necessary, and that said price of six dollars was unjust and unreasonable, in this: That a just and reasonable price for said wood did not exceed the sum of four dollars, and that defendant did then and there make an unjust and unreasonable rate and charge in handling and dealing in and with the said necessary."

The statute under which the indictment is drawn provides:

"That it is hereby made unlawful for any person * * * to make any unjust or unreasonable rate or charge, in handling or dealing in or with any necessaries." Act Aug. 10, 1917, c. 53, § 4, 40 Stat. 276, 277 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 3115⅛ff).

The demurrer challenges the indictment through the law itself, on the ground that the offense is not defined with such certainty as to enable an individual to determine what is, and what is not, forbidden, be-

cause the statute nowhere defines, or furnishes any rule to define, what shall constitute an unjust or unreasonable rate or charge, but leaves that question to be determined without check or guide by the uncontrolled opinion of the court and jury to which shall be submitted any alleged violation of its provisions.

The statute is one arising out of the necessities of the war, and designed for the very laudable purpose of preventing profiteering. Sympathy with its purpose, or approval of its design, however, should not blind us to the facts that no individual can know in advance of a trial and verdict of a jury whether he has violated the statute or not, and that the criminality of his conduct is not fixed by any definition or with any certainty, but is made to depend upon whether a jury may later think that the rate or charge made by him is just or unjust, reasonable or unreasonable.

In upholding a Texas statute which denounced acts which "tended" to bring about prohibited results, or which were "reasonably calculated" to fix and regulate the price of commodities, the Supreme Court of the United States, in Waters-Pierce Oil Co. v. Texas, 212 U. S. 86, 29 Sup. Ct. 220, 53 L. Ed. 417, uses the following language:

"But the Texas statutes in question do not give the broad power to a court or jury to determine the criminal character of the act in accordance with their belief as to whether it is reasonable or unreasonable, as do the statutes condemned in the cases cited."

Among the cases cited to which the language refers is the case of Louisville & Nashville Railway v. Commonwealth, 99 Ky. 132, 35 S. W. 129, 33 L. R. A. 209, 59 Am. St. Rep. 457, which case the Supreme Court described as one—

"in which a railroad was indicted for charging more than a just and reasonable rate, in which it was held that the law was unconstitutional, for under such an act it rests with the jury to say whether a rate is reasonable, and makes guilt depend, not upon standards fixed by law, but upon what a jury might think as to the reasonableness of the rate in controversy."

This language exactly fits the present statute. The guilt or innocence of an individual under it is not made to depend upon standards fixed by law, but upon what a jury might think as to the justice or injustice, the reasonableness or unreasonableness, of rates or charges made by him in handling or dealing with necessaries.

I cannot forecast the action of other courts, but it is my own firm conviction that no one should be put upon trial for an offense so vaguely defined—for an act the criminality of which he has no possible means of measuring in advance, depending not at all upon his own intent to violate the law, but wholly upon the opinion of a jury, based on instructions by a court, which is itself without guide or compass, and where all concerned, defendant, counsel, government, court and jury, may well be at cross-purposes, no one knowing what is just, or what is reasonable, and all disagreeing as to the method by which what is just or reasonable may be, if indeed it can ever be, legally ascertained.

With these views I deem it best to sustain the demurrer, to the end

that they may be reviewed, and, where wrong, corrected by the appellate tribunals, which could not be done, if upon a trial a verdict should be directed for the defendant.

The demurrer will therefore be sustained, and the defendant discharged.

HINES, Director General of Railroads, v. STRUTHERS FURNACE CO.

(District Court, N. D. Ohio, E. D. November 12, 1920.)

No. 10374.

Railroads ⇐5½, New, vol. 6A Key-No. Series—Federal agent may sue on claim accruing to government during control.

Under Federal Control Act March 21, 1918, §§ 1, 8, 12 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a, 3115¾h, 3115¾l), and Transportation Act 1920, §§ 202, 206, 211, the new Director General, appointed pursuant to section 211 of the Transportation Act, is the proper party plaintiff in an action to recover a claim accruing to the United States or to the Director General during the period of federal control.

At Law. Action by Walker D. Hines, Director General of Railroads, against the Struthers Furnace Company. Motion to dismiss denied.

Harrington, De Ford, Heim & Huxley, of Youngstown, Ohio, for plaintiff.

Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. The motion herein raises the question of whether or not, since March 1, 1920, an action to recover a claim accruing to the United States or to the Director General of Railroads during the period of federal control can now be prosecuted to judgment in the name of the Director General, appointed pursuant to section 211 of the Transportation Act 1920 (41 Stat. 469).

The Federal Control Act of March 21, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 3115¾a–3115¾p), by section 1, provided in substance that any railway operating income accruing during the period of federal control in excess of just compensation to the railroad company owning the system of transportation, shall remain the property of the United States. Section 12 thereof provides in substance that moneys and other property derived from the operation of the carriers during federal control are declared to be the property of the United States. Section 8 thereof provided in substance that the President might execute any of the powers granted him with relation to federal control through such agencies as he might determine. A Director General of Railroads was appointed by him as the agent through whom all the powers conferred by that act were exercised. The practice adopted under that act was to bring and maintain actions in the name of the Director General either as plaintiff or defendant. No doubt was ever entertained or expressed that the revenues accruing from operation during federal control belonged to the United States or that liabilities in-

curred from operation by federal control were liabilities of the United States and not liabilities of the owners of the railway company. Some doubt exists and has been expressed as to whether or not under section 10 thereof, the action might not have been maintained or brought against the owner of the transportation company by its corporate name. The practice, however, was adopted, followed, and has been generally approved by the courts that the Director General was the proper party plaintiff and defendant either to bring actions or against whom actions might be brought.

Section 200 of the Transportation Act of 1920 terminates federal control at 12:01 a. m., March 1, 1920. Section 202 thereof, however, provides that, notwithstanding such termination of federal control, the President shall adjust, settle, liquidate, and wind up all matters, including compensation, and all questions and disputes of whatsoever nature, arising out of or incident to federal control. This section further provides in substance that all moneys derived from the operation of the carriers, or otherwise arising out of federal control, and all moneys that have been or may be received in payment of the indebtedness of any carrier to the United States, arising out of federal control, shall be and remain available until expended for the aforesaid purposes. By the Act of March 21, 1918, a revolving fund of $500,000,000 was provided to pay liabilities and compensation, and this fund has since been supplemented by additional appropriations, including an appropriation of $200,000,000 by said section 202.

Section 211 provides in substance that all powers and duties conferred or imposed upon the President by the preceding sections of the act, except the designation of the agent under section 206, may be executed by him through such agency or agencies as he may determine. Pursuant to this power, a new Director General has been appointed, clothed with all the powers and duties conferred or imposed upon the President under that act, except the powers and duties specially reserved by section 206. This last-named section provides for the appointment of a special agent to be known as Litigation Agent, against whom all actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of the possession, use, or operation of any system of transportation, shall be brought and prosecuted. Rights of action in favor of the United States or the Director General are not among those mentioned in section 206. As regards actions or suits to recover on causes of action accruing to the United States during the period of federal control, the situation remains precisely as it was under the Act of March 21, 1918.

The only question, it seems to me, which can be made, is whether or not the action should be in the name of the United States rather than in the name of the Director General. The practice adopted, followed, and universally approved under the Act of March 21, 1918, of bringing these actions in the name of or against the Director General, is equally proper in this new situation. Upon consideration of both acts, it seems to me that the Director General is now the proper party plaintiff.

STANDLEY v. UNITED STATES RAILROAD ADMINISTRATION et al.

(District Court, N. D. Ohio, E. D. August 5, 1920.)

No. 10193.

1. **Constitutional law ⟸107, 308—Limitation of actions ⟸4(2)—Exclusion of period of federal control from computation of limitations valid.**
   Transportation Act 1920, § 206, par. F, providing that the period of federal control shall not be computed as part of the periods of limitation in actions against carriers for causes of action arising prior to federal control, excludes from such periods the period of federal control from December 31, 1917, to March 1, 1920, and is valid even as applied to a cause of action for personal injuries against a carrier, which was barred February 28, 1920, when the act was approved, as there is no constitutional prohibition forbidding the removal of the bar of limitations against causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed, and the power of Congress to legislate upon this subject-matter rests on the same basis as its power to pass the other acts relating to federal control.
2. **Pleading ⟸217(2)—Demurrer searches record.**
   Plaintiff's demurrer to the answer searches the record, and calls for a decision as to whether a good cause of action is stated by the petition.
3. **Railroads ⟸5½, New, vol. 6A Key-No. Series—Director General not suable for injury prior to federal control.**
   No liability exists and no action can be maintained against the Director General of Railroads on a cause of action for personal injuries arising prior to federal control of railroads.

At Law. Action by Asie E. Standley against the United States Railroad Administration, Walker D. Hines, Director General of Railroads, and the Pennsylvania Railroad Company. On plaintiff's demurrer to a defense in the answer. Sustained, and sustained as to the petition, so far as it makes the Director General a defendant.

J. B. Dworken and Mathews, Bell & Winsper, all of Cleveland, Ohio, for plaintiff.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. [1] This case is before me on plaintiff's demurrer to the second defense set forth in answer filed herein February 6, 1920. This defense is that plaintiff's cause of action, which is for personal injuries, accrued July 21, 1914, and that, inasmuch as the petition herein was not filed until June 21, 1919, plaintiff's action is barred by section 11224, G. C. of Ohio, requiring actions of this character to be instituted within four years after the cause thereof first accrued. This defense would be good, except for the reservation contained in paragraph F of section 206, Transportation Act 1920, 41 Stat. 456. This reservation is in these words:

"The period of federal control shall not be computed as a part of the periods of limitation in actions against carriers or in claims for reparation to the commission for causes of action arising prior to federal control."

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

This language applies to plaintiff's cause of action, and admits of no other interpretation than that the period of federal control is not to be taken into account in computing the period of time within which causes of action are barred by statutes of limitation. The period of federal control thus excluded runs from and after December 31, 1917, to March 1, 1920, and, excluding this time, plaintiff's action is not barred by the four-year statute of limitations.

Nor can any question be properly made respecting the power of Congress to enact this legislation. Plaintiff's action, it is true, was barred February 28, 1920, when this act was approved; but there is no constitutional prohibition forbidding the removal of the bar of the statute of limitations against causes of action based upon debts, claims, or personal demands, even though the bar has already attached when the act is passed. Campbell v. Holt, 115 U. S. 620, 6 Sup. Ct. 209, 29 L. Ed. 483; 12 Corpus Juris, 980, § 576.

Nor does it seem to me any question can be made as to the power of Congress to legislate upon this subject-matter. Its power so to do rests upon the same basis as its power to pass the other acts relating to the federal control of railroads.

[2, 3] This demurrer, however, searches the record and calls for a decision as to whether a good cause of action is stated in plaintiff's petition against these defendants. The cause of action, it is alleged, arose prior to the period of federal control. A liability, if one is stated, exists only against the Pennsylvania Railroad Company, then in control of and operating its lines of railway. No liability exists and no action can be maintained against the Director General of Railroads on a cause of action thus arising prior to and not during the period when the Director General was in control of and operating the lines of railway owned by the Pennsylvania Railroad Company. For these reasons, no cause of action is stated against the Director General, and the demurrer will be sustained to the petition, so far as it makes him a defendant.

Leave is given plaintiff to file within 10 days a proper amended petition against the Pennsylvania Railroad Company alone. An exception will be noted to this ruling on behalf both of the defendants and the plaintiff, so far as it is adverse to each of them respectively.

UNITED STATES v. HALLOWELL.

(District Court, W. D. Washington, N. D. March 30, 1921.)

No. 5912.

Internal revenue ⇐47—Indictment for resisting revenue officer held insufficient.

An indictment under Penal Code, § 65 (Comp. St. § 10233), for resisting a revenue officer "authorized to make searches and seizures, in the execution of his duty," or for destroying property after its seizure by such officer, must set out facts showing that the search and seizure were lawfully authorized; otherwise, the acts charged constitute no offense.

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

Criminal prosecution by the United States against Herbert Hallowell. On demurrer to indictment. Demurrer sustained.

Robert C. Saunders, U. S. Atty., and F. C. Reagan, Asst. U. S. Atty., both of Seattle, Wash.

Authorities cited by plaintiff: Armour Packing Co. v. U. S., 209 U. S. 84, 28 Sup. Ct. 428, 52 L. Ed. 681; Paraiso v. U. S., 207 U. S. 368, 28 Sup. Ct. 127, 52 L. Ed. 249; Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162; Clement v. U. S., 149 Fed. 305, 79 C. C. A. 243; U. S. v. Swift (D. C.) 188 Fed. 99; Brown v. U. S., 143 Fed. 60, 74 C. C. A. 214; U. S. v. McEwan (C. C.) 44 Fed. 594.

Clarence L. Reames, of Seattle, Wash., for defendant.

Authorities cited by defendant: U. S. v. Baird (D. C.) 48 Fed. 554; U. S. v. Pitotto (D. C.) 267 Fed. 603; U. S. v. Fears, Fed. Cas. No. 15,080.

NETERER, District Judge. The indictment is in two counts. Count 1 charges:

"That the defendant did * * * assault, resist * * * a certain officer of the Treasury Department, * * * a duly qualified federal prohibition officer, * * * to make searches and seizures while * * * he was engaged in the execution of his duties."

Count 2 charges the willful destruction of a quart bottle of whisky which had "been lawfully seized by one * * * who was then and there a person duly authorized to make searches and seizures, to wit, a duly qualified federal prohibition officer," the defendant knowing him to be such officer.

The charge in each count is barren of authority under which the search and seizure was made. The Constitution guarantees all persons against unreasonable searches and seizures. Before search and seizure can be made, the law requires an adjudication of right to search and seize as a prerequisite, and until this right is adjudicated, and warrant issued, no right is vested in the officers, and search and seizure without such warrant is unlawful, and may be resisted without offending against the law.

This indictment does not fall within the class of cases where the charge may be made in the language of the statute creating the offense. The person to come within the provisions of section 65, Penal Code (Comp. Stat. § 10233; section 5447, R. S.), must be an officer and must be in the line of discharge of his duty. The prerequisites of statute fixing the line of duty must therefore be set out in the indictment.

The authority of the officer not being set out in the indictment, it is bad, and the demurrer must be sustained.

EDWARDS v. BROWNLOW et al.

(Court of Appeals of District of Columbia. Submitted February 14, 1921. Decided March 7, 1921.)

No. 3456.

1. **Eminent domain ⟸182—Notice by publication and personal service on owners who can be found in the District held required.**
   Code of Law 1911, § 491c, requires both general notice of a condemnation proceeding for the opening of a street by publication and personal service of the notice upon such owners of land to be condemned as can be found within the District of Columbia.

2. **Eminent domain ⟸167(4)—Provisions of statute as to notice are jurisdictional, and must be strictly followed.**
   In an action to condemn and take private property in opening a street, the requirements of the statutes as to notice are jurisdictional, and must be strictly followed.

3. **Eminent domain ⟸224—Party moving to quash verdict for want of service must show he was subject to personal service.**
   A landowner, whose name was not included in the list turned over to the marshal in a condemnation proceeding for personal service, cannot have the verdict quashed on motion for want of service, where it does not appear that he was a resident of the District of Columbia, or so situated as to be subject to personal service under Code of Law 1911, § 491c.

Appeal from the Supreme Court of the District of Columbia.

Condemnation proceeding by Louis Brownlow and others, Acting Commissioners of the District of Columbia, in which W. Walton Edwards filed a motion to quash the verdict. From a judgment confirming the verdict, Edwards appeals. Affirmed.

W. Walton Edwards, of Washington, D. C., in pro. per.

F. H. Stephens and F. W. Hill, Jr., both of Washington, D. C., for appellees.

VAN ORSDEL, Associate Justice. This action arose out of condemnation proceedings to open a street, instituted in the Supreme Court of the District of Columbia by the commissioners of the District.

Appellant, Edwards, appeared after the jury had made its findings as to damages and assessments of benefits, and filed exceptions to the verdict on the principal ground that he, the owner of certain land condemned and taken, was not made a party thereto, and "was not served with process or otherwise given notice of these proceedings." Upon motion by counsel for the District to confirm the verdict notwithstanding the exceptions, appellant filed a motion, supported by an affidavit, to quash the verdict of the jury. Aside from an indefinite averment that the proceedings were irregular and illegal, the principal ground of the motion was:

"That the owners of the fee simple of all the land involved were not made parties to this cause, nor served with process or notice as required by the statute and by the order of this court."

On hearing, the motion was denied, and judgment confirming the verdict entered, from which this appeal was taken.

Section 491c of the District Code, under which notice was given and service was attempted to be made, reads as follows:

"The said court shall cause public notice of not less than twenty days to be given of the institution of such proceeding, by advertisement in three daily newspapers published in the District of Columbia, which notice shall warn and require all persons having any interest in the proceeding to appear in court at a day to be named in said notice, and to continue in attendance until the court shall have made its final order ratifying and confirming the award of damages and the assessment of benefits by the jury herein provided for; and in addition to such published notice said court shall cause a copy of said notice to be served by the United States marshal for the District of Columbia, or his deputies, upon such owners of the land to be condemned as can be found by said marshal, or his deputies, within the District of Columbia, and upon the tenants and occupants of the same. The said court shall appoint a guardian ad litem for any person interested in the proceeding who may be under disability."

[1, 2] It is clear that the statute requires both general notice by publication and personal service of the notice by the marshal upon such owners of land to be condemned as can be found within the District of Columbia. As this is an action to condemn and take private property for public use, the requirements of the statute as to notice are jurisdictional, and must be strictly followed. Boswell v. Otis, 9 How. 336, 13 L. Ed. 164; Brown v. Macfarland, 19 App. D. C. 525; Fay v. MacFarland, 32 App. D. C. 295; Lynchburg Investment Corp. v. Rudolph, 40 App. D. C. 129.

[3] No point is made that the notice by publication was defective. To that extent, therefore, the requirements of the statute as to appellant have been satisfied. The return of the marshal discloses the names of the persons served and the names of the persons "not to be found," from which it may be inferred that appellant's name was not included in the list turned over to the marshal for personal service. It nowhere appears that appellant was a resident of the District of Columbia, or so situated that he was subject to personal service. This controlling fact does not appear in the motion to quash the verdict or in the affidavit in support thereof. The failure to point out the only defect upon which the jurisdiction of the court could be challenged leaves appellant without any legal status which would justify setting aside the findings of the jury.

The judgment is affirmed, with costs.

Affirmed.

Mr. Justice STAFFORD, 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.

SOLOMON v. ROUSSO (two cases).*

(Court of Appeals of District of Columbia. Submitted March 16, 1921. Decided April 4, 1921.)

Nos. 1403, 1404.

Patents ⇐91(4)—Evidence held to show that exhibit which embodied invention was made before date allowed to adverse party.

In interference proceedings, evidence *held* to show that an exhibit produced by appellant, which embodied the invention and constituted a full reduction to practice of the device in issue, had been constructed by appellant before the earliest date allowed to the party to whom the Commissioner awarded priority.

Appeals from the Commissioner of Patents.

Two proceedings to determine priority of invention between Harry Solomon and Jacques Rousso and two other parties. From a decision of the Assistant Commissioner, awarding priority to Rousso, Solomon alone appeals. Reversed, and priority awarded to Solomon.

William F. Hall, of Washington, D. C., for appellant.

Joshua R. H. Potts, of Chicago, Ill., for appellee.

SMYTH, Chief Justice. These appeals from decisions of the Commissioner of Patents involve the question of priority with respect to an invention defined by the following counts:

Count 1. In a device of the class described, a towel support and a retaining member extending upwardly from said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described.

Count 2. In a device of the class described, a towel support and a retaining member extending upwardly from adjacent the outer edge of said support and then downwardly sufficiently to constitute a suitable guide for a towel while in use, substantially as described.

There were originally four parties—Fetherolf, Solomon, Rousso, and Brigham. Brigham was successful before the Examiner of Interferences, Solomon before the Examiners in Chief, and Rousso before the Assistant Commissioner. Solomon alone appeals. We have, therefore, to consider only the controversy between him and Rousso.

The Examiner of Interferences refused to give Solomon any date for conception earlier than December 31, 1912, and held that Rousso was not entitled to a date prior to December 13, 1911. The Examiners in Chief held that Rousso had no right to a date earlier than December 22, 1911. Thus they and the Examiner of Interferences are in accord in holding that Rousso is not entitled to any date earlier than December 13, 1911. But the Examiners in Chief, differing from the Examiner of Interferences, gave Solomon March, 1911, for reduction to practice. When the Assistant Commissioner came to dispose of the matter he confined Rousso to his filing date, January 12, 1912, but gave him priority over Solomon, saying:

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 623, 65 L. Ed. —.

"I have hesitatingly reached the conclusion that Solomon's proof should be accepted as establishing that he had the device known as his Exhibit No. 2 in March, 1911, but I do not think that this construction, simple as the invention is, is shown by the proofs to have been actually reduced to practice."

It is not denied that Exhibit 2 embodies the invention. We have seen it at the bar and cannot doubt that it constitutes a full reduction to practice of the device of the issue. When was it manufactured?

Prior to March, 1911, Solomon had a towel rack similar to Exhibit 2. Davidson testified to this, describing the rack, and then identified Exhibit 2 as the device to which he referred. Jamieson, general manager of the Jamieson Machine Company, testified that he had done considerable work for Solomon and that the latter brought him a towel rack, which he was unable to describe accurately. Upon being shown Exhibits 1 and 2, he said it was more like the latter. While he could not fix the date on which he saw it, he knew that he bent some rods like the one in Exhibit 2 for Solomon before January, 1911. The witness Lehr said that he saw racks similar to Exhibits 1 and 2 early in 1911, and Ames testified that Solomon disclosed to him a towel rack which he thought was Exhibit 2, and that this was done a year or two after March 31, 1909, when Solomon signed a contract to furnish towels to a concern with which he was connected. Other witnesses testified to the same effect. Their testimony is set out quite fully and commented upon in the opinion of the Examiners in Chief. It establishes to our satisfaction that Solomon manufactured Exhibit 2 as early as March, 1911, and as it constitutes a reduction to practice we feel constrained to reverse the decision of the Assistant Commissioner and award priority to Solomon in both appeals.

Being of the opinion that the parts of the record sent to this court by the Patent Office in response to a writ of certiorari sued out by Rousso have no bearing on the issues presented, we tax all costs on the writ against Rousso.

Reversed.

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.

THE VIKING.

PETROL TRAFFIC CO. et al. v. PROVIDENCE-WASHINGTON INS. CO.

(Circuit Court of Appeals, Sixth Circuit. April 15, 1921.)

No. 3498.

1. **Insurance ⇐603(3)—Marine insurer, paying damage, subrogated to shipper's right of action against it.**
An insurer of a steamer's cargo, which paid the damage to the shipper after the sinking of the steamer, and took an assignment of the shipper's cause of action, was thereby subrogated to the shipper's right of action against the ship and its owner.

2. **Shipping ⇐137—Freight boat held unseaworthy by reason of siphon for discharge of water.**
A freight boat, equipped with a siphon for the discharge of water from the bilge, whose outboard end was under water when the draft exceeded 14 feet and 3 inches, and which could be closed only by a stop cock located in the bilge about 2 feet above the keel and 10 or 12 feet below the working platform of the engine, and which it was practically impossible to close after a few feet of water entered the hold, *held* unseaworthy for a load causing a draft of 14 feet and 7 inches, within the Harter Act (Comp. St. §§ 8029–8035).

3. **Shipping ⇐137—As respected unseaworthiness, fact that coal, increasing draft, was taken on at intermediate port, held immaterial.**
Where the coaling of a freight boat at Toledo was contemplated as a necessary part of a voyage from Buffalo to Sault Ste. Marie, and the weight of the coal increased the draft to a point where the boat was unseaworthy, the situation, as respected liability under the Harter Act (Comp. St. §§ 8029–8035), was no different than if the coaling had been at Buffalo.

4. **Shipping ⇐132(5)—That boat passes inspection not conclusive of seaworthiness.**
That a boat passed official and other inspections is not conclusive of the fact of seaworthiness.

5. **Shipping ⇐132(5)—Evidence held insufficient to show location of stop cock of siphon was not proximate cause of sinking.**
Evidence *held* insufficient to show that the inaccessibility of the stop cock of a siphon used to discharge water from the bilge, the outboard end of which was under water at certain drafts, was not the proximate cause of the sinking of the vessel.

6. **Shipping ⇐132(4)—Burden on owner to show unseaworthiness did not cause sinking.**
Where a vessel was unseaworthy, liability for damages caused by its sinking cannot be escaped, without the clearest showing that the disaster was bound to have happened, despite the unseaworthiness.

7. **Shipping ⇐132(5)—Evidence insufficient to show stop cock was closed when vessel started on voyage.**
Evidence *held* insufficient to show that the stop cock of a siphon used to discharge water from the bilge, the outboard end of which was under water at certain drafts, was closed before and at the time the vessel started on a voyage.

8. **Shipping ⇐132(4)—Closing of stop cock, essential to seaworthiness, cannot be left to presumption.**
Where a vessel was unseaworthy for a load causing a draft of 14 feet and 7 inches, because at such draft the outboard end of a siphon was under water, unless the stop cock was closed, the performance of the duty to close the stop cock and render the vessel seaworthy could not be left to presumption.

9. Shipping ⊂=132(4)—Burden on ship to show closing of stop cock essential to seaworthiness.

Where a vessel was not seaworthy, unless the stop cock of a siphon, the outboard end of which was under water at certain drafts, was closed, and it was not claimed that it was purposely left open when the boat started on a voyage, the burden was on the ship to show that it was closed.

Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge.

Libel in admiralty by the Providence-Washington Insurance Company against the steamer Viking, her engines, boilers, etc., and the Petrol Traffic Company. From a decree for libelant, defendants appeal. Affirmed.

L. C. Hinslea, of Cleveland, Ohio (Holding, Masten, Duncan & Leckie and F. L. Leckie, all of Cleveland, Ohio, on the brief), for appellants.

John B. Richards, of Buffalo, N. Y. (Brown, Ely & Richards, of Buffalo, N. Y., on the brief), for appellee.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

KNAPPEN, Circuit Judge. [1] On May 18, 1915, a coal company shipped on board the steamer Viking, then lying at Buffalo, N. Y., a cargo of coal, in good order and condition, for transportation to Sault Ste. Marie, Mich., at an agreed rate of freight, to be delivered to the consignee in like good order and without delay, dangers of navigation only excepted. The Viking left Buffalo during the afternoon of May 18th, arrived at Toledo in the late afternoon of the next day, and moored at a dock in that harbor, where she remained until she sank at 5:30 a. m. on May 21st. The cargo was insured by the Providence-Washington Insurance Company, which paid the damage, took an assignment of the shipper's cause of action, and was thereby subrogated to the shipper's right of action. Federal Insurance Co. v. Detroit, etc., Ins. Co. (C. C. A. 6) 202 Fed. 648, 651, 121 C. C. A. 58. This libel was then filed by the Insurance Company alleging two causes of action: First, the failure to deliver the cargo in good order; and second, a wrongful deviation in the voyage to Sault Ste. Marie, Mich., by going to Toledo.

[2] As to the first cause of action, the answer alleged that the sinking was caused by the negligence or mismanagement of a member of the crew, and that claimants were accordingly exonerated by virtue of the Harter Act (Act Feb. 3, 1893, c. 105, 27 Stat. 445; U. S. Comp. St. 1916, § 8031), which relieves the vessel and her owners in case due diligence has been exercised to make the vessel seaworthy and properly manned, equipped, and supplied; as to the second cause of action, that the proceeding to Toledo was for the purpose of picking up the steamer's regular consort, in accordance with the usage of the trade and the custom on the Great Lakes. The District Judge found neither of these defenses sustained, and held the steamer liable accordingly.

The question of seaworthiness arises out of this situation: The Viking was a freight boat of the single-deck type; i. e., she had but one main deck. When loaded, she sat low in the water and had but a small amount of freeboard. She was equipped with a 2½-inch siphon for discharging water from the bilge, suction being created by the introduction of steam at a connection near the lower end of the siphon, whose outboard end was at the 14 foot 3 inch draft line. There was no valve in the siphon, except a plug cock (which could be operated only by a large monkey wrench) located in the bilge, possibly 2 feet above the keel and 10 or 12 feet below the working platform of the engine (the engine room was on the main deck), and was reachable by a descent of six or seven steps. There was no way of telling whether the stop cock was open, except by the direction of a certain mark from the plug cock. When the vessel left Buffalo, she was drawing 14 feet forward, and 13 feet 11 inches aft, and the freeboard end of the siphon was thus above the water line. On the 20th, she coaled at Toledo, thus increasing her draft to 14 feet 7 inches, and making the discharge end of the siphon about 3 inches under water. When the boat was raised, the stop cock was found open, and it is clear from the record that the sinking was due solely to this condition of the siphon.

The District Judge, in rejecting the defense of seaworthiness, said that, in his judgment the boat—

"was not seaworthy to be loaded more than 14 feet. It seemed to the court on the trial, and time has not removed this impression, that, if this boat were to be so deeply loaded, the most ordinary precaution to make her seaworthy would have been to have placed a cock near the point of discharge of the siphon where it would be readily accessible. Without such an obvious and important, yet inexpensive, addition to her equipment, she cannot be said to have started from Buffalo in a seaworthy condition when loaded so deeply. We do not believe that the Harter Act should be so construed as to pass to the cargo owner responsibility for carelessness on the part of the crew when that carelessness operates on a failure of ordinary prudence when furnishing equipment. To send this vessel on a voyage with her [outboard] siphon end under water, and with no safeguard save a cock so inaccessibly located and awkwardly operated as in this case, is without excuse under any reasonable construction of the Harter Act."

[3] This conclusion meets our approval. We do not think it open to the criticism that the District Judge supposed the boat left Buffalo with the discharge end of the siphon under water. The opinion was a mere summary memorandum, reciting no facts. Presumably, the court had in mind the situation after coaling at Toledo, after which the major part of the voyage was to occur, and which coaling was contemplated as a necessary part of the voyage. This being so, the situation is no different than if the coaling had been at Buffalo. The Southwark, 191 U. S. 1, 7, 8, 24 Sup. Ct. 1, 48 L. Ed. 65; The R. P. Fitzgerald (C. C. A. 6) 212 Fed. 678, 683, 129 C. C. A. 214.

[4] While there was testimony tending to show that such a siphon construction was seaworthy, it is not persuasive. The record impresses us otherwise, and that the more usual method was to have a globe valve on the inboard side of the vessel, reachable from the working platform, and which would plainly show whether it was open or closed. True, the

testimony indicates that a vessel is not rendered unseaworthy by the mere fact that the discharge end of the siphon is allowed to be under water, provided the stop cock therein, wherever located, is kept closed. The unseaworthiness as respects equipment lies in the fact that, if the valve is not kept closed and the outer end of the siphon remains under water, the ship is bound to sink sooner or later, if that condition continues long enough—coupled with the fact of inaccessibility of the stop cock and the practical impossibility of closing it after a few feet of water have entered the hold, and the greater danger that the open condition of the valve will be left unnoticed, if located where it cannot readily be seen and operated by the engine room crew. The fact that the boat passed official and other inspections is not conclusive of the fact of seaworthiness. The R. P. Fitzgerald, supra, 212 Fed. at pages 686, 687, 129 C. C. A. 214, and cases there cited.

[5] Claimant contends, however, that this condition of the siphon, even if amounting to unseaworthiness, did not contribute to the sinking, for the reason that the engineer testified, without dispute, that when he arrived on deck, after being called by the watchman (all the remainder of the crew, as well as the master, being turned in for the night), the ship had so far settled that the water was pouring in through the gangways, portholes, and over the deck; and it is accordingly argued that, even had the valve been located near the discharge end of the siphon, its closing at this juncture would not have saved the vessel from sinking to the bottom. The watchman, who discovered the settling and called the engineer and master, was not produced (nor was any other member of the crew), and the defense of noncontribution assumes not only that the watchman called the engineer and master as soon as possible after he discovered the sinking condition, but that, when so discovered, the boat had settled to the point of letting the water through the gangways and portholes and over the deck, in the face of the natural improbability that a watchman actually on duty would have failed to notice that the boat was settling until the water was coming in freely to the extent stated. But if these assumptions are to be indulged there remains the greater probability that a visibly open valve, accessibly located, would have been discovered by the engine force long before water began to come in to an extent making complete sinking inevitable.

[6-8] The defense of noncontribution also assumes that the open valve was due to negligent operation. The vessel being unseaworthy, to say the very least, liability cannot be escaped without the clearest showing that the disaster was bound to have happened despite the unseaworthiness, and this burden we think not clearly sustained. As part of the evidence of seaworthiness, the claimant presented the testimony of the engineer, who answered in the affirmative this question:

"Leaving Buffalo on this occasion, or before leaving Buffalo, can you state whether or not the stop valve, the safety valve, in the siphon pipe in the Viking was closed?"

We assume that the witness meant that the stop cock was closed before and at the time the ship left Buffalo, and we assume that he thought

such was the case. The view which the District Court took of this evidence does not appear; but, while it is not directly disputed, it is not convincing of the fact. In substance, the engineer's testimony, taken as a whole, comes merely to this: That the last use which the engineer knew had been made of the valve was during the discharge of a cargo of corn, which immediately preceded the loading of the coal in question. There is no testimony of the actual closing of the valve, or that it was looked after or even thought of before the ship left Buffalo, or at any time after it was used during the discharge of the corn cargo until the ship was found to be sinking at the Toledo dock. The engineer knew of no use had of the siphon (or occasion for such use) after the corn cargo had been unloaded. There had been no occasion to use the siphon at Toledo. The fires were put out in the middle of the forenoon of the 20th, and the siphon could not have been operated after that time. The engineer knew of nobody who had opened the stop cock; on the contrary, he testified that none of the crew would admit any knowledge of it. The natural inference from the engineer's testimony is that he had no affirmative recollection of closing the valve, but assumes that it was closed because it plainly should have been. The performance of that duty cannot be left to presumption. The Wildcroft, 201 U. S. 378, 388, 26 Sup. Ct. 467, 50 L. Ed. 794. As the discharge end of the siphon was out of water during the voyage from Buffalo to Toledo, and, indeed, until the coaling was nearly completed on the 20th, water would, so far as appears, normally not have come in from the sea in such an amount as to be discoverable even in the hold.

[9] It is not claimed that the valve was purposely left open on the boat's departure from Buffalo, and thus that the failure to close it later was due to negligence in operation. The burden of showing that the valve was closed when the boat left Buffalo thus rested on the ship (International Nav. Co. v. Farr, 181 U. S. 218, 222, et seq., 21 Sup. Ct. 591, 45 L. Ed. 830), and we think that burden not sustained. The ship being unseaworthy, it is unnecessary to consider the question of deviation.

The decree of the District Court is affirmed.

SCANDINAVIAN-AMERICAN BANK OF FARGO, N. D., v. UNITED STATES NAT. BANK OF PORTLAND, OR.

(Circuit Court of Appeals, Eighth Circuit. April 5, 1921.)

No. 5656.

1. **Election of remedies ⇐1—Money received ⇐12—Acts before knowledge money had been received do not waive or bar recovery.**

A right of action for the recovery of money received to plaintiff's use cannot be defeated by dealings between plaintiff and defendant, which the defendant claimed operated as rescission, waiver, ratification, estoppel, and election of remedies, where such dealings all occurred before plaintiff had knowledge that the defendant had collected the money in controversy.

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

2. **Appeal and error ⊜846(1)—On review of trial to court whether findings support judgment, and whether error was committed, held only questions for consideration.**

Where the case was tried to the court, and special findings were made, which it was not claimed were without evidentiary support, the Circuit Court of Appeals can only inquire whether the facts found support the judgment, and whether, during the progress of the trial, there was error prejudicial to the plaintiff in error, to which it saved exceptions.

3. **Banks and banking ⊜175(4)—Findings held to show collecting bank liable for collection by it.**

Findings by the trial court that a bank, to which a draft with bill of lading attached had been sent by another bank for collection, collected the money and delivered the bill of lading, but thereafter recalled the draft sent in payment of the collection, and concealed from the remitting bank the fact that the collection had been made, *held* to show the collecting bank was liable to the remitting bank for the amount collected, with interest, as money received to the remitting bank's use.

4. **Banks and banking ⊜169—Bank fraudulently concealing collection is liable for expenses incurred by remitting bank.**

A bank, which collected a draft sent by another bank, but fraudulently concealed from the latter the fact that it had made a collection, is liable for the money expended by the bank sending the draft for collection in the storage and insurance of the goods covered by the bill of lading, which was delivered at the time the bank made the collection.

In Error to the District Court of the United States for the District of North Dakota; Joseph W. Woodrough, Judge.

Action by the United States National Bank of Portland, Or., a corporation, against the Scandinavian-American Bank of Fargo, N. D. Judgment for plaintiff, and defendant brings error. Affirmed.

The United States National Bank of Portland, Oregon, defendant in error, brought an action against the Scandinavian-American Bank of Fargo, plaintiff in error, on a complaint containing two causes of action—the first for $2,450.18 on the common count, as for money had and received for the use and benefit of the Portland bank, and the second for $906.35, for its damages as an action of deceit. There was answer, replication, jury regularly waived, and the court, after hearing the proof on both sides, made these special findings:

"1. That at all times mentioned herein the plaintiff was and now is a corporation organized and existing under and by virtue of the National Bank Act of the United States, and the amendments to each thereof, and engaged in the banking business in the City of Portland, Multnomah County, Oregon, and is a citizen, inhabitant and resident of the State of Oregon.

"2. That the defendant is a copartnership organized and existing under and by virtue of the laws of the state of North Dakota, with its principal place of business in Fargo, North Dakota, and is a citizen, resident and inhabitant of the State of North Dakota.

"3. That the amount in controversy between the parties, exclusive of interest and costs, exceeds the sum of three thousand dollars.

"4. That on or about the 16th day of October, 1916, F. C. Barnes Company, a corporation, made a draft upon one Lars Mikkelson then a resident of Fargo, North Dakota, for $2,450.18, and attached thereto a bill of lading for six hundred cases of canned salmon.

"5. That thereafter, and on or about the said 16th day of October, 1916, F. C. Barnes Company discounted said draft at the Lumbermen's National Bank of Portland, Oregon, and for a valuable consideration indorsed, transferred and assigned said draft and said bill of lading to the said Lumbermen's National Bank of Portland, Oregon, and the said Bank became the owner thereof.

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

"6. That on said 16th day of October, 1916, the Lumbermen's National Bank transferred from its loan funds to the checking account of F. C. Barnes Company, in payment for said draft and bill of lading, the sum of twenty-four hundred and fifty dollars and eighteen cents ($2,450.18), and credited to the F. C. Barnes Company, in their bank book, the sum of twenty-four hundred and fifty dollars and eighteen cents ($2,450.18); that the F. C. Barnes Company checked against said funds, and used them in the ordinary course of business.

"7. That thereafter and on or about the 16th day of October, 1916, the said Lumbermen's National Bank of Portland, Oregon, forwarded the said draft and bill of lading attached, to the defendant herein for collection, with instructions to deliver only upon payment of the draft.

"8. That thereafter, and on or about the 22d day of November, 1916, the said Lars Mikkelson paid to the said Scandinavian-American Bank the sum of $2,450.18, the amount of the aforesaid draft, and thereupon the said Scandinavian-American Bank delivered to the said Lars Mikkelson the aforesaid bill of lading.

"9. That there was no contract or agreement entered into between this plaintiff and the F. C. Barnes Company, that this plaintiff would not be responsible for the failure of the defendant to remit the moneys so collected, as above found.

"10. That upon the payment to this defendant by the said Lars Mikkelson of the sum of $2,450.18, as above found, the defendant, on November 22, 1916, prepared and placed in the United States mail a draft in said amount in favor of the Lumbermen's National Bank, and addressed to them at Portland, Oregon; that later, through the effect and at the request of this defendant, said draft was intercepted at Portland, Oregon, and returned to this defendant.

"11. That prior to paying to the defendant here the amount of the draft drawn on him by the F. C. Barnes Company, Lars Mikkelson made request of the Railway Company for permission to make inspection of the fish, and was given certain cans of the fish, as directed by him for that purpose, and the defendant received payment of the draft without any understanding as to further inspection.

"12. That the defendant Bank never at any time advised either this plaintiff or the F. C. Barnes Company, nor did either of them have any knowledge until after January 1, 1919, that the draft in question had in fact been paid by Mikkelson, and the bill of lading delivered to him; that on the contrary the defendant, on November 27, 1917, advised this plaintiff that said draft had been refused.

"13. That in January, 1917, the said Lumbermen's National Bank, believing that the said draft had not been paid, and that the said bill of lading had not been taken up, and that the salmon covered by the bill of lading had not been received or paid for by the said Lars Mikkelson, arranged with the said defendant Bank for the storage of the salmon in question, and paid the said defendant Bank, on or about the 8th day of February, 1917, the sum of $342.85, the freight on the said salmon from Portland, Oregon, to Fargo, North Dakota, and the sum of $63.50, the premium upon insurance obtained upon said salmon by the said defendant bank, and the said plaintiff bank became obligated in the sum of $525.55 on account of attorney's fees and cash expenses incurred in an action heretofore brought in this court against the said Scandinavian-American Bank, and the Union Transfer Company, to recover the full value of the said salmon, such action having been instituted, and such expenses having been incurred without any knowledge on the part of the said Lumbermen's National Bank or this plaintiff that the said draft had been paid, and the said bill of lading delivered as above set forth.

"14. That on or about 12th day of January, 1917, the Lumbermen's National Bank charged the account of F. C. Barnes Company the face of the draft in question, $2,450.18, and eighty days' interest, to-wit, $35.93. That said charge was made in the belief that the draft had been dishonored and without any knowledge that it in fact had been paid, and the bill of lading delivered.

"15. That the Barnes Company has, and has had, full knowledge of the bringing of this action, and consented to and approved the bringing of the same.

"16. That on or about the 15th day of September, 1917, the Lumbermen's National Bank of Portland, sold, assigned and transferred unto the plaintiff all of its assets, including all of its rights, claims and demands against the defendant herein, and the plaintiff is now the owner and holder thereof.

"17. I find that the action commenced in this court against this defendant, and the Union Transfer Company, and everything done by plaintiff, or the Barnes Company, subsequent to November 16, 1916, in connection with the fish in question, was done under the mistaken belief that the draft in question had not been paid, or the bill of lading delivered to Mikkelson, and that the same had been dishonored and not taken up; that the belief was created and existed because of the negligence and misconduct on the part of the defendant Bank and its failure to notify the Portland Bank of the fact, as heretofore found in that regard.

"18. I do further find that neither the plaintiff nor the Barnes Company have received from the defendant Bank the sum of $2,450.18 collected from Mikkelson, or any part thereof, nor have they received anything for the fish in question, from anybody, although due demand has been made upon this defendant.

"19. That prior to October 16, 1916, F. C. Barnes Company, of Portland, Oregon, sold to one Lars Mikkelson six hundred cases of canned salmon, by sample, and agreed that said Mikkelson should have the right to examine and inspect said canned salmon at Fargo, North Dakota.

"20. That said shipment of canned salmon was not according to sample and contract, but was inferior and cheaper; and that said Mikkelson, after he had made an examination and inspection of the canned salmon, which revealed that fact to him, sought to reject said salmon, and so wrote Barnes & Company; that said Barnes & Company, by its answering letter, indicated an acquiescence in Mikkelson's refusal to accept the salmon, and consented to Mikkelson's refusal to accept the shipment, and consented to a mutual rescission of the sale, all of which was done without knowledge of the fact of the collection of the draft by the defendant bank.

"21. That the defendant at all times held and retained the warehouse receipt which it obtained from the Union Transfer Company, and the insurance policy, as directed by the plaintiff.

"22. That on or about the 4th day of June, 1918, the plaintiff, the successor of said Lumbermen's National Bank, and as the assignee of said Barnes Company, the owner of said shipment of canned salmon, commenced an action in this court, against the defendant herein, the Scandinavian-American Bank, and said warehouseman, the Union Transfer Company, its alleged cause of action being based upon the ownership of said fish by said Barnes Company, and its right of possession thereof, and alleging that said Union Transfer Company, and the defendant in this action, without authority from said Barnes Company, or said Lumbermen's National Bank, unlawfully converted said fish to their own use and benefit, after the same were stored in said warehouse, and said warehouse receipt had been issued. That at the time of the commencement of this present suit said suit against said Union Transfer Company and the defendant therein was, and still is, pending and undetermined in this court and on the calendar for trial at the present term.

"23. That said Barnes Company did not make a formal demand of plaintiff that it reimburse them for the money charged to their account, as found by the court and did not formally advise the plaintiff bank that Barnes Company expected to hold the plaintiff for the payment of the same, but Barnes Company upon ascertaining that the draft had actually been paid at Fargo, to the Scandinavian-American Bank, went with such information to the officers of the United States National Bank, and was sent by that Bank to its attorneys, who instituted this action. The fair inference from the conduct of the Barnes Company, and the bank, is that there was a mutual recognition of obligation by the bank towards Barnes & Company.

"24. That on or about January 29, 1917, plaintiff instructed defendant to take a warehouse receipt for said salmon in the name of F. C. Barnes Company, and to insure said salmon, and to reimburse said Mikkelson for the amount of the freight on said shipment which had been paid by him, and to hold said

warehouse receipt and insurance policy for the plaintiff's account, all under the mistaken belief that the draft had not been paid.

"Conclusions of Law.

"1. That the plaintiff have and recover from the defendant the sum of $2,450.18, with interest at the rate of 6% per annum from November 22, 1916, and the further sum of $403.35, with interest at the rate of 6% per annum from February 8, 1917, together with its costs and disbursements to be taxed by the clerk.

"2. That the plaintiff is not entitled to recover the sum of $525, or any sum, in this action, as attorney's fees, and expenses incurred in the case of United States National Bank v. Scandinavian-American Bank and the Union Transfer Company."

The defendant below requested the court to make twenty-three additional findings of fact and eight conclusions of law therefrom, which were all denied.

A. W. Cupler, of Fargo, N. D. (B. G. Tenneson and Ed. Pierce, both of Fargo, N. D., on the brief), for plaintiff in error.

E. T. Conmy, of Fargo, N. D. (Platt & Platt, of Portland, Or., and Young, Conmy & Young, of Fargo, N. D., on the brief), for defendant in error.

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

LEWIS, District Judge, after stating the case as above, delivered the opinion of the Court.

[1] A comparison of the requested findings of fact by plaintiff in error with those made by the court, discloses that the former were, to a great extent, but a repetition of the substance of the latter, except as to matters which we deem immaterial to the issues; and that the requested conclusions of law which were attached to and followed them as claimed deductions, were grounds of asserted nonliability,—rescission, ratification and waiver when the storage arrangement was entered into, waiver and estoppel to claim the $2,450.18 of defendant, election of remedies by bringing the first action, and no damage. But from the facts found, indeed almost wholly admitted in the answer, it is established that the acts and conduct of plaintiff below on which rescission, waiver, ratification, estoppel and election of remedies is sought to be rested, were at a time when plaintiff was being fraudulently misled as to the true situation by the defendant Fargo bank, and which it succeeded in keeping covered up from the knowledge of the Portland bank until after January 1, 1919. Those defenses were therefore precluded.

[2] It is not claimed, nor argued, nor assigned as error, nor was objection made at the trial, that any of the findings made by the court is wholly without evidential support, nor that the court failed to make a material finding indispensable to the determination of liability under the issues. We can, then, go no farther than to inquire whether the facts found support the judgment, and whether during the progress of the trial there was error prejudicial to the plaintiff in error to which it saved exceptions. The E. A. Packer, 140 U. S. 360, 11 Sup. Ct. 794, 35 L. Ed. 453; Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329,

45 L. Ed. 457; Stanley v. Albany County, 121 U. S. 535, 7 Sup. Ct. 1234, 30 L. Ed. 1000; Syracuse Tp. v. Rawlins, 104 Fed. 958, 44 C. C. A. 277; Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515; Tiernan v. Insurance Co., 214 Fed. 238, 131 C. C. A. 284; Bank v. Watkins, 119 Fed. 545, 554, 56 C. C. A. 111.

[3] As to the first count, on collecting the $2,450.18 from Mikkelson the Fargo bank was at once obliged to remit to the Lumbermen's National Bank or the U. S. National Bank its successor, the two having become one by consolidation and reorganization, as alleged and admitted in the pleadings. That obligation has never been discharged by the Fargo bank, plaintiff in error, by any one acting for it. When it received the draft on Mikkelson for collection and collected it, the law implied a promise on its part to remit the amount collected less its reasonable charges. The parties thence stood in a contractual relation, and the plaintiff below was the proper party to bring and maintain this action. No one else could do so. It is the only party interested in the subject-matter of this action and a recovery of the money collected for it. 15 Encyc. Pl. & Pr. p. 502, note.

[4] As to the second count, from the special findings it appears that while the plaintiff below was laboring under the mistaken belief that Mikkelson had not paid its draft on him, created by the false and fraudulent acts and representations of the Fargo bank, it sent to the Fargo bank $406.35 which it was induced to do by said fraudulent conduct, and it incurred a liability for $525.55 in bringing and prosecuting the first action it brought while it was being so misled; and there is no finding that any of those amounts have been returned or paid to it. It thus appears that it has been damaged in the sum of $931.90 by the fraudulent acts and representations of the Fargo bank, which amount it was entitled to recover on the second count.

Twenty assignments of error are directed to the admission and exclusion of evidence. They have been examined and considered, and we regard none of them as prejudicial to the rights of plaintiff in error.

Affirmed.

VICTOR TALKING MACH. CO. v. KEMENY.

(Circuit Court of Appeals, Third Circuit. March 4, 1921.)

No. 2602.

1. **Monopolies ⇐17(1)—Contracts fixing prices for resale of article unlawful.**
An attempt by the manufacturer of a patented article, by means of a system of so-called license contracts, which wholesale and retail dealers were required to sign, to control the resale price of such article after it had sold and received payment for the same, and after such article, under the law as settled by prior decisions of the Supreme Court, by reason of such sales, had been freed from the patent monopoly, *held* an unlawful restraint of trade, in violation of Anti-Trust Act, § 1 (Comp. St. § 8820).

2. **Monopolies ⇐17(2)—Combination to prevent dealer from obtaining goods unlawful.**
An agreement or combination between the manufacturer of certain articles and the wholesalers or distributors handling the same not to

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

sell any of such articles to a retail dealer *held* unlawful as a restraint of trade in violation of Anti-Trust Act, § 1 (Comp. St. § 8820).

3. Monopolies ⟸28—Profits cannot be measured by those made under illegal contract.

Damages for loss of profits by a retail dealer in certain articles, resulting from an illegal combination between the manufacturer and wholesale dealers in such articles, which prevented him from obtaining the same, cannot be measured by his profits from their sale at prices fixed by the manufacturer under a previous contract which was unlawful.

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

Action at law by Louis Kemeny against the Victor Talking Machine Company. Judgment for plaintiff, and defendant brings error. Affirmed, on condition of filing of remittitur by plaintiff.

James M. Beck and Frank L. Crawford, both of New York City, John D. Myers, of Camden, N. J., William H. Griffin, of New York City, and Louis B. Le Duc, of Camden, N. J., for plaintiff in error.

Joseph E. Stricker, of Perth Amboy, N. J., and Frederick M. P. Pearse, of Newark, N. J., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

WOOLLEY, Circuit Judge. Louis Kemeny brought this action against Victor Talking Machine Company to recover damages, treble in amount, for injury done his business in violation of the Sherman Anti-Trust Law (Comp. St. §§ 8820–8823, 8827–8833). Before determining what were the issues in the case and whether in their trial error was committed, we shall state the course of the defendant's business out of which the controversy arose and review very briefly some decisions which bear on its lawfulness.

Speaking of the parties as they stood in the court below, the defendant is a manufacturer of talking machines and accessories made and sold under many patents. It marketed its products primarily through wholesalers, who were called "Distributors," and secondarily, through "Retail Dealers," who secured the products from the distributors. The plaintiff had been a retail dealer.

With members of each of these classes of dealers the defendant had separate contracts called "License Contracts" and in addition it affixed a notice, called a "License Notice," to each of its products. By the license contract with distributors the defendant disposed of its wares to them upon payment in full of list prices, with certain stipulated restrictions, among which was one that they should sell only to licensed dealers and then only at named prices.

The license contract with dealers provided for the purchase of the defendant's wares only from licensed distributors, similarly restricting them with reference both to purchase prices and resale prices.

The license notice which the defendant affixed to a machine before it started to the public through the channels of so-called licensed distributors and licensed dealers declared that the machine was manufactured

under patents and was licensed in the hands of the ultimate purchaser for the term of that patent having the longest time to run and was to be used only with accessories manufactured by the defendant; that the distributor's only right to use the machine was for demonstrating purposes, assignable to retail dealers and the public; that the right which the ultimate purchaser should have in the machine was only the right to use it; that the title thereto shall remain in the defendant with a right to repossess it upon breach of any of the conditions of the notice; and that "any excess use, or violation of the conditions, will be an infringement of the said patents." Straus v. Victor Talking Machine Company, 243 U. S. 490, 494, 495, 37 Sup. Ct. 412, 413 (61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955).

The defendant had outstanding several hundred license contracts with distributors, many thousand with retail dealers, and innumerable license notices. It is not seriously denied that the defendant's purpose in formulating and putting into effect this method of doing business was the fixation of selling prices of Victor products from distributor to dealer and from dealer to the public under the defendant's conception of the monopoly created and awarded it under the patent law. But as later determined, the defendant's conception of its rights and its belief in the legality of its conduct were, all the while, wrong.

The main fact on which the law touching the validity of the defendant's conduct turned was the transaction by which the defendant initially disposed of its products to licensed distributors. However termed, these contracts were and subsequently have been held to be contracts of sale, and on payment of the contract price and delivery of the machine paid for, the distributor, and, later on, the retail dealer, became a purchaser and thereafter was entitled to dispose of it as his own. The question which ran through the cases involving similar transactions concerned the right of the seller to follow the patented commodity (sold through a primary purchaser and in some instances through a secondary purchaser) to the ultimate purchaser and to control its price at all times.

The first pronouncement by the Supreme Court bearing on the subject, of which we are informed, was made in 1873 in the case of Adams v. Burke, 17 Wall. 453, 21 L. Ed. 700. There it was said:

> "The right to manufacture, the right to sell, and the right to use are each substantive rights, and may be granted or conferred separately by the patentee.
>
> "But, in the essential nature of things, when the patentee, or the person having his rights, sells a machine or instrument whose sole value is in its use, he receives the consideration for its use and he parts with the right to restrict that use. The article, in the language of the court, passes without the limit of the monopoly. That is to say, the patentee or his assignee having in the act of sale received all the royalty or consideration which he claims for the use of his invention in that particular machine or instrument, it is open to the use of the purchaser without further restriction on account of the monopoly of the patentees."

With one exception, the Supreme Court has consistently followed this rule of the patent law.

The next case in point of time and importance was Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502, decided in 1911. There the manufacturer of proprietary medicines, to prevent their sale at cut prices, undertook to govern directly the entire trade in the medicines of its make. To do this it adopted two forms of restrictive agreements limiting trade in the articles to those who became parties to one or the other. With marked resemblance to the defendant's contracts, one sort of contract was known as "Consignment Contract—Wholesale," having been made with several hundred wholesale dealers; and the other described as "Retail Agency Contract," having been made with many thousand retail dealers. One issue turned on the character of the consignment contract, it being contended that it contemplated "a true consignment for sale for account of the complainant." The trial court however regarded the contract merely as an effort "to disguise the wholesale dealers in the mask of agency" and held that the purchaser acted in his own capacity, and that the transaction was one of sale. Being of the same opinion the Supreme Court held that the contract in effect eliminated all competition, established the amount which the consumer should pay and therefore constituted a restraint of trade, violative of the Sherman Anti-Trust Act.

Then came Henry v. Dick Company, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880, sustaining the claimed right of a patentee to follow the patented machine into the hands of a purchaser and to restrict its use except in connection with prescribed unpatented articles. While confusion may have arisen from this decision and from the fact that subsequently it was overruled, its pertinency to this case bears mainly on the license notice attached to the machine, and on that part of the license contracts which permitted the use of the machines only in connection with other Victor products. The decision did not sanction the features of the defendant's contracts by which it sought to restrain competition and regulate the sale prices of its commodities as they passed from distributing purchaser to ultimate consumer.

The defendant in the instant case insists, however, that the main terms of the offending contracts were framed after the pronouncement and on authority of the law of Henry v. Dick. But it happened that before these contracts went into effect the case of Bauer & Cie. v. O'Donnell, 229 U. S. 1, 33, Sup. Ct. 616, 57 L. Ed. 1041, 50 L. R. R. (N. S.) 1185, Ann. Cas. 1915A, 150, was decided. In that case also the patentee sought to follow the patented article into the hands of the public, and, by "Notice to Retailer" on each package, to impose a condition as to price, violation of which it regarded as infringement. The Supreme Court distinguished that case from Henry v. Dick, and, quoting from Adams v. Burke the rule to which we have adverted, held:

> "A patentee may not by notice limit the price at which future retail sales of the patented article may be made, such article being in the hands of a retailer *by purchase* from a jobber who *has paid* to the agent of the patentee the full price asked for the article sold."

The decision in Bauer v. O'Donnell was rendered in May, 1913. It was in August following (and more than a year after the decision in

Henry v. Dick) that the defendant, with the law of Bauer v. O'Donnell before it, framed and put into effect the license agreements in dispute.

On April 9, 1917, the Supreme Court handed down a decision in Straus v. Victor Talking Machine Co., 243 U. S. 490, 37 Sup. Ct. 412, 61 L. Ed. 866, L. R. A. 1917E, 1196, Ann. Cas. 1918A, 955, reversing Victor Talking Machine Co. v. Strauss, 230 Fed. 449, 144 C. C. A. 591.

This action was brought by Victor Talking Machine Company, the present defendant, against Straus and others for infringement of its patents in acquiring Victor products from sources other than licensed dealers and disposing of them to the public contrary to the conditions of the attached license notices. In the prosecution of this suit, the Victor Company set forth in its bill of complaint its entire scheme of operation. The plaintiff in the case at bar availed himself of the bill of complaint in that suit by introducing it in evidence against the defendant here in proof of its business conduct. The trial court in Victor Talking Machine Co. v. Strauss referred to the case as presenting—

"the familiar one of the manufacturer of a patented article undertaking to extend its use and at the same time regulate the terms and conditions under which it shall be used. It seeks to accomplish this in part by a written contract entered into between itself and every so-called licensed dealer to whom it delivers the possession of instruments or records. This need not be recited, as in substance it is the same as a so-called 'license notice' which is attached to a conspicuous part of every machine."

The notice, embodying the substance of the contracts, was then given in full.

The defendant insists that the decision on appeal in Straus v. Victor Talking Machine Company, being an action of infringement relating solely to the validity under the patent law of the license notice, has no bearing on the instant case where the license contracts, it alleges, are involved as violative of the Anti-Trust Law. We think however that Straus v. Victor Talking Machine Co., as decided by the Supreme Court, has a bearing on some aspects of the case before us.

After reciting the several license contracts and the license notice resorted to by the defendant further to control its patented products in the hands of the ultimate purchaser, the Supreme Court said:

"First of all it is plainly apparent that this plan of marketing adopted by the plaintiff is, in substance, the one dealt with by this court in Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, and in Bauer v. O'Donnell, 229 U. S. 1, adroitly modified on the one hand to take advantage, if possible, of distinctions suggested by these decisions, and on the other hand to evade certain supposed effects of them."

In the conclusion of the opinion, holding that the monopoly of use granted by the patent law cannot be made a means of controlling the prices of patented articles after they have been in reality, even though not in form, sold and paid for, the court rested its decision on Adams v. Burke and Bauer v. O'Donnell, which seemingly it regarded always to have been the law, by saying:

"Convinced as we are that the purpose and effect of this 'License Notice' of plaintiff, considered as a part of its scheme for marketing its product, is not to secure to the plaintiff any use of its machines, and as is contemplated by the patent statutes, but that its real and poorly-concealed purpose is to re-

strict the price of them, after the plaintiff had been paid for them and after they have passed into the possession of dealers and of the public, we conclude that it falls within the principles of Adams v. Burke, 17 Wall. 453, 456, and of Bauer v. O'Donnell, 229 U. S. 1; that it is, therefore, invalid."

On the day of its decision in Straus v. Victor Talking Machine Co., the Supreme Court decided Motion Picture Patents Co. v. Universal Film Co., 243 U. S. 502, 37 Sup. Ct. 416, 61 L. Ed. 871, L. R. A. 1917E, 1187, Ann. Cas. 1918A, 959, overruling Henry v. Dick, 224 U. S. 1, 32 Sup. Ct. 364, 56 L. Ed. 645, Ann. Cas. 1913D, 880.

Later, the case of Boston Store of Chicago v. American Graphophone Co., 246 U. S. 8, 38 Sup. Ct. 257, 62 L. Ed. 551, Ann. Cas. 1918C, 447, involving a price-fixing contract under the patent law was decided. In that case the Chief Justice, speaking for the court, gave its interpretation of its previous decision in Straus v. Victor Talking Machine Co. as follows:

"The right to fix a permanent marketing price at which phonographs should be resold *after they had been sold by the patentee* was considered. Basing its action upon the substance of things, and disregarding mere forms of expression as to license, etc., the court held that the contract was obviously in substance like the one considered in the Miles Medical Case and *not different from the one which had come under review in Bauer v. O'Donnell.* Thus brushing away disguises resulting from forms of expression in the contract, and considering it in the light of the patent law, it was held that the attempt to regulate the future price or the future marketing of the patented article was not within the monopoly granted by the patent law, in accordance with the rule laid down in Bauer v. O'Donnell."

Also in reviewing its decision in Motion Picture Patents Co. v. Universal Film Manufacturing Co., supra, the court gave its construction of that case by saying:

"It required once again a consideration of the doctrine which had been previously announced in Henry v. Dick Co. and of the significance of the monopoly of the right to use, conferred by the patent law, which had been reserved in Bauer v. O'Donnell. Comprehensively reviewing the subject, it was decided that the rulings in Bauer v. O'Donnell and Straus v. Victor Talking Machine Co. conflicted with the doctrine announced and the rights sustained in Henry v. Dick Co., and that case was consequently overruled. Reiterating the ruling in the two last cases, it was again decided that, as by virtue of the patent law, one who had sold a patented machine and received the price, and had thus placed the machine so sold beyond the confines of the patent law, could not, by qualifying restrictions as to use, keep under the patent monopoly a subject to which the monopoly no longer applied."

Thus the court again held to the rule of Adams v. Burke, supra, as followed through Bobbs-Merrill Co. v. Straus, 210 U. S. 339, 28 Sup. Ct. 722, 52 L. Ed. 1086; Dr. Miles Medical Co. v. Park & Sons Co., supra; Bauer v. O'Donnell, supra.

[1] We have reviewed the decisions at this length in order to make it clear that the business arrangement by which the defendant marketed its products, involving a sale to so-called licensed distributors with restrictions on their use and resale price, was unlawful; and also in order to meet the defendant's contention that even if the arrangement were unlawful it was justified under the authority of the Supreme Court and that such arrangement did not become culpably unlawful until that court changed the law by overruling its previous decision and established

with finality that where a patentee sells his product he exhausts his monopoly right. This law we regard as having been established by the Supreme Court as early as Adams v. Burke (1873). If disturbed by the decision in Henry v. Dick, the rule of Adams v. Burke was later reaffirmed in Bauer v. O'Donnell, at a time before the contracts in question were put into force. The defendant's marketing arrangement was therefore unlawful.

Coming to the facts, this case was tried and on this writ of error it was argued on wholly opposite conceptions of the issues involved. Whether error was committed in the trial depends accordingly on the question whether the learned judge tried the case on the right issues. If he did not, there was fundamental error; if he did, then error, if any, was only incidental. Therefore we must first find what were the issues,—that is, what was the case about?

The plaintiff had for several years been a licensed retail dealer under the usual form of the defendant's license contracts for the sale of Victor products. His contract required him to purchase from a licensed distributor and to sell to the public only at list prices. He violated his contract by buying from a licensed distributor at less than list prices and selling to the public at cut prices. On discovering this, the defendant informed the plaintiff that he could no longer purchase Victor products either from the Company direct or from its distributors, and on March 19, 1917, cancelled the contract. Thereafter the plaintiff brought this suit for conduct of the defendant destructive of his business and violative of the Sherman Anti-Trust Law. The defendant tried the case on the theory that—using the language of its brief—"the actionable wrong of which Kemeny complains was committed on March 19, 1917, when he was suspended as a retail dealer and as such cut off from his supply of Victor goods." On this conception of the issue, the defendant made several defenses:

First, that under the terms of the contract, though unlawful, the defendant had a right to cancel it. As no one questioned this right, it figured little in the case.

Second, that the arrangement, involving license contracts and license notices, by which the defendant sought to retain price control of its patented products throughout the terms of the patents, was valid; or, if not, it was justified under Henry v. Dick until the law in that case was overruled twenty-one days following the date of the cancellation of the contract. Having already passed upon the last two contentions, we go to the next, which is:

Third, that assuming the business system or combination established by the defendant for the sale of its products was in violation of the Sherman Anti-Trust Law, the plaintiff, having been a part of the system or combination and thereby having participated in the violation of the law, cannot be heard to complain of injury to his business resulting therefrom. If we were to find as the defendant assumes that the cause of action is based on conduct involved under the contract of license with the plaintiff, concluding with its cancellation, we should not hesitate to hold that the plaintiff was as guilty as the defendant in violating

the law, and that the principle on which Bluefields Steamship Co., Limited, v. United Fruit Co., 243 Fed. 1, 155 C. C. A. 531, was decided would apply to him and preclude recovery. In pari delicto potior est conditio defendentis.

Fourth, if the conduct which the defendant considers to be the substance of the plaintiff's complaint consisted merely in requests by the defendant to its distributors, even though they were vendees, to adhere to list prices, and in its refusal to sell to those who would not so promise, we should take the defendant's view and regard the law of United States v. Colgate, 250 U. S. 300, 39 Sup. Ct. 465, 63 L. Ed. 992, 7 A. L. R. 443, as applicable. But the law of that case,—which in United States v. Schrader, 252 U. S. 85, 99, 40 Sup. Ct. 251, 64 L. Ed. 471, was clearly shown not to overrule or modify that of Dr. Miles Medical Co. v. Park & Sons Co.,—applied to a situation where the defendant was not charged to have made "agreements" which limited the future use of commodities sold and which bound vendees to observe specified resale prices. There was in that case no evidence of a purpose to maintain a monopoly and restrain trade by means of restrictive agreements. In a word, all that was done by the decision in the Colgate Case, as we read the opinion, was to preserve a producer's right of freedom to trade—lawfully. It has been decided that the defendant's method of trade was unlawful.

The plaintiff's theory of the wrong done him by the defendant, and of the issues of the case as pleaded (and later proved), were directly the opposite of those entertained by the defendant. In his bill of complaint, he recited the course of the defendant's business; averred that, in February, 1917, the defendant informed him that he could get no more Victor products, and, at or about the same time, forbade its distributors and dealers to sell products to the plaintiff under penalty of having their own supply cut off. Having later proved the cancellation of the contract as of March 19, 1917, the plaintiff further averred in his bill:

"That since April 9, 1917 (the date of the decision by the Supreme Court of Straus v. Victor Talking Machine Company and Motion Picture Patents Co. v. Universal Film Mfg. Co.), and for no good reason or cause whatever, the defendant by its agents, officers and distributors has refused to sell to the plaintiff any of the Victor articles," etc.

charged that these acts of the defendant "were and are for the purpose of restraining trade, preventing competition and controlling and maintaining prices contrary to" Federal statutes; and alleged damage to his business in an amount named. It thus appears that the issues of this case as regarded by the defendant involved its conduct at and before the cancellation of the contract; and that the issues as pleaded, and later proved, by the plaintiff concerned conduct of the defendant after the cancellation of the contract. This distinction the learned trial judge grasped at the very beginning of the trial and to it he firmly held throughout the trial in all his rulings on evidence and instructions on the law.

[2] Paraphrasing the opinion, he told the jury, that the agreements were sales agreements which entitled the plaintiff on paying for and receiving goods to dispose of them as he saw fit; that the agreements were unlawful; that, when acting under them, both the plaintiff and defendant were alike guilty of violating the law; and that for an injury arising out of their mutual conduct neither one could obtain legal redress against the other. Continuing he said:

"However, the cause of action is not founded on those agreements; it is based on something which the plaintiff alleges took place after the agreements were terminated, which the defendant did, as it had a right to do, on March 19, 1917,"

instructing the jury specifically that, if the defendant did nothing more than cancel the agreement, there would have been no cause of action, but directing their attention to evidence that, in addition to cancelling the dealer's agreement, the defendant entered into a combination, or agreement, or conspiracy, or some kind of an understanding with its distributors that they should not sell to the plaintiff any of its goods nor fill any of the plaintiff's orders previously placed. Continuing the court said to the jury: If that is proven, the plaintiff has made out a cause of action, noting that it makes very little difference what may have transpired before March 19, 1917. That the cause of action is the understanding of the defendant with one or more of its distributors, seeking to prevent and actually preventing the defendant from getting goods. "If that has been proven in the case, there is a cause of action; if that has not been proven in the case, that is an end to the inquiry and you dismiss everything else from your minds and find a verdict for the defendant."

We think the learned trial judge found the true issue in the case and stated it with admirable clarity.

Evidence of the defendant's acts after the cancellation of the contract, whereby it induced distributors and dealers from filling the plaintiff's orders already given and thereafter from selling him Victor products which such distributors had purchased and which they owned and were free to sell under the construction given the license agreements and license notices, was introduced, and was sufficient, we think, to sustain the finding by the verdict that they were violative of the Sherman Anti-Trust Law and also to sustain the finding of damage to the plaintiff—if the court's instructions on the measure of damages were proper.

The damages which the plaintiff claimed he had sustained by reason of the defendant's unlawful acts were of two kinds: First, loss of anticipated profits, and second, loss in disposing of his stock in hand when shut off from obtaining more Victor products. The court by separate instructions charged the jury with reference to the measure applicable to damages of each kind.

[3] On the measure of damages for loss of anticipated profits, as charged by the court, the defendant specified three errors, two having to do with instructions requested and refused and one with the instruction given. The instruction which the court gave permitted the jury,

in ascertaining the plaintiff's damages for loss of anticipated profits, to resort to evidence of profits he had made in his business as retail dealer of Victor products when he was a member of the defendant's unlawful business system. The two instructions which the defendant requested were framed along the line of its understanding of the issue as centering on the cancellation of the contract and, when read together, were in substance as follows:

"The plaintiff may not use the earnings or profits which he made out of Victor goods prior to March 19, 1917," "in the course of a violation of law or in a business system which was unlawful," "as a measure of the damages which he claims to have suffered by the interruption of his business on or about that date, because he was a willing party to the system" and participated in its profits.

We are of opinion that the learned trial judge made no error in refusing these instructions as framed, for, if given as requested, they might have mistakenly led the jury to issues of the case, regarded by the defendant as involving its conduct before and at the time of the interruption of the plaintiff's business by the cancellation of the contract. Yet it is possible to construe the "interruption" referred to as occurring by the defendant's conduct after the cancellation of the contract. In any event we are constrained to hold that the learned trial judge fell into error when he permitted the jury to find damages by way of unrealized profits from evidence of profits which the plaintiff had made when engaged with the defendant in an unlawful business. Profits which the plaintiff could anticipate if he had been permitted to go on and sell Victor products were only such as he could earn lawfully in a competitive market. Such profits can not, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition, and create monopoly.

As to the measure of the plaintiff's second ground of damages, arising from the sale of his stock under the forced disadvantage of being unable to round it out by the purchase of more goods, the defendant made no request for instructions except under its erroneous theory of the action; and with reference to this element of damages assigned no error in the instruction which the court gave.

If, however, any one of the many assignments of error can be construed as bearing on this second ground of damages, we hold after careful consideration that the court's instruction with reference to it was not affected by error.

On the two instructions as to damages—loss of anticipated profits and loss incident to sale of stock on hand—the court submitted the case and the jury rendered a verdict for the plaintiff (first trebling damages) in the amount of $2,000.00. If that were all the jury did, it would manifestly be impossible for this court to find on what evidence the jury based its verdict—whether on that relating to loss of profits or on that concerning loss on sale of stock—and there being error in the instruction with reference to the first, the judgment would have to be reversed and the case retried. But the jury, following carefully the separate instructions of the court on the two kinds of damages, did a quite un-

usual thing. It showed how it made up its verdict for the plaintiff for $2,000.00 by rendering the verdict in the following form:

"Allowance for profits lost (trebled).....$1,000.00
Allowance for damages (trebled).....$1,000.00

Making a total of .....$2,000.00"

As the jury distinguished between the two elements of damages by returning a separate finding upon each, we can readily separate the finding in which error was involved from the one which was free from error. And this we do. Therefore we affirm the judgment, provided, however, the plaintiff file a remittitur for $1,000.00, the amount found by the verdict "for profits lost," thus in effect leaving the judgment stand on the verdict "for damages." Otherwise the judgment is reversed and a new trial ordered.

J. C. SHAFFER & CO. v. WEST TENNESSEE GRAIN CO.

(Circuit Court of Appeals, Sixth Circuit. February 16, 1921.)

No. 3484.

1. **Sales ⟸89—Extension after expiration of time for delivery not without consideration.**
   A contract for sale of grain to be delivered during a stated month, which provided: "If this contract, or any part of it, expires without being filled, take up disposition of balance with buyer by wire, phone, or letter. Buyer reserves right to accept or reject cars shipped after contract expires"—gave the buyer the right at his election to waive a breach by failure to deliver within the month, and an agreement made after expiration of the month extended the time for deliveries *held* not without consideration.
2. **Sales ⟸182(1)—Whether buyer first breached contract held for jury.**
   Where, in an action by the purchaser for breach of a contract for the sale and delivery of grain, defendant pleaded as an excuse for failure to deliver or tender delivery that plaintiff had repudiated the contract, such defense raised an issue of fact for the jury.
3. **Appeal and error ⟸1066—Trial ⟸253(6)—Instruction as to weight of evidence erroneous and prejudicial, as ignoring other evidence.**
   An additional instruction, given to a jury which was in disagreement, stating that there were two disinterested witnesses whose testimony tended to support the contention of defendant, and that if the jury believed them they would be warranted in finding the weight of evidence to be in favor of defendant, which was immediately followed by a verdict for defendant, *held* erroneous and prejudicial, as in effect requiring the jury to ignore all other evidence on the issue.

In Error to the District Court of the United States for the Eastern Division of the Western District of Tennessee; John E. McCall, Judge.

Action at law by J. C. Shaffer & Co. against the West Tennessee Grain Company. Judgment for defendant, and plaintiff brings error. Reversed.

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

C. G. Bond, of Jackson, Tenn., and Chas. V. Clark, of Chicago, Ill. (Bond & Bond, of Jackson, Tenn., and Jeffery, Campbell & Clark, of Chicago, Ill., on the brief), for plaintiff in error.

Geo. T. McCall, of Huntingdon, Tenn. (George T. McCall, of Huntingdon, Tenn., T. O. Morris, of Union City, Tenn., and W. S. Draper, of Dyersburg, Tenn., on the brief), for defendant in error.

Before KNAPPEN, DENISON, and DONAHUE, Circuit Judges.

DONAHUE, Circuit Judge. The action in the District Court was brought by the plaintiff in error, J. C. Shaffer & Co., to recover damages for breach of two separate contracts for the sale and delivery of 10,000 bushels and 5,000 bushels, respectively, of No. 3 corn at $1.30 per bushel, to the plaintiff at Chicago, in October 1917. The defendant, for answer, among other things, averred as part of its fourth defense that on the 7th day of November, 1917, the plaintiff and defendant entered into a further agreement by the terms of which the time for delivery of this corn was extended to include November, 1917. Delivery to be made at Memphis, Tenn., instead of Chicago, Ill. The plaintiff by reply denied that it, or any one authorized to act in its behalf, made or entered into any agreement to alter or change the original contract, and also averred that there was no consideration to support such a contract.

There were other issues joined by the pleading, but the court disposed of these issues and submitted to the jury the sole question of whether Mr. Hirschy, representing the plaintiff, did or did not on the 7th day of November, 1917, make or enter into any contract or agreement with the defendant extending the time of shipment to include the month of November, 1917. Upon this issue the jury found for the defendant. Motion for a new trial was overruled, and judgment entered upon the verdict.

It is insisted upon the part of the plaintiff in error that the court erred in submitting to the jury the question of the making of this supplemental agreement extending the time of delivery, for the reason that at the time this agreement was claimed to have been made the defendant had already breached its contracts of August 28, 1917, and its liability to this plaintiff for damages had already accrued; that for this reason, if any such agreement was made, it must be based on a new consideration; that there is no pretense or claim on the part of the defendant, nor is it shown by any evidence, that any consideration whatever for this new contract passed from defendant to plaintiff, nor was any consideration agreed to be paid to the plaintiff by the defendant; that at most it was but an attempt at an accord and satisfaction, and, never having been executed in whole or in part, and no performance by the defendant ever having been made or tendered, it is but an accord without satisfaction, and is no defense to plaintiff's action on the original contract.

[1] It is provided in each of these contracts that:

"If this contract, or any part of it, expires without being filled, take up disposition of balance with buyer by wire, phone, or letter. Buyer reserves the right to accept or reject cars shipped after contract expires."

It would appear from this provision that it was clearly within the contemplation of the parties that the buyer might elect to waive the breach for failure to deliver in October and accept later deliveries. It further appears from the telegrams in evidence that under this provision in the contract the buyer by telegram did offer, in effect, to waive the breach and accept delivery up to and including the 8th of November. This proposition was not accepted by the seller, but interchange of telegrams in reference thereto continued up until late on the 6th of November, when Mr. Hirschy, representing the plaintiff, left Chicago and reached the defendant's place of business at Obion early the next morning, so that it cannot be said that at the time he reached Obion and conferred with the president of the defendant company and Mr. Fox, who it appears is jointly interested with the defendant in these contracts, that the plaintiff had definitely elected, under this provision of the contract giving him the right to elect, whether it would or would not waive the breach and receive later shipments. For this reason we are of the opinion that, if this contract was made as claimed by the defendant, it amounted merely to an extension of time for delivery under the original contract, and that the promise to deliver in November was a sufficient consideration for the agreement to accept deliveries in that month.

There is also evidence in this record tending to show that there was some difficulty in obtaining this grade of corn upon the open market; that the price of corn was rapidly advancing; that in all probability the price would be much higher later in November than the market price on the last day of October, or in the early days of November, when these negotiations were pending. From this evidence the jury might reasonably conclude that it would be more to the advantage of plaintiff to have this corn delivered to it in November than to receive payment of damages based upon the difference in the contract price and the market price at the time the contract was breached; or the jury might have reached the conclusion from this evidence that the defendant would suffer greater loss by delivering in November than by payment of damages for the breach of this contract, which additional loss it was willing to assume and pay in recognition and discharge of its obligation to furnish this amount of corn to the plaintiff under the further terms of this contract. United Steel Co. v. Casey (C. C. A.) 262 Fed. 889–892.

[2] In order to establish this contract, however, it would not be sufficient to show that during the course of these negotiations between Mr. Hirschy, representing the plaintiff, and Mr. Parks, representing the defendant, they tentatively agreed upon an extension, which tentative agreement, in the same conference, or in an adjourned session of that conference, was finally abandoned. On the contrary, the burden was upon the defendant to establish by the preponderance of the evidence that the minds of the parties met on each material provision of this contract, and particularly as to time and place of delivery, and that each party thereto had fully and finally consented to all its terms without intention, purpose, or necessity of further negotiations and without the intention and purpose that these terms discussed by them

at this meeting should be reduced to writing and signed by the respective parties thereto before it should become binding upon either. Nor does it necessarily follow that the plaintiff should not have recovered in this action, even though the jury found that this contract of extension was made, notwithstanding the averment in the declaration that the corn was to be shipped by defendant to plaintiff in the month of October, 1917, and damages are asked for the failure of the defendant to deliver in that month, if the evidence further shows that no delivery was made or tendered in November. Any agreement for the extension of time is merely supplemental to the original contract, and must be construed in connection therewith, the same as if it had been originally written into that contract.

If this defendant understood that a final agreement had been reached extending the time for delivery to include the month of November, and it relied upon that contract as a modification of the original contract, then it became the duty of the defendant to ship the corn within the month of November. This it did not do, nor is there any evidence that it tendered delivery, although there is evidence that it then had the corn ready for shipment. It is averred in the answer that—

"within a few hours after this contract for extension of time for delivery was made, the plaintiff repudiated the same, and notified defendant that it would go upon the market in Chicago and buy corn to fill the contract; that defendant immediately advised plaintiff that it was ready, able, and willing to abide by the contract which they had just made to ship this corn to Memphis by November 30, 1917; and that it would not in any way be responsible for the purchase of this corn upon the open market, and thereupon negotiations came to an end."

It appears from the evidence that negotiations came to an end when Mr. Parks, representing the defendant, signed a written memorandum of agreement, prepared in part by Mr. Buxton and in part by Mr. Morris, attorney for the defendant, and tendered the same to Mr. Hirschy for his signature, at the depot, at the time Mr. Hirschy was leaving Obion. It does not appear that anything further was said or done by the parties at that time, nor did the defendant at any time thereafter perform or tender performance. The telegram of November 6th, in which the defendant refused to allow purchase on open market to be charged to its account, cannot be taken into consideration as affecting the question of delivery under the alleged contract of November 7th, nor can the evidence in reference to the two cars, the bills of lading of which were changed prior to November 7th, from plaintiff to some other purchaser, or the reason for such change be offered as an excuse for nonperformance on the part of defendant of the alleged supplemental contract made after that time. The question, therefore, as to whether the conduct of the plaintiff excused defendant from making the delivery in accordance with the alleged supplemental contract was at least a question for the jury, and should have been submitted to the jury in connection with the question as to whether such contract had in fact been made.

[3] The fourth assignment of error raises by far the most important question in this case. It appears from the record that:

"The jury, having retired, was called into court on the late afternoon of the 4th and reported that they were unable to agree. They were thereupon respited until the following morning, the 5th, when they resumed the consideration of the case, when about 10:30 o'clock they were called into court and asked by the judge whether they had agreed upon their verdict they stated they had not. The court then asked them whether they disagreed as to anything in his charge. They announced that they did not. He then asked did they disagree as to any evidence, or what any witness stated, and they stated they did not. He then asked did they disagree as to what weight should be given to the witnesses' evidence, and one or two of the jurors announced that 'you might consider that they did.' Thereupon the court charged the jury as follows:

"It may be that the jury did not fully understand the court's charge relating to weighing the evidence, and, since it is desirable that you arrive at a verdict, I take the liberty to repeat in substance what I said to you on that subject. You are instructed that defendant's liability must turn on whether it sustained by the greater weight of the evidence its special plea in which it is averred that Mr. Hirschy, on November 7th, modified the terms and extended the time as to when and where the corn might be delivered.

"There were five witnesses testified in support of the defendants' plea and one against it. Ordinarily, the greater weight of the evidence is not necessarily determined by the greater number of witnesses. But where, as in this case, the witnesses on both sides were unimpeached, and where all of them appear to have had an equal opportunity to know the facts about which they testified, and all appear to be men of equal intelligence, and where only two of such witnesses appear to have no material interest in the result of the case, and the testimony of these two tends to support the contention of the defendants, if you believe the evidence of such two witnesses you would be warranted in finding that the greater weight of the evidence is in favor of defendants' special plea, and such a finding would justify a verdict for the defendant."

It later appears in the record that the jury then retired and in a very short time returned into court and announced that "we find the issues in favor of the defendant." It is clear, therefore, that the verdict of the jury was a quick response to this additional charge, and that, if erroneous, it was beyond question prejudicial to the plaintiff. In giving this charge the court made a mistake of fact, in that the testimony of only one disinterested witness, instead of two, as stated by the court, tended to support the contention of the defendants. This fact as to but one disinterested witness had been properly stated by the court in its original charge, and the jury's attention called to that witness by name. The court in giving this charge also overlooked the fact that Mr. Buxton, a broker, had testified on behalf of the plaintiff. It does not appear that he was an interested witness, in that he had any financial interest in the litigation. He was, perhaps, interested in the proper performance of the contract he had negotiated between the parties; but he could not be said to have a material interest in the controversy. Whether his conduct and his testimony evidenced any friendship or prejudice for or against either of the litigants was a question for the jury to determine. That is also true in reference to the testimony of Mr. Fleming, who had testified on behalf of the defendant, and who likewise had no material interest in the result of the trial. While Mr. Buxton was not present at the time it is now claimed this agreement to extend the time of delivery was made, yet what happened on the succeeding day is of material importance in determining the contro-

verted question in this case. If Mr. Buxton's testimony in reference to what occurred at the meeting between these parties on the night of November 8th and the morning of November 9th tends in any way to corroborate the testimony of Mr. Hirschy, the plaintiff was entitled to the full benefit of that testimony.

It is the claim of the defendant that the matter was fully adjusted, settled, and determined on the 7th of November at the first meeting between Mr. Hirschy, Mr. Parks and Mr. Fox. As testing the credibility of the evidence tending to support that contention, it was proper for the jury to consider the fact that Mr. Buxton came from Memphis to Obion on the succeeding day, for the evident purpose of assisting in the adjustment of the controversy; that in pursuance of this purpose the matter was discussed in the office of the defendant company at Obion from about 9 o'clock that evening until 2 o'clock the next morning; that during the course of these negotiations Mr. Buxton drew up a memorandum of agreement between the parties, which Mr. Parks refused to sign, and thereupon called his attorney over the telephone and read him what Mr. Buxton had written; that the next day Mr. Morris, attorney for the defendant, came to Obion and wrote an additional provision to the memorandum prepared by Mr. Buxton; that thereupon Mr. Parks signed the memorandum of agreement, and in company with Mr. Morris, attorney for the defendant, went to the train to see Mr. Hirschy, but that Mr. Hirschy refused to sign the memorandum of agreement containing the additional provision placed there by Mr. Morris, and refused to enter into any further negotiations in reference thereto. Certainly all these facts tended strongly to corroborate the testimony of Mr. Hirschy that no final or definite agreement was made on the 7th day of November. Mr. Hirschy is further corroborated by the testimony of Mr. Parks that after he had talked to his attorney over the telephone, and read the statement prepared by Mr. Buxton to him, he came back and told Hirschy that—

"Mr. Morris would be in Obion the next day at noon; that I wouldn't sign that night, but if he would hold it open until the next day Morris said he would be down, and I said, 'I want to talk the matter over with him and with you, and, if you hold it over until then, we can probably get it closed up,' and he said he would do so."

If, therefore, any of the facts or circumstances in evidence, or if the testimony of any of defendants' witnesses tended in any way to corroborate the testimony of Mr. Hirschy, it was error for the court to instruct, in effect, that the jury should ignore all of these facts and circumstances and look only to the oral testimony of disinterested witnesses, whose testimony tended to corroborate the testimony of defendants' witnesses.

The credibility of witnesses is solely a question for the jury. The number of witnesses that testify upon one side or the other is not the test as to the weight of the evidence. If that were so, a reviewing court might readily determine whether or not a verdict is against the manifest weight of the evidence by merely counting the witnesses that testified on opposite sides of the case. The important thing is whether

or not the jury believes the witnesses. Nor is the credibility of a witness to be determined solely from his interest in the case. That fact the jury, of course, has a right to consider in determining what weight it will give to his testimony; but it is not conclusive. The jury should also take into consideration the demeanor of the witness upon the stand; his willingness or unwillingness to testify; whether his testimony as a whole is consistent or conflicting in some of its parts; whether or not there is anything in his manner or method of testifying that would indicate such prejudice or bias as might induce him to color his testimony or exaggerate the facts in favor of or against either party to the suit; and every other attendant fact and circumstance upon which the jury might reasonably base its conclusion as to the credibility of his testimony.

The rule is well settled in the federal courts that a trial judge has a right to express his opinion upon the facts of a case and to advise the jury regarding their conclusions thereon, provided the jury is given to understand, unequivocally, that it is not bound by the judge's expressed opinion. Simmons v. United States, 142 U. S. 148–155, 12 Sup. Ct. 171, 35 L. Ed. 968; Allis v. United States, 155 U. S. 117–123, 15 Sup. Ct. 36, 39 L. Ed. 91; Young v. Corrigan, 210 Fed. 442, 127 C. C. A. 174. This general rule, however, is subject to the limitation that the trial court's comments upon the facts should be "judicial and dispassionate, and so carefully guarded that the jurors, who are the triers of them, may be left free to exercise their independent judgment." Shea v. United States, 251 Fed. 440–446, 163 C. C. A. 458, 464; Rudd v. United States, 173 Fed. 912–914, 97 C. C. A. 462; Sandals v. United States, 213 Fed. 569–576, 130 C. C. A. 149.

While this additional charge was "judicial and dispassionate," nevertheless it was not so carefully guarded as to leave the jury free to exercise an independent judgment. Nor was the jury given to understand, unequivocally, that it was not bound by the court's opinion. The effect of this charge was to advise the jury to disregard proven facts and circumstances that might be just as potent in the corroboration of an interested witness as oral testimony given by a disinterested witness, and to disregard all the indicia by which a juror is enabled to determine the credibility of a witness, whether interested or not, and return a verdict based entirely upon the testimony of disinterested witnesses. The court might just as well have peremptorily directed a verdict for the defendant, for the plaintiff had not offered, and was not in position to offer any disinterested witness to establish its contention as to what occurred between Mr. Hirschy, Mr. Parks, and Mr. Fox at their first meeting on November 7th.

It is said, however, that there was no exception taken to this charge until after the jury had retired. That statement does appear in the record immediately after this additional charge, but shortly following that is the further statement that "the plaintiff then excepted to the court giving such charge, and also specifically to that part of the charge as follows," quoting the charge as above given. Then following the quotation of the portion of the charge excepted to is the further statement:

"The jury then retired and in a very short time returned into court and announced: 'We find the issues in favor of the defendant.' "

It is impossible to reconcile this conflict in the record. The trial judge was dead at the time this bill of exceptions was prepared and submitted to and signed by another judge. The judge signing this bill of exceptions had no personal knowledge with reference to what had transpired at the trial. Counsel for plaintiff in error insisted that the exceptions were taken before the jury retired. Counsel for defendant had no such recollection. The judge very properly left the record just as it was handed to him for his approval and signature. It is clear that this additional charge of the court is not only erroneous, but also that the jury returned its verdict in accordance therewith, and not upon consideration of all the evidence. This court is therefore inclined to accept that view of the record that will enable it to correct this error, and secure for the plaintiff a trial of these issues of fact by a jury, and not by the court, unless it should specifically waive that constitutional right.

It is further insisted upon the part of the plaintiff in error that the court erred to its prejudice in refusing to give its several special requests in charge to the jury, and particularly the fourth, fifth, fifteenth, and sixteenth. There was no error in the refusal to give these requests. What has been said earlier in this opinion in reference to the validity of the alleged contract extending the time of delivery applies to the fourth and fifth requests. The fifteenth and sixteenth requests are substantially covered by the charge of the court.

For the reasons above stated, the judgment of the District Court is reversed, and cause remanded for new trial in accordance with this opinion.

SHUBERT THEATRICAL CO. v. RATH et al.

(Circuit Court of Appeals, Second Circuit. February 16, 1921.)

No. 170.

1. **Injunction ⟸60—Granted to enforce negative covenant in contract for personal services.**
   While a court of equity will not decree specific performance of a contract for personal services, it has power to enforce by injunction a negative covenant in the contract that the services contracted for shall not be rendered to another during the contract term, and will do so where the services are unique and extraordinary and cannot be purchased from others, and damages for breach of the contract cannot, therefore, be measured with certainty.

2. **Contracts ⟸22(1)—Operation of "option" contract stated.**
   An "option," when based on a sufficient consideration, is a contract by which one party binds himself to sell property or perform services, and leaves it discretionary with the other to take the property or accept the services on the terms specified, and in such a contract there are two elements: First, the offer to sell or to render the services, which does not

become a contract until accepted; and, second, the completed contract to continue the offer, or leave it open for the time named.

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

3. **Contracts ⊂=22(1)—Generally mailing letter effective exercise of option.**
If an option contract either expressly or impliedly authorizes acceptance of the offer by letter, the due mailing of such a letter is an effective exercise of the option, whether it is received or not.

4. **Contracts ⊂=22(1)—Mailing letter held effective exercise of option.**
Where a contract was made by letter, and gave one party an option to renew it by notice, either written or oral, the mailing of a letter, duly stamped and addressed, containing such notice, *held* an effective exercise of the option.

5. **Contracts ⊂=22(1)—Notice of exercise of option held sufficient.**
Where notice of the exercise of an option to renew a contract for a further term expressly stated that it was given "in accordance with the terms of" the contract, such terms are controlling, and the notice is to be construed according to the intention of the contract, and is not ineffective because it stated incorrectly the date of expiration of the contract.

6. **Sunday ⊂=17—Contracts for services on Sunday not invalid at common law.**
A contract for rendition of services in theatrical performances *held* not void because it provided that such services should be rendered on Sundays, when required "in states where Sunday performances are expressly permitted by law"; such performances not being unlawful, in the absence of prohibitory statutes.

7. **Sunday ⊂=17—Contract not construed to require unlawful services.**
A contract to perform in theatrical entertainments for 20 weeks *held* not one to perform on Sundays where such performances were prohibited by statute.

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

Suit in equity by the Shubert Theatrical Company against George Rath and Richard Rath. Decree for complainant, and defendants appeal. Affirmed.

Nathan Burkan, of New York City, for appellants.

William Klein, of New York City (Charles H. Tuttle and William Klein, both of New York City, of counsel), for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff corporation is organized under the laws of the state of New York, is in business as a theatrical manager and producer of plays, and for a number of years last past was and still is engaged in producing plays and attractions at various theaters in the city of New York. It likewise presents plays on the road in a tour of the United States and Canada, and among the plays so produced is one known as "The Passing Show of 1919," in which the defendants appear.

The plaintiff on July 8, 1919, entered into a written agreement with the defendants by the terms of which the plaintiff engaged them to render their exclusive services to it for a period of one year commencing from September 1, 1919. It was agreed therein that the defend-

ants should appear at all times as directed by the plaintiff during the year, and it was guaranteed that they should be employed for 20 weeks in the minimum, and their salary was fixed at the sum of $250 per week while appearing in the city of New York and $275 per week while on the road. It was further provided that the plaintiff had an option on the services of the defendants for the theatrical year beginning September 1, 1920, and ending September 1, 1921, provided plaintiff gave notice of its desire to exercise such option prior to July 1, 1920. If the plaintiff exercised the option reserved to it, the agreement provided that the guaranty of 20 weeks should again apply for the period, but that the salary should be $300 per week while appearing in the city of New York and $325 per week while appearing on the road. On June 7, 1920, the plaintiff pursuant to its option employed the defendants for the year beginning on September 1, 1920. Notwithstanding this, the defendants advised the plaintiff that they refused to perform according to their agreement; and it appears that they have contracted with a rival manager to appear in a production to be presented in a rival theater in the city of New York.

An injunction is asked to restrain the defendants from performing for any managers other than the plaintiff, or from performing in any other theater or place of public amusement, or in any other company, except that of the plaintiff, until the expiration of the term mentioned in the agreement made between the plaintiff and the defendants. The court below granted the injunction as prayed.

The contract is found in a letter addressed by the plaintiff to the defendants and signed "Shubert Theatrical Company, by J. J. Shubert." Then follows:

"We have read the foregoing. The same contains our full understanding, and with our signatures at the bottom hereof, let this be deemed a contract between us.
Geo. & Dick Rath,
"By Geo. H. Rath."

The letter (contract) contains the following:

"You [the defendants] agree throughout the term hereof that you shall not render your services, nor will you appear publicly for any other firm or corporation, whether moving pictures or otherwise, without our written consent first had and obtained, and shall you attempt to appear for any other management or in moving pictures, we shall have the right to apply to any court having competent jurisdiction for an injunction restraining your appearance, and you agree, for the purpose of such lawsuit, that your services are extraordinary and unique, and you cannot be replaced, except for Morris Gest."

The performances which the defendants contracted to give are acrobatic in character. The testimony shows that their feats are unique and extraordinary. A prominent theatrical manager and producer of wide experience, and not associated with the plaintiff, testified. One of the feats of the defendants' performances, as he described it, is that one of the defendants with one hand raises the other defendant, a full-grown man, from the floor, his body being stretched at full length upon the floor. The witness, in describing it, said this was done without

apparent effort, "just as easy as you would lift a straw." In reply to a question by the court, he declared:

"It is a fact that it is the most marvelous thing that has ever been before."

He added that it had never before been done with a grown-up man in the history of this country. Another theatrical manager, of whom defendants' counsel said, "I will concede that he is a great manager and producer, and cannot be equaled in the theatrical business," and who was asked by the court whether the performances of the defendants were unique and unusual, answered, "Absolutely." He added that he did not know of any imitator in the world. Another theatrical producer, having an experience of nearly 30 years and who is widely known, testified that their performance was "absolutely unique and extraordinary." This is an excerpt from his testimony:

"One of the moves they make is taking a man underneath his body, and raising him right over his shoulder, and standing him up straight on his hands, something that has never been done, as long as my experience has been in the show business. I have never seen anything like it.

"Q. Are you an athlete yourself? A. I am.

"Q. And do these features impress you as being peculiarly difficult? A. It has never been done as long as I remember seeing anything in the show business.

"Q. Yes. Do you know from your experience whether it would be possible to replace that act by other people? A. Absolutely impossible."

The finding of the trial court that the performances of the defendants are unique and unusual is amply justified by the testimony. The services of the defendants are extraordinary, unique and cannot be replaced.

[1] These services were to be given to the plaintiffs exclusively, and the contract contains an express negative covenant that they would not be given under any other management during the period named. By a negative covenant the covenantor promises that something shall not be done. The relief appropriate to a breach of such a contract is an injunction. The leading authority, as respects covenants for personal service, is the well-known case of Lumley v. Wagner, 1 De G., M. & G. 604. In that case a famous singer agreed to sing in the opera house of the complainant for a certain time, and not to sing for any one else during that time. The opinion in that case reviews the authorities and contains what is regarded as a very able and convincing discussion of the principle applicable in such cases. As the services contracted for were those of a person possessing special and extraordinary qualifications, Lord Chancellor St. Leonards granted an injunction restraining the defendant from singing at any other theater than that belonging to the plaintiff. It was held that the fact that the court would have been unable to enforce specifically the defendant's affirmative covenant to sing at the plaintiff's theater did not affect the complainant's right to an injunction to restrain a violation of the negative covenant not to sing elsewhere.

In McCaull v. Braham (C. C.) 16 Fed. 37, Judge Addison Brown continued an injunction restraining Lillian Russell from the breach of a negative covenant not to sing in comic opera during the season at any

other than the plaintiff's theater. In addition to the negative covenant, the contract contained an affirmative covenant to sing in the employment of the plaintiff whenever required. In the course of his opinion Judge Brown said:

"Contracts for the services of artists or authors of special merit are personal and peculiar; and when they contain negative covenants which are essential parts of the agreement, as in this case, that the artists will not perform elsewhere, and the damages, in case of violation, are incapable of definite measurement, they are such as ought to be observed in good faith and specifically enforced in equity. That violation of such covenants will be restrained by injunction is now the settled law of England."

In Cincinnati Exhibition Co. v. Marsans, 216 Fed. (D. C.) 269, the complainant had employed defendant as a ball player for a certain specified period, and defendant had covenanted not to render similar service to others during the continuance of the contract. An injunction issued to prevent the breach of the negative covenant. The court, by Judge Sanborn, said:

"It is a settled rule of law that where a person agrees to render services that are unique and extraordinary, and which may not be rendered by another, and has made a negative covenant in his agreement whereby he promises not to render such service to others, the court may issue an injunction to prevent him from violating the negative covenant in order to induce him to perform his contract. The facts of this case seem to me to bring it under this rule."

In Philadelphia Ball Club, Ltd., v. Lajoie, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627, it was held that, where a baseball player had contracted to play with a particular club for a certain term, he would be enjoined from playing with another club during the continuance of the term, where the evidence showed that he was an expert player in any position, and had a great reputation among the patrons of the sport for his ability and skill.

In Pomeroy on Specific Performance, p. 31, the principle is stated as follows:

"Where one person agrees to render personal services to another, which require and presuppose a special knowledge, skill and ability in the employee, so that in case of a default the same service could not easily be obtained from others, although the affirmative specific performance of the contract is beyond the power of the court, its performance will be negatively enforced by enjoining its breach."

The basis upon which the decisions rest in all such cases is that the damages for the breach of such contracts cannot be estimated with any certainty, and the employer cannot by means of any damages purchase the same services from others. The injury in such cases is irreparable. Damages which can be estimated in cases of this class only by conjecture, and not by any accurate standard, constitute such an irreparable injury as courts of equity will restrain by injunction.

In 5 Pomeroy's Equity Jurisprudence, § 289, p. 518, it is said that the doctrine of Lumley v. Wagner has been generally accepted, both in England and in this country, upon a similar state of facts. The author also states that—

"The most frequent application has been in cases of actors and actresses of established reputation. Contracts for their services often stipulate that they shall not perform elsewhere during their engagement with a particular manager. Their services being extraordinary and special, an injunction is generally granted against the breach of such a stipulation. It will likewise be granted when an artist agrees to work for the complainant and for no one else."

In the argument in this court counsel for the defendants insisted that the contract between the parties is so lacking in equitable mutuality that a court of equity should not enforce it. We are not impressed by the argument. The contract binds the complainant to give the defendants employment for at least 20 weeks in the theatrical year, "not necessarily consecutive," for which the plaintiff is bound to pay a certain specific amount. The contract also binds the defendants to render their services to the plaintiff for a like number of weeks at least, and to do so for the specified salary. That there is mutuality of obligation in such an agreement is too plain for controversy, and mutuality of obligation is sufficient to justify the issuance of an injunction to restrain the breach of the agreement if the services to be rendered are unique, special, or extraordinary, and the contract be not otherwise inequitable or oppressive. Whether the contract is inequitable or oppressive will be considered in a subsequent part of this opinion.

An application for an injunction in a case like this does not depend, as counsel for the defendants in his argument in this court seemed to think, upon the principle applicable to cases for specific performance. It is not necessary in the present case for us to inquire as to what the doctrine of mutuality means in cases of specific performance. There is a distinction between actions brought to compel the specific performance of an affirmative covenant and those which are brought to restrain by injunction the breach of a negative covenant in the same agreement. It is familiar doctrine that courts of equity do not exercise their jurisdiction to grant the remedy of an affirmative specific performance of a contract for personal services. This they decline to do, because they cannot in any direct manner compel an actor to act or a singer to sing. But the rule is established in England and in this country that the courts of equity may restrain by injunction the breach of a negative covenant by which an actor or a singer of unusual gifts has agreed not to act or not to sing in a specified period, except under the management of the other party to the contract. That this may result or may not result in indirectly compelling the specific performance of the affirmative covenant is not a matter with which this court needs in the present case to concern itself. There has been a great difference of opinion, especially in the English courts, over the question whether an injunction can issue to prevent the breach of a contract unless it contains an express negative covenant. But with that question also we are not concerned in this case, as the contract here involved does contain an express negative covenant. It is sufficient for our present purpose that a distinction exists between suits brought to compel specific performance of an affirmative covenant for personal services, and suits brought to restrain by injunction the violation of a negative covenant respecting such serv-

ices. McCall Co. v. Wright, 198 N. Y. 143, 91 N. E. 516, 31 L. R. A. (N. S.) 249.

The contract gave the plaintiff an option to renew its contract for the theatrical year from September 1, 1920, to September 1, 1921, provided it gave defendants notice in writing or orally of its desire to exercise such option prior to July 1, 1920. If the option was not exercised according to its terms, the contract has expired, the defendants have not violated it, and no injunction can issue.

The testimony shows that Mr. Shubert, the vice president of the plaintiff corporation, and who had full charge of such matters, dictated to his stenographer on June 7, 1920, a letter exercising the option; that she typed it and then handed it to Shubert, who signed it and gave it back to her; that she then handed it, properly addressed, to the head of the mailing department in the Shubert office, telling her that it was important and to mail it herself; and that the latter person stamped it and herself mailed it on the same day in a regular United States government post office box. The letter was mailed in a Shubert envelope having a return address stamped on it, and it was never returned for nondelivery. The letter was addressed to defendants, in care of the Detroit Opera House, Detroit, Mich., where the defendants were engaged for the week beginning on that day.

[2] The court below has found as a fact that the letter was written and mailed. We concur with him in that finding. The court also said that in writing and mailing the letter the plaintiff did all that was required of it under the contract. In that proposition we also fully concur; the letter having been written prior to the expiration of the option. Prior to that time the defendants are deemed in law to have been making to the plaintiff a continuing offer, and the mailing of the letter was an acceptance of it. An option, when based on a sufficient consideration, is a contract by which one binds himself to sell property or perform services, and leaves it discretionary with the other to take the property or accept the services on the terms specified. In such a contract two elements exist: First, the offer to sell or to render service which does not become a contract until accepted; second, the completed contract to continue the offer or leave it open for the time named. Black v. Maddox, 104 Ga. 157, 162, 30 S. E. 723.

An option is said in Milwaukee Mechanics' Ins. Co. v. B. S. Rhea & Son, 123 Fed. 9, 11, 60 C. C. A. 103, to be nothing more than a continuing offer to sell. In Standiford v. Thompson, 135 Fed. 991, 996, 68 C. C. A. 425, 430, it is defined as "an unaccepted offer to sell," and it is said to be "a continuing offer until the expiration of the time limited." In McMillan v. Philadelphia Co., 159 Pa. 142, 28 Atl. 220, it is said that an option is an unaccepted offer, which becomes a binding contract when the holder of the option signifies that he accepts the offer within the time fixed. And an option is defined in Adams v. Peabody Coal Co., 230 Ill. 469, 82 N. E. 645, as a continuing offer, which the offerer may not withdraw until the expiration of the time limited. In Rease v. Kittle, 56 W. Va. 269, 49 S. E. 150, it is said that "an option contract to purchase is but a continuing offer to sell." In 35

Cyc. 56, it is said that an option is a continuing offer or contract by which the owner stipulates with another that the latter shall have the right to buy the property at a fixed price within a certain time. And see Ganss v. J. M. Guffey Petroleum Co., 125 App. Div. 760, 110 N. Y. Supp. 176, 177; Sizer v. Clark, 116 Wis. 534, 93 N. W. 539; Snider v. Yarbrough, 43 Mont. 203, 115 Pac. 411; Bates v. Woods, 225 Ill. 126, 80 N. E. 84; John v. Elkins, 63 W. Va. 158, 59 S. E. 961.

[3] The law is settled that, if a letter accepting an offer is made in the manner either expressly or impliedly indicated by the party making the offer, it makes no difference whatever that the letter is never received because of some mistake of the post office authorities, or through accident in transmission, or because in some way it becomes lost. Patrick v. Bowman, 149 U. S. 411, 13 Sup. Ct. 811, 866, 37 L. Ed. 790; Tayloe v. Merchants' Fire Ins. Co., 9 How. 390, 13 L. Ed. 187; Burton v. United States, 202 U. S. 344, 384–386, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362; MacTier v. Frith, 6 Wend. (N. Y.) 103, 21 Am. Dec. 262; Vassar v. Camp, 11 N. Y. 441; Trevor v. Wood, 36 N. Y. 307, 93 Am. Dec. 511; White v. Corlies, 46 N. Y. 467; Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Mercer Electric Mfg. Co. v. Conn. Electric Manufact. Co., 87 Conn. 691, 89 Atl. 909; Perry v. Mt. Hope Iron Co., 15 R. I. 380, 5 Atl. 632, 2 Am. St. Rep. 902. The law of England is to the same effect, Brogden v. Metropolitan R. Co., 2 App. Cas. 666; In re Marseilles Imperial Land Co., L. R. 15 Eq. 18.

It is necessary, therefore, to inquire whether under the circumstances the plaintiff had a right to use the mails for the purpose of communicating its exercise of its option. The plaintiff was expressly authorized by the defendants to exercise the option in writing orally. We think that this gave it the right to communicate by mail its written acceptance of the offer. Authorization to communicate acceptance by mail is implied in two cases:

(1) Where the post is used to make the offer and says nothing as to how the answer is to be sent.

(2) Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usages of mankind the post might be used as a means of communicating the acceptance. Menthorn v. Fraser, [1892] 2 Ch. 27; Carey v. Rocts, 5 Dom. L. R. 670; Ellis v. Block, 187 Mass. 408, 73 N. E. 475; Campbell v. Beard, 57 W. Va. 501, 509, 50 S. E. 747. See 13 C. J. p. 300, § 116.

[4] Where authority is given to accept in writing an offer which was made orally, the offeree has a right to understand, in our opinion, that he is at liberty to send his answer by post; and if he incloses the writing in an envelope properly stamped and addressed, and deposits it either in the post office or in a street letter box which is a part of the post office system for the transmission of mail, he has done all that is required. Wood v. Callaghan, 61 Mich. 402, 28 N. W. 162, 1 Am. St. Rep. 597.

[5] It appears, however, that the written notice which was deposited in the mails was not in all respects accurate. The notice was in the following form:

"June 7, 1920.

"Dear Sirs: In accordance with the terms of our contract dated July 8, 1919, we hereby notify you that we exercise our option for your services to continue with us, commencing October 1, 1920, and expiring on October 1, 1921, at salary as contained in said contract.

"Very truly yours, Shubert Theatrical Company,
"By J. J. Shubert.

"Rath Bros., Passing Show, Detroit Opera House, Detroit, Michigan.
"JJS/HC"

Under the contract the period of renewal, as before pointed out, was from September 1, 1920, to September 1, 1921. The notice as given substituted "October" for "September." But the notice distinctly described itself as a renewal "in accordance with the terms of our contract" "at salary as contained in said contract." The mention of "October" for "September" was a palpable slip, which could have misled no one, and which did not vitiate the notice. Where a contract is specifically mentioned in a notice given under it, the terms of the contract are controlling. A notice given under a contract is to be construed according to the intention of the contract. 29 Cyc. 1124.

[6] Counsel for defendant insisted in this court that the contract is illegal and cannot be enforced, because it requires the defendants to give acrobatic performances in the city of New York on Sundays, the giving of which is prohibited by the Penal Law of the state of New York (Consol. Laws, c. 40). Section 2143 of that law is as follows:

"All labor on Sunday is prohibited, excepting the works of necessity and charity. In work of necessity or charity is included whatever is needful during the day for the good order, health or comfort of the community."

Section 2152 of the law expressly mentions acrobatic performances among the performances the rendition of which on Sunday is declared unlawful and punishable as a misdemeanor. The provision is found in part in the margin.[1]

The statute of 29 Charles II, c. 7, 1676, seems to have laid the foundation for the Sunday observance laws of England and of those in this country. It provided in its first section that—

"No tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business or work of their ordinary callings, upon the Lord's Day, or any part thereof (works of necessity and charity only excepted)."

In 27 Am. & Eng. Encyc. of Law, 389, it is said that—

"At common law judicial proceedings only were prohibited on Sunday. A person was not prohibited from doing his ordinary labor on Sunday, and the making of contracts was lawful."

[1] "The performance of any tragedy, comedy, opera, ballet, farce, negro mistrelsy, negro or other dancing, wrestling, boxing with or without gloves, sparring contest, trial of strength, or any part or parts therein, or any circus, equestrian or dramatic performance or exercise, or any performance or exercise of jugglers, acrobats, club performances or rope dancers on the first day of the week is forbidden; and every person aiding in such exhibition, performance or exercise by advertisement, posting or otherwise, and every owner or lessee of any garden, building or other room, place or structure, who leases or lets the same for the purpose of any such exhibition, performance or exercise, or who assents to the use of the same, for any such purpose, if it be so used, is guilty of a misdemeanor. * * *"

In 37 Cyc. 545, it is also said that—

"At common law all business other than judicial proceedings could be lawfully transacted on Sunday."

In Frolich on the Law of Motion Pictures and the Theater, p. 391, it is said:

"Sunday was not a dies non under the common law, and all regulations respecting the observance of Sunday and the prohibition of particular lines of activity are purely of statutory creation."

The law as above stated is supported by a number of court decisions. See Heisen v. Smith, 138 Cal. 216, 71 Pac. 180, 94 Am. St. Rep. 39; Ward v. Ward, 75 Minn. 269, 77 N. W. 965; Merritt v. Earle, 29 N. Y. 116, 86 Am. Dec. 292; Boynton v. Page, 13 Wend. (N. Y.) 429; Eden v. People, 161 Ill. 296, 43 N. E. 1108, 32 L. R. A. 659, 52 Am. St. Rep. 365; Marengo v. Rowland, 263 Ill. 531, 105 N. E. 285, Ann. Cas. 1915C, 198. In Richardson v. Goddard, 23 How. 28, 42, 16 L. Ed. 412, Mr. Justice Grier, of the Supreme Court of the United States, calls attention to the fact that in England formerly the courts sat even on Sunday, and that contracts made on that day were not regarded as void till the statute of 29 Charles II, c. 7 (not 27, as he erroneously states), was enacted.

We assume that, in the absence of a statute, participation in innocent amusements on Sunday is lawful. We also assume that contracts to perform on Sunday something prohibited by statute are void. It has been held that, where a contract provides for the performance on Sunday of acts prohibited by the statute, the entire contract is void, and no recovery can be had for the part performed on a secular day. Stewart v. Thayer, 170 Mass. 560, 49 N. E. 1020; Handy v. St. Paul Globe Publishing Co., 41 Minn. 188, 42 N. W. 872, 4 L. R. A. 466, 16 Am. St. Rep. 695; Williams v. Hastings, 59 N. H. 373.

The contract here involved, as expressly stated in its opening paragraph, is an engagement of the exclusive services of the defendants at any place or places that the plaintiff designates in the United States of America and Canada. So far as Sunday performances are referred to, the contract provides as follows:

"In states where Sunday performances are expressly permitted by law, you agree to appear and perform."

And it also provided that:

"We have the right to the use of your services in any theaters wherein we shall give Sunday concerts, and you shall appear and play in such concerts whenever we shall give you two (2) days' notice prior thereto of our desire to have you appear and naming the place where. Should you be out of the city of New York if such notice reaches you, you shall pay your expenses to the city where said concert is given and the return to your city of engagement."

An examination of these clauses shows, not only that the parties did not agree to violate any Sunday observance statute, but that the intention was that there should be no performances by the defendants on such days except in states where Sunday performances "are expressly permitted by law." The two clauses of the contract relating

to Sunday performances must be read together, and they in no way bind the defendants to appear anywhere in violation of any Sunday law. The reference to the city of New York, found in the second clause, is not a reference to that city as a place of performance, but as fixing the length of notice. If the plaintiff undertook to require the defendants to perform on Sunday in any state where such performances are prohibited by statute, the defendants would have been under no obligation to appear, and their refusal would not have involved any breach of contract.

[7] An agreement to perform for 20 weeks is not an agreement to perform on Sunday. Goddard v. Morrissey, 172 Mass. 594, 53 N. E. 207. In Kelley v. London Pavillion, 77 Law Times, 215, where a music hall artiste engaged to perform "every evening," this was held to mean "every evening on which the music hall may be legally opened and the artistes called upon to perform." In Zenatello v. Hammerstein, 231 Pa. 56, 79 Atl. 922, the plaintiff had bound himself to sing certain operas "each day of the week" in New York and elsewhere in the United States. The court said the law would not presume that the parties intended an unlawful thing. The presumption was that the plaintiff would not be required to sing on Sundays, except in places where such singing was permitted; and in the instant case it cannot be said that the contract in any way violates the Sunday observance law of the state of New York.

It certainly will not be claimed by any one that there is anything intrinsically immoral or any immoral tendency connected with an athletic performance such as that given by these defendants. In this connection it is interesting to note a decision under the Sunday law of Missouri. The statute prohibited horse racing, cock fighting, or playing cards or games of any kind on Sunday. The statute was construed in St. Louis Agl. & Mech. Association v. Delano, 37 Mo. App. 284. In an opinion written by Judge Seymour D. Thompson he said that—

"This court is of the opinion that this prohibition is against games of chance or other games of an immoral tendency, and that it does not involve a prohibition of athletic games or sports, which are not of an immoral tendency, but which tend to the physical development of the youth, and are rather to be encouraged than discouraged."

The case was affirmed by the Supreme Court in 108 Mo. 217, 18 S. W. 1101.

But it is said that a court of equity does not grant an injunction to prevent the breach of a negative covenant where the contract is inequitable, or harsh, or in any way oppressive. We do not dispute the statement. It is not applicable to the particular contract under review. We have examined its provisions with care, and we have failed to discover that it contains anything which can be regarded as unfair, oppressive, or in any way inequitable. It guarantees to the defendants a salary for the year of the renewal of at least $6,000, with a possible maximum of $16,900. In accordance with its provisions and during the first year of the contract the defendants received from the plaintiff over $10,000.

During the year of the renewal the defendants were to receive a larger salary and might realize in that year about $28,000 or $29,000 from the contract. The salary paid them was three times the salary received by the usual acrobatic performers. There is nothing unusual or unfair in the provision that during the period of their engagement with the plaintiff the defendants are not publicly to appear under another management or in connection with a rival company. The contract was not induced by fraud or misrepresentation. The defendants made it of their own free will and with full knowledge of all that it contained. Contracts are made to be kept and not broken, and the parties who make them are in duty and in law bound to perform them. The injunction should issue as prayed.

Decree affirmed.

UNITED STATES v. GOLDSTEIN et al.

(Circuit Court of Appeals, Eighth Circuit. January 14, 1921.)

No. 5427.

1. **Judges ⇐30—Federal judge may hear application to modify decree while sitting in another district.**
   A federal District Judge, who heard a cause and entered a decree while setting by assignment in another district, *held* to have power to hear and determine a motion for modification of such decree while sitting in his own district, and the modified decree as determined by him when entered in the district of trial by the judge of that district in open court *held* valid and effective.
2. **Courts ⇐354—Decree should not include findings of fact.**
   Under equity rule 71 (33 Sup. Ct. xxxviii) it is proper to include findings of fact in a decree only when necessary to make the decree more clear and specific.
3. **Equity ⇐429—Error in decree may be corrected after term.**
   Where a decree canceling a certificate of naturalization as having been obtained by fraud included a finding of fact that the witnesses for the applicant, who were not parties and had no knowledge of the suit, had knowingly testified falsely, the court *held* to have power at any time thereafter on application of such witnesses to correct its decree by expunging such finding.
4. **Depositions ⇐56(1)—Insufficiency of notice not ground for suppression, where counsel appeared.**
   A deposition *held* properly received in evidence, where, though notice of its taking was short, counsel for the adverse party appeared, but refused to cross-examine after his objection on the ground of insufficiency of notice was overruled.

Stone, Circuit Judge, dissenting.

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

Suit in equity by the United States against Shloen Layzor Evel Yokovich Klubok, alias Sall Glubok. On appeal by complainant from modification of decree on motion of Nat A. Goldstein and William Sacks. Modified and affirmed.

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

On January 2, 1914, the United States of America filed its bill in equity in the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, under section 15 of the act of Congress of June 29, 1906 (Comp. St. § 4374), against Shloen Layzor Evel Yokovich Klubok, alias Sall Glubok, by which the government sought and prayed the cancellation of the letters of citizenship granted to said Glubok by the said United States District Court for the division and district last aforesaid on the 7th day of October, 1910. In its bill the government alleged and charged, among other things, that said Klubok had fraudulently and illegally obtained and procured entry of the said decree or letters admitting him to American citizenship by reason of fraud, perjury, deceit, and imposition committed and practiced upon the court by him and his verifying witnesses, Nat A. Goldstein and William Sacks, appellees in this matter, in this, to wit: That the said petitioner had falsely and fraudulently represented himself to be a man of good moral character, and to be fully qualified to be admitted to American citizenship, and that the said witnesses, Nat A. Goldstein, and William Sacks, had been guilty of the commission of fraud, deceit, and imposition on the court, in falsely asserting and stating under oath, in the affidavit executed by them as part of the petition for naturalization of said Glubok, that they knew of their own personal knowledge that said petitioner was a man of good moral character, and had conducted and behaved himself as such for the period of time requisite under the naturalization statute, and that he was in all respects qualified and eligible to be admitted a citizen of the United States of America, and that said witnesses had further been guilty of the commission of fraud, deceit, and imposition on the court in falsely and fraudulently representing and testifying in open court on the final hearing on said petition for naturalization of said Glubok that they of their own personal knowledge knew said petitioner to be a man of good moral character, and to have conducted and behaved himself as such, as required by the naturalization statute, and that they knew him to be in all respects qualified and eligible to be admitted to American citizenship.

The bill of complaint then alleged further that in truth and in fact the said Klubok was not a man of good moral character, and had not conducted or behaved himself as such, as required by the statute in such matter made and provided, and that the affidavits executed by said witnesses, in which they stated that they knew of their own personal knowledge that the petitioner for naturalization was a man of good moral character and had conducted and behaved himself as such was false and untrue, and that the testimony of said witnesses, given under oath in open court on the final hearing on the petition for naturalization of the petitioner, in which said witnesses had falsely and fraudulently represented that they of their own personal knowledge knew the petitioner for naturalization Glubok, to be a man of good moral character, and to have behaved and conducted himself as such for the requisite period of time as demanded by the naturalization statute, was false and untrue, and that in truth and in fact the said Glubok, for a considerable period of time previous to his naturalization, had lived with and off the illegitimate earnings of his wife, Annie Glubok, alias Lizzie Greenstein, who during all of said time had been a common prostitute and keeper of houses of prostitution at various addresses in the city of St. Louis, Mo. The affidavits attached to and forming part of the said bill of complaint, executed by various officers of the metropolitan police department of the city of St. Louis, Mo., as well as others established the fact of the bad moral character of the said petitioner for naturalization Glubok as alleged in the government's bill.

On February 26, 1914, the defendant Glubok filed a joint plea and answer to the bill of complaint, in which he alleged and claimed compliance with the statutory requirements in obtaining grant of the letters of citizenship, and denied that he or his verifying witnesses had been guilty of any fraud, deception, or perjury in obtaining the entry of said decree or letters of citizenship. The cause was heard by Judge Pollock of the district of Kansas, who had been duly assigned to the District Court for the Eastern District of Missouri. On June 16, 1915, the defendant failing to appear, the case was heard and submitted to the court upon the petition of the plaintiff, the answer

of the defendant, and the proofs adduced. On the 18th day of June, 1915, two days subsequent to the date of the hearing and submission, a final decree was entered in favor of the plaintiff, the United States of America, which is as follows:

"This cause coming on to be heard on the 16th day of June, A. D. 1915, the United States appearing by its District Attorney, and the defendants being in default, and the court being fully advised in the premises, finds: That a bill in equity in the above-entitled cause was filed in this court on January 2, 1914; that a subpœna duly issued was served on said defendant January 7, 1914; that on February 26, 1914, defendant filed plea and answer in said cause; and that on June 15, 1915, by leave of the court, defendant's counsel withdrew from the case, said defendant having fled the jurisdiction of the court.

"The court further finds that the subject-matter of this action is a decree of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri; that the defendant at the time of the institution of this suit, was a resident of St. Louis, Mo., within the Eastern Division of the Eastern Judicial District of Missouri; and that on July 1, 1910, said defendant, under the alias of Sali Glubok, filed petition for naturalization No. 883 in the aforesaid United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, and was by said court on said petition naturalized a citizen of the United States on October 7, 1910, certificate of naturalization No. 148771 being issued to him as documentary proof of such naturalization.

"The court further finds that the naturalization of the said defendant was granted on the testimony of Nat A. Goldstein and William Sacks, who declared on their oaths that to their personal knowledge said defendant was a man of good moral character, etc., and a proper person to be naturalized a citizen of the United States.

"The court further finds that the naturalization of the said defendant was a fraud upon the court, and upon the United States, in that the testimony of said Nat A. Goldstein and William Sacks that defendant was a man of good moral character to their personal knowledge, was false, and contrary to the facts; that said defendant petitioned for and secured naturalization under a nctitious and assumed name, to wit, Sali Glubok, and not under his true name, to wit, Shloen Layzor Evel Yokovich Glubok; that said defendant named in his petition for naturalization, one Anna Glubok, as his wife with whom he was living in lawful wedlock; that said Anna Glubok was one Lizzie Greenstein, a public prostitute and keeper of houses of prostitution; that said defendant shared in and derived profit from the prostitution of said Lizzie Greenstein; that said defendant had shared in and derived profit from the prostitution of said Lizzie Greenstein for many years prior to his naturalization; and that said defendant committed a further fraud upon this court, and the United States, through reciting in his petition that he had two children, to wit, Isidore, born April 10, 1905, at New York, N. Y., and Sam, born May 23, 1906, at Grodna, Russia, when as a matter of fact said children were born some six or seven years prior to the dates given, and both were born in Russia, and neither in the United States.

"That for the reasons hereinbefore set forth, the court finds that the qualifications and right of said defendant to become a citizen of the United States were not proved or made to appear to the court in any true or lawful manner; that said decree of naturalization was procured by and based on false and fraudulent testimony, misrepresentation and deceit; that the court was induced to render said decree of naturalization by and through mistake as to the true facts, as well as by the fraud, perjury, imposition, and deceit practiced upon it by said defendant, and his witnesses; and that by reason thereof a fraud was committed by said defendant upon the court, and the United States; said defendant unlawfully and fraudulently obtaining said decree naturalizing him, and conferring the status of a citizen of the United States upon the said prostitute, Lizzie Greenstein, and children, Isidore and Sam.

"It is therefore by the court ordered and decreed that the decree of said United States Circuit Court for the Eastern Division of the Eastern Judicial

District of Missouri, entered October 7, 1910, admitting said defendant to citizenship, be and the same is hereby vacated, set aside, and held for naught, and that the said certificate of naturalization No. 148771 be and the same is hereby revoked and canceled; that said defendant is hereby directed and required to surrender to this court for cancellation said certificate No. 148771; and the said defendant be and he is hereby forever enjoined and restrained from claiming any rights, privileges, or immunities under said order of naturalization and said certificate of naturalization.

"It is further ordered that the clerk of this court shall send a certified copy of the foregoing decree to the Commissioner of Naturalization, Department of Labor, at Washington, D. C., accompanied by the canceled certificate of naturalization of said defendant (in the event said certificate is recovered), and that said defendant pay the costs of this proceeding, for which let execution issue as at law."

On the 19th day of September, 1918, three years and three months subsequent to the entry of said final decree, Nat A. Goldstein, one of the verifying witnesses in the naturalization proceedings, as well as one of the appellees in this proceeding, filed in the said District Court, a motion for the vacation and reopening of the final decree and the amendment, modification, or correction of the judicial findings therein, in which motion the said Goldstein sought and prayed that the judicial findings in said final decree adjudging and finding him guilty of the commission of fraud, perjury, deceit and imposition on the court in the naturalization proceedings, as heretofore set forth, be eliminated and expunged from said final decree, and that the court judicially find as a matter of law and fact, and embody such judicial findings in a new decree, that he, the said Goldstein, was honestly mistaken in swearing in the affidavit executed by him as part of the naturalization proceedings that he had personal knowledge of the good moral character of the said petitioner for naturalization as well as in testifying in open court on the final hearing on said petition for naturalization, that he knew of his own personal knowledge that the said petitioner, Glubok, was a man of good moral character, and was fully qualified in all respects to be admitted a citizen of the United States of America.

Notice of the application to be made to Judge Pollock on September 21, 1918, at Kansas City, Kan., was duly served on the District Attorney for the Eastern District of Missouri and the Chief Naturalization Examiner of the United States. On that day the parties appeared before Judge Pollock at Kansas City, Kan., and on motion of the solicitors for appellant the hearing was continued until September 26, 1918, at Wichita, Kan., in order to give them an opportunity for investigation of the facts. No objections were made by appellant at that time. At the hearing at Wichita, the United States for the first time objected to the jurisdiction of Judge Pollock to hear the motion in Kansas, and also upon the ground that the decree sought to be corrected had been rendered and entered more than three years before the filing of the petitions. The objections were overruled and exceptions saved.

At the hearing the appellees offered to read the depositions of Edward F. Fisher, Harry Chosid, Robert L. Cole, Peter McGauley, William A. Sievers, Frank J. Kraus, Frank Dempsey, Louis W. Deppe, John F. Frey, May Littman, William H. Tabacius, Edward H. Miller, Albert D. Ulrich, Joseph Baer, Henry Kaiser, Vance J. Higgs, Thomas Symon, Gustave Cytron, William D. Killoven, Albert Strangler, and the appellee Sacks. Objections to the reading of the depositions were made by the appellant, upon the ground that the witnesses, whose depositions were taken, were all residents of the Eastern District of Missouri, and that the notices given were too short.

The notices for the taking of the depositions of the witnesses were served on the day they were taken. The United States did not appear when the depositions of the witnesses were taken, except at the taking of appellee Sacks' deposition, when objections were made by them to the taking of Mr. Sacks' deposition, upon the ground that, the term at which the decree had been rendered having expired more than three years, the court was without jurisdiction to correct it, and that the notice served was insufficient. The commissioner, before whom the depositions were to be taken, very properly held that these objections should be determined by the court when the depositions

were offered to be read at the hearing and therefore overruled them. The solicitors for appellant thereupon withdrew and Mr. Sacks' deposition was taken ex parte.

The deposition of Sacks shows that he is a resident of Tulsa, Okl., which is out of the Eastern District of Missouri, and more than 100 miles from St. Louis, where the cause was pending and more than 100 miles from Wichita, Kan., where the motion was to be heard by Judge Pollock.

The appellee Goldstein testified orally at the hearing in Wichita, Kan. The objections to the reading of the depositions were overruled, and after they were read, and the appellant Goldstein had testified, the court prepared the following decree:

"Now, on this 30th day of September, 1918, comes on for final order and decision herein the application of Nat A. Goldstein and William L. Sacks to expunge from, modify, and correct certain language contained in the final decree filed and entered herein on the 18th day of June, 1915, in so far only as the language thereof is asserted to work a wrong and injustice to the reputation and good name of the applicants for this order, contrary to the very truth of the matter, leaving, however, said decree to be and remain standing of record in full force and effect in all respects and every particular as to the rights of the parties therein decreed as fully, to the same effect and intent as though no such correction in verbiage of said decree had been applied for or granted. * * *

"It is therefore by the court ordered and decreed that the decree of said United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, entered October 7, 1910, admitting said defendant to citizenship, be and the same is hereby vacated, set aside, and held for naught, and that the said certificate of naturalization No. 148771 be and the same is hereby revoked and canceled; that said defendant is hereby directed and required to surrender to this court for cancellation said certificate No. 148771; and the said defendant be and he is hereby forever enjoined and restrained from claiming any rights, privileges, and immunities under said order of naturalization and said certificate of naturalization.

"It is further ordered that the clerk of this court shall send a certified copy of the foregoing decree to the Commissioner of Naturalization, Department of Labor, at Washington, D. C., accompanied by the canceled certificate of naturalization of said defendant (in the event said certificate is recovered), and that said defendant pay the costs of this proceeding, for which let execution issue as at law."

And the court also inserted findings of fact, exonerating appellees from having knowingly testified falsely, as recited in the original decree. The decree was signed by Judge Pollock and sent to Judge Dyer, the District Judge for the Eastern District of Missouri, and by him ordered to be entered as the decree of the court, while the court was in session, and he presiding.

The assignment of errors raises the following issues of law, the findings of fact not being questioned:

(1) That Judge Pollock was without jurisdiction to hear the motion in the state of Kansas.

(2) That the court was without jurisdiction to correct the decree, rendered more than three years before the filing of the motion to correct it.

(3) That the court erred in overruling appellant's objections to the reading of the depositions taken on behalf of appellee.

James E. Carroll, U. S. Atty., W. L. Hensley, former U. S. Atty., and N. C. Whaley, Asst. U. S. Atty., all of St. Louis, Mo.

C. C. Madison, of Kansas City, Mo., and Selden P. Spencer and Forrest C. Donnell, both of St. Louis, Mo., for appellees.

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

TRIEBER, District Judge (after stating the facts as above). We will dispose of the questions in the order in which they were assigned by appellant in the assignment of error.

[1] The first question to be determined is: Is the decree appealed from void, for the reason that the hearing was had in the state of Kansas, although the decree was entered in the proper District Court, while in session?

The acts of Congress treat the divisions of a district, unless otherwise provided, as separate districts for jurisdictional purposes. Section 53, Judicial Code (Comp. St. § 1035); Bankruptcy Act, secs. 18f and 18g (Comp. St. § 9602). It has been held that an order granting a new trial, by the District Judge, while in another division than where the trial and conviction were had, was within his jurisdiction. Abbott v. Brown, 241 U. S. 606, 36 Sup. Ct. 689, 60 L. Ed. 1199. The facts in that case were: Abbott had been indicted in the District Court for the Southern District of Florida, held at Tampa, Fla., for a violation of the Penal Code (Comp. St. §§ 10165–10519); that being the place for the court of one of the six divisions of that district. In the month of March, 1912, he was tried on the indictment, found guilty, and a sentence of imprisonment imposed. May 24, 1912, he filed a motion for new trial. On June 26, 1912, the motion was heard by Judge Locke, at Jacksonville, in the same district, but in another division, and the motion granted. The order of Judge Locke, granting the new trial was forwarded to and entered by the clerk at Tampa, while the judge was absent, under a rule of the court requiring the court to be held open. He was again tried at Tampa on February 11, 1913, when the jury disagreed. On March 13, 1914, he was again tried, and the jury returned a verdict of not guilty. In February, 1915, he was indicted for subornation of perjury. He demurred to this indictment, and moved to quash it, upon the ground that Judge Locke had no jurisdiction to grant the new trial. One of the grounds relied on was that the new trial had been granted out of the division in which the cause was pending and the order entered while that court was not in session; the judge not being present. The demurrer and motion to quash were heard by the then presiding judge, the successor of Judge Locke, who sustained the demurrer and quashed the indictment, upon the ground that Judge Locke had no power or authority, after the adjournment order of March 12, 1912, to vacate or set aside the sentence passed upon the appellant on that date, and when out of the division of the district. Thereupon the United States Attorney procured a commitment to be issued on the original judgment of conviction, and while held in custody under this commitment the appellant applied for a writ of habeas corpus. The trial judge discharged the writ, whereupon the cause was appealed to the Supreme Court. The judgment of the lower court, refusing to discharge the petitioner on habeas corpus, was reversed, the court holding that—

"The judgment of conviction having been vacated by an order of the court made within the scope of its power and jurisdiction, there remains no legal foundation for the commitment issued on March 20, 1915, and the appellant is entitled to be discharged from custody."

In United States v. Louisville & P. Canal Co., Fed. Cas. No. 15,633, Mr. Justice Miller, sitting as Circuit Justice, held that, notwithstanding section 719, Rev. St. (re-enacted as section 264 of the Judicial Code

[Comp. St. § 1241]), provided, "But no Justice of the Supreme Court shall hear or allow any application for an injunction or restraining order in any cause pending in the circuit to which he is allotted, elsewhere than within such circuit, or at such place outside of the same as the parties may stipulate in writing, except when it cannot be heard by the Circuit Judge of the circuit or the District Judge of the district," when the District Judge of the district and the Circuit Judge for the circuit and the Justice of the Supreme Court allotted to that circuit are absent from the district and circuit, any Justice of the Supreme Court has jurisdiction, at any place in the United States, to hear and grant an application for an injunction. In Searles v. Jacksonville, P. & M. R. R., 2 Woods, 621, Fed. Cas. No. 12,586, Mr. Justice Bradley, sitting as Circuit Justice, held that, notwithstanding the provisions of section 719, Rev. St., a Circuit Justice may grant a temporary injunction when the District and Circuit Judges of the district and circuit are disqualified or out of the district and circuit, at any place where he may be, although out of the circuit, and against the objections of the defendants. See, also, United States v. Finnell, 185 U. S. 236, 22 Sup. Ct. 633, 46 L. Ed. 890.

Aside from this, the order correcting the decree made by Judge Pollock was entered by Judge Dyer, the regular presiding judge of the court in which the original decree had been rendered, thereby making it his decree, based on information from Judge Pollock, which was satisfactory to him.

It is also proper to state in this connection that, when the motion was first presented to Judge Pollock, at Kansas City, Kan., no objection to his hearing it in the state of Kansas was made by the solicitors for appellant. The first time this objection was made was when the hearing had been continued and was had at Wichita, Kan., the continuance having been granted at the request of the solicitors of the appellant, upon the ground that they had not had sufficient time to prepare for the hearing.

We are of the opinion that no error was committed in overruling the objection to the hearing of the motion by Judge Pollock in the state of Kansas.

[2, 3] 2. Did the court err in acting on the motion after the expiration of the term at which the decree sought to be modified was rendered?

The only modification of the decree sought and granted was to expunge the findings of fact included in the decree, reflecting on appellees. They were not parties to that action, were not present at the hearing, and did not know of these findings until a few days before they filed their motions. They first learned of it by publication in a newspaper and within a few days thereafter filed their motions. They certainly cannot be said to have been guilty of a lack of diligence. Not having been parties to that action, they were not chargeable, with constructive notice of the contents of the decree. Findings of fact have no place in a decree in a national court. Rule 71 of the present Equity Rules (33 Sup. Ct. xxxviii), a re-enactment of rule 86 of the former Equity Rules, promulgated March 2, 1842, prescribed the form for decrees,

and although it does not in express terms prohibit the inclusion of findings of fact in the decree, it does so by necessary implication. Only, if it is necessary to make the decree more clear and specific, is it proper to include findings of fact in the decree. Putnam v. Day, 89 U. S. (22 Wall.) 60, 22 L. Ed. 764; McClaskey v. Barr (C. C.) 48 Fed. 130. There was no necessity for that in this decree.

The findings complained of in effect found appellees guilty of having willfully and knowingly sworn falsely, when they were neither parties to the action to set aside the order granting naturalization to the defendant in that case, nor present at the hearing, and therefore without an opportunity to defend themselves against so serious an imputation made in a solemn decree of a superior court.

The law is well settled that a court may correct its judgment after the expiration of the term at which it was rendered, if it was without jurisdiction, in excess of jurisdiction, erroneous on face of it, or improper by reason of doing injustice. Farmers' & Merchants' Bank v. Arizona Mutual S. & L. Ass'n, 220 Fed. 1, 135 C. C. A. 577; In re Dennett, 221 Fed. 350, 136 C. C. A. 422; Sweeney v. State, 35 Ark. 585.

A judgment upon a matter not within the pleadings and not litigated is void, being contrary to fundamental principles of justice. Reynolds v. Stockton, 140 U. S. 254, 11 Sup. Ct. 773, 35 L. Ed. 464; Coe v. Armour Fertilizer Works, 237 U. S. 413, 426, 35 Sup. Ct. 625, 59 L. Ed. 1027. "A decree has to be founded on the allegata as well as probata of the case." Putnam v. Day, 89 U. S. (22 Wall.) 60, 66 (22 L. Ed. 764); Hendryx v. Perkins, 114 Fed. 801, 806, 52 C. C. A. 435. If the error in the decree is within the recollection of the judge who presided at the trial, the correction may be without notice. In re Wight, 134 U. S. 136, 10 Sup. Ct. 487, 33 L. Ed. 865; Odell v. Reynolds, 70 Fed. 656, 17 C. C. A. 317; Groton Bridge & Mfg. Co. v. Clark Pressed Brick Co., 136 Fed. 27, 68 C. C. A. 557, affirming s. c. (C. C.) 126 Fed. 552.

The decree went beyond the relief asked by the plaintiff in that case, was highly prejudicial to appellees, who were not before the court, and it was the duty of the court to correct it in justice to the parties thus wronged. Brinkerhoff v. Franklin, 21 N. J. Eq. 334; Black on Judgments, § 161. In the decree appealed from, the learned trial judge again included his findings exonerating appellees from the imputations cast on them in the original decree. While this should not have been done, the learned trial judge, no doubt, felt that as the former decree contained these reflections on the petitioners, the corrected decree rectifying this error, should also appear on the records of the court.

We are of the opinion that, in neither decree should the findings of fact have been included, but in justice to the appellees it was proper for the court to make the findings it did and make these findings a part of the record of the cause, by placing them among the files of the cause, instead of including them in the decree.

[4] 3. Did the court err in admitting the depositions of witnesses read on behalf of appellees at the hearing?

Whether in a proceeding of this nature depositions are to be taken under section 863, Rev. St. (Comp. St. § 1472), in order to be admissible, or whether ex parte affidavits, with an opportunity to the adverse party to controvert them by counter affidavits, would be admissible, it is not necessary to determine in this case; nor do we deem it necessary to decide in this case whether the depositions of the witnesses residing within the Eastern District of Missouri, but more than 100 miles from Wichita, Kan., where the hearing was to be had, were improperly permitted to be read at the hearing, for, disregarding all the depositions except that of the appellee Sacks, there was substantial evidence to warrant the findings made by the court, and therefore their admission could not, by any possibility, be prejudicial to appellant.

The deposition of Mr. Sacks was properly admitted. He was neither a resident of the Eastern District of Missouri, nor of the District of Kansas, and resided more than 100 miles from the court in which the proceedings were pending, and the place of the hearing. While the time given by the notice to take his deposition was rather short, still, as the hearing was set for September 26th, in order to have the deposition at the hearing, they had to be taken, not later than September 24th. Mr. Sacks, who resided at Tulsa, Okl., first learned of the contents of the decree on September 23d, while he was in St. Louis on some business. He immediately filed his petition to expunge so much of the decree as reflected on him, and served notice on the solicitors for appellant that his deposition would be taken the next day.

Counsel for appellant appeared before the commissioner who was to take the depositions, objected to his taking them, and when the objections were overruled they refused to remain and cross-examine him. There is no reason why they could not have remained and cross-examined the witness, as the cross-examination would be limited to what was testified by the witness on direct examination. This deposition and the oral testimony of appellee Goldstein clearly warranted the findings made. Whether, in view of the fact that, the government is in no wise prejudiced by this decree, as all it asked in its suit against Glubok was to cancel the order granting him naturalization, it had a right to prosecute this appeal, we do not deem it necessary to decide, as no motion to dismiss was made by appellees.

Our conclusion is that the decree entered on October 7, 1918, should be modified, so as to include only the part of the decree, as set out hereinbefore, and omitting all findings of fact. The memorandum opinion prepared by Judge Pollock contains his findings of fact, and is a part of the record of the case, and it removes all imputations on appellees contained in the original decree.

As thus modified, the decree is affirmed.

STONE, Circuit Judge (dissenting). I am compelled to dissent in part on the ground that I think the depositions should have been excluded, because taken upon notice which was insufficient under the existing circumstances. Those circumstances as shown by the record and the notices given are as follows:

A record entry at St. Louis, Mo., in the District Court, signed by

Judge Dyer, the regular judge for that district, shows the filing of the Goldstein motion as of September 19, 1918. The original motion shows service of motion and notice on September 20, 1918, and filing of such motion with attached service on September 23, 1918. September 21, 1918, the Goldstein motion was presented for hearing before Judge Pollock at Kansas City, Kan. At that time and place the government orally applied for a continuance, for the purpose of gaining time to investigate the facts. Thereupon Judge Pollock, by order, continued the hearing until Thursday, September 26, 1918, and set the place of hearing at Wichita, Kan., at 9 a. m.; the court then stating that he would not hear the matter on affidavits, but upon depositions. This order was made Saturday, September 21, 1918, at Kansas City, Kan., about 300 miles from St. Louis, Mo.

The following Monday, September 23d, the United States Attorney, the United States Assistant Attorney in charge of the case, and the Naturalization Examiner at St. Louis were served with notices to take depositions, in St. Louis, in support of the Goldstein motion. These notices were served at 11:45 and 11:50 a. m., and were for the depositions of 19 witnesses. The first deposition, William L. Sacks, was set for 1:30 p. m. of the same day, or 1 hour and 45 minutes after the first service of notice. The other 18 depositions were for 8:30 the following morning, or September 24th. On Monday, the 23d of September, the Naturalization Examiner appeared before the commissioner at the time set for the deposition of Sacks. This appearance was on behalf of the United States Attorney and the Assistant United States Attorney in charge, and also of the Naturalization Service. The appearance was expressly limited to the purpose of objecting to the taking of the depositions, and when the commissioner ruled that he had no power to pass upon the objection made, and proceeded with the depositions, the Examiner withdrew and the government declined to participate further. One element of the objection was:

"No modification of said decree can at this time be made by Hon. John C. Pollock, United States District Judge for the District of Kansas, and at this time while he, the said District Judge, is sitting within the jurisdiction and district of the state of Kansas, and not in the Eastern district of Missouri."

Another element was that the notice to take depositions was not given in ample time to enable the government to prepare therefor, and was unreasonably short, having been made, it was claimed, on the Examiner at 12:30 p. m. of that day, only an hour before the time set in the notice, and on the others at 12:35 p. m., less than an hour before such time. The objections were expressly made applicable to the 18 depositions noticed for the following morning at 8:30 o'clock. On September 24th, notices to take 2 other depositions upon that day were served—the first was set for 11 a. m., with service upon the Examiner at 9:10 a. m., and upon the United States Attorneys at 1:45 p. m.; the second was set for 2 p. m., with service on the United States Attorneys at 9:40 a. m. and upon the examiner at 9:50 a. m. The depositions proceeded upon September 23d and 24th and were completed upon those days. On September 24th, Sacks executed, filed, and served his motion for modification of the decree annulling the citizenship of

Glubok, and on that day served notice that the same would be presented to Judge Pollock at Wichita, Kan., on September 26th, at 9 a. m. The hearing was held before Judge Pollock at Wichita, Kan., on September 26th. At this hearing the depositions were offered and objected to on many grounds, including the two above set forth as made when they were taken. Such objections were overruled and the depositions admitted and considered.

A fair summarization of the above facts affecting the depositions is as follows: Goldstein's motion was filed in St. Louis, Mo., Thursday, September 19th; service thereof in St. Louis, Mo., Friday, September 20th; called for hearing before Judge Pollock at Kansas City, Kan., Saturday, September 21st; at that time continued to the next Thursday, September 26th, at Wichita, Kan.; service of notice in St. Louis about noon on Monday, September 23d, for deposition to be taken there at 1:30 o'clock that afternoon; service at the same time for 18 other depositions to be taken the following morning (September 24th) at 8:30 o'clock; service during morning of September 24th, at St. Louis, for two further depositions to be taken two and four hours later; taking of depositions of 21 witnesses under the above notices and on the two days, September 23d and 24th, in St. Louis; hearing of the cause and admission of the depositions at Wichita, Kan., two days later, September 26th. No justifying reasons appear in the record for this haste. I cannot agree that these depositions were taken upon proper notice. Notice implies something more than an opportunity to be present physically, and it is by no means clear that these notices, as to some of the depositions, afforded even that opportunity. In my judgment, the objection to the depositions should have been sustained. The elimination of the depositions would result in complete absence of all testimony as to the applicant Sacks, and leave no basis for the finding in regard to him.

In addition to the depositions, Goldstein testified orally at the hearing, and his testimony afforded sufficient basis for the finding in his favor.

EWEN v. AMERICAN FIDELITY CO.

(Circuit Court of Appeals, Second Circuit. March 2, 1921.)

No. 116.

1. **Abatement and revival ⟸39—Action against dissolved corporation abates.**
When a corporation has been legally dissolved, it is dead, and an action against it abates the same as an action against an individual abates on his death, so that a judgment against a corporation after its dissolution is wholly void.

2. **Insurance ⟸49—Existence of surety company held to have terminated two years after injunction against continuing business.**
Under the Illinois Surety Company Act, which made such a company subject to Act of July 1, 1874 (Hurd's Rev. St. 1917, c. 73, §§ 11–19), in regard to the dissolution of insurance companies, providing that such companies should become extinct by ceasing to do business for one year

and that when their charters expired or became forfeited by nonuser the company should be continued a body corporate for two years for the purpose of prosecuting and defending suits against them, a surety company ceased to exist two years after the entry of a decree against it enjoining it from transacting any further business and appointing a receiver to close up its affairs.

3. **Abatement and revival ⊂⊃39—Dissolution of corporation in home state abates actions in all states.**
The state which grants a corporate franchise has exclusive and supreme power to withdraw it, so that, when a corporation's existence is terminated in the state of its organization, an action against it in another state is thereby abated.

4. **Insurance ⊂⊃49—Enjoining continuance of business of surety company held "final decree" and not "interlocutory decree."**
In a suit for the dissolution of an insolvent surety company and the appointment of a receiver, a decree, reciting that the court, being fully advised in the premises, restrained the surety company from further prosecution of its business and its officers from interfering with its records, and which was based not only on the bill and petition and answer but also upon oral proof in open court, is a "final decree" which determines the existence of the corporation, not merely an "interlocutory order," which is one made pending cause and before final hearing on the merits and where further action is necessary for the object of maintaining the status quo.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment; Interlocutory Decree or Judgment.]

5. **Courts ⊂⊃366(7)—State court's construction of general corporation law held not to control construction of insurance corporation law.**
The decisions of the Supreme Court of Illinois, construing section 10, General Corporation Law Ill., which continued the corporate capacity of corporations for two years for the purpose of collecting debts due the corporation, does not control the construction of the Insurance Company Law of 1874, which by different language regulates the dissolution of insurance and surety companies.

6. **Insurance ⊂⊃49—Proviso against relief from liability held not to authorize judgment against dissolved surety company.**
A provision in Insurance Company Law, § 13, that the dissolution of the company by ceasing to do business shall not relieve it from liabilities to any of its creditors, does not authorize the entry of judgment against a surety corporation more than two years after it had been enjoined from doing further business when such judgment was prevented, not by section 3, which contained the proviso, but by section 4, continuing the corporate powers for two years for settling its affairs.

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

Action by John Ewen against the American Fidelity Company. Judgment for defendant, and plaintiff brings error. Affirmed.

This cause comes here on writ of error to the United States District Court for the Southern District of New York.

On May 11, 1915, a summons was issued in an action brought in the New York Supreme Court, Kings County, wherein David Clinton Mackey was plaintiff and the Illinois Surety Company was defendant. That company was a surety corporation organized under the laws of the state of Illinois. Mackey had been its agent in New York City for the purpose of executing fidelity and surety bonds. The action was brought by him to recover an alleged balance of commissions due under contracts respecting which Mackey acted as agent

and broker for the company, obtaining the applications for the bonds and issuing the same.

In the above action Mackey in his complaint declared that he had at the special instance of the surety company performed services for it in the procuring and execution of surety company bonds and undertakings and that the company had agreed to pay him therefor certain commissions on all premiums earned in respect to such bonds and undertakings. He asked for judgment in the aggregate sum of $7,498.02 with interest from February 20, 1915. By stipulation and consent and pursuant to an order of the court an amended complaint was subsequently filed on November 28, 1917, in which Mackey demanded judgment in the sum of $23,000.

The surety company in its answer admitted some of the allegations in the complaint and denied others. It set up the contract which existed between it and Mackey and alleged that after Mackey had repeatedly violated its provision he was on that account discharged by it on December 17, 1913. It set up by way of counterclaim that Mackey had collected premiums for which he was liable to the defendant in the sum of $495,269.72, on which the commissions earned amounted to $185,614.47, leaving a balance of $309,655.25 as its share of the said premiums. That of this amount it had received the sum of $245,700.99, leaving a balance due and owing to it the sum of $63,954.25. It was also alleged that Mackey as agent had collected other sums which he had converted to his own use wrongfully and it asked for judgment in its favor for the sum of $153,914.56 with interest from December 17, 1913.

The case was at issue in July 1915, and it was not until November 21, 1917, that Mackey obtained an order of reference. It was finally agreed that the matter should be submitted to the referee in August, 1918. About that time the referee died. The second referee was not appointed until May 2, 1919, which was eight months after the first referee's death. The referee then appointed filed his report on June 9, 1919, in which he found the plaintiff entitled to judgment against the defendant in the sum of $31,859.38 with interest thereon from January 1, 1917, in the amount of $4,662.08, making a total of $36,521.46, and for the costs of the action to be taxed. The counterclaim set up in the answer was dismissed. Accordingly and on June 21, 1919, judgment was entered in favor of Mackey in the amount of $37,041.95.

It appears that prior to the entry of this judgment Mackey had attached certain property belonging to the surety company, the warrant having been issued to the sheriff of the county of Kings and a levy made thereunder. The property so attached was released on July 10, 1915, by the execution and delivery of a bond by the American Fidelity Company whereby it undertook in the sum of $7,500 that the Illinois Surety Company would on demand pay to Mackey any judgment he might obtain against it in the action then pending between them, not exceeding the amount above named. And thereupon the attachment was released.

On the same day that Mackey obtained his judgment he assigned it to John Ewen, a lawyer in the city of New York. The assignment gave to the assignee an irrevocable power of attorney to take all lawful ways to recover the money due on the judgment. And on the same day by a separate instrument Mackey also assigned to Ewen all of his rights against the American Fidelity Company growing out of its undertaking already referred to.

The assignee of the judgment on August 29, 1919, commenced the present action against the American Fidelity Company as defendant on the bond given by it to Mackey by which it undertook that the judgment which Mackey obtained against the Illinois Surety Company should be paid in a sum not exceeding $7,500 with interest.

The plaintiff in the present action alleges in his complaint the giving by the defendant of its undertaking to Mackey that the Illinois Surety Company would pay any judgment he obtained in his action against that company in a sum not to exceed $7,500. It alleges the recovery of the judgment in the sum of $37,041.95, and that demand has been made for the payment of the judgment by the Illinois Surety Company and that no part thereof has been paid either by that company or by the defendant. He demanded judgment against the defendant in the sum of $7,500.

The defendant thereupon removed the action from the state court into the District Court of the United States for the Southern District of New York on the ground of diversity of citizenship. It appears that the Illinois Surety Company was organized under the laws of the state of Illinois. It also appears that the American Fidelity Company, defendant herein, is a corporation organized under the laws of the state of Vermont and is licensed and authorized to transact fidelity and surety business in the state of New York, and that it was actually so transacting business therein at the times mentioned in the complaint.

After the removal into the District Court defendant answered and set up the defense that at the time judgment was entered in the action which Mackey brought against the Illinois Surety Company that corporation was not in existence and that the judgment was consequently void.

On the trial of the case in the court below by consent of counsel a jury of one was impaneled and sworn.

At the conclusion of the case counsel for the defense moved to dismiss and also moved to direct a verdict for defendant on the ground that at the time the alleged judgment was entered the Illinois Surety Company had ceased to exist and that it was impossible to enter a valid legal judgment against it thereafter. The court stated that the defense had been established, and he accordingly instructed the jury to return a verdict for the defendant. This was done and judgment was rendered accordingly.

Wilder, Ewen & Patterson, of New York City (John Ewen and William R. Wilder, both of New York City, of counsel), for plaintiff in error.

Gleason, Vogel & Proskauer, of New York City (Joseph M. Proskauer and Wesley S. Sawyer, both of New York City, of counsel), for defendant in error.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] When a corporation has been legally dissolved it is dead. According to the principles of the common law it is not in existence for any purpose thereafter. The necessary effect of the death of a corporation is not different from the death of a natural person in that in the case of each no judgment can thereafter be entered against either in the absence of a statute otherwise providing. A judgment can no more be rendered against a dead corporation than against a dead man. It is wholly void in the one case as in the other. That such is the common-law rule is so well established upon the authorities that it is idle to controvert it. An action against a corporation abates when corporate existence comes to an end. Pendleton v. Russell, 144 U. S. 640, 12 Sup. Ct. 743, 36 L. Ed. 574; Carr v. Hamilton, 129 U. S. 252, 9 Sup. Ct. 295, 32 L. Ed. 669; Martyne v. American Ins. Co., 216 N. Y. 196, 110 N. E. 502; Blanchard v. Gay Co., 289 Ill. 421, 124 N. E. 616; Thornton v. Railway Co., 123 Mass. 32; Morgan v. New York National Building Association, 73 Conn. 151, 46 Atl. 877; Eagle Chair Co. v. Kelsey, 23 Kan. 632; Short Line R. R. Co. v. Maine Central R. R. Co., 92 Me. 476, 43 Atl. 113.

It is necessary to inquire, therefore, into the alleged dissolution of the Illinois Surety Company to ascertain whether the corporation had become civiliter mortuus before judgment was rendered against it. It appears that the statute under which the Illinois Surety Company was

organized is entitled "An act to provide for the organization, management and regulation of surety companies," in force April 17, 1899 (Laws Ill. 1899, p. 260). That that statute provided that such companies shall be subject to the provisions of "An act in regard to the dissolution of insurance companies," in force July 1, 1874. That this statute of 1874 (Hurd's Rev. St. of Illinois 1917, pt. 2, c. 73, pp. 1679, 1680) provides as follows:

"(3) The charters of all insurance companies incorporated in this state, which either from neglect or by vote of their members or officers, or in obedience to the decree of any court, have ceased, or shall hereafter cease, for the period of one year, to transact the business for which they were organized, shall be deemed and held extinct in all respects, as if they had expired by their own limitation; and the circuit courts shall have authority, upon application, by the petition of the auditor of state, or of any person interested, to fix, by decree, the time within which such companies shall close their concerns: Provided, that this section shall not be construed to relieve any such company from its liabilities to the assured or any of its creditors.

"(4) Insurance companies whose charters expire by their own limitation, or become forfeited by non-user, or are dissolved by decree of court, or otherwise, shall, nevertheless, be continued bodies corporate for the term of two years after such expiration, forfeiture or dissolution, for the purpose of prosecuting and defending suits by or against them, and of enabling them gradually to settle and close their concerns, to dispose of and convey their property, and divide their capital stock and assets, but not for the purpose of continuing the business for which they were organized."

It appears also that on April 19, 1916, a majority in number and interest of the stockholders of the Illinois Surety Company filed a bill in the superior court of Cook county, Ill., "to close said company and to procure a decree of dissolution of the corporation in the manner provided by law." That they enumerated the assets of the corporation in all states, and alleged that the corporation was insolvent and that if a receiver should not be appointed it would be subject to a multiplicity of suits and its property lost and depleted by expenses and unevenly distributed to its creditors. That they asked that—

"The Illinois Surety Company may be restrained by proper decree * * * from further prosecution of its business, * * * and that a receiver be appointed forthwith, to take charge of the estate and effects of said corporation, including all such securities as are deposited in this and other states, to collect the debts due and the property belonging to said corporation with power to prosecute and defend suits in the name of said corporation, or in the name of said receiver, and to do all other acts necessary for the collection, marshaling, and distribution of the assets of said Illinois Surety Company and the closing of its concerns."

On the same day, April 19, 1916, the Illinois Surety Company filed an answer to the bill, admitting all the allegations thereof, including insolvency.

On the same day, April 19, 1916, oral testimony was taken in the superior court of Cook county, Ill., which found that the averments of the bill were true, and decreed:

"(1) That the said Illinois Surety Company, be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business."

On the same day the superior court made a separate order appointing a receiver of all the property of the corporation or held for its

account wherever situated. The order gave the receiver "power to prosecute and defend suits in the name of the Illinois Surety Company, or in his own name."

[2] By virtue of the above order of the Illinois court enjoining the Illinois Surety Company from the further prosecution of its business, the charter of the company must be deemed and held to have become extinct in all respects as if it had expired by its own limitation after the lapse of one year from the date of the order as provided in section 3 of the Act of 1874 above quoted. But this corporation in accordance with the provision contained in section 4 of the same act, also above quoted, continued to be a body corporate for the term of two years after the expiration of its charter for the purpose of prosecuting and defending suits by or against it and for the settlement of its affairs.

As the Illinois Surety Company was restrained from doing any business by court decree of April 19, 1916, its charter expired on April 19, 1917. As it was continued a body corporate by statute for two years and no more after its charter became extinct its existence ceased and it became dissolved for all purposes on April 19, 1919.

The receiver was never made a party to the action brought by Mackey in New York against the Illinois Surety Company. On April 18, 1919, the superior court of Cook county, Ill., which had appointed the receiver, directed him to discontinue any further defense of the Illinois Surety Company in the New York action and directed him to notify Mackey of the order. The order also directed Mackey to file his claims with the master who had been appointed under an order of the Illinois court made on January 30, 1918. That order referred all actions pending in the several states against the Illinois Surety Company, and against the Illinois Surety Company and the receiver, and all disallowed claims to a master to hear the evidence and report his conclusions of fact and law. Both of these orders appear to have been made on due notice to all parties entitled to receive notice. As soon as the order of April 18, 1919, was made the receiver directed the attorneys who had hitherto appeared for the Illinois Surety Company in the New York action to discontinue their appearance. They thereupon at once notified Mackey that their authority to represent the defendant in that action and to appear for it had been terminated and revoked. After this notification Mackey made haste to obtain the judgment in the New York action which is the judgment involved in the suit now before this court, and for the payment of which it is claimed the present defendant must pay to the extent of its bond. That action it will be recalled had been commenced in May, 1915, and had been prosecuted, it must be admitted, with much indifference through a period of four years, there being no adequate explanation given of the reason for the delay.

[3] The state which grants a corporate franchise has exclusive and supreme power to withdraw it. Morgan v. New York National Building Association, supra. When the state of Illinois which created the Illinois Surety Company terminated its existence, its action was as decisive in New York as in Illinois. For as Chief Justice Taney said in Bank of Augusta v. Earle, 13 Pet. 519, 588 (10 L. Ed. 274):

"A corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. * * * It must dwell in the place of its creation, and cannot migrate to another sovereignty."

The Supreme Court has often reaffirmed the statement. It must necessarily follow that a decree of dissolution of a corporation rendered in the state of its creation abates not only all actions pending by or against it in that state but in every other.

[4] It was urged upon the argument that the language of section 13 of the Illinois Insurance Law hereinbefore set forth and which provides for the forfeiture of charters for failure to transact business for one year requires that this failure to do business must be "in obedience to the decree of any court," and there was no such decree but only an interlocutory order. The language used by the court was:

"* * * And the court being fully advised in the premises, doth find from said bill and petition and answer and oral proof heard in open court that the averments in said bill and petition are true, and doth order, adjudge and decree as follows, without bond from the complainants and until the further order of court:

"(1) That the said Illinois Surety Company be, and it is hereby forthwith restrained, enjoined and forbidden from further prosecution of its business.

"(2) That all the servants, agents, officers and employees of said Illinois Surety Company, be and they are hereby restrained and enjoined from interfering with, copying or carrying away any of its books, papers, records, schedules, lists of policyholders, or other documents, or any copies thereof."

An interlocutory order is one made pending a cause and before final hearing on the merits and where further action is necessary. But the decree in this case by its language shows that it was made after the court was "fully advised in the premises" and that it was based not only on the "bill and petition and answer" but also upon "oral proof in open court" which satisfied the court "that the averments in said bill and petition are true." It was not necessary that any further steps should be taken, and it settled not some intervening matter but the cause itself. There was nothing left open which remained to be disposed of. The rights of the parties were determined by it. The object of an interlocutory order is to maintain the status quo. The object of a final decree is to determine the right in controversy. That was done by the decree which was entered in this case. This court has before decided that a decree does not lose its character as a final decree by adding the words "until the further order" of the court. That question has been settled for fifty years in the federal courts by the decision of the Supreme Court in French v. Shoemaker, 12 Wall. 86, 98, 20 L. Ed. 270. In that case leave was given, at the foot of the decree, to either party to apply for such further order as might be necessary or as might be required in relation to any matter not finally determined by it. The court in commenting upon it declared it to be "quite apparent that that reservation was superadded to the decree as a precaution and not because the court did not regard the whole issue between the parties as determined by the decree."

[5] In Commercial Loan & Trust Co. v. Mallers, 242 Ill. 50, 89 N. E. 661, 134 Am. St. Rep. 306, 17 Ann. Cas. 224, the court construed section 10 of the General Corporation Law of that state (Hurd's Rev.

St. 1917, c. 32), and which provided that corporations organized under the law should continue their corporate capacity "during the term of two years, for the purpose only of collecting the debts due said corporation, and selling and conveying the property and effects thereof." It held that the act applied only to corporations organized under it. It accordingly held that a corporation organized for banking purposes, and not organized under the General Corporation Law, was not affected by the two-year limitation and might rightfully enforce its claims against its debtors in the courts of the state until such indebtedness had become barred by the general statute of limitations. This, the court thought, was in accord with "the general public policy of the state which permits a corporation to do such acts as may be necessary to collect its debts and settle up its affairs after dissolution." In that case the banking corporation had been dissolved during the pendency of the action; judgment was not actually entered in the suit until ten years thereafter; it was held that the action did not abate.

In Singer & Talcott Co. v. Hutchinson, 176 Ill. 48, 51 N. E. 622, the court construed section 12 of the Corporation Law of the state which reads as follows:

"The dissolution, for any cause whatever, of any corporation created as aforesaid, shall not take away or impair any remedy given against such corporation, its stockholders or officers, for any liabilities incurred previous to its dissolution."

The court in passing upon it said:

"While the corporate capacity of this corporation was continued for two years after the expiration of its charter, or until April 10, 1894, in order to bring suits for the purpose aforesaid, its corporate capacity to be sued as a party defendant, for liabilities which accrued before its dissolution, was continued without limitation as to time, and therefore the general statute of limitations, only, would apply."

If the Illinois Surety Company had been subject to the General Corporation Law of the state instead of the Insurance Law of 1874 there might be ground for the contention that the judgment which Mackey obtained in New York after the two year period had expired was binding upon the Illinois Corporation. But if, as we hold it was, the corporation was subject to the act of 1874 in regard to the dissolution of insurance companies, then it was not subject to the General Corporation Law of the state, or to the public policy of the state as announced in the two decisions last quoted. Our attention has not been called to any decision of the Supreme Court of Illinois, or of any of its other courts, construing sections 3 and 4 of the act of 1874, and in the absence of such a decision we must hold that the provision in section 4, heretofore quoted, which continues bodies corporate after their charter had expired "for the term of two years" for the purpose "of prosecuting and defending suits by or against them and of enabling them gradually to settle and close their concerns" is a period of limitation and that no judgment can be entered in any action, against any corporation subject to its provisions, unless it is done within the period so prescribed.

[6] Counsel for the plaintiff directs our attention to the language used at the end of section 13 of the Insurance Law, wherein it is expressly said that—

"This section shall not be construed to relieve any such company from its liabilities to the assured or to any of its creditors."

That section provides that the charter of the corporation expires by limitation at the end of the one-year period, and that the fact that it has expired shall not relieve it from liabilities to creditors. But it is not claimed that the company is relieved from liabilities to creditors by section 13. It is claimed that it is relieved under section 14. That section provides that after the corporation has been dissolved at the end of one year under the provisions of section 13 it shall be continued for the term of two years more for the purposes mentioned. The relief from liability plainly comes at the end of this additional period of two years under the provision of section 14.

There are other assignments of error which we have examined and found without merit.

Judgment affirmed.

AMERICAN LAUNDRY MACHINERY CO. v. UNITED STATES HOFFMAN CO.

(Circuit Court of Appeals, Second Circuit. March 2, 1921.)

No. 27.

1. **Patents ⇐168(2)—Claim narrowed to secure allowance cannot be construed to cover rejected claims.**
   Where an inventor acquiesces in the rejection of a broad claim, and substitutes phraseology which results in the grant of a narrower claim, he cannot insist on a construction of the claims allowed which would cover that which has been previously rejected, or would cover prior devices which are operative under the original claim.
2. **Patents ⇐328—962,213, claims 5 and 9, for cuff-pressing machine, held not infringed.**
   The Hagan and Cooper patent, No. 962,213, claims 5 and 9, for an improvement in cuff-pressing machines, which, to secure an allowance, were limited to devices for drying the cuffs while they were being ironed, to secure the polished finish, is not infringed by a suit-pressing machine, in which the drying is done only after the pressure has been removed, to avoid the shiny surface which is objectionable in pressing suits.

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

Suit for infringement of patent by the American Laundry Machinery Company against the United States Hoffman Company. Decree for defendant, and plaintiff appeals. Affirmed.

Louis Prevost Whitaker, of New York City (Livingston Gifford, of New York City, and Brockett & Hyde, of Cleveland, Ohio, of counsel), for appellant.

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

Charles Neave, of Boston, Mass., and George E. Cruse and Maxwell Barus, both of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

MANTON, Circuit Judge. The appellant brought this suit for infringement of letters patent No. 962,213. It is a manufacturer of laundry machinery. Its chief business is the sale of equipment for laundries, while the appellee is the manufacturer of garment pressing machines—that is, machines for pressing suits of clothes and woolen clothes. Its garment presses were made under patents which it owned. They appeared on the market as early as 1910. The appellant sold the garment press manufactured by the appellee as a jobber up to 1911, and in 1918 brought out a garment pressing machine.

The claims involved are 5 and 9 and read as follows:

"5. The combination with the heated platen and a hollow padded work support movable relatively toward and from the platen to press the material between them, the platen being adapted to co-operate with substantially the entire working surface of the bed at the same time during the pressing operation, of means for passing air through the padding to remove the moisture therefrom during the pressing operation."

"9. In an ironing machine, the combination with a heated platen of a hollow perforated bed having a padded covering and formed to permit the platen to co-operate with the entire working surface of said bed at the same time, and means for passing air through the bed and the padding at the edges of the latter during the pressing operation."

The application for the patent was filed in December, 1904. From the file wrapper and contents, it appears that claim 5, as originally filed, was objected to and rejected on the patents to Benjamin, No. 675,435, and Ericson, No. 622,336. This claim was again redrafted, and rejected by the Patent Office on the same Benjamin and Ericson record, for the reason that, it was said, no invention would be required to supply the bed in the Benjamin patent with air, or to substitute a pump for the blower in the Ericson patent. Claim 5 was then amended so as to add the words to "press the material." Claim 9, as originally filed, was rejected because of the patents to Benjamin and Ericson, and the claims were redrafted, so limiting them as to keep the pad on the bed dry so that the speed of the operation of the machine could be increased and therefore its capacity. Nowhere in the original claims, or any of the proposed amended claims, or the final accepted claims, did it appear by the language used that the applicant intended there would be any drying of goods after the pressing operation.

The claims as allowed provide that the pressing iron "remains in contact with the goods during the entire pressing and drying operation," and the patent describes the operation of the machine so that the pad work support with the goods is raised against the heated platen, and that the parts are permitted to remain in this position as long as desired; the moisture being removed from the pad and the goods by the air pressure apparatus connected with the chamber. The drying of the goods, so much as there is, must be while the platen and padded work support are in contact with the goods during the entire pressing and

drying operation. The whole idea and scope of the invention, as finally allowed, is, as is stated in the patent, to keep its pad dry, "this result being accomplished by varying the air pressure at the upper side of the padded surface and removing the moisture and steam as it is liberated or generated by the application of the hot iron." It thus appears, from the proceedings in the Patent Office and the claims as finally allowed, that the improvement in the art must be limited to the sense in which the words are employed. This is essential, in view of the prior art, to escape anticipation by the Benjamin and Ericson patents.

We agree with the court below in its conclusions that the prior art discloses that to blow air through the pad of a pressing machine operated on the rotary or progressive ironing plan was old; also to press the article while in a fixed position by bringing down upon it a heated platen, which remains stationary upon it, except for the downward pressure, was old and extensively used; and the passing of air through a perforated pad was old and used in stereotyping matrices. The appellant's patent, however, provides for perforating the plate or pad support of a laundry machine for the purpose of passing air through it either by pressure or suction. A method of drying the pad was long needed in the art, and the appellant's patent made the way for this accomplishment. In this respect, there was progress and invention. The patentees have invented a simple, but efficient, way for this accomplishment. But, because of the state of the prior art, we think the patentees were so limited in the claims which were allowed them in the Patent Office, by the words used in their claims, that they have restricted themselves to a construction in which the air passed through the pad during the period of the pressing operation.

[1] Where an inventor, seeking a broad claim, as the patentee did here, finds his claim rejected, and after rejection acquiesces, and substitutes phraseology which results in the grant of a narrower claim, he cannot insist that the construction of the claim allowed shall cover that which has been previously rejected. Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609, 27 Sup. Ct. 307, 51 L. Ed. 645; Corbin Cabinet Lock Co. v. Eagle Lock Co., 150 U. S. 40, 14 Sup. Ct. 28, 37 L. Ed. 989. Nor can he maintain successfully that his granted claims cover prior devices which are operative under the original claims which have been rejected. Hubbell v. U. S., 179 U. S. 80, 21 Sup. Ct. 24, 45 L. Ed. 95; Leggett v. Avery, 101 U. S. 257, 25 L. Ed. 865; Nathan Support Co. v. Cammeyer (C. C. A.) 264 Fed. 968.

[2] Again, the evidence is quite clear here that the method of performing the work of laundering clothes and pressing garments is not the same. In the laundry press, the goods are put in wet or dampened, while in the garment press the goods are put in dry and steam applied to the garment above or below, or both, to wet it. One of the objects desired in the laundry press is that the hot pad head is used, not only to iron or press the goods to give them a "beautiful domestic finish," but to dry them by converting the steam into moisture, which is absorbed by the pad. On the other hand, the garment press desires no polish, and it is necessary that goods remain dry during the pressing

operation, so that the wrinkles may be taken out where not desired, and creases put in them where desired. In the laundry machine it is desired that all moisture be taken out of the goods during operation, and in the garment pressing machine it is the most steam which softens the fabric, so that it can be restored to its original shape while being pressed, and after the pressing operation is completed the goods are still soft, moist, and hot, and the air is then used to dry the garment quickly.

With these differences in mind, can it be said that the appellee's machine infringes appellant's patent? The appellant's catalogue describes the pressing system of ironing. It says, in substance, that the pressure system is by the application of extreme pressure to a flat padded surface against a hot polished surface, and that the dampened goods, being thus subjected to pressure, take on a beautiful domestic ironed finish, caused by the great pressure which flattens the wove of the goods, brings the starch to the surface, and makes a perfectly smooth shirt, and at the same time drying out the dampness, leaving the material dry and extra stiff. There is no motion or friction. The goods remain under pressure until dried, obviating any wear or stretching of the goods, and making it possible to mold the shirt into the proper shape and give to it the character that cannot be obtained any other way. And by the appellant's witness it appears that in the appellee's garment press, when the head is brought down in position of pressure, the valve can be opened to throw steam upon the goods which are on the padded support; that the goods are then placed under pressure by the pressure on the treadle, and the head remains there for a time dependent upon the personal equation of the operative, usually a few seconds, and then allowed to go up; then he opens the air valve, which causes currents of air to shoot down through the goods, and through the padding and the perforations of the head, and out of the machine, thereby drying the goods while in this position on the machine pad. The treatment given to the garment is described as sponged, pressed, and dried, while in situ on the padded work support in its original position.

It thus appears that, according to the appellant's contention, its machine would give a suit of clothes a beautiful domestic ironed finish after it has been pressed, and would flatten the wove of the material in so doing. In the garment press machine, instead of drying the pad while the goods are under pressure, the pad and garment thereon are wet, and kept wet by steam. Air is applied only after the pressing operation has been concluded, and it is then used, not to dry the pad, as in the laundry machine, but to dry the garment, for the garment, unlike the starched cuff or shirt, that must be dry when the platen is lifted, is and must be wet when the press is opened, so as to keep the garment from becoming shiny by drying during the pressing operation. In the appellant's machine, provision is made to supply steam through the press cloth on the heated platen, and it also supplies steam to the garment from the heated buck through the padded work support, thus insuring that both sides of the garment are kept wet during the pressing operation. In the garment press, the pad is purposely wet during each pressing operation, and the air is used solely to dry the garment after the

pressing operation. Each garment, when pressed, is treated with steam to or through the pad, and the pad is purposely wetted.

It is apparent that the appellant's machine relates to ironing, pressing for starched goods and steam laundry work, where as the appellee's relates to pressing machines used for suits of clothes or similar heavy woolen goods. The desired result in each of the operations is different. They are separate industries. Both presses have an upper heated platen—the iron—and the lower padded platen, the ironing board. In the cuff press of the patent, the cuff is put into the press, dampened, and is then dried in the contact with the iron, so as to acquire the beautiful domestic ironed finish. In the laundry machine, the pad on the ironing board member, against which the cuff is being pressed, must be dry at the end of the pressing operation. This occurs when the iron is removed from the cuff. If the pad is not dry, the cuff will be wet, and the desired finish cannot be obtained. In the appellant's garment press, the clothes are put in dry, and immediately moistened by hot steam, and they are kept moist as long as they are kept in contact with the heat pressing surfaces. Indeed, if the clothes become dry in the press, they will get shiny surfaces, and shiny surfaces on clothes are undesirable. If the air was sent in before the press was opened, there would be no drying effect.

The appellant's laundry press required that the pad and goods must be dry when the iron is raised, while in the appellee's press the pad and goods must be wet when the iron is raised. The difference is clear. The air is sent through the bed and the padding during the pressing operation, according to the appellant's claims, and that is done in practice in appellant's machine during the contact of the iron and ironing board, whereas in appellee's machine the air is turned on by treadle operation from the air apparatus after the platen has been raised. The inventors say:

"Our invention also provides an ironing or pressing machine of the type embodying a padded work support and a pressing iron movable relatively to each other, the latter of which remains in contact with the goods during the entire pressing and drying operation."

And they further state:

"* * * In a pressing machine the goods remain stationary and are given the requisite amount of stiffness by the drying of the starch in them while stationary and under pressure."

The patent further says that—

"When the operation is finished pressure upon the releasing treadle 54 flexes the toggle, allowing the bed to fall, and he then draws forward the pad support and removes the goods, applying another cuff, and proceeding as before."

This is a different operation than appellant's machine provides, to wit, that in practice the suction means of drying in appellee's machine are operated after the platen has been raised from the pad or is about to be so raised; and it is abundantly shown that there is no reason why

the drying process should be begun before the pressing of the cloth garment is finished.

We agree with the District Court that, while the patent is valid, the appellee's machine does not infringe.

The decree is affirmed.

SEABOARD AIR LINE RY. CO. v. NEW ORLEANS EXPORT CO.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1921.)

No. 3584.

1. **Carriers ⇐30—Tariffs held to authorize storage charges for goods kept in cars.**
   The tariffs of a railway filed with the Interstate Commerce Commission, which included a storage charge on the goods for export after 20 days' free storage, and provided that such charges were in addition to transportation rate on all property passing over the company's wharves or stored in warehouses or storehouses, or on other property operated by the railway, authorizes the carrier to collect storage charges from goods for export held in its cars more than 20 days; the provision not being limited to goods which had been removed from the cars to warehouses.

2. **Carriers ⇐196—Amount of recovery of storage charges held for the jury.**
   In action by a railway company for storage charges on goods intended for export, where the number of carloads and the total weight of the goods as set forth in the petition were admitted in the answer, evidence of the dates of arrival of the cars at the port and of the dates when the ships in which the goods were loaded were ready for loading *held* sufficient to require submission to the jury of the amount of storage charges to which the railway company was entitled.

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 Seaboard Air Line Railway Company against the New Orleans Export Company to recover storage charges. Judgment for defendant on a directed verdict, and plaintiff brings error. Reversed.

Walter J. Suthon, Jr., of New Orleans, La. (Hall, Monroe & Lemann, of New Orleans, La., and James F. Wright, of Norfolk, Va., on the brief), for plaintiff in error.

John D. Miller, of New Orleans, La. (Miller, Miller & Fletchinger, of New Orleans, La., on the brief), for defendant in error.

Before WALKER, BRYAN, and KING, Circuit Judges.

KING, Circuit Judge. The Seaboard Air Line Railway Company (hereinafter styled the plaintiff) brought suit against the New Orleans Export Company (hereinafter styled the defendant) to recover storage charges on 1,070 carloads of cotton seed oil cake, weighing 63,520,844 pounds, which it alleged had been received at Savannah for export and shipped by certain steamers, which had been berthed at

certain dates set forth in Exhibit C to the petition. Said storage was claimed under two tariffs filed with the Interstate Commerce Commission; one providing the following charges:

"Cotton seed oil cake in bulk, or in bulk to be sacked by owner when for export, wharfage and handling, including twenty days' free storage (Sundays and legal holidays excepted), one cent per 100 pounds.

"Storage for first ten days or fractional part thereof succeeding the twenty days' free storage, one cent per 100 pounds; storage for each succeeding ten days or fractional part thereof, ¾ cent per 100 pounds."

The other tariff was identical, except that sacking or resacking was to be done by the carrier for 50 cents per ton of 2,240 pounds; the owner furnishing sacks and twine. Each of said tariffs provided:

"The charges shown here will be made and collected by the Seaboard Air Line Railway for the services indicated in addition to the transportation rates on the property herein described passing over the company's wharves or stored in warehouses or storehouses, or on other property operated by the Seaboard Air Line Railway when traffic originates at or destined to: Georgia —All points. * * *

"The term 'handling,' as used herein, except where otherwise specified herein, means the legal or legitimate expense involved in the movement of the traffic between shipside and cars, or between shipside and storage warehouses of Seaboard Air Line Railway."

Plaintiff alleged that the charges for storage under the above tariffs amounted to $13,721.45, on which $7,500 had been paid, leaving $6,221.45 due. Said storage was computed upon the length of time each car remained loaded after the expiration of said free storage period, up to the time when the steamer on which the carload was to be loaded for export was berthed and ready for loading.

The court, at the conclusion of the plaintiff's testimony, directed a verdict for the defendant. It appears from the record that the court directed the verdict upon its interpretation of the tariffs, to the effect that storage on the cotton seed oil cake began only after the freight was unloaded from the cars, either on the wharf or in the storage warehouses, for the time it remained on said wharves or in said warehouses after 20 days' free storage had been allowed there.

The plaintiff insists that this was an erroneous interpretation of the tariffs; that they permitted storage to be charged when the cake was held in cars for more than 20 days (Sundays and legal holidays excepted), after the arrival of said cars, waiting for the placing of the vessel in which the contents of said cars were to be loaded, as well as where said contents were unloaded from the cars upon the wharves, or put in the storage warehouses.

[1] 1. We think that the tariffs under which this storage is claimed provide for charges, after transportation ended, and after the 20 days' free storage time had elapsed, for the use of said cars to store said cake awaiting the arrival of the several vessels. Clearly, after the arrival of said cars at Savannah and notice of such arrival to the defendants, and the expiration of said 20 days, the relation of said plaintiff to said freight was not that of a carrier, but was that of a warehouseman. The freight charge is intended to compensate for the transportation. One of the provisions of the tariff is that the storage charges

will be made on property "passing over the company's wharves, or stored in warehouses or storehouses, or on other property operated by the Seaboard Air Line Railway."

That storage in cars is contemplated by the Interstate Commerce Commission is apparent from a number of utterances in their decisions:

"* * * Carriers are not obliged to provide storage in cars, but if they do so they are entitled to reasonable compensation." Pittsburg & Ohio Mining Co. v. Baltimore & Ohio R. R. et al., 40 Interst. Com. Com'n R. 408.

"The rate of freight includes a delivery of the property; it does not include the storage of the property after a reasonable opportunity has been afforded the consignee to receive it. When, therefore, the carrier, through failure of the consignee to promptly remove the property, is obliged to store the same either in its cars or in its warehouses, it performs a service not embraced in the rate and for which additional compensation may properly be exacted." New York Hay Exchange Association v. Pennsylvania Railroad Co., 14 Interst. Com. Com'n R. 178, 184.

See Michie v. New York, N. H. & H. R. Co. (C. C.) 151 Fed. 694, 696.

Clearly, if one exporter was not charged for storage in cars, although his property was kept therein, awaiting the arrival of his vessel, when his competitor was charged with storage because his cars had been unloaded in the warehouse during the same period of time, the shipper enjoying the free use of the cars would have received a marked advantage over the one charged for storage in warehouse. Where facilities are furnished to a shipper, they should be paid for. Mechanical & Chemical Pulp Division, etc., v. B. & O. R. R. Co., 41 Interst. Com. Com'n R. 506; Plymouth Coal Co. v. Delaware, L. & W. R. R. Co., 36 Interst. Com. Com'n R. 76; Plymouth Coal Co. v. Lehigh Valley Ry. Co., 36 Interst. Com. Com'n R. 140.

[2] 2. It is further insisted by the defendant that, regardless of the true construction of the tariffs, there was no definite evidence of when said cars arrived and were placed on storage tracks in Savannah, or when said vessels in which their contents were to be loaded were placed for receiving the same; therefore there was no sufficient evidence upon which a verdict could have been found. From the recitals in the bill of exceptions it is evident that the court would not have directed a verdict upon the ground of a want of sufficient evidence to take the case to the jury, if he had been of the opinion that the storage charges were permitted under a proper construction of the tariffs.

We do not think that there was an absence of evidence sufficient to require the withdrawal of the case from the jury upon the issues of fact therein. The number of cars on which storage was claimed, and the quantity of cotton seed oil cake, and the number of cars loaded in each of the vessels in which shipped, with the time of arrival and time of detention, was set out in Exhibit C of the petition, as stated in paragraph 12 thereof.

The number of cars embraced in said Exhibit C and the total weight of the oil cake therein set forth were admitted to be correct in the answer to said paragraph 12, and while for lack of information the

defendant denied the other allegation set forth in said paragraph 12, which averred the quantity of said cake and dates upon which it was delivered to the several steamers, there was produced an exhibit made up by the defendant, stating the dates of the arrival notices of the several cars which were loaded upon the different steamers mentioned in said Exhibit C, with the weights and also the number of days elapsing between the date of said arrival notices and the date when said steamer was berthed, which it was testified without contradiction was the time when said storage charges terminated.

The testimony of the harbor master showed that each of the ships mentioned in said Exhibit C, with the exception of the City of St. Louis, were berthed for loading on the several dates stated in said Exhibit C of his own knowledge, and as to the City of St. Louis he testified, without objection, that the same was berthed on the date mentioned in said Exhibit according to information furnished him by the boarding officer of the United States custom house. Furthermore, the arrival of each of said cars at Savannah was proved by the trainmen handling the same, and that they were all delivered on the storage tracks within 24 hours of their arrival.

There was sufficient evidence in said Exhibit No. 1 of Reeb's testimony coming from the custody of the defendant, and upon which it had been negotiating with the plaintiff, taken with the testimony of the other witnesses, to furnish a basis for submission to the jury. If the storage in cars prevented the sacking of the cake, in time, and thus occasioned any damage to the defendant, while it might afford a basis for a plea of recoupment, it would not be evidence that no storage had taken place. But there is no proof in this record of any delay in sacking having been caused, or damage suffered, on this account.

3. We find no error in the rulings of the court on the admission or rejection of evidence. Northern Pac. Ry. Co. v. Keyes et al. (C. C.) 91 Fed. 47; Wigmore on Ev. p. 1230.

The answers of the witness Moylan, which were excluded, were clearly hearsay.

We think, on the whole case, that the direction of the verdict was error, and there should be a new trial.

Judgment reversed.

DINGESS et al. v. HUNTINGTON DEVELOPMENT & GAS CO.

(Circuit Court of Appeals, Fourth Circuit. February 15, 1921.)

No. 1828.

1. Mines and minerals ⇐55(5)—Reservation of "minerals" held to include natural gas.

Under the settled law of West Virginia that the word "mineral" is not capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it to be ascertained from the language of the deed, the relative position of the parties, and the nature of the transaction, where a controversy over the title to land was settled by a conveyance of the land by one party to the other, who was

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

in occupancy of the surface, with a reservation of "all the minerals, mineral substances, and oils of every sort and description," with the right to mine, bore wells, and use so much of the surface as required in operating mines or wells, the reservation *held* to include natural gas.

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

2. **Evidence ⊂⊃461(5)—Exclusion of extrinsic evidence to affect construction of reservation in deed held not error.**

On an issue as to whether a reservation of "minerals" in a deed included natural gas, the exclusion of evidence to show that at the time natural gas had not been commercially produced in the vicinity *held* not error.

3. **Taxation ⊂⊃776—Tax deed held not to convey title to minerals.**

Under Code W. Va. 1913, c. 29, § 39 (sec. 923), providing that, when one person is the owner of the surface and another of the minerals under it, the assessor shall list the interests separately and assess each to its owner, a tax deed, based on taxes assessed to the owner of the surface, who was not the owner of the minerals, *held* not to convey title to the mineral rights.

4. **Evidence ⊂⊃230(3)—Declaration of grantor after conveyance not admissible against grantee.**

A statement of a grantor in disparagement of his title, made after his conveyance, is not admissible against his grantee.

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

Ejectment by the Huntington Development & Gas Company against Henderson Dingess and others. Judgment for plaintiff, and defendants bring error. Affirmed in part, and reversed in part.

Maynard F. Stiles, of Charleston, W. Va., and C. S. Minter, of Logan, W. Va. (Pendleton L. Williams, of Huntington, W. Va., on the brief), for plaintiffs in error.

W. C. W. Renshaw and W. R. Thompson, both of Huntington, W. Va. (H. A. McCarthy, of Philadelphia, Pa., and Z. T. Vinson and J. H. Meek, both of Huntington, W. Va., on the brief), for defendant in error.

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

ROSE, District Judge. The defendants below are plaintiffs in error here, but it will be more convenient to refer to them and to their adversary in accordance with the positions they had in the trial court.

The plaintiff in an ejectment suit sought to recover from the defendants a number of tracts of land aggregating upwards of 1,300 acres, all parts of what are known as the Samuel Smith grants, the exterior bounds of which inclose some 206,000 acres, but from which previously granted tracts having a combined surface of 86,000 acres had been excepted. Of the land in controversy the plaintiff claimed the full ownership of over 1,200 acres and the mineral rights under some 165 more. The court instructed a verdict for the defendants for 11 acres, and for the plaintiff for all the rest, except 4 acres, and the jury gave the last to the plaintiff. Such of the defendants as have sued out this writ of error seek the reversal of the entire judgment, in so far

as it affects them, and in the alternative to set it aside as to certain tracts or interests claimed by them.

Such of their objections as go to the whole case assail the admission of certain evidence given by the plaintiff for the purpose of sustaining the burden of proof resting upon it to locate the exterior boundaries of the Smith grants, and to show that none of the land within those boundaries, but excepted from the grants, included any part of the land claimed by defendants. We cannot feel that there is any substantial merit in any of them. The exterior lines of the Smith grant have been before established in other cases. There appears to be no real question as to their location. We do not find it necessary or expedient to consider whether any of the somewhat meticulous objections made to some of the testimony of one of the surveyors produced by the plaintiff are as a matter of technical law well founded. If all of them in which there is any shadow of substance are sustained, there would be enough proof left to justify the instruction given by the court that the plaintiff had shown an undisputed record title to all those portions of the Smith grants included in this litigation. The evidence by which the plaintiff attempted to show that none of the land it sought to recover was included in any of the tracts excepted from the Smith grants was, under the West Virginia law as we understand it, both admissible and, in the absence of any attempt at rebuttal, conclusive. Winding Gulf Colliery Co. v. Campbell et al., 72 W. Va. 474, 78 S. E. 384; Hector Coal Land Co. v. Jones et al., 79 W. Va. 627, 92 S. E. 102.

[1] The purpose of rules of evidence is to ascertain the truth as to facts in issue, and not to take up the time of court and jury in listening to testimony as to something about which there is no real question. What has been said disposes of all the objections as to the rulings below, in so far as they affect by far the greater portion of the land in controversy. But as to that part of it in which confessedly plaintiff is not entitled to the surface other contentions are made. It appears that some 40 years ago the predecessors in title of the plaintiff had brought or threatened an ejectment suit against those through whom some of the defendants derived title. A compromise was made under the terms of which the plaintiff's grantors deeded the land with which we are now concerned to the predecessors in title of the defendants. Each of these deeds contained a provision by which the grantors reserved and excepted from its operation—

"all the minerals, mineral substances and oils of every sort and description, * * * with the privilege of mining, digging and excavating for said minerals, mineral substances and oils, and of boring and pumping for said oils, and of erecting and maintaining thereon all the necessary buildings, oil tanks, machinery and apparatus for working and operating all mines, pits, excavations and oil wells which now are or may be hereafter opened, worked and operated," on any part of the real estate, and "for storing and taking proper care of the products thereof. * * *"

The reservation also included all necessary rights of way, with the right and privilege to operate and maintain railroads and other roads and pipe lines, such as might be necessary to the successful and convenient discovery, working and operating of the mines, pits, excava-

tions, and oil wells, and for carrying away the products thereof. The defendants say that the exceptions and reservations did not include natural gas, and they assign as error that the court below otherwise ruled, and that it refused to permit them to prove that at the time the deeds were made natural gas was not a commercial product in that neighborhood. In some states, such as Pennsylvania, grants or reservations of minerals, nothing else appearing, do not cover natural gas. Dunham & Shortt v. Kirkpatrick, 101 Pa. 36, 47 Am. Rep. 696; Silver v. Bush, 213 Pa. 195, 62 Atl. 832; Preston et al. v. South Penn Oil Co. et al., 238 Pa. 301, 86 Atl. 203.

Some 13 years ago the Supreme Court of Appeals of West Virginia, upon full consideration, declined to follow Dunham & Shortt v. Kirkpatrick, supra, and held that a reservation of "all minerals" includes petroleum and natural gas, in the absence of anything to the contrary in the deed itself, or fairly deducible from any facts within the knowledge of the parties, at the time. Sult v. A. Hochstetter Oil Co., 63 W. Va. 317, 61 S. E. 607. It is contended for the defendants that the mention in the reservations of mines, oil wells and oil tanks, and the silence as to gas and gas wells, shows that the parties had not gas in mind. That is certainly quite possible, and indeed highly probable. It is urged that they did not intend to reserve anything which could not be obtained by mining or boring oil wells, as distinguished from those for natural gas. Reliance is put upon the comparatively recent West Virginia case of Rock House Fork Land Co. v. Raleigh Brick & Tile Co., 83 W. Va. 20, 97 S. E. 684, in which it was said that the—

"term 'mineral' is not a definite one, capable of a definition of universal application, but is susceptible of limitation according to the intention of the parties using it, and in determining its meaning regard must be had, not only to the language of the deed in which it occurs, but also to the relative position of the parties interested, and to the substance of the transaction which the deed embodies."

In conformity with the doctrine thus laid down it was held that a grant of coal and all other minerals, as well as of certain rights to be enjoyed in the production of such minerals, the rights being those ordinarily required in mining operations, should be restricted to such minerals as are ordinarily procured by mining, and that fire clay was not included among them.

In the case at bar it must be remembered that gas as well as oil can be obtained by boring wells, and, what is obviously of importance, the right of the owner of the surface to its beneficial use is no more interfered with by the production of gas than it would be by that of oil, if as much. Under the settled law of West Virginia it would appear that the words of reservation used were in themselves adequate to cover natural gas, and the relation in which the parties stood at the time the deeds were made makes this conclusion all the more reasonable. From the recitals in the grants it appears, as has already been stated, that the plaintiff's predecessors in title had instituted ejectment proceedings against the defendants or their grantors, and a compromise was reached by which the plaintiff's grantors conveyed to the defendants, or to those under whom they claim, the surface of the land of which they were

then in possession, reserving the minerals to themselves. In plain English the defendants were not to be ousted from their homes. They were to retain all they had in fact theretofore enjoyed, subject to such incidental interferences and no more as might subsequently result, if and when the plaintiff's grantors and those claiming under them should work the subsurface mineral deposits.

[2] The defendants, however, contend that in order to make clear the "relative position of the parties interested" at the time the deeds were made, they were entitled to show that up to that time natural gas had never been commercially produced in that portion of the state. There are authorities which either expressly or by necessary implication so hold. Detlor et al. v. Holland, 57 Ohio St. 492, 49 N. E. 690, 40 L. R. A. 266. But the inference which may be drawn from the facts sought to be established are too uncertain and even contradictory to make evidence of it helpful. Silver v. Bush, supra.

[3] One of the defendants claimed to hold 13½ acres of the land in controversy under a tax deed. This was one of the tracts which the plaintiff's predecessors in title had granted, reserving the mineral rights already referred to. The taxes for the nonpayment of which the sale was made were levied after the title to the surface and the minerals had been separated. Such estates may be separately assessed and if they are the sale of the one for non-payment of taxes does not necessarily carry title to the other. Elder v. Wood, 208 U. S. 226, 28 Sup. Ct. 263, 52 L. Ed. 464. When one person is the owner of the surface and another of the minerals under it, the Code of West Virginia 1913, c. 29, § 39 (sec. 923) makes it the duty of the assessor to divide the value of the land between the different owners and to list each separately. It is true that when it affirmatively appeared that all the value was assessed to the owner of the surface and no assessment was made against the owner of the minerals, a sale for the failure of the owner of the surface to pay his taxes will carry the mineral rights with it. Peterson v. Hall et al., 57 W. Va. 535, 50 S. E. 603. In this case there is no evidence as to whether the mineral rights were or were not separately valued and listed, and we have been referred to no case to support the contention of defendants that there is any presumption that the taxing authorities did not do what the law said they should. In this state of the proof the learned judge below was clearly right in directing a verdict for the plaintiff on this issue.

[4] Included in the conveyance below was a tract of some 4 acres claimed by the defendant, Minerva Adams, under a deed from her father Jackson McCloud. This deed was made two years before and the grantor in it admittedly had no paper title, but Mrs. Adams asserted and offered evidence to prove that he had held it in adversary possession for a length of time sufficient to bar plaintiff's rights. In rebuttal of this part of her case the plaintiff was allowed, over objection and exception, to prove a statement said to have been made by Mr. McCloud a few days before the trial, to the effect that he had never claimed the 4 acres in question. Whether she had made out a sufficient adverse title in McCloud was a question left to the jury, and they decided against her. It may well be that the admission of

what purported to have been her father's disclaimer had much to do in leading the jury to the conclusion at which they arrived. A statement of a grantor in disparagement of his title, if made before he parts with it, is admissible against his grantee; but the law is otherwise as to declarations subsequently made. Fry, Trustee, v. Feamster et al., 36 W. Va. 464, 15 S. E. 253.

It follows that so much of the judgment in favor of the plaintiff against the defendant Minerva Adams as affects the 4 acres in question must be reversed, and that in all other respects and against all the other defendants it should be affirmed.

KNIGHT v. KISER.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1844.

1. **Pleading ⇐236(4)—Allowance of amendment at close of trial within discretion of the court.**
   Allowing amendment of a declaration after close of the evidence, on the ground that it more clearly defined the issues tried, *held* within the discretion of the court.
2. **Frauds, statute of ⇐33(2)—Promise by wife to perform contract of husband on condition that promisee would not sue him, held an original promise, not within statute.**
   A promise by a wife to perform a contract of her husband in case she outlived him, on condition that the promisee would not bring an action against the husband *held* an original and not a collateral promise, and not within the statute.
3. **Frauds, statute of ⇐158(4)—Finding of sufficient consideration for wife's promise to perform her husband's contract warranted.**
   A jury *held* warranted in finding that a promise by a wife to perform a contract of her husband, who was then over 80 years old, on condition that the promisee would not bring suit against him during his life, which action might endanger his life, was made to subserve the wife's own pecuniary interest and based on sufficient consideration.

In Error to the District Court of the United States for the Western District of Virginia, at Lynchburg.

Action at law by Virginia Lee Kiser against Minnie Evelyn Krise Knight. Judgment for plaintiff, and defendant brings error. Affirmed.

Armistead R. Long and Randolph Harrison, both of Lynchburg, Va. (S. H. Williams, of Lynchburg, Va., on the brief), for plaintiff in error.

Lowry F. Sater, of Columbus, Ohio (Vorys, Sater, Seymour & Pease, of Columbus, Ohio, on the brief), for defendant in error.

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

KNAPP, Circuit Judge. In the court below plaintiff in error was defendant and defendant in error plaintiff; they will be so designated

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

in this opinion. Facts which are either undisputed, or which, as we think, the jury were warranted in finding, may be summarized as follows:

Philip A. Krise, a retired banker of Lynchburg, Va., died February 1, 1917, in his eighty-fifth year, leaving an estate appraised at upwards of $840,000. He had been twice married. His first wife, Virginia Davis, died August 8, 1914, and in the following March he married the defendant, then about 38 years old. He left no children, his only child, a son by the first marriage, having died in 1903. His will, dated January 5, 1917, gives his entire estate to his second wife.

Mr. and Mrs. Krise had known the plaintiff, Virginia Lee Kiser, from her childhood, and she had been a frequent visitor in their home, sometimes for extended periods After their son's death in 1903, they urged her to come and live with them permanently. She was then giving instruction in art at a college in Dalton, Ga., and continued to do so for some months longer, for reasons which need not be recited, so that it was not until the summer of 1904 that she went to stay with the Krises. Her status in their household for the next two years appears to have been that of a welcome guest, as nothing was paid her for services or otherwise, and there was no definite arrangement for the future. In May, 1906, she determined to take up her art work again, and went to Europe with an artist friend. During her absence abroad she was frequently solicited by both Mr. and Mrs. Krise to come back to them, and they met her in New York on her arrival there in the following December. After a holiday visit to her mother in Columbus, Ohio, she returned to Lynchburg and made her home with the Krises until the death of Mrs. Krise in August, 1914. During this period she was treated as a daughter by this aged couple, and Mrs. Krise especially had for her from first to last the greatest affection.

The alleged promise of Mr. Krise to provide for her was made about the 1st of January, 1907, when in an interview sought by him he said, as she testifies:

"Virginia, madam and I have gone all the way to New York to bring you back to us to make your permanent home with us. Now, when I say this, I mean you should be to us the same as a daughter. You need not have any anxiety about the future. You are going to be just as our daughter, and we will provide for you as long as you live."

Thereafter, for the remaining lifetime of Mrs. Krise, plaintiff held the place of a daughter of the house and was maintained in a style befitting that position. All her expenses were paid, and she had besides a monthly allowance for spending and personal use. The three lived together in harmonious and intimate relations. They took a trip to Europe in the summer of 1907, and another in the summer of 1908, besides making visits to Florida and other resorts. In short, there appears to have been a pleasant family life, which lasted for some 7½ years, and in which the plaintiff at all times had a daughter's share.

Shortly after the death of his wife, Mr. Krise said to plaintiff, as she further testifies:

"Virginia, I don't want strangers to come here and take charge of the home and be with me. I haven't any one but you. I would like for things to go on as usual as near as they can."

And she promised to do what she could for him as long as she lived. So they kept on together, apparently in full accord, until he married defendant, rather suddenly as would seem, on the 13th of March, 1915. At his request, however, she remained in their home during the bridal trip, and in fact continued to reside there until some time in the following January.

Of what occurred during this time and later, according to plaintiff's testimony, it is enough to say that shortly after the bridal trip was over she told defendant about the promise of "Uncle Phil," as she called Mr. Krise, to provide for her as a daughter; that at defendant's suggestion she had a talk with Mr. Krise, in which she in effect asked him to do what he had promised; that he told her to "go out and look out for yourself," declined to make any provision for her and denied his liability to do so, saying, "But, Virginia, you haven't anything down in black and white to show for it;" that she reported this to defendant, who said, "Virginia, you cannot do it; I know how to battle with the world, you do not; you stay on and things have got to come your way;" that in January, 1916, she consulted a lawyer with the view of bringing suit against Mr. Krise; that he and defendant soon learned of this intention, and defendant said, "Virginia, why have you taken this case to a lawyer? Why are you bringing suit?" that plaintiff replied, "Johnny, you know that Uncle Phil has not carried out his promise to provide for me as a daughter as long as I lived, that I would have no need for any anxiety about the future," and added, "Now you are both saying that I must leave." Thereupon defendant said:

"After all, Virginia, you are mighty shrewd; you have engaged the best attorney in the state, and he has told Mr. Krise he is going to hand him papers, and if you allow these papers to be handed to Mr. Krise you will kill him. Now, if you don't allow these papers to be handed to Mr. Krise, of course, I don't know that I will outlive Mr. Krise; but, if I do, I promise to do for you what he has promised to do for you."

That, relying on this assurance, plaintiff stopped the intended suit before any papers were served, and took no further steps to enforce her claim during the lifetime of Mr. Krise. In August, 1917, plaintiff filed a claim against Mr. Krise's estate for $40,000. On the executor's refusal to pay, the claim was submitted to the commissioner of accounts, but subsequently withdrawn. In May, 1919, this suit was brought, and plaintiff had a verdict for $35,000.

[1] It is argued at length that the trial court erred in allowing the declaration to be amended after all the testimony had been introduced; but the argument is not convincing. It is fully refuted, in our judgment, by the statement of the learned judge of his reasons for granting the motion to amend. After pointing out "the ambiguity and confusion of thought which seemed to run through the declaration as it then stood," he said:

"This proposed amendment eliminates that ambiguity and confusion, as it seems to me. In the proposed amendment the plaintiff pins herself squarely to the proposition that she had with old Mr. Krise a contract, for the breach of which she would have been entitled to damages, had she sued him in his lifetime, and to the proposition that the defendant took upon herself, as an

original promise, the performance of said contract, and has not lived up to it. In view of the fact that the evidence of the plaintiff has been, to all practical intents, the same on this trial as on last July, and inasmuch as during the trial in July, the same as during this trial, plaintiff's counsel has all the time insisted on the right to recover damages for the breach of the alleged contract to provide for the plaintiff, I cannot see that the defendant has been taken by surprise, or that any injustice would be done the defendant in permitting to be filed an amendment that simply clarifies the contentions of the parties and pins the plaintiff down to one of two possible theories as the basis for recovery."

In the light of this explanation, if any were needed, it seems clear that the ruling complained of was a proper exercise of discretion, not here reviewable.

[2] The case as we see it turns on two questions which will be briefly considered: First, was defendant's promise to do for plaintiff what Mr. Krise had promised to do, which the jury found she made, void under the statute of frauds? It would be profitless to attempt discussion of a question which has long vexed the courts and to which we can add nothing of value. The Virginia authorities appear to be in some confusion, and we are unable to deduce from them a rule of governing application to the facts of the instant case. The true rule, we apprehend, is stated in the syllabus of Davis v. Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 526, as follows:

"In determining whether an alleged promise is or is not a promise to answer for the debt of another, the following rules may be applied: (1) If the promisor is a stranger to the transaction, without interest in it, the obligations of the statute are to be strictly upheld; (2) but, if he has a personal, immediate, and pecuniary interest in a transaction in which a third party is the original obligor, the courts will give effect to the promise. The real character of a promise does not depend altogether upon form of expression, but largely upon the situation of the parties, and upon whether they understood it to be a collateral or direct promise."

And the opinion quotes with approval the following from Emerson v. Slater, 22 How. 28, 43 (16 L. Ed. 360):

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

"The thought is," says Mr. Justice Brewer in Davis v. Patrick, supra, "that there is a marked difference between a promise which, without any interest in the subject-matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor."

These citations make comment unnecessary. We hold that the promise in question, as found by the jury, was an original and independent promise, made by defendant for her own benefit, and therefore not within the statute of frauds.

[3] The other question is whether the jury were warranted in finding that defendant made the promise mainly to subserve her own pecuniary interest, whether by benefit to herself or detriment to plain-

tiff, and not chiefly from a desire to shield her husband from annoyance. We are of opinion that this question should be answered in the affirmative. Defendant had a pecuniary interest in prolonging the life of her husband, not only for the value of his companionship and protection, but also for the benefits to be derived from his business ability. This pecuniary interest of a wife in her husband's life is recognized in numerous statutes relating to the subject of compensation for the death of a husband, and to the insurable interest of a wife in the life of her husband. In this case, also, as a jury might find, defendant apprehended the most serious consequences to her husband if plaintiff prosecuted her claim against him, and relief from risk and anxiety in that regard was a distinct and valuable consideration. Moreover, in accepting defendant's promise, plaintiff gave up the advantage of bringing a suit against Mr. Krise in his lifetime, since in such suit she would have been a competent witness in her own behalf, to prove the original promise made by him, and it is at least conceivable that his testimony might have aided her case. In short, we think there was sufficient evidence of a pecuniary consideration for the promise to sustain the verdict of the jury on that issue.

At the trial of the cause, and after all the evidence was in, certain questions were submitted to the jury, one after the other, and separate verdicts returned. The procedure appears somewhat unusual, but we do not perceive that it was prejudicial to defendant, or otherwise subject to valid objection. The other questions raised require no discussion.

Affirmed.

LILLY LUMBER CO. v. SAVAGE et al.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1842.

Brokers ⊂=71—Contract by letter for commissions held binding, and not changed as to amount by subsequent letter.

Where plaintiffs, as agents, were authorized by letter to sell certain timber lands of defendant, the letter suggesting a maximum and minimum price to be asked, and expressly fixing plaintiffs' commission, a statement in a subsequent letter, definitely accepting an offer procured by plaintiffs at a price even higher than the maximum suggested, that in view of the terms of payment given the purchaser defendant was of "opinion" that plaintiffs should be satisfied with a smaller commission, to which plaintiffs promptly refused to agree, *held* not to have effected any change in the original contract for commissions, especially as defendant made no further objection until after the sale was finally closed, some two months later.

In Error to the District Court of the United States for the Western District of North Carolina, at Asheville; Edwin Y. Webb, Judge.

Action at law by C. W. Savage and W. A. Savage, partners as Savage Bros., against the Lilly Lumber Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

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

Thomas J. Hill, of Greensboro, N. C., and James G. Merrimon, of Asheville, N. C. (Dillard & Hill, of Murphy, N. C., and Merrimon, Adams & Johnston, of Asheville, N. C., on the brief), for plaintiff in error.

M. W. Bell, of Murphy, N. C., and Thomas S. Rollins, of Asheville, N. C. (Martin, Rollins & Wright, of Asheville, N. C., on the brief), for defendants in error.

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

KNAPP, Circuit Judge. Plaintiff in error, a West Virginia corporation, herein called defendant, owned a large tract of timber lands in Cherokee county, N. C., which Savage Bros., plaintiffs below, were employed to sell, and which was in fact sold through their agency. Dispute arose as to their commissions, and this suit was brought. The trial court directed a verdict in their favor, and defendant brings the case here on writ of error.

Aside from the testimony of one of the plaintiffs, all the evidence is in writing, consisting of letters and telegrams which passed between the parties. The correspondence of record begins in November, 1918, but nothing of importance appears until the 14th of December. On that date defendant wrote plaintiffs a letter in which the following is said:

"Now, we suggest a minimum price of $10 per acre, with your commission of 5 per cent. to be deducted, and a maximum price of $12 per acre, with the further understanding, that, in addition to the 5 per cent. commission, you are to receive 50 per cent. of the difference between the minimum and maximum price. As to terms, we would further agree with you in your letter of the 9th in the way of a suggestion; that is, giving an option for 12 or 18 months, or whatever terms may be agreed upon, and, as you advise, with the payment with said option of $15,000, and make such reasonable and easy terms as would be attractive to the purchaser, with the understanding and agreement, of course, that all money bear interest, and final payment to be made within a reasonable length of time, and at such times as would guarantee us no loss, leaving at all times double amount of timber in the way of security for any deferred payment, and, as you state, restricting the purchaser to cut on certain tracts, between certain creeks and branches, etc., until all the payments are made. A proposition similar to these suggestions could be agreed upon, if you find a party who means business."

It will be noted that this letter, whilst definite as to prices and commissions, is quite indefinite as to terms of payment. The general basis of an acceptable offer is outlined, and plaintiffs are authorized in effect to close with a proposition "similar to these suggestions."

The numerous letters afterwards exchanged, down to July, 1919, are without direct bearing on the matter in controversy. They indicate active efforts by plaintiffs to effect a sale of the property, and approval by defendant of what they were doing, and in none of them is there any intimation of a purpose or desire on defendant's part to reduce the commissions originally offered. On July 21st plaintiffs write a long letter about their negotiations with one Woodbury and a tentative offer made by him. After stating that they had asked $12.50 per acre, with 6 per cent. interest on deferred payments, they say:

"For your information, we have been talking with W. H. Woodbury about your Beaver Dam timber. Woodbury knows about what you have got. While he said he would want to go and look it over carefully before he did anything, we asked him $12.50 an acre for it, with 6 per cent. interest on deferred payments. He stated he didn't like that interest proposition, and wanted to know if you would make it $12.50 without interest, and pay $5,000 every six months until the property was paid for, or would you take $10 on the same terms, with interest at 6 per cent., being $5,000 every six months until the property is paid for."

And defendant is asked to write them—

"a nice letter that we can show Woodbury. * * * that you would like to sell it to him on such terms as he has offered, providing he would pay a price to justify you, with interest at 6 per cent."

Two days later defendant writes them a letter, which says in substance that the property is worth more, and had been held at a higher figure, but that the price might stand for a while at $12.50, provided the deferred payments bear interest at 6 per cent. Again it is to be noted that in this letter no objection is made to the terms proposed, namely, $5,000, every six months, nor is there any suggestion that the agreement of the previous December as to plaintiffs' commissions should be modified because of a smaller cash payment than was then in contemplation.

Under date of August 6th plaintiffs write that they have "agreed on a proposition with Mr. Woodbury" of $12.50 per acre, $5,000 down and $5,000 every six months, with 6 per cent. interest on all deferred payments, which are to be secured by a deed of trust on the property and a limitation upon the amount of timber that may be cut from time to time until the whole purchase price is paid. The letter further says that "this is subject to your acceptance," and that Woodbury also is to have the privilege of accepting or rejecting the proposition after looking over the timber. Request then is made that defendant send an extra copy of its answer, "so that Mr. Woodbury may have a copy and Savage Bros. a copy, and cover all the points fully named in our letter, as Mr. Woodbury has requested that we have you do that in the form of an agreement, so as to protect Mr. Woodbury while he is looking over the timber, and assuring him that he will get the timber after he goes to the expense of making a cruise, if it suits him." On the 20th of August answer was sent, to be delivered to Woodbury, saying that a meeting of defendant's stockholders had been held on the 16th, at which "it was ordered that this property be offered to you for sale to Mr. Woodbury at $12.50 per acre," on terms stated, which appear to be substantially, if not exactly, the terms proposed by him, as set forth in plaintiffs' letter of the 6th, and plaintiffs were authorized "to give Mr. Woodbury 20 days from this date to make up his mind." In the same envelope was another letter to plaintiffs, calling attention to the difference between the terms of payment mentioned in the letter of December 14, 1918, and the terms accepted from Woodbury, and saying, in view of this difference, that—

"myself as well as the board was of the opinion that if the sale was made in accordance with your letter that you should be satisfied with 5 per cent. commissions, to be paid proportionately out of each payment."

Plaintiffs promptly replied to the effect that they were entitled to and would insist upon the compensation agreed to in the original contract. The subsequent correspondence, extending over a period of two months or more, until the transaction was closed, throws no light on the subject of commissions. Woodbury in the meantime decided to take the property at the price and on the terms offered in defendant's letter of August 20th, and in October following deeds were executed to the Woodbury-Mauney Company of 8,859.12 acres of land for the consideration of $110,090.25. The cash payment of $5,000 and notes for balance, secured by deed of trust, were accepted by defendant.

It will thus be seen that the matter in dispute is whether plaintiffs are entitled to half the difference between $10 an acre and $12.50 an acre, in addition to 5 per cent. on the minimum price, or whether they are entitled to only 5 per cent. on the price actually realized. It will also be seen that defendant's denial of liability for half the excess is based wholly on its letter of August 20th, in which the opinion is expressed that plaintiffs should be satisfied with 5 per cent. commissions, "to be paid proportionately out of each payment." The original agreement for compensation is perfectly plain and nothing afterwards occurred to modify or change it, except what is said in this letter. Defendant got 50 cents an acre more for its land than the maximum price named in the December letter, and the fact that it accepted less favorable terms of payment did not of itself operate to deprive plaintiffs of the commissions then agreed to be paid.

For several reasons we are of opinion that the letter in question was without effect on the contract relations of the parties. In the first place, it appears that nearly a month before defendant had assented to the terms on which the land was afterwards sold to Woodbury. Those terms are fully and specifically stated in plaintiffs' letter of July 21st, and defendant's reply of the 23d authorized a sale in accordance therewith, and this without any suggestion that plaintiffs' commissions should be diminished by reason of the longer time allowed for payment. Therefore, as seems to us, plaintiffs were empowered to accept the offer of Woodbury, if definitely made, and to bind defendant by so doing. If that had happened, their right to commissions under the December contract would not have been doubtful; and we do not perceive that they are less entitled to the benefits of that contract because they stated in their letter of August 6th that Woodbury's proposal "is subject to your acceptance," since it was in fact accepted, and the sale made accordingly.

In the second place, it is evident that the "opinion" expressed by defendant that plaintiffs should be satisfied with 5 per cent. on the purchase price was not made a condition of the sale to Woodbury. Defendant was anxious to sell the property, and quite willing to accept Woodbury's offer, and its letter to plaintiff, for delivery to him, was in effect as well as in form an unconditional acceptance. Had defendant so intended, it could and should have refused to make the sale unless plaintiffs consented to take 5 per cent. commissions. But plainly that is not the import of its private letter to them of the same date. It

wanted the sale to go through, even if it had to pay the commissions originally offered, and it also wanted in that event to reduce the measure of its liability. In short, we regard this letter to plaintiffs as nothing more than a request that they forego their claim to half the excess above $10 an acre, because of the considerable period of time over which Woodbury's payments were extended. It was not put forward as a condition, and cannot be held to annul or modify the December agreement.

Moreover, taking the whole correspondence into account, we think that defendant should be deemed to have acquiesced in plaintiffs' refusal to accept 5 per cent. commissions. They immediately answered the letter to them, stating the opinion that they should be satisfied with the compensation, with a firm insistence that the December contract should be carried out, and saying at the close of their letter:

"We would thank you to advise us on receipt of this letter if you will still agree on your terms of commission as set out in your December letter, which terms have never been countermanded, and, in doing so, help us to encourage, rather than discourage, this Woodbury sale and any other sales we might make for you."

To this defendant made no reply until some time after Woodbury had agreed in writing to take the property and defendant had been so advised, which was about the 8th of September. In our judgment it was then too late for it to claim that the contract with plaintiffs was not binding. Its continued silence, while doubt remained as to what Woodbury would do, should charge it with acquiescence in plaintiffs' contention.

It follows, from the views thus briefly stated, that no defense to the suit was established, and the trial court was therefore right in directing a verdict for plaintiffs.

Affirmed.

UNITED STATES v. BOSTON, C. C. & N. Y. CANAL CO. et al.

(Circuit Court of Appeals, First Circuit. February 16, 1921.)

No. 1485.

1. **Eminent domain ⟸202(1)—In suit for condemnation of canal, evidence of cost of reproduction admissible.**
   In a suit by the United States for condemnation of a canal, evidence of the value of the land included on the right of way at the time of commencement of the suit, assuming that the canal had not been built, *held* admissible as bearing on the cost of reproduction.

2. **Eminent domain ⟸202(1)—Evidence as to earning capacity of canal not competent.**
   In a suit for condemnation of a canal, evidence of a proposed contract with a steamship company respecting tolls, as bearing on the potential value of the property, *held* not competent, where the contract was not executed.

3. **Evidence ⟸486—Future earnings of canal not proper subject of opinion evidence.**
   In a suit by the United States for condemnation of a canal used for interstate traffic, the probable future towage of the canal and the addi-

tional revenue to be derived, in view of such increased tonnage, *held* not a proper subject of opinion evidence.

4. **Eminent domain ⟸202(1)—Evidence of cost of reproduction under abnormal conditions not admissible.**
In a suit by the United States for condemnation of a canal, evidence of the cost of reproduction at the time of commencement of the suit, when, owing to war conditions, such cost was abnormally increased, *held* not admissible as an element of value to be considered, unless reproduction at such enhanced cost would be a reasonable commercial investment, a fact to be either determined by the court as a preliminary or submitted to and found by the jury.

5. **Eminent domain ⟸134—Peculiar value of property to party asking condemnation not element of market value.**
In ascertaining the market value of property taken in a condemnation proceeding, the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only party who can use it for that purpose.

6. **Eminent domain ⟸262(5)—Error in admission of evidence not cured by instruction.**
In a suit by the United States for condemnation of a canal, the admission, on the issue as to the value of the property, of the testimony of high officers of the army and navy that the property was of great value, and even necessary for military and naval purposes and for national defense, *held* error, and where the testimony was not withdrawn, and such facts were argued at length to the jury as enhancing the value of the property, the error *held* not cured by a brief instruction that its peculiar value to the government for such purposes should not be considered.

7. **Eminent domain ⟸126(1)—Elements entering into valuation of public utility; "going value."**
In ascertaining the fair value of a public utility in a proceeding for its condemnation, apart from its franchise, consideration is to be given to the value of its physical property, including preliminary and overhead costs necessary to prepare the plant for service, and also to the sums actually and fairly expended in creating the business and revenue of the enterprise, or what is generally known as the "going value" of the concern, provided the business has been profitable or there is a reasonable probability of its becoming so.
[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Going Value.]

8. **Eminent domain ⟸202(1)—Elements entering into valuation of property.**
In ascertaining the value of a canal in a proceeding for its condemnation, evidence of the amount of stock and bonds of the canal company paid for rights, franchises, and services, largely by the construction company, to which they were issued under its contract, and including a payment made for organizing a syndicate for floating the bonds, *held* improperly received, especially where there was no evidence of the actual market value of the stock and bonds so used, or to show what items of the total expenditure were proper items of construction costs.

9. **Eminent domain ⟸241—Suit for condemnation of Cape Cod Canal; form of judgment.**
In a suit by the United States for condemnation of the Cape Cod Canal under Act Aug. 8, 1917, the court *held*, under the pleadings and verdict, without authority to enter any judgment, except the conditional judgment provided for by the statute.

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

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

Petition for condemnation by the United States against the Boston, Cape Cod & New York Canal Company and others. From the judgment, the United States brings error. Judgment vacated, and cause remanded.

Nathan Matthews, of Boston, Mass. (Francis G. Goodale and Daniel J. Gallagher, both of Boston, Mass., and A. Mitchell Palmer, of Washington, D. C., on the brief), for the United States.

Sherman L. Whipple, of Boston, Mass. (Frederic B. Greenhalge, of Boston, Mass., Garrard Glen, of New York City, and Currier & Young, of Boston, Mass., on the brief), for defendants in error.

Before BINGHAM, JOHNSON, and ANDERSON, Circuit Judges.

BINGHAM, Circuit Judge. This proceeding was begun April 1, 1919, in the District Court for Massachusetts under the Act of August 1, 1888 (25 Stat. at Large, 357 [Comp. St. §§ 6909, 6910]), and the River and Harbor Act of August 8, 1917 (40 Stat. at Large, 250), for the condemnation of certain land and appurtenances constituting the Cape Cod Canal. In the petition the terms of the Act of August 8, 1917, are set forth, the government's compliance with the same, a description of the premises sought to be condemned, and an assertion, on information, that the only parties interested in the property are the Boston, Cape Cod & New York Canal Company and the Old Colony Trust Company, and, after requesting a determination of the value of the property by a jury, it prays that upon proof to the court that the amount of the verdict has been paid or tendered by the United States to the persons entitled, or upon the payment of the same into court, a decree be entered that the fee of the land and appurtenances shall thereupon be vested in the United States.

May 14, 1919, the Canal Company filed its answer, alleging that it was the sole owner of the property described in the petition and requested full compensation therefor.

May 22, 1919, the Old Colony Trust Company filed its answer setting up a mortgage on the property dated January 1, 1910, for the sum of $6,000,000 and asking that its rights be protected and compensation paid to it on the amount of its interest in the property to be taken.

In October and November, 1919, trial was had before a jury. On the question being raised as to the title of the Canal Company it was stipulated, on the 18th of November, 1919, that the only issues to be submitted to the jury should be (1) the value of the property and franchise sought to be condemned, and (2) the amount fairly and reasonably chargeable to the Canal Company on account of dredging and other work done by the United States while the canal was in the control of the United States Railroad Administration, so far as it did not relate to current maintenance.

November 18, 1919, a verdict was returned as follows:

"The jury find that on April 1, 1919, the date of the filing of the petition for condemnation, the Boston, Cape Cod & New York Canal Company was the owner in fee simple of the property and franchise sought to be condemned, and that on said date the value of the property and franchise, estimating the

same as an entire estate and as if it were the sole property of one owner in fee simple, was the sum of sixteen million eight hundred and one thousand two hundred and one and eleven-hundredths ($16,801,201.11) dollars."

At the same time the jury rendered a special verdict, in which they found that the amount reasonably chargeable to the Canal Company on account of the dredging above referred to was $150,000, which, under the stipulation, was to go in reduction of the general verdict.

On the 31st of August, 1920, a judgment of condemnation was entered as of August 3, 1920. The judgment recites the giving of notice, describes the property sought to be condemned, and refers to the appearances of the Canal Company and the Old Colony Trust Company, and to the assertions of title in their respective answers; also to the appearances of certain other parties, to the agreement as to the issues to be tried by the jury, and to the verdicts of the jury, general and special. It then adjudged that on the 1st of April, 1919, the Canal Company was, "except for the rights which the United States may have acquired therein and the rights of the claimant, Old Colony Trust Company, as trustee, sole owner in fee simple of the land, interest, appurtenances and other property hereinbefore described; that the value of the same on that date was $16,801,201.11; that the amount fairly and reasonably chargeable to the Canal Company on account of dredging, etc., was the sum of $150,000; "and that, of said resultant sum of $16,651,201.11, if paid, the Boston, Cape Cod & New York Canal Company shall receive $10,076,701.11, and the Old Colony Trust Company, trustee, shall receive $6,574,500." It was further ordered that, upon payment into the registry of the court by the United States within a reasonable time after the date of the decree of the sum of $16,651,201.11, "the fee to said land hereinbefore described and to all rights, etc., * * * therein, if not already so vested, shall vest in the United States of America, to have, hold, possess, and enjoy for its use forever; but, if within a reasonable time said sum is not paid into the registry of the court, such further order may be made in this proceeding for dismissal or otherwise as justice may require, and the Boston, Cape Cod & New York Canal Company and the Old Colony Trust Company, trustee, and each or either of them, may pursue in such form and in such court as they or it may be advised their or its remedy or remedies against the United States upon the claim of ownership by the United States of said canal and its appurtenances, as set forth in the Canal Company's said petition for judgment, without prejudice by this decree except so far as said claim shall, if at all, have become res judicata by this proceeding."

It appeared in the case that, pursuant to the proclamation of the President of July 18, 1918, the control of the canal was taken over by the United States on July 25, 1918, as a war measure; that the government was in possession and control of the canal at the time the petition for condemnation was filed and the trial was had, and remained in such control down to March 1, 1920, when it was turned back to the Canal Company.

March 1, 1920, the Canal Company filed in the District Court a document entitled "Petition for Entry of Judgment," in which it set out:

that on the 25th of July, 1918, the President, through the Secretary of War, took possession of the canal pursuant to the authority conferred by section 1 of the Act of Congress of August 29, 1916 (Comp. St. § 1974a). It alleged that neither the proclamation nor the act contained any provision for the return of the property or limited the power of the President to take and acquire less than the whole property or required the President to take only the use thereof for a limited time; that since July 25, 1918, the canal and its appurtenant property had remained continuously in the possession and under the control of the Director General of Railroads and had been completely and exclusively sequestered for public uses; that prior to the date of the taking by the President on July 25, 1918, to wit, on August 8, 1917, Congress enacted legislation which authorized the condemnation proceedings; and that, at the time when the canal was taken by the President, proceedings had already been instituted under the Act of August 8, 1917; that the engineers had made their report, the Secretaries named had considered the report and recommended that the canal be acquired by the government, and the Secretary of War had undertaken negotiations with its owner for the purchase of the canal, which negotiations had failed, and the Secretary of War had caused the Attorney General to file the condemnation proceedings. It was further alleged that the act of Congress under which the President had taken over the canal contained no provision for procedure for the recovery of the value by the owner; that therefore there arose on the part of the government an implied obligation to pay the fair value thereof; that the "petition for condemnation had and could have no other object except the single one of having determined by a jury at the bar of this honorable court the fair value of said canal and its appurtenant property and just compensation to be paid to the former owner thereof by the government." After setting out other matters unnecessary to relate, it prayed that judgment be entered "either that the United States shall pay to your petitioner as compensation for its canal and appurtenant property taken as heretofore set forth and applied to public uses, the amount of the verdict heretofore found by the jury and accepted by the court, or in such other form as upon hearing of the facts this honorable court shall deem proper and appropriate." In other words, the Canal Company by its petition, sought to obtain an absolute judgment for a fixed sum rather than a conditional one as called for by the act of 1917, and this is the petition which is referred to in the judgment that was entered.

From the judgment of August 31, 1920, the government prosecuted this writ of error. In its assignments of error it complains that the court erred (1) in the admission of evidence; (2) in its charge to the jury; (3) in its refusal to grant certain requests for instructions; and (4) in the substance and form of the decree entered.

The Canal Company was incorporated June 1, 1899 (Stat. Mass. 1899, c. 448). By the charter it was authorized to build and operate a canal across a strip of land on Cape Cod lying in Sandwich and Bourne and extending a distance of some 8 miles. The charter depth of the canal was to be 25 feet at mean low water, and its width at

the bottom 100 feet, and the company was authorized to collect tolls for its use. It was authorized to issue $6,000,000 of stock and $6,000,000 of bonds to raise money for the acquisition of a right of way and the construction of the canal. It could issue the stock and bonds only upon certificates of the board of harbor and land commissioners that a proportionate amount of the entire work had been done to justify the issue, and could issue the balance of the stock and bonds when the work was completed.

The evidence disclosed that the company had complied with the terms of its charter and at the time of the trial had become the owner of the canal and entitled to the privileges and franchises which the Legislature had granted.

The purpose of the canal was to afford a short passage for coastwise shipping, and, at the same time, avoid the dangers of navigation encountered by vessels in the passage around Cape Cod. The course taken by vessels prior to the building of the canal was through Pollock Rip Slue, which was one of the most dangerous on the Atlantic coast. The evidence showed that by use of the canal the dangers of navigation were greatly reduced and that there was a saving in distance of about 60 miles It also appeared that the canal offered a safe passage for "box" barges, which could not be towed around the Cape, and that, as a result of the opening of the canal this type of barge had increased in number and their use had brought about substantial economies in the expense of shipping; also that passenger steamers plying between Boston and New York could be operated more safely and reliably through the canal.

On July 3, 1914, before the canal was completed, it was opened for vessels drawing not over 12 feet. In April, 1916, the canal was completed with a depth of 25 feet and was opened generally for business. As the United States took over the canal on July 25, 1918, for war purposes, the company was permitted to operate it after its completion (in April, 1916) for a period of about 2 years, and during 6 months of this time it was closed on account of the sinking of a vessel in the canal and the frozen condition of Buzzards Bay. The World War broke out in 1914, and this country entered the war in April, 1917. The breaking out of the war caused a stringent and uncertain financial condition, and our entrance into the war resulted in withdrawing shipping from its ordinary commercial routes and into routes made necessary by the activities of war, much to the detriment of the canal as a financial enterprise. The steamships of the Eastern Steamship lines were the canal's best patrons and contributed about one-third of its income, but the best of its steamers passing through the canal were taken over by the government, and this caused a loss of revenue. The number of vessels making use of the canal from its opening, November 5, 1914, down to the time of the trial, materially increased, with the exception of 1917, when we entered the war. The tolls, however, which it charged, remained the same, notwithstanding the operating costs of the canal and everything that had to do with shipping greatly increased.

[1] The first assignment of error relates to the reception of evidence given by Charles L. Gifford, a real estate expert familiar with the value of lands in the vicinity of the canal, who gave his opinion as to the value of the land April 1, 1919, included in the canal right of way, assuming that no canal had been built. We see nothing in the exception to this evidence that calls for special comment. It was offered as bearing upon the cost of reproducing the canal as of the time in question, and there was no evidence or suggestion that land values in that vicinity were abnormal. We do not think the surrounding conditions affecting the canal property and other property in the neighborhood had so changed at the time of trial as to render this element of cost merely speculative.

[2] The second assignment relates to the reception of evidence offered through one Calvin Austin of the Eastern Steamship Company. It appeared that in the fall of 1916 Austin, as president of the Eastern Steamship Company, agreed with the president of the Canal Company upon a proposed contract relative to tolls for the year 1917; that the terms of the contract were subsequently reduced to writing and signed by the Canal Company, but not by the Steamship Company, as Austin testified that he was not authorized by the board of directors to sign it. The terms of this proposed contract were put in evidence, subject to exception, as bearing upon the useful or potential value of the canal property.

We think that, inasmuch as the evidence disclosed that the Steamship Company had never sanctioned the proposed contract, the evidence was inadmissible, and that the court erred in receiving it.

The third assignment relates to the admission in evidence of a contract entered into between the Canal Company and the Construction Company providing for the construction of the canal and payment therefor in the stocks and bonds of the Canal Company. The grounds of the objection were that the evidence was incompetent for the purpose of showing the value of the canal property, inasmuch as the cash or market value of the stocks and bonds was not shown. The difficulty with this assignment of error is that the evidence was not offered, received, or used for the purpose of showing the value of the property, but for the purpose of showing the history of the enterprise. On what theory the evidence as to the history of the enterprise was deemed competent is not clear; but, as no exception was saved to its admission, we do not discuss the question.

[3] The fourth assignment relates to the admission in evidence of the testimony of Emory R. Johnson, offered by the Canal Company, concerning the probable future growth of the traffic through the canal and its earnings, as bearing upon the value of the canal property.

Mr. Johnson qualified as an expert on the history and theory of canal transportation, and as having special knowledge of canals and inland waterways, both in this country and in Europe, with reference to the amount of business they did and the tolls charged. Having testified that the total gross tonnage passing around the Cape in 1909 was 26,465,000 tons, and that the gross vessel tonnage per annum during the war which passed through the canal and coastwise was

18,108,893 tons, he was asked what, in his opinion, the future coastwise traffic would be, and he said that he predicted the coastwise traffic would return to normal within three years and, assuming the tonnage would be 26,000,000 in 1923, it would reach 34,500,000 tons in 1933, if the increase in a decade is only one-third; that that rate of increase would carry the figures to 46,200,000 tons in 1943, 20 years after the period of return to normal; and that the traffic for the years 1943–44, assuming this rate of increase, would be 47,357,000 tons. On being asked how much of this traffic would use the canal, the witness said:

"The most reliable estimate that I can make of the future growth of the traffic of a canal like the Cape Cod Canal is by predicting for it such a rate of increase as has actually been experienced by canals who have run their history for 20, 30 or 40 years, whose history is a matter of record. * * * The best method I know of to estimate the probable development of a canal like the Cape Cod Canal is to consider—and I shall be very brief about it—the actual experience of some other canals, and I have selected the Suez, the Manchester and the Kiel Canals."

At this point counsel for the government objected to the admission of the testimony, claiming that the conditions relating to the canals spoken of by the witness were wholly dissimilar. The court declined to allow the witness to continue with his answer, saying that he was "inclined to think that the Suez Canal * * * [was] so differently situated in many points that [he was] not disposed to allow direct evidence in regard to it for purposes of comparison." Later the witness was asked

"What is your estimate of the future use of the canal, assuming that its dimensions are substantially as they now exist; that is, a 25-foot canal, with 100 feet width at the bottom?"

He answered:

"The prediction as to the future traffic of the canal was based upon the assumption, first of all, that the available traffic, coastwise, would increase 33 1/3 per cent. per decade after that traffic had again become normal in volume; that is, from 1923 on. That carries the total available traffic up to 46,200,000 tons in 1943. The problem to be solved in making an estimate of the probable traffic of the Cape Cod Canal is to determine what rate—what would be the normal rate of increase in traffic of a canal such as the Cape Cod Canal. Now, I do not think that there is any way of arriving at a normal rate of increase so reliable, at least, not to my mind so reliable, as the average rate of increase of other canals that have gone through their early years of experiment, their early years of slow growth, and through their later years of fair prosperity. So I have predicted for the future of the Cape Cod Canal a rate of increase equal to the average rate of increase of the Suez, which increased slowly for 10 years. * * *

"Q. Without going into that, if you will state what your prediction is, being based upon your study of canals in general, because, you see, Mr. Matthews has got it in for the Suez Canal. * * *

"Q. So, if you will just state from your knowledge of canals in general, then you will get by the objection. A. I will finish the sentence at least. The other two canals I had in mind were the Manchester, which grew very slowly, and the Kiel Canal. I applied the average rate of increase for those canals to the traffic of the Cape Cod Canal, starting the line from 1919—I talk in terms of lines, because one thinks graphically—and carried that line, which merely locates graphically the figures, through to 1943, and the figures run as follows."

At this point counsel for the government interposed an objection, stating that the facts relating to the Suez, Kiel, and Manchester Ship Canals had been ruled out, and that it appeared from the witness' last statement that the answer he was about to give was predicated solely on that comparison. The court sustained the objection so far as it related to the witness undertaking to give a mere summary of the results in those canals, but allowed him to state his opinion as to the future business of this canal, saying, "He can arrive at that in any way he thinks proper;" that the witness might testify "as to his opinion, and it is his affair and the jury's as to whether that opinion is founded on rock or sand." To this ruling counsel for the government saved an exception. Counsel for the Canal Company then premised his question with the following statement:

"I want to make that, in view of the exception, very explicit, that I am not asking for a comparison with any other canals or average in canals as such.

"Q. What his honor has said is proper to submit to the jury is your opinion. Your methods of having reached it are inconsequential so long as it is your opinion, and what Mr. Matthews objects to, apparently, is the way you reach your opinion, and very likely he will cross-examine you about it, and show that it is an improper way to reach your opinion. I should like to see him do it. I hope he will. But in the absence of that I understand his honor to rule that you may state your opinion, and you have already indicated that you have considered in making that opinion all the knowledge that you have in regard to canals, which seems to be rather larger than most of us have. A. My opinion, then, is that the traffic of the Cape Cod Canal 10 years hence will be 7,700,000 tons of vessels gross register. * * * I wish to correct that statement; I was in error. I misread my figures here. I will read them correctly now. At the end of 10 years of operation of the canal, which means 5 years hence, the prediction is 7,700,000 tons gross register; 10 years hence, 9,900,000 tons; fifteen years hence, 11,700,000; 20 years hence, 14,500,000 tons; 25 years hence, 16,800,000 tons—in all cases gross tonnage."

The witness then testified that he had decided upon what would seem to be a reasonable schedule of maximum tolls higher than the existing schedule, and, applying that schedule to the predicted tonnage through the canal, found the revenue to be in 1919, $1,100,000; in 1929, $2,100,000; in 1933, $2,500,000; in 1943–44, $3,600,000. He was then asked:

"Q. May I ask whether these figures include any consideration of special factors of growth, like the increase of traffic, passenger traffic, by passenger steamers from New York to Boston, which cannot go around the Cape, and the transportation of coal in box barges, which is limited, as I understand, or as has been testified, to the use of the canal? A. All of the factors affecting the probable growth of traffic were considered by me in reaching a general decision as to the probable rate of increase. In connection with reaching that decision, the facts to which you refer, and certain others, were given weight."

After giving the future gross tonnage of the canal as above stated, the witness said that those figures "were merely a matter of computation," and on cross-examination he testified:

"A. My prediction as to the future development of the traffic of the canal was a judgment based not upon the development of the Cape Cod Canal to date. My judgment was influenced by that, but it was not based upon that development. X-Q. 21. And you based your opinion of the prospective

probable business of the canal 5, 10, 20, 30 years in the future on the calculations that you have given to the jury this morning? A. Certainly."

It is asserted on the part of the government that Professor Johnson predicated his opinion as to the future tonnage passing through the canal solely on facts relating to the Kiel, Suez and Manchester Canals, as to which the court had ruled that testimony could not be received. While the majority of the court are of the opinion that the record discloses that the witness, in giving the figures as to the future tonnage of the canal, stated a mere calculation, which any one could make if given the data, and not his opinion, and that the calculation was based mainly on the rate of increase of the three foreign canals, which rate was not allowed to be put in evidence, we do not, under the circumstances of this case, regard this question as of controlling importance, as it is involved in the broader question of whether the subject-matter with reference to which the witness was allowed to give his opinion was a proper subject for expert testimony.

Whether a given subject is one concerning which an expert may express an opinion is a question of law (Jones v. Tucker, 41 N. H. 546, 549; Dole v. Johnson, 50 N. H. 452, 458; Keefe v. Railroad, 75 N. H. 116, 121, 71 Atl. 379); and it has been held that—

"When it is supposable that jurors can form a correct judgment or opinion, without the aid of the opinions of others, from facts stated, the opinions of others are not, as a general rule, to be received in evidence." Leighton v. Sargent, 31 N. H. 119, 133 (64 Am. Dec. 323); Keefe v. Railroad, supra.

Tested by this rule, was the opinion of Professor Johnson as to the probable future tonnage of the canal and the additional revenue to be derived in view of such increased tonnage a proper subject of opinion evidence? We think it was not. It seems to us that the jury might well be supposed to be able to determine the future increased tonnage of the canal from a statement of the facts upon which the witness might found his own opinion. In this case it could be shown what the tonnage passing through the canal was at the time of the taking, and the increase in the tonnage that had taken place from the time the canal was opened to the time of taking. It could also be shown what the tonnage going around the Cape was at the time of taking, and what the increase was over a reasonable period antedating that time, and, from this and other competent evidence bearing on the question, we think the jury could form a correct judgment of the probable future increase of the tonnage through the canal without the opinion of an expert.

Then, again, the tolls which the Canal Company could charge on the interstate traffic passing through the canal were subject to governmental regulation and the opinion of Professor Johnson as to the probable future revenue based on an increase of tolls was in any aspect nothing more than a mere guess.

We are therefore of the opinion that the evidence under consideration given by Professor Johnson was incompetent and should not have been received.

The fifth assignment is that the court erred in admitting in evidence for the purpose of showing the value of the canal property the opinion of General Goethals on the ground that it was predicated upon the testimony of another witness in the case. General Goethals was called by the Canal Company and qualified as an expert on the construction and operation of canals. He was asked to state his opinion as to the value of the canal, giving due consideration to the different elements of value which had been submitted, and especially to the potential earning capacity of the canal as outlined by Professor Johnson. The testimony was admitted and the government excepted, on the ground that the opinion was predicated upon the acceptance of Professor Johnson's figures as to the potential earning capacity of the canal. On cross-examination the witness testified that he accepted Professor Johnson's estimates of the probable tonnage and the probable revenue, but, when inquired of as to whether or not he incorporated them in his opinion or used them as a basis for it, he said in substance that he considered the prospective earning capacity of the canal, but that he did not know of the prospective earning capacity, as stated by Professor Johnson, at the time he made up opinion; that he did not know of his figures until he had made up his mind. Under these circumstances we do not think that this assignment, limited as it is, presents any question for our consideration.

[4] The sixth assignment relates to reproduction cost and is comprised under three heads—(a), (b), and (c). In subdivision (a) the government complains that the court erred in admitting, for the purpose of showing the value of the canal property, evidence relative to the amount which it would cost to reproduce the property under the conditions and the enhanced prices of April 1, 1919; in subdivision (b) it complains that there was error in the admission of evidence for the same purpose, for the reason that there was "no sufficient evidence in the case that the reproduction of the canal property at present prices and under present conditions was a reasonable commercial proposition"; and in subdivision (c) that the court erred in refusing to instruct the jury (1) that the "Canal Company is not entitled to such a sum as would enable it to reproduce the canal at present prices or at any prices"; and (2) that it is only entitled "to that sum which will enable it to procure something else of equal pecuniary present value"; and (3) that "the jury should not consider as elements of value the estimates of McGovern and Goethals of the reproduction cost of the canal at present prices."

Patrick McGovern, a contractor who duly qualified as an expert on the cost of construction, testified that in his estimation it would cost to reproduce the canal in 1919, $27,980,729, and General Goethals, who likewise qualified as an expert, testified that in his opinion the cost of reproducing the canal in 1919 would be $25,832,245, if the work was done by the government by "force account," or $30,716,081.75 if done by a private contractor, and if by a private corporation obliged to finance the project by floating stocks and bonds about $40,000,000. Before this evidence was introduced, counsel for the government re-

quested the court not to admit the evidence unless it was supported by affirmative proof on the part of the Canal Company that the reproduction of the canal at present prices was a reasonable, commercial proposition; that in the absence of such evidence the court should take judicial cognizance of the enormous increase in the cost of work of this sort between the time when the canal was built and the cost April 1, 1919. In answer to this the court said:

"So the question before me is whether I can say as a matter of fact—and it is nothing but a question of fact—that in this case the circumstances are so peculiar that reproduction cost is of no significance. I am not prepared to do it."

An exception was saved to the ruling of the court permitting the introduction of the evidence.

It is in substance conceded that reproduction cost is competent evidence of market value, provided the prices existing at the time of reproduction are normal, making due allowance for the period of time necessary to reconstruct the property.

The evidence which the Canal Company offered shows that reproduction prices as of April 1, 1919, were, due to war conditions, about 100 per cent. above the actual cost of the canal; and the question is whether, under such circumstances, the court below should have declined to admit the evidence of reproduction cost, unless he was satisfied from evidence produced that a reasonable man would undertake to reproduce the canal at present prices as a commercial proposition, or whether the evidence should have been submitted to the jury, with instructions that they should not consider it on the question of market value, unless they were satisfied by a balance of probabilities that a reasonable man would undertake to reproduce the property at present prices, or whether the evidence should have been submitted to the jury, with the single instruction that they might consider it, and allow it such weight as they thought it was entitled to, disparaged, as it might be, by proof introduced by the government See Colburn v. Groton, 66 N. H. 151, 28 Atl. 95, 22 L. R. A. 763; Jaques v. Chandler, 73 N. H. 376, 382, 62 Atl. 713.

While it is customary to admit evidence of reproduction cost as bearing upon the question of value, the rule seems to be subject to certain limitations. In the Minnesota Rate Cases, 230 U. S. 352, 452, 33 Sup. Ct. 729, 761 (57 L. Ed. 1511, 48 L. R. A. [N. S.] 1151, Ann. Cas. 1916A, 18), Mr. Justice Hughes, speaking on this subject, said:

"The cost of reproduction method is of service in ascertaining the present value of the plant, when it is reasonably applied and when the cost of reproducing the property may be ascertained with a proper degree of certainty. But it should not justify the acceptance of results which depend upon mere conjecture."

In that case the court thought, in view of the length of time which had elapsed since the railroad was built and the material development of property and changes in the community since that time, that to attempt to estimate what would be the actual cost of acquiring the right of way over which the railroad was located, on the assumption

that the railroad was not there, was to indulge in mere speculation, and that such a method of ascertaining present value under the conditions shown should not be made use of. The question then is, if we assume that the cost of reproducing the canal may be ascertained with a proper degree of certainty, can the rule permitting the introduction of such evidence be reasonably applied in times of abnormal prices, in the absence of proof that a reasonably prudent man would purchase the property or undertake its construction at reproduction prices?

It seems to us that this is a necessary limitation upon the application or use of the rule when construction prices are abnormal, and that the court below either should have passed upon the preliminary question of fact himself, or submitted it to the jury, with instructions that they should not consider the evidence of reconstruction cost upon the question of value, unless they were satisfied that a reasonably prudent man would purchase or undertake the construction of the property at such a figure. When the cost of reproduction is taken into consideration as evidence of value, if the original property has depreciated, proper deduction therefor should be made in the evidence submitted to the jury.

As the evidence of Mr. McGovern and General Goethals was admitted generally and without limitation and without any deduction for depreciation, the court erred in so doing.

We do not find it necessary to consider in detail the requests for instructions embraced in this assignment of error, as they are, in all essential respects, covered by what has been said.

The seventh assignment of error is under three heads—(a), (b), and (c). In subdivision (a) the government complains that the court erred in admitting, for the purpose of showing the value of the canal property, the testimony of Admiral Francis T. Bowles and that of General Clarence R. Edwards relative to the utility and adaptability of the canal property for military and naval purposes.

In subdivision (b) it complains that the court erred in refusing to give the following instruction:

"That the value of the property in question is represented by the amount of money which the company could probably secure for it at a fair cash sale at the present time to some person or corporation other than the government."

And in subdivision (c) it complains that the court erred in admitting, for the purpose of showing the value of the canal property, the testimony of General Edwards that in his opinion the canal is a substantial and essential part of a modern scheme of defense of the United States in time of war.

Admiral Bowles was called by the Canal Company and qualified as an expert. He was asked, among other things, with regard to the use of the canal in connection with the military defense of the country in case of war. Counsel for the government objected that the company was not entitled to have the canal appraised at its value to the government for military or naval purposes. The court ruled that the avail-

ability of the canal for national defense was competent, and that the evidence might be admitted, and the government excepted.

Admiral Bowles then testified as to the availability of the canal for use for military and naval purposes. The court subsequently, in explaining his ruling, stated that he did not think he allowed the evidence as to the availability of the property for military and naval use "as to the dollars and cents value of that particular use."

General Edwards was called and qualified as an expert. Having testified that he had given consideration and study to the defense of the New England coast and submitted a report thereon to the War Department, he was asked whether the canal played any part in the plan of defense which he had outlined as commander of this department, and answered "Yes." He was then asked what was the importance the canal would play in his plan of defense. The court ruled that the question might be answered, the government saved an exception, and the witness answered: "I think, it is substantial and essential."

Counsel for the Canal Company, in the course of his argument to the jury, after referring to the testimony showing that the cost of reproducing the canal was from $25,000,000 to $30,000,000, said:

"So that we have here testimony upon which you would find that the least figure at which it could be reproduced by the government itself—and that is the important figure here for the reason I will point out in a moment—is in excess of $25,000,000. * * *

"Now, let us examine whether it would be likely to be built or not. You know something about what it costs for our national defense. I haven't the figures, but they are talking, I think you very likely saw recently, about $60,000,000 for a new kind of dreadnaught, one dreadnaught. $25,000,000 would be less probably, than the cost of a cruiser for our national defense. Now, would they be likely to build it, even at a cost like this? New York has spent $168,000,000 for its system of canals, to build up its commerce. They are talking about $40,000,000 or $50,000,000 for a canal to build up commerce down across the state of New Jersey. Would they overlook us here in Massachusetts entirely with this small sum and this important arm of their canals if it had not been built?

"Well, now, let us see about it. How will we get at that? That question is how important is it to our national defense and the defense of the New England coast? If it was important and vital, do you suppose the government would neglect building it? Haven't we received some lessons in the last few years about national defense? Some of our generals have come home wide awake to them, and the slothfulness which has characterized our government in those matters is not to continue. National defense, the protection of national life, has a vitality now that it has not had in years before.

"Is this of any importance in national defense? Well, Captain Colbath, the witness for the government, says, it played an important part in winning the war—he says that. Admiral Bowles—you heard his testimony with regard to it—calm, quiet, impressive, characteristic of a man who has carried the responsibilities that he has carried for his country; as a young man the leading naval constructor in this country, deservedly winning the high title of rear admiral; then taken from official duty, put at the head of the Fore River Works, which were destined to become the great national building place for warships for the national defense; for several years he headed that great enterprise, and then from his retirement, when war broke out, he was called to one of the most stupendous tasks of the many stupendous tasks which were assigned to citizens in Washington in national defense. He had the practical supervision of the rebuilding of the American merchant marine. For the

Shipping Board he superintended, with supervisory powers, not only the great Hog Island yard, the most marvelous achievement in American history and in shipbuilding, but the shipyards throughout the country, which in the course of the war expended in the vicinity of $4,000,000,000.

"That is the man who told you, in those simple words, with regard to the vital part that this canal, even in its present condition, would play in the defense of the New England coast, joining together those great commercial centers of Boston and New York. And how is his testimony treated? With flippancy, as if it were a joke, as if somehow that testimony could be waived out of this case with a laugh and a sneer. He brought Colonel Shunk, I think, to contradict it, and, he becoming ill, he summoned General Burr, or at least he arranged in Washington that General Burr should be ordered on here to do it, with what results you know. General Goethals, of whom I shall speak a little later in another connection, confirmed everything from the military point of view that Admiral Bowles had said from the naval point of view. He said that it was a vital—I am not quoting exactly—an essential part of our coast defense. Narragansett Bay is likely to be the center of the navy for protection in action.

"But finding that at least in one particular the distinguished government counsel was going to produce a witness who would contradict somebody, we called, as we should have earlier, and it was a matter of delay, a gentleman recently back from the battlefields, with a proud and creditable record, bringing the lessons of that great contest, who has been placed in charge of the Northeastern Division, in charge of the defense of our New England coast. And what does he say? He says it is essential and necessary. Am I right? Essential and necessary—that is right—to our modern scheme of New England defense. And the distinguished counsel says that what is essential and necessary, by the highest military and naval authorities in this nation, would not be built because it costs twenty-five millions of dollars. 'We will build dreadnaughts that can be sunk in half an hour, we will build cruisers, and we will build forts that can be blown into eternity; but we won't have a canal—no, sir. I, Nathan Matthews, say it. No, sir.'

"He doesn't bring anybody to support it, not the slightest evidence; he doesn't bring a man to say that it is not useful; he doesn't bring one witness to say that it would not be built at $25,000,000—not one. And he has the resources of the United States Treasury behind him to summon witnesses wherever he will; and he prefers, instead of having some witness come here to say, 'At that figure it never would be built'—he prefers to assert it himself before you. Wasn't it enough to be counsel, without trying to be the witness, too, and furnish the evidence?

"It is for you to say, gentlemen. Is it likely that our government would be so neglectful of the interests committed to their charge that an essential and necessary part of a scheme of modern defense would not be built because it cost $25,000,000? Well, I think that if some administration said that it would not other administrations might be found that would say it would, and that might be a vital thing in turning out one administration and putting in another. Whether we are going to have national defense or not might easily become a question of importance. If it is, if it has that special value—and now I am speaking of special value—if it has really a special value because it is a vital factor in New England defense even in its present shape, and if it was not there the government would have to build it, is there any reason why they should not pay what it would cost them to build it so far? They say, 'We want it wider, we want it deeper.' All right. Take it; widen it and deepen it. It is big enough for us, it is big enough for our investment, as Mr. Wilson said; we cannot widen it and deepen it; it would not be commercially practicable at present, however it might in the future. They say currents run through it. All right. Stop the currents, if it is needed for national defense. It won't bankrupt this nation, after what it has gone through. But so far as it would cost you to do the work that we have done, why should you come in and take advantage of it, and take it away from us, and then say: Well, it will cost us $25,000,000 or more to build it; but as long as you have built it I

guess we will take it and pay you what we think it is worth; not what its benefit is to us a special value.

"Well, that may be fair. But isn't it a fact that the gentlemen who have had to deal with this for some reason or other have not gotten the right idea or right theory with regard to it; that they have been moved by obstinate opinion rather than a liberal view? Perhaps they have been too busy with other more important facts, and have not been able to give this attention; but you have devoted more than a month to it, and I rejoice that you will be able to give it the attention that it deserves.

"They say it must be fortified. But that does not make it any less valuable. We would not fortify it for commercial uses. General Edwards says it won't be fortified. It is perfectly easy—we have had the thing outlined what it means. If Provincetown should be fortified, if Cape Ann should be fortified, and in case of invasion the defense should be strung across that Bay, with mines there, so that no ships could enter, and if Nantucket or Martha's Vineyard in the same way were connected with Montauk Point, and that sound shut off, so that ships could not get into it, think what it means to have that canal joining Cape Cod Bay and Long Island Sound, all protected waters! It is perfectly evident what an essential and vital factor that water connection is, and I do not need to dwell upon it further."

In the course of his charge the court instructed the jury on this question as follows:

"This property, connecting as it does Cape Cod Bay and Buzzards Bay, obviously has some place in military and naval schemes of defense on the part of the United States. Nobody denies that. The history of the enterprise, with George Washington moving up Monument river and discussing it, as was testified to, we have no reason to believe falsely, testifies that. There is a good deal of discussion as to how much the military or naval value of the canal is. Of course, the only person interested in that is the government, which has the duty of national defense. How far are you going to consider this aspect of the canal in determining its value? Well, you are not to consider the necessities of the government. You are not to consider how much could be squeezed out of the government if the owner of the canal were at liberty to refuse to sell unless he got his price. You see at once that any such test as that would be absurd, because the man who happened to own Fisher's Island here, which is absolutely necessary, you see, to the defense of Long Island Sound, could ask his own price for it, and the government would have to pay it, because it has got to have fortifications there on Fisher's Island. That is not to be considered at all the necessities of the government for the property. But what you are to consider is this: If that canal is valuable for government use, the government has got to pay for the use—pay for it in peace, pay for it in war, pay for it when and as it uses it; and for that use, the government's use, and the compensation which would result from it, in addition to the commercial and pleasure use of the canal, you are entitled to give consideration in arriving at value."

After finishing his charge, at the request of counsel, the court further instructed the jury as follows:

"I state to you now, gentlemen, that the peculiar value of the property to the government for military, naval, or other uses is not to be considered as an element of value. I have already told you that the use which the government made of the property for tolls is to be considered."

The questions raised by the government's exception to the evidence are: (1) Whether the evidence as to the availability of the canal to the government for military or naval purposes was competent upon the issue of the market value of the property; and (2) if not, whether its use in argument by counsel for the Canal Company for the pur-

pose of showing the value of the canal to the government for military and naval purposes can be said to have been so eliminated from the minds of the jury by the instructions given that this court can see affirmatively that the error in the admission of the testimony worked no injury to the government.

[5] We are of the opinion that, in ascertaining the market value of property taken in a condemnation proceeding the utility or availability of the property for the special purpose of the taker cannot be shown, if the taker is the only party who can use the property for that purpose. If, however, the property has a special utility or availability, not only to the taker, but to other parties who could use the property for the particular purpose intended by the taker, then this utility or availability may be shown. Moulton v. Newburyport Water Co., 137 Mass. 163; Sargent v. Merrimac, 196 Mass. 171, 81 N. E. 970, 11 L. R. A. (N. S.) 996, 124 Am. St. Rep. 528; Mass. General Hospital v. Belmont, 233 Mass. 190, 124 N. E. 21; Matter of Daly v. Smith, 18 App. Div. 194, 45 N. Y. Supp. 785; Matter of Simmons, 130 App. Div. 350, 114 N. Y. Supp. 571; Id., 130 App. Div. 356, 114 N. Y. Supp. 575; Id., 195 N. Y. 573, 88 N. E. 1132; McGovern v. New York, 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1228, 46 L. R. A. (N. S.) 391; Boom Co. v. Patterson, 98 U. S. 403, 25 L. Ed. 206; United States v. Chandler-Dunbar Water Power Co., 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063; New York v. Sage, 239 U. S. 57, 36 Sup. Ct. 25, 60 L. Ed. 143; Sidney v. N. E. R. R. Co. [1914] 3 K. B. 629.

The canal property, as a toll-producing instrumentality, is or may be of value to any person as owner. But the government upon whom the duty of national defense devolves is the only party to whom it has special utility for military and naval purposes. The evidence in question under this assignment had no relation to the toll-producing qualities of the canal, and had nothing to do in the way of showing its utility or availability for military or naval purposes in the hands of any person other than the government. Its sole bearing was upon the special and peculiar utility of the property to the government as a taker for purposes of national defense. The evidence was incompetent. Were the rights of the government prejudiced by its introduction and the trial rendered unfair?

[6] Although, after the completion of the charge, the jury were told that the peculiar value of the property to the government for military and naval uses was not to be considered as an element of value, the evidence bearing upon the question was not withdrawn, the argument of counsel based upon it was allowed to stand, and the jury were not told to eliminate from their minds either the evidence or the argument based upon it. The evidence of the utility of the canal to the government having been permitted to go to the jury, and argued in the forceful manner shown in the extracts above quoted, we are forced to the conclusion that the course pursued was prejudicial to the rights of the government and the trial was for this reason rendered unfair. Gilmer v. Higley, 110 U. S. 47, 50, 3 Sup. Ct.

471, 28 L. Ed. 62; Vicksburg & Merriden Railroad v. O'Brien, 119 U. S. 99, 103, 7 Sup. Ct. 118, 30 L. Ed. 299; Washington Gas Light Co. v. Landsden, 172 U. S. 534, 554, 19 Sup. Ct. 296, 43 L. Ed. 543; Throckmorton v. Holt, 180 U. S. 552, 557, 21 Sup. Ct. 474, 45 L. Ed. 663; Turner v. American Trust Co., 213 U. S. 257, 267, 29 Sup. Ct. 420, 53 L. Ed. 788.

The eighth assignment of error is divided into two subdivisions—(a) and (b). In subdivision (a) the complaint is that the court erred in admitting, for the purpose of showing the value of the canal property, the testimony of John J. Coakley, treasurer of the Canal Company, to the effect that the Canal Company had expended in addition to the direct cost of the canal certain amounts paid in stocks and bonds of the Canal Company for rights, franchises and services; that it had expended certain additional amounts by way of discount on its bonds, which it sold to provide funds for the construction of the canal; that in the course of its operations it distributed certain stock as bonus stock; that it paid the firm of August Belmont & Co. for organization expenses and for fiscal expenses, and for services, certain other sums; that it paid certain amounts by way of interest on its bonds and notes in excess of a reasonable allowance for interest during construction; and that it sustained throughout the period of operation operating losses. The evidence was admitted for the purpose of showing the original cost of the canal.

In subdivision (b) the complaint is that the court erred in refusing to give the jury the following instructions:

"(17) * * * In fixing the present value of the canal the jury are not to consider the amount which the Canal Company are out of pocket. They may, however, consider as evidence of present value the original cost of the present tangible property of the Canal Company described in the petition, in so far as that cost was fair and reasonable."

"(21) * * * The jury should not consider as evidence of value—

"(i) The loss to the company in interest paid on its bonds and notes in excess of a reasonable allowance for interest during construction; such allowance to be considered only in connection with the actual cost of the property.

"(j) Interest paid for any other or subsequent purposes."

"23. The jury are not to include in actual cost of the property the operating losses sustained by the company."

Although there is some dispute as to whether the government saved an exception to the evidence complained of under this assignment of error, we think that the record as a whole shows that an exception was saved to its introduction; and it is clear, so far as these matters are covered by the above requests for instructions, which were refused, that exceptions were duly saved, and that an exception was also saved to the instructions of the court to the jury relating to the particular items complained of in the evidence. Furthermore, as the case must for reasons previously stated be sent back for a new trial, we feel called upon to consider the questions raised by this assignment.

On the question of the actual cost of the property to the Canal Company it introduced its evidence under four heads:

(1)	Direct costs, the various items of which amounted to	$6,245,256.97
(2)	Overhead costs, the items of which amounted to	1,287,598.70
	Interest on same during construction	972,027.72
	Total	$8,504,883.39
(3)	Development costs:	
	(a) Net operating loss, July 30, 1914, to March 31, 1919, when the government took over the property for war purposes	$ 243,961.77
	(b) Interest on $6,000,000 of its outstanding bonds	1,628,416.77
	(c) Discount on $2,000,000 of notes issued to fund indebtedness	423,925.74
	Total development costs	$2,296,304.28
(4)	Additional items:	
	Loss of interest on paid-in cash capital of Construction Company, nine years at 6 per cent	$540,000.00
	Income tax payment	18,479.58
	Contingent claims (obligations incurred through negligence in sinking a ship in the canal)	300,000.00
	Total of additional items	$858,479.58
	These totals make the sum of	$11,659,667.25
	There were also included in the cost of the property:	
(1)	Payments in stock and bonds for rights, franchise and services (at par value of securities)	2,050,000.00
(2)	Discounts from par value of stocks and bonds sold to syndicate	1,006,250.00
	Total	$14,715,917.25

The court, in charging the jury as to the costs of the work, said:

"The counsel have saved us a great deal of time and effort by the way in which they have dealt with that question. They submitted, you remember, a very condensed, summarized result made by accountants from the books of the Canal Company, and which represented, I have no doubt, weeks of work. The parties are, as to some of the figures, not greatly apart; as to the actual figures not at all. They took those from the books of the company. The government accountants thought that the direct cost, as they termed it, was about eight and a quarter millions. Taking their basis of figuring, the Canal Company arrived at a result within a couple of hundred thousand dollars of that, about $8,400,000. But the Canal Company says that those figures were not correct, in that they did not include certain elements which were fairly includable in the cost, for instance, development expense and things of that sort; and the Canal Company says that the out of pocket cost of the thing was somewhere about eleven and a half millions, if I carry their figures right—that being the cash out of pocket cost of the enterprise up to the time when you are to make your valuation. In addition to which the Canal Company stated that it had cost something like three millions more in securities, as to the dollars and cents worth of which there may be very fair room for argument and doubt.

"The cost, you see, depends largely on what items you include in the cost. The government says that the eight and a quarter millions included items of overhead and office and promotion expenses, which ought to have been left out, which were not part of the cost. Well, that is a question for you to say, always remembering that, when we are working toward the cost, we are not working towards the verdict but are only working towards one of the facts which we desire to have in mind in reaching a verdict and in forming a judgment. And so you will consider the evidence as to cost from the various angles, and see about what you think should be fairly considered as the cost of the structure or construction as it now exists. And you should consider, also, the cost of the franchise. A franchise is the act of the Legislature and the rights which it confers, and we all know that in an enterprise of this sort

that involves a real expense. Nobody could do that sort of thing and get that franchise without a substantial expenditure, and the franchise itself once you have it is in the nature of a monopoly from the character of the land. There appears to be only this one place in which a canal can be built there, and it may have a value above the cost of getting it. Probably it does have a value above the cost of getting it, or at least was supposed to or nobody would have put the expense into it.

"And so, taking all those elements, you will arrive at what you think is the out of pocket cost of the franchise and the works and appurtenances."

To this instruction the government excepted.

It is apparent from this charge that the court regarded the evidence as showing what he termed "cash out of pocket cost of the enterprise," to be about eleven and a half millions, which necessarily included the items of "direct costs," of "development costs" and the so-called "additional items"; that he considered the "three millions or more in securities" as covering the items "payments in stocks and bonds" and "discounts on stocks and bonds," which, as above shown, amount to a little rising $3,000,000, and that under the instructions given the jury were to take all of these items into account in arriving at the cost of the canal.

The court further charged the jury as follows:

"Something was said to you about including damage claims in this development cost. I do not think they should be, and I tell you they are not. I see no reason why a pilot's blunder in running a ship ashore, although it may have been a thing that was to be expected, should be considered as development cost or as any other kind of cost to the canal."

He also later told the jury that they were not to consider as evidence of value "the amount of stock and bonds issued by the company, nor the amount of the mortgage, nor the amount of money borrowed on mortgage, on notes, or represented by the floating debt, nor the loss to the company by reason of discounts on the sale or pledge of its bonds."

Whether the jury were to understand from this charge that they were not to take into consideration the discount on the $2,000,000 of notes issued to fund indebtedness amounting to $423,925.74, or were not to take into consideration the discounts on the par value of the stocks that went in to make up a part of the $1,006,250, it is difficult to determine. They were only told that they were not to take into account "the discounts on the sale or pledge of its bonds."

[7] In ascertaining the fair value of a public utility, apart from its franchise, consideration has to be given to the value of its physical property, including preliminary and overhead costs necessary to prepare the plant for service, and also to those costs incurred in creating the business and revenue of the enterprise, or what is generally known as "going value" of the concern, provided the business has become profitable, or there is a reasonable probability of its becoming so.

In ascertaining the "going value" of such a utility, consideration may properly be given to the sums actually and fairly expended in producing the business, the same as the fair value of the physical property may be arrived at from a consideration of its original cost. It is

said that, in the case of a public utility, "going value" is not good will, and this may be true where the utility has a monopoly of the business in the community which it serves. Whether it is true as applied to this canal, which has to compete for business with the natural route for ships around the Cape, may be doubtful. But whether it be called going value or good will, we think the elements of cost that enter into it may properly be considered as elements going to increase the physical value of the plant. Kennebec Water District v. Waterville, 97 Me. 185, 217, 54 Atl. 6, 60 L. R. A. 856; Brunswick & T. Water Dist. v. Maine Water Co., 99 Me. 371, 59 Atl. 537; Gloucester Water Supply Co. v. Gloucester, 179 Mass. 365, 382, 60 N. E. 977; Omaha v. Omaha Water Co., 218 U. S. 180, 202, 30 Sup. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; Spring Valley Water Works v. San Francisco (C. C.) 192 Fed. 137; Des Moines Water Co. v. Des Moines (C. C.) 192 Fed. 193; People v. Willcox, 210 N. Y. 479, 104 N. E. 911, 51 L. R. A. (N. S.) 1. See, also, Brooklyn Borough Gas Co. v. Public Service Commission, P. U. R. 1918F, 335, 354, and cases there cited.

In the trial of this case these costs were spoken of as "development costs," and it is argued that to allow such costs is to capitalize losses, and that on this theory the greater the loss the greater would be the value, and that no limit could be placed on the period of development in creating a "going value." But we think that such costs may fairly be taken into consideration in determining the amount by which the value of the physical plant should be increased, provided the evidence discloses that the enterprise is a profitable one, or that there is reasonable probability that it will become so. A business which is unprofitable, or which it is not reasonably probable will become profitable within a reasonable time, has no "going value." It may be difficult to determine how much of the costs of development should be allowed as having created a "going value," but the question does not stand differently from other questions of fact which must be determined by a jury.

As to the competency of the items of cost introduced under the heading "Development Costs," we think that the item termed "Net operating loss" was proper to be considered, if it was made to appear that the enterprise, at the time of the taking, was a profitable one, or that it was reasonably probable it would become profitable within a reasonable time. The item of "Interest on bonds" under this heading, we do not regard as proper evidence of going value; but interest on money derived from the bonds, to the extent that the money went into the development of the business, and not into construction, would be proper to be considered, subject to the limitation above stated. In considering such items, however, the jury should be instructed that they should not be taken into account by them if they are of the opinion that the enterprise had, at the time of the taking, no going value, actual or potential, as above defined.

The items of discount on "notes issued to fund indebtedness" and "discount from the par value of stocks and bonds sold to syndicate" we do not regard as proper, either as items of actual cost or as bearing on going value. These items are not a part of the actual cost, and

in no way contributed to the going value of the enterprise, if it had any.

[8] Upon the question of the actual cost of the construction of the property, we think that the item designated "Payment in stocks and bonds for franchise, etc.," at par value of the securities, amounting to $2,050,000, was improperly received. These stocks and bonds were a part of the $12,000,000, or thereabout, of stocks and bonds turned over by the Canal Company to the Construction Company for building the canal; and of the $2,050,000 stocks and bonds, $1,650,000 were paid by the Construction Company to Mr. Flannigan for the franchise and right of way, $100,000 was paid to Parsons, in addition to the cash paid him, for services as engineer, $250,000 to McDonald for services as president and general manager of the Construction Company, and $50,000 to August Belmont for organizing a syndicate to float the bonds for the Construction Company. If some of the stocks and bonds going to make up the $2,050,000 can be fairly said to have gone into the construction cost of the canal, there is no evidence of their value upon which to base the cost of construction that they went to satisfy. The payment to Belmont for organizing the syndicate to float the bonds is, in no sense, a proper element of cost, and the evidence would indicate that the par value of the securities paid to McDonald was far in excess of the value of the services rendered by him.

The federal income tax of $18,479.58 was not a tax upon the income of the Canal Company, for it had no net income. It was a tax upon the income of the Construction Company based on the par value of the bonds paid it by the Canal Company, and could not properly be considered as an item of cost entering into the construction of the canal.

The item of $208,225.28, given under the head of "Organization and Promotion," includes $50,000 paid to Belmont & Co. for organizing a syndicate to float the Canal Company's stocks and bonds. We do not think this item should be included as a part of the cost of construction. As to whether the other items embraced in the sum of $208,225.28 are proper items of construction costs the record is obscure. So far as this sum may have included engineering expenses, plans, and legal services rendered in connection with or in relation to land taking, railroad changes, or work pertaining to canal construction, as distinguished from underwriting and financing services, such expenses may be properly considered.

The item of $325,000 designated "Fiscal," represents $50,000 a year for 6½ years paid for services in financing the company. We do not think this item should be included as an item of construction cost.

There is also an item of $122,960.28 for legal expenses and an item of $10,450.55 for miscellaneous expenses. Whether the legal services for which this was paid had to do with work pertaining to the construction of the canal the evidence does not disclose, and neither that nor the item for miscellaneous expenses should be included in the cost

unless and only to the extent that they pertained to the construction of the canal.

An item of $260,462.76, designated as "Administration," was allowed to go to the jury as construction cost. The evidence shows that this included the cost of the premium on the bond of the Construction Company and the cost of the general administration offices in New York outside of fiscal agents. We think that the premium on the bond is a proper element of cost, and that the general administration expenses of the New York offices, outside of fiscal agents, may be, provided they were incurred and had to do with furthering the construction of the canal. The evidence, however, is silent on this question.

It appeared that the Construction Company which built the canal had a capital of $1,000,000, and that interest on this sum for 9 years at 6 per cent. amounted to $540,000. This item was included as an element of construction cost. It also appeared that interest during construction, which covered the period from 1910 to April, 1916, amounting to $972,027.72, was introduced as a part of the cost of construction under the heading "Overhead Costs." It is evident that the interest on the $1,000,000 covered the 6 years of the construction period and 3 years of the development period. It is apparent, if the interest that accrued on the $1,000,000 during the construction period of 6 years was included in the item of $972,027.72, it should not have been received a second time in evidence. If not so included, we regard it as proper. But such of the interest as accrued during the 3 years after the canal was completed was erroneously received, as it could not have entered into the cost of construction.

The jury were not permitted to consider the item of contingent claims, amounting to $300,000, nor the discounts from the par value of the stocks and bonds sold to the syndicate of $1,006,250, as elements of construction cost, and we think rightly.

[9] The ninth assignment of error relates to the form and substance of the judgment. The questions under this assignment arise out of the Canal Company's petition for entry of judgment, and the motion of the government to dismiss that petition. We think the motion should have been granted, and the judgment framed without reference to the petition. The petition for judgment was grounded upon a theory entirely inconsistent with the petition for condemnation, with the answer of the Canal Company asserting sole ownership in the canal property, and with the verdict of the jury finding that it was the sole owner; and the court should have entered a conditional judgment, such as is customary and called for by the statutes under which the condemnation proceeding was brought, and complying with the pleadings and verdict of the jury.

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

LEHIGH VALLEY R. CO. v. ALLIED MACHINERY CO. OF AMERICA.*

(Circuit Court of Appeals, Second Circuit. February 23, 1921.)

No. 76.

1. **Carriers ⊜108—Duty to exercise care in handling explosives, in addition to compliance with legal regulations.**
   Compliance by a carrier with the regulations of the Interstate Commerce Commission in the transportation of explosives does not relieve it from its common-law duty to exercise such additional care as is required by the circumstances of the particular case.
2. **Evidence ⊜208(2)—Pleadings in other cases containing admissions held admissible.**
   In an action against a railroad company for loss and damage to property in transit, alleged by plaintiff to have been due to defendant's negligence, and which resulted from a fire originating in cars containing explosives, standing in the same yard, causing explosions which destroyed and damaged plaintiff's property, where the cause of the fire was in controversy on the trial, the pleadings in other cases, in which defendant admitted that the fire was due to incendiarism, *held* admissible.
3. **Carriers ⊜108—Liable to holder of bill of lading for loss due to negligence; "caused by it."**
   Under the Carmack Amendment to the Interstate Commerce Act (Comp. St. § 8604a, 8604aa), providing that a carrier shall be liable to the holder of a bill of lading for any loss, damage or injury to the property "caused by it," such liability extends to loss or damage due to its failure to exercise its common-law duty of due care according to the circumstances.
4. **Trial ⊜314(1)—Instruction to give weight to opinions of other jurors approved.**
   Instruction to a jury, on report of inability to agree, that it was the duty of each juror, especially if in the minority, to keep an open mind and give careful thought to the views of other jurors, *held* proper and commendable.

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

Action at law by the Allied Machinery Company of America against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hornblower, Miller & Garrison, of New York City (Lindley M. Garrison and Edgar H. Boles, both of New York City, George S. Hobart, of Newark, N. J., and Charles A. Boston, of New York City, of counsel), for plaintiff in error.

Hartwell Cabell, of New York City (Edwin G. Marks, of New York City, of counsel), for defendant in error.

Butler, Wyckoff & Campbell, of New York City (Frederick B. Campbell and Thomas R. Rutter, both of New York City, of counsel), amici curiæ.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The Lehigh Valley Railroad Company operates a great railroad terminal on a peninsula extending easterly from the west or New Jersey side of the Upper Bay of New York, known

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

*Certiorari denied 254 U. S. —, 41 Sup. Ct. 625, 65 L. Ed. —.

as the Black Tom Terminal. The distance from the easterly or water end to the land end is 4,900 feet, and at the easterly end there is a yard of 11 acres in extent and about 600 feet wide from the north to the south side, where loaded cars are stored.

On the night of July 29/30, 1916, there were 39 cars standing on the north side of the yard, 11 loaded with high explosives, 3 with wet nitro-cellulose, 17 with ammunition for cannon, 2 with combination fuses, 5 with benzol, and 1 with toluol.

On the south side of the yard there were standing 19 cars loaded with machinery under straight nonnegotiable bills of lading for export, lighterage free, of the New York, New Haven & Hartford Railroad Company, consigned to the plaintiff, the Allied Machinery Company, and one car consigned to the same company under a straight nonnegotiable bill of lading of the Chicago & Northwestern Railway Company, goods to be delivered at Black Tom Terminal.

All of these cars, except the last, were in course of transportation in interstate commerce for export, and the liability of the defendant in respect to all of them was that of warehouseman, and not of common carrier, by virtue of a provision in the uniform bill of lading approved by the Interstate Commerce Commission providing that, in case goods are not removed within a certain time after notice of arrival, the liability of the railroad company shall become that of warehouseman.

During the night a small fire broke out in one of the ammunition cars on the north side of the yard, which gradually increased, and at 2:07 a. m. a great explosion occurred, followed by a second half an hour later, as the result of which all the goods in the 20 cars mentioned standing on the south side of the yard were damaged or destroyed. The Allied Machinery Company, as consignee of 19 cars and as assignee of the claim of the shipper of the twentieth car, instituted this suit to recover for the loss.

The plaintiff's right of recovery depends entirely on proving negligence on the part of the railroad company. The cause came on for trial before Judge Mack. The verdict was for the plaintiff for the full amount of its claim, and this writ of error was taken to the judgment entered thereon.

There are 46 assignments of error, but we shall take up only the contentions which underlie those which were argued. For instance, the plaintiff's right to maintain the action was not contested, nor was its right to recover for the loss in connection with the twentieth car, which amounted to less than the sum of $3,000.

[1] The defendant claims that, if it complied with the regulations of the Interstate Commerce Commission as to the transportation of explosives, it discharged its full duty. The trial judge rightly held that those regulations were exclusive whenever they applied, but that Congress had not attempted to regulate the whole subject, and that the defendant remained under the common-law duty of exercising care according to the circumstances, wherever Congress and the Interstate Commerce Commission had provided no regulations as well as where they had. It is evident that such regulations in the nature of things

are applicable to the handling of these dangerous agencies in all situations. But there remains the care appropriate to the particular situation in each case which it would be impossible to cover by general regulations. Such an instance is illustrated in Texas & Pacific R. R. Co. v. Coutourie, 135 Fed. 465, 68 C. C. A. 177, and Marande v. Texas & Pacific R. R. Co., 184 U. S. 173, 22 Sup. Ct. 340, 46 L. Ed. 487. The care required on a terminal like the defendant's, accessible not only from one end by land, but at the other and on both sides by water, might differ from that required in a terminal accessible only from the land. So the care required where cars loaded with dangerous explosives stand near other cars might be different from the case where they were widely separated. A multitude of such cases could be suggested. Can it be believed that conformity with these regulations will excuse a carrier from maintaining a proper watch to discover fires and proper equipment to extinguish them? If not, then the question of the sufficiency of what has been provided is a proper subject of inquiry.

The court treated the question of the origin of the fire from two points of view, viz. either as the result of spontaneous combustion, as the defendant claimed, or incendiarism, as the plaintiff claimed. He instructed them that, if the fire was the result of spontaneous combustion, all testimony of the defendant's practice in respect of permitting persons to come into the terminal from the land and water sides was totally irrelevant. If, however, it was of an incendiary origin, especially in view of the German propaganda and the general apprehension of acts of violence from German sympathizers, such evidence was quite material. Of course, in either case, the sufficiency of the fire equipment would be a relevant inquiry in connection with the question of the care exercised by the railroad company.

[2] Upon the question of the origin of the fire the court quite properly admitted, over the objection and exception of the defendant, the pleadings in two cases brought by other parties in the Supreme Court of the state of New York to recover for damages resulting from the same explosion. The complaint in each of these cases charged:

"XVIII. That the said fire and explosion hereinbefore specified in paragraph IX herein was caused by incendiarism."

To which the defendant's verified answer responded:

"Eighteenth. The defendant admits the allegations of paragraph XVIII of the complaint."

These admissions were properly received, although they were not conclusive. They were made some time after the present suit was brought, and there was no attempt to qualify or explain them. Pope v. Allis, 115 U. S. 363, 6 Sup. Ct. 69, 29 L. Ed. 393; Cook v. Barr, 44 N. Y. 156.

[3] Although the action was for negligence, and not upon the bill of lading, the goods were still in the course of transportation, and the right of the consignee as lawful holder of the bill of lading to maintain an action for negligence in respect to the property held by the carrier as warehouseman is governed by the Carmack Amendment of the Interstate Commerce Act, section 7, Act June 29, 1906, 34 Stat. 595 (Comp.

St. §§ 8604a, 8604aa), Penna. R. R. Co. v. Olivit Bros., 243 U. S. 574, 37 Sup. Ct. 468, 61 L. Ed. 908; Southern Ry. Co. v. Prescott, 240 U. S. 632, 36 Sup. Ct. 469, 60 L. Ed. 836; Georgia Ry. Co. v. Blish Milling Co., 241 U. S., 190, 36 Sup. Ct. 541, 60 L. Ed. 948. For the purpose of this case, the amendment, which is the same in all subsequent amendments of the Interstate Commerce Act, as it was when originally passed, reads:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

It is argued that only loss or damage can be recovered of a railroad company which is "caused by it." Very true. But such loss or damage may be caused either by the affirmative action of the carrier or by its passive failure to exercise its common-law duty of due care according to the circumstances. It is equally liable in either case. Adams Express Co. v. Croninger, 226 U. S. 491, 506, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Kansas Southern Ry. Co. v. Karl, 227 U. S. 639, 649, 33 Sup. Ct. 391, 57 L. Ed. 683.

The case was plainly one for the jury, and the trial court submitted to their consideration in a full and fair charge the question whether the defendant exercised due care, having in view the size and character of the terminal and the storage in the yard of cars loaded with explosives and the general apprehension of incendiarism from German sympathizers, the sufficiency of the fire equipment, as to the number of hydrants, amount of hose, proper number of watchmen, and whether its employees had seasonably discovered the fire, and had exercised proper care to extinguish it, or to reduce the extent of its effect, or whether, if it had not failed in one or more of these duties, the loss might have been prevented. If so, the damage was "caused by" the railroad company within the meaning of the Carmack Amendment.

The argument that this explosion was to be treated like an act of God, such as the Johnstown flood, the San Francisco earthquake, or the volcanic eruptions at Mt. Pelee and Mt. Etna, does not convince us; but even in such cases of vis major the defendant would be obliged to show in addition that the loss was inevitable—that is, could not have been prevented by the exercise of due care on his part. This is exactly what the jury have found against the defendant in this case. Their verdict is binding upon us as to all questions of fact which there

was any evidence to support; our jurisdiction relating exclusively to questions of law.

[4] Finally, it is said that the trial judge erred in his remarks to the jury as to the influence of the views of the majority upon the views of the minority:

"At 12:20 the jury sent in the following note: 'The jury is hopelessly divided.' Whereupon the court instructed that the jury be brought in and the following took place:

"The Court: Gentlemen, I do not propose endeavoring to coerce you into coming to an agreement; but it is my duty to point out to you just what your duty is in that respect. Of course, in the end, every man must answer to his conscience—that is to say, as he thinks is right; but every juryman must make an honest endeavor to see the point of view of the other men, to keep his mind absolutely open, not to get into an obstinate state of mind, and to endeavor, as far as he honestly can, to give the most careful thought to what a majority of his fellows believe to be the solution.

"I do not mean to say that if, after doing that, a juror is absolutely convinced that the majority is wrong, that he has not the right to abide by his own judgment. But, just as in a case before several judges, so in a case before a jury. When one or more finds himself or themselves in a minority, or even if there is an equal division, it behooves every reasonable man to get into a condition of humility of mind as to his own powers of reasoning and judgment, and to consider and reconsider whether the majority, if there is a majority one way or the other, has not, on the whole, reached the sounder conclusion.

"Our law compels a retrial unless the jury is unanimous. That involves both the state, the country, and the parties in a very considerable expense and loss of time, and it is for that reason that I am always loath to let a jury go on their statement—even on their repeated statement—that they believe themselves hopelessly divided. I am glad to give any further instructions on any point as to which you are in doubt; to go as fully as you please into any phase of the case that you point out, that you believe more light is needed in the way of direction as to the law, because, as I have said, in the end you have got to decide the facts.

"This case is a large one; it is, of course, of great importance to the parties, and of great importance to the state; it was well tried, tried as rapidly, I think, as it could have been tried—more rapidly than ordinarily a case of that kind is tried—and yet a disagreement will mean going through that whole process over again. Now, if you are all convinced that you have gone at this thing from all possible angles and with a firm endeavor to see one another's point of view, and that, despite the great inconvenience to the public and the parties, further consideration is sure to be hopeless, there would be nothing further to do but to accept the inevitable. But if, after what I have just said, you think there is a chance, that you are not so hopelessly divided—I mean so evenly divided—but that you think there is a chance that a minority may be willing again to weigh the points of difference between you in the light of the views of the majority, particularly after anything further that I could say on which you would require further light, I should want you, after recess for lunch, to get together again this afternoon.

"I know that it is an inconvenience to you, too; but, of course, that is what you are here for. Every jury duty is an inconvenience. I should not keep you to-night, but I should want to keep you this afternoon, if there is any chance whatsoever of your getting together."

The jurors thereupon asked for further instructions in respect to the powers of the Interstate Commerce Commission in regulating the handling of explosives and as to the extent of the regulations it had actually promulgated. After receiving further instructions upon this

point in entire accord with the original charge, the jury retired at 12:45 p. m., and at 2:55 p. m. returned, rendering a verdict for the plaintiff. What the trial judge did is, in our opinion, eminently wise and fair.

The judgment is affirmed.

HOUGH, Circuit Judge (concurring). The issue of fact herein was raised by one sentence of the complaint as amended after trial began, viz.: That the subject-matter of suit "was destroyed while in the possession of the defendant * * * and became wholly lost to [plaintiff] through the negligence of the defendant." Under such pleading I do not think that the admission contained in defendant's answer in another litigation should have been received in evidence. That it was competent is thought to be true; the law in my judgment, being stated in Wig. Ev. § 1066. But the admission was neither relevant nor material to a charge of negligence so generally made; for non constat that incendiarism was either negligence or evidence thereof. Nor did anything else proven suggest incendiarism.

But, having regard to the whole course of trial, I think the error harmless, because the trial consisted merely in a general survey of all the conditions of life and business at the Black Tom Terminal. It seems to me, and, indeed, I think it admitted, that no one from this evidence can say with any certainty how, when, or why the fire started; the one thing certain is that there was a fire before the tremendous explosion occurred. Amid this mass of information, or misinformation, the fact that in another litigation another plaintiff had asserted incendiarism, and defendant had admitted it, became, I think, wholly unimportant and uninfluential—therefore in substance immaterial and irrelevant.

The very interesting and important question presented by this record and the treatment of it in the court below is well stated by plaintiffs in error in arguing that the duty of defendant was defined by law, and the function of the jury was to determine disputed matters of fact, and not to determine the measure of defendant's duty; whereas, the trial judge laid down as matter of law no measure of duty, further than that of exercising an "ordinary and reasonable care dependent on all the surrounding circumstances," and so left it to the jury to determine what precautions should have been taken by the railroad company having regard to the explosive character of much of the goods then on Black Tom, and thus the jury determined what measure of duty the defendant owed to plaintiff with respect to the goods in question.

The law on this subject must be derived from the statements thereof by courts of authority. Where the gravamen of action is negligence, I had until lately supposed that it was the duty of the court to lay down a definite measure of duty or standard of conduct demandable from both plaintiff and defendant, and leave to the jury only the question whether the facts showed a failure in that duty or deviation from the standard so defined by him. Such, however, is not the law as lately and repeatedly laid down by this court, and this case was in my judgment tried in strict accordance with the doctrine I tried to define in Lehigh, etc., Co. v. Scanlon, 259 Fed. 143, 170 C. C. A. 205.

Furthermore, in respect of this particular disaster, it was held in New Jersey, etc., Co. v. Lehigh, etc., Co., 92 N. J. Law, 470, 105 Atl. 207, that it was for the jury to say whether defendant exercised "that degree of care commensurate with the risk of danger arising from the accumulation" of explosives upon its premises. This is equivalent to saying that the court handed over to the jury the measurement of defendant's duty, when the only tool for measurement was the suggestion (long after the event) of what might have been done to obviate the possibility of a disaster of proportions previously unheard of; and this ruling by a large and able court was left undisturbed by the Supreme Court through denial of certiorari. 249 U. S. 600, 39 Sup. Ct. 258, 63 L. Ed. 796. By this great weight of very recent authority I am compelled to conclude that no material error was committed in the trial below, and to concur in the result of the majority opinion.

LEHIGH VALLEY R. CO. v. JOHN LYSAGHT, Limited.*

(Circuit Court of Appeals, Second Circuit. February 23, 1921.)

No. 108.

1. **Carriers ⇐178—Railroad holding carload shipment as warehouseman becomes liable as carrier on receipt of forwarding order.**
   Under the tariff regulations of a railroad company, providing that carload shipments arriving at its general New York terminal and there held for further directions, after a stated term, should be subject to demurrage charges, and the liability of the company therefor should be that of warehouseman only, where a car was so held, the liability of the company as carrier *held* to have reattached on its receipt of an order for forwarding the shipment.

2. **Carriers ⇐108—Statutory liability to holder of bill of lading extends to common-law liability for loss or damage "caused by it."**
   Interstate Commerce Act, as amended by Act March 4, 1915 (Comp. St. § 8604a), incorporating what is known as the Carmack Amendment, providing that a carrier shall be liable to the holder of a bill of lading for any loss, damage, or injury to the property "caused by it," does not limit the liability of a carrier to that of an ordinary bailee for its own negligence only, but covers any loss or damage for which it would be liable at common law.

3. **Carriers ⇐131—Answer in action for loss of property destroyed in terminal yard by explosion alleging nearby boat as origin thereof held to state no defense.**
   In an action against a railroad company for loss of property destroyed while standing in defendant's terminal yard by an explosion of explosives in other cars in the yard, where it was alleged that defendant was negligent in failing to provide watchman or fire equipment, an answer alleging that the fire which caused the explosion originated on a boat lying at the terminal over which defendant had no control *held* not to state a defense.

Hough, Circuit Judge, dissenting.

In Error to 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. 625, 65 L. Ed. —.

Action at law by John Lysaght, Limited, against the Lehigh Valley Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 254 Fed. 351.

Hornblower, Miller & Garrison, of New York City (Lindley M. Garrison and Edgar H. Boles, both of New York City, George S. Hobart, of Newark, N. J., and Charles A. Boston, of New York City, of counsel), for plaintiff in error.

Hayden & Post, of New York City (W. K. Post, of New York City, of counsel), for defendant in error.

Butler, Wycoff & Campbell, of New York City (Frederick B. Campbell and Thomas R. Rutter, both of New York City, of counsel), amici curiæ.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. Lysaght, Limited, is the holder of two through domestic bills of lading of the Missouri, Kansas & Texas Railway Company for transportation of plates of spelters from Kansas to New York, state of New York, for export, under which the Lehigh Valley Railroad Company is the last connecting carrier. The two cars arrived July 17 and 18, 1916, respectively, and the goods were destroyed by the explosion at the Black Tom Terminal on the night of July 29/30, considered in our opinion in the case of Lehigh Valley Railroad Co. v. Allied Machinery Co. of America, 271 Fed. 900, handed down herewith.

The defendant's tariff regulations applicable to the situation are:

"A-1. All carload shipments for delivery locally or to vessels in New York Harbor, transported under domestic bill of lading to New York, not consigned direct to an established freight station of this company, as shown in list of station deliveries on page 10 of this tariff, will be held in or on cars, piers or warehouses at Jersey City, N. J., or Jersey City (National Docks), N. J., until receipt of written order for disposition from consignee or party notified of arrival under the terms of the bill of lading, and while so held at Jersey City, N. J., or Jersey City (National Docks), N. J., awaiting such orders for disposition, the freight will be subject to car demurrage or storage rules as on file with the Interstate Commerce Commission, and the carrier shall not be liable for loss, damage or delay, except in case of negligence of the carrier."

"16. Delivery orders and vessel permits limiting the time for delivery will only be accepted with the understanding that same will be accomplished with as reasonable dispatch as conditions and the general business of the company will permit."

"8. Cars containing export freight (not subject to warehouse storage rules or not covered by through export bills of lading) will be allowed 15 days' free time at terminal points in New York Harbor.

* * * * * * * * * * *

"(b) Free time to be computed from the first 7 a. m. after the day on which notice of arrival is sent to consignee.

"Note.—In computing time Sundays and legal holidays (national, state, and municipal) will be excluded. When a legal holiday falls on Sunday, the following Monday will be excluded.

"The foregoing rule will be effective on shipments forwarded from points of origin on and after May 2, 1916."

Section 1 of the bill of lading reads:

"No carrier or party in possession of any of the property herein described shall be liable for any loss thereof or damage thereto or delay caused by the act of God, the public enemy, quarantine, the authority of law, or the act or default of the shipper or owner, or for difference in the weights of grain, seed, or other commodities caused by natural shrinkage or discrepancies in elevator weights. For loss, damage or delay caused by fire occurring after forty-eight hours (exclusive of legal holidays) after notice of the arrival of the property at destination or at port of export (if intended for export) has been duly sent or given, the carrier's liability shall be that of warehouseman only."

The plaintiff gave orders for delivery to the steamer at New York as follows:

"New York, 7/29/16.

"Messrs. Lehigh Valley Railroad Co., 6 Broadway, City—Gentlemen: We inclose herewith original bills of lading indorsed notices of arrival and check for freight for the following cars, which are to be delivered to the S/S Wells City at Pier 69, North River, on August 2/16. We are inclosing check for freight and would request that you kindly send us receipted freight bills.

Car	C., M. & St. P.	54326	932 plates of spelter
"	S. O. U.	27110	813 plates of spelter
"	N. W.	21715	837 plates of spelter
"	Erie	72290	832 plates of spelter

"The loading permit has been mailed direct to the S/S and we trust you will give this matter your immediate attention and see that these consignments are delivered within the time specified and that the dock receipts are sent to us at the earliest possible moment.

"Yours truly, F. B. Vandergrift & Company,
"Wm. W. Rich, Pres."

September 25, 1917, Lysaght, Limited, brought this action on the bills of lading against the railroad company as insurer without any charge of negligence. January 23, 1918, the defendant demurred to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled by L. Hand, J.

June 1, 1918, the defendant's answer admitted the foregoing statements, but denied knowledge or information sufficient to form a belief as to whether the goods were destroyed by fire or exclusively by fire. It also set up three separate defenses, summarized by defendant's counsel as follows:

"(1) That the railroad company and plaintiff were alike innocent victims of a great public calamity, through the explosion of munitions of war in course of transportation in connection with the European War, which exploded without fault of defendant from causes beyond its control, and produced results likewise beyond its control.

"(2) That the said explosives were in interstate and foreign commerce in compliance with the Interstate Commerce and Federal Explosives Transportation Law, and the regulations of the Interstate Commerce Commission, with all of which the railroad company had duly complied; that the destruction complained of was caused by such explosives, which were munitions of war; and that their explosion and its results was the result of causes wholly beyond defendant's control.

"(3) That such explosives as aforesaid were not in the railroad company's possession or control, but on nearby public waters, and the railroad company was free from fault."

The plaintiff's demurrer to these defenses was sustained by L. Hand, J.

[1] When the cause came on for trial before Judge Mayer, the defendant moved to dismiss on the ground that its liability was that of warehouseman, and not of carrier, which motion was denied, because overruled on demurrer by Judge Hand. Without going into the question whether the defendant waived this objection by answering over, we think it was bad in law. The goods were in course of transportation, and the delay at the Black Tom Terminal during the period that the plaintiff failed to give shipping instructions for export for either 48 hours after notice of arrival under the bill of lading or for 15 days under the tariff changed the defendant's liability to that of warehouseman, but as soon as shipping instructions were given, July 29, at 1:42 p. m., its liability as carrier to transport the goods to New York, county of New York, was reinstated. This is expressly stated by A–1 of the company's tariff. The only effect of article 8 of the tariff is to postpone the time at which demurrage begins to run. The other provisions of section 16, which give the railroad company a reasonable time within which to deliver alongside the steamer for export, in no way affect its liability as carrier or make it a warehouseman. There is nothing in the suggestion that lighterage to New York is a mere terminal service. The railroad company, having agreed to deliver at New York, would have been responsible as common carrier, if the goods had been lost or damaged while on the lighter. Judge Hand concluded his opinion on the demurrer to the complaint as follows:

"It does not, of course, follow that the defendant became a carrier at the moment of receiving the order at 1:42 p. m. For example, it might be that that was too late for delivery that evening. If so, the defendant's liability would not attach until such time as it could have commenced delivery under the conditions of the harbor. All such considerations cannot be decided upon the pleadings; they must wait for the evidence developed at the trial. It does not follow, therefore, that on Sunday, July 30th, the defendant was not still holding as a warehouseman, but it equally does not follow that it was."

We go further, and hold that, had the case rested on the complaint and the denials of the answer, a verdict should have been directed for the plaintiff.

The defendant contends that, because July 29 was a Saturday and July 30 a Sunday, defendant's liability as common carrier could not have reattached before the explosion. It relies upon the Sunday laws of New York and New Jersey, but the Sunday laws of neither state prohibit the giving of shipping instructions or the transportation of goods on half holidays or Sundays. See sections 24 and 25 of the New York General Construction Law (Consol. Laws, c. 22), and Van Orden v. Simpson, 90 Misc. Rep. 322, 153 N. Y. Supp. 134; New Jersey Compiled Statutes, vol. 3, p. 3091, par. 5, § 1, and page 3092, par. 7, § 3.

Judge Mayer directed a verdict for the plaintiff, and the defendant has taken this writ of error to the judgment entered thereon.

[2] The liability of the defendant depends upon the Interstate Commerce Act and the uniform bill of lading approved by the Interstate Commerce Commission. The Act of March 4, 1915, c. 176, 38 Stat.,

L. 1196 (Comp. St. § 8604a), amending the Interstate Commerce Act, incorporates what is known as the Carmack Amendment, which reads, so far as material in this case, as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

"That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof."

The defendant contends that it is not liable for any loss or damage not "caused by it," and alleges that this explosion was not caused by it. These words of the act were used to make the initial carrier liable for any loss or damage occurring during the whole course of transportation, whether caused by it or by a connecting carrier, though they apply, also, to each carrier as to loss or damage on its own line. Georgia Railway Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948. Congress cannot have intended to reduce the liability of common carriers to that of ordinary bailees for their own negligence only. Happier words than "caused by it" might have been used, but they fairly cover loss or damage for which the carrier would be liable at common law. See Adams Express Co. v. Croninger, 226 U. S. 491, 506, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Cincinnati, etc., R. R. Co. v. Rankin, 241 U. S. 319, 326, 36 Sup. Ct. 555, 60 L. Ed. 1022, L. R. A. 1917A, 265.

Counsel for the railroad company make a very interesting argument to the effect that in the time of the general European War, when the defendant was compelled to carry these dangerous agencies, an explosion like this should be treated as an act of God. We are not persuaded by it. If it be better public policy to take this step in advance (a question we will not discuss), it must be taken by Congress, and not by the courts.

[3] Compliance with the requirements of the federal law as to the transportation of explosives does not fulfill the whole of the carrier's duty at common law. This subject has been considered in the case of Lehigh Valley Railroad Co. v. Allied Machinery Co. of America, 271 Fed. 900, handed down herewith. The carrier is bound, wherever the regulations of the Interstate Commerce Commission do not apply, to exercise due care according to the circumstances. Compliance with the regulations would not, for instance, justify the carrier in dispensing with watchmen or with fire equipment. If this is so, the number and competency of the watchmen and the efficiency of the fire equipment

are subjects for consideration. The New Jersey Court of Errors and Appeals held to this effect in New Jersey Fidelity, etc., Co. v. Lehigh Valley R. R. Co., 92 N. J. Law, 467, 105 Atl. 206, certiorari denied 249 U. S. 600, 39 Sup. Ct. 258, 63 L. Ed. 796; Howell v. Lehigh Valley R. R. Co., 109 Atl. 309, certiorari denied April 26, 1920, 253 U. S. 482, 40 Sup. Ct. 482, 64 L. Ed. 1024, and Royal Indemnity Co. v. Lehigh Valley R. R. Co., 109 Atl. 745, certiorai denied April 26, 1920, 253 U. S. 483, 40 Sup. Ct. 482, 64 L. Ed. 1024. It follows from the foregoing that the third defense, viz. that the fire originated on a boat lying at the defendant's terminal, with which it had no relations, would be no justification, if true.

The judgment is affirmed.

HOUGH, Circuit Judge (dissenting). The tariff regulations, and section 1 of the bill of lading, quoted above, have the force of law under existing statutes regulating commerce. Since negligence was not pleaded, the sole question in this case is whether the liability here insisted on is that of an insurer, or (to put it another way) was the railroad company, at the time of the explosion and in respect of plaintiff's goods, a warehouseman or an insurer?

The common law here relevant, and as crystallized in judicial declarations since Lord Mansfield's famous dictum, is authoritatively expressed in Pratt v. Railway Co., 95 U. S. 43, 24 L. Ed. 336; i. e., the liability of the carrier as carrier is fixed by accepting the property to be transported, and such acceptance is complete whenever the property comes into his possession with his assent. The liability continues until delivery or its equivalent. But the tariff regulations modified that historic rule, so that goods might be held at such a place as Black Tom "until receipt of the written order for disposition," and while so held the railway is liable as a warehouseman only.

The majority opinion, in holding that the liability of an insurer reattaches as soon as the carrier is told to send the goods forward, seems to me to lose sight of the reason for the change of law. Under these comparatively new regulations, common-law liability exists during the physical carriage and for a reasonable time before and after the completion thereof; the carriage itself being divided into steps or periods. When this carrier was told to send on the goods that were destroyed, and thenceforward until disaster occurred, the property remained in the same condition as for a long time before the receipt of notice, nor would the railroad have been under any obligation to move the goods until after the time of explosion.

To make the insurer's liability depend upon the date of telling the railway company to do something in futuro, instead of making it dependent upon what was actually being done, or what ought to have been in progress, at the time of disaster, seems to me wrong. No such holding is required by any authoritative decision. The reason and intent of the new regulations was to establish a correspondence between the duty imposed and the acts being done—i. e., when the carrier is carrying, he is an insurer; when he is warehousing he is a warehouseman.

It seems to me an unfortunate ruling to treat the regulations as if they were a penal statute, or something in derogation of common law; they are remedial legislation.

For these reasons I dissent.

PIERRIERO v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1921.)

No. 1861.

1. **Criminal law ⟸307—Possession of narcotics may be made prima facie evidence of crime.**

Though the mere possession of narcotic drugs cannot of itself be made a crime, it may be made prima facie evidence of some other offense, as it was by Harrison Narcotic Act, § 1, as amended by Revenue Act 1918, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g).

2. **Poisons ⟸9—Allegation in indictment that defendant sold and distributed narcotics implies he was within class required to register.**

An allegation in the indictment that defendant sold, dispensed, and distributed narcotics implies that he was within the class required to register by Harrison Narcotic Act, § 1, as amended by Revenue Act 1918, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), and, with proof that narcotics were found in his possession, is sufficient allegation and proof that he was required to register to place on him a burden of showing that he was not in the class required to register and that his possession was not unlawful.

3. **Poisons ⟸9—Instruction that finding narcotics in defendant's room was prima facie evidence held not error.**

In a prosecution for violating Harrison Narcotic Act, § 1, as amended by Revenue Act 1918, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), where it was undisputed that narcotics were found in defendant's room, but he denied any knowledge of them, and offered evidence that others had access to his room, a charge that if the narcotics were found in defendant's possession—that is, in the room occupied by him—such possession was prima facie evidence of purchase and sale by him, was not erroneous, as declaring the finding of the narcotics in the room established his possession, where immediately after that paragraph the court directly charged that, in determining whether the narcotics were found in defendant's possession, the jury should consider all the circumstances in the case, including the fact, if so found, that other persons had access to the room.

Webb, District Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of Virginia, at Norfolk; Edmund Waddill, Jr., Judge.

Manuel Pierriero was convicted of violating the Harrison Narcotic Act, and he brings error. Affirmed.

J. S. Barron, of Norfolk, Va., for plaintiff in error.

Hiram M. Smith, Sp. Asst. U. S. Atty., of Richmond, Va.

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

KNAPP, Circuit Judge. Plaintiff in error, herein called defendant, was convicted of a violation of section 1 of the Harrison Narcotic

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

Act, as amended by section 1006 of the Revenue Act of 1918 (Comp. St. Ann. Supp. 1919, § 6287g).

Defendant is an engineer, and at the time of his arrest was employed by the United Dredging Company. He had leased the premises known as Nos. 215 and 217 Court street, Norfolk, Va., but had rented No. 215 to one John Corey, who in turn had sublet certain rooms to men named Price and Meeks. Meeks was jointly indicted with defendant, but as to him the indictment was nolle prossed. Pierriero lived in an upstairs front room of No. 217, renting other rooms in that house to different men. There was a connecting door on the ground floor between No. 215 and No. 217, and defendant stated that the room occupied by him was always unlocked and open to any one who desired to enter.

Revenue officers testified that on March 16, 1920, between 6:30 and 6:45 p. m., they saw defendant, carrying a black handbag, come from the rear up a narrow alley which ran alongside No. 215 and enter that house by a side door. These officers were standing on the opposite side of Court street some 80 feet distant. An hour or two later, with the aid of certain policemen, they raided the premises, arrested Pierriero in his room, and took possession of an unlocked handbag, which was discovered protruding from a closet, and which was similar in appearance to the one that defendant was seen carrying. In the handbag was found a large quantity of unstamped cocaine and gum opium, of the estimated value of $60,000 or more, at prices said to be paid by addicts. One of the officers, unknown to defendant, secured a bunch of keys which the latter had taken from his belt. When these keys were shown him at the trial, he said they belonged to his wife, who had left them when she went to New York, and pointed out one which he declared he had not seen before, and which was found to fit the lock on the handbag. He had previously stated that his keys were in the possession of his brother-in-law. He also said that the handbag did not belong to him, that he had never seen it before, and that he did not know it was in his room.

The amended section under which defendant was indicted imposes a tax on certain named drugs, to be represented by appropriate stamps so affixed to the container as to securely seal the same, and provides:

"It shall be unlawful for any person to purchase, sell, dispense, or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package; *and the absence of appropriate tax paid stamps from any of the aforesaid drugs shall be prima facie evidence of a violation of this section by the person in whose possession same may be found.*" (Italics ours.)

[1] 1. It is contended that defendant was wrongfully convicted because the government attempted to prove nothing more than possession, and possession cannot of itself be made a crime. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854. But beyond doubt possession may be made prima facie evidence of some other offense, and the courts have frequently so held. Luria v. United States, 231 U. S. 9, 25, 34 Sup. Ct. 10, 58 L. Ed. 101; Gee Woe v. United States, 250 Fed. 428, 162 C.

C. A. 498; Baender v. United States, 260 Fed. 832, 171 C. C. A. 558; Dean v. United States (C. C. A.) 266 Fed. 694. The last-named case arose under the statute here involved and is directly in point.

[2] 2. It is also contended that to convict under the amended section it must be alleged and proved "that the accused is one of those persons required to register and pay the special tax," even if untaxed and unstamped drugs be found in his possession. We are not of that opinion. The clause above quoted includes, not only those who purchase, but also those who sell and dispense, and the latter are specifically required to register and pay the special tax. Therefore an indictment in the language of the statute, charging that defendant "did sell, dispense and distribute," as in this case, alleges by necessary implication that he is within the class required to register. And if there be proof that unstamped drugs were found in his possession, the clause in question creates the presumption that he has violated the amended section. The burden is then upon him to show that he is not in the class required to register, and that his possession was not unlawful, as was held to be the case in United States v. Wilson (D. C.) 225 Fed. 82.

[3] 3. Exception is taken to following instruction to the jury:

"The court charges you that if you believe from the evidence that the inhibited article mentioned in the indictment not in the original stamped package, or from the original stamped package, without appropriate tax-paid stamps thereon, was in the possession of the defendant—that is to say, in a place in the room occupied by him in his residence and place of business—then such possession constitutes prima facie evidence of the purchase, sale, dispensing, and distribution of the drugs in question by the accused, as charged in the indictment, and would warrant his conviction of the offense charged."

The contention here is that the facts recited in this instruction, "that is to say, in a place in the room occupied by him in his residence and place of business," were in effect held to establish defendant's possession of the unstamped drugs as matter of law, and thus to virtually direct a verdict of guilty. Whether or not the defendant was in possession of the handbag found in his room was of course the principal matter in dispute, and if nothing else had been said to the jury on the subject of possession a somewhat serious question would be presented. But immediately following the paragraph quoted the learned judge further said:

"In determining whether the drugs in question, not from the original package and in the unstamped condition in question were found in the possession of the defendant, you should take into account all the facts and circumstances in the case including the fact, if such you believe to be true, that persons other than the accused had access to the room in which the drugs were found and give such consideration thereto as you think the circumstances warrant. * * *

"The court further charges you that you must consider this question in the light of all the facts and circumstances detailed to you and the reasonable and fair inferences to be drawn therefrom. You should take into account the manner and deportment of the witnesses when on the stand, their interest, if any, to give or withhold the truth, the reasonableness or unreasonableness of the explanation made of the possession of the drugs, as well at the time of the search of the premises and finding of the drugs as that made upon the witness stand, and if, upon the whole testimony, you are satisfied that

the drugs found belong to the defendant, or were in his possession and control at the time when found, you should find him guilty; otherwise he should be acquitted."

Taking into account the entire charge on the subject of possession, it seems perfectly clear that the question whether defendant was in possession of the handbag found in his room was distinctly and fairly submitted to the jury as a question of fact to be determined by them, and there is no ground for claiming that they did not so understand the instruction. The circumstantial evidence on this issue warranted a finding against defendant, notwithstanding his denial, and the objection here considered is without substantial merit.

Of the rejected instructions it is enough to say in a word that, so far as material, they had been covered in the general charge, and defendant was not entitled to have them repeated.

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

WEBB, District Judge (dissenting). I think a new trial should be awarded in this case for errors committed by the court below in his charge to the jury. The charge consisted of eight paragraphs. The first paragraph merely quoted the statute under which the defendant was indicted. In the second paragraph the court said to the jury:

"If you believe from the evidence that the inhibited article mentioned * * * was in the possession of the defendant—that is to say, *in a place in the room occupied by him in his residence and place of business*—then such possession constitutes *prima facie* evidence of the purchase, sale, dispensing, and distribution of the drugs in question by the accused, * * * and would warrant his conviction of the offense charged."

This is an unusual statute, in that it does not undertake to prohibit the possession of opium, but does prohibit its purchase, sale, dispensing, or distribution, and makes the possession of the drug prima facie evidence of such purchase, sale, dispensing, and distribution. The penalties for its violation are severe. In the above-quoted portion of the judge's charge he told the jury what possession was; that is, if a drug was found in a room occupied by the defendant in his residence and place of business, then that was such possession as constituted prima facie evidence, and would warrant his conviction of the offense. The defendant did not deny that the opium was found in his room, where he slept, and consequently the judge's charge amounted to telling the jury practically that the defendant admitted his guilt, because he admitted that the opium was found in a grip in a room where he slept. In other words, it seems to me that the court took away from the jury the right to find the fact of possession, because under this highly penal statute the fact of possession is one for the jury to find under proper instructions. Guilty knowledge of the presence of the inhibited drug played no part in the court's instructions. I think the jury should have been told that, before a prima facie case was made out against the defendant, they should find beyond a reasonable doubt that he *knowingly* possessed the opium, and the question should have been left to the jury to say whether or not he

did knowingly possess the drug; but, instead, the jury were told in effect that, if the opium was found where the defendant admitted it was found, then they would be warranted in finding the defendant guilty of purchasing, selling, dispensing, and distributing the drug. I cannot think that this error was cured by the subsequent paragraphs of the judge's charge.

In the fourth paragraph of the court's charge we find this language:

"The court further charges you that you must consider this question in the light of all the facts and circumstances detailed to you and the reasonable and fair inferences to be drawn therefrom. You should take into account the manner and deportment of the witnesses when on the stand, their interest, if any, to give or withhold the truth, the reasonableness or unreasonableness of the explanation made of the possession of the drugs, as well at the time of the search of the premises and finding of the drugs, as that made upon the witness stand, and if, upon the whole testimony, you are satisfied that the drugs found *belong to the defendant, or were in his possession and control at the time when found*, you should find him guilty; otherwise, he should be acquitted."

In other words, the court told the jury that, if they were satisfied that the drugs were found in the room which the defendant occupied, then they should find the defendant guilty, because the court, in paragraph (B), or 2, of his charge told the jury that the unlawful possession was complete, if the opium was found in a place in the room occupied by the defendant. This instruction seems to me to be manifest error, for the reason that the court should simply have told the jury that, if they were satisfied that the drugs were in his possession and he *knew* that they were in his possession, then this fact would raise a prima facie presumption that the defendant had violated the law. It must be remembered that the defendant had testified and stated that he did not know the drugs were in the room, and that they did not belong to him. The court, therefore, took the question of guilty knowledge from the jury. It seems to me that, if a person were indicted for having half a pound of opium in his overcoat pocket, and denied that he knew the opium was there, and offered to prove that on a thickly crowded street some miscreant had dropped the opium into his overcoat pocket without his knowledge, that he would have the right to present the question of his guilty knowledge to the jury, and the court should certainly tell the jury that the defendant would not be guilty, although the opium was in his overcoat pocket, if some one else had placed it there without his knowledge. But in the case at bar the court precluded this very vital question by telling the jury that, if the opium was found in the defendant's room, that fact alone was sufficient to convict him.

Again, in paragraph 5 of the judge's charge, marked (E) in the record, the court again tells the jury:

"This is a criminal case, and has to be proven by the government beyond a reasonable doubt, *save that the government has the right to rely on the prima facie presumption arising from the possession of the inhibited drugs by the defendant*, if such you believe to be the fact, until the defendant has properly accounted for the presence of the drugs where found."

I cannot get away from the belief that the jury under the foregoing instructions felt that they should find the defendant guilty upon the judge's charge, and did find him guilty because the judge had told them what possession was and that possession raised a prima facie presumption of the defendant's guilt.

The evidence shows that a number of other persons frequented the room in which the drug was found, and with these facts proven, and the defendant denying any knowledge of the presence of the drug in question, the question of guilty knowledge certainly should have been submitted to the jury, and the jury should have been told that a prima facie case was not made out against the defendant, unless the opium was in the defendant's possession with his knowledge. When the court charged the jury that the case against the defendant had to be proven by the government beyond a reasonable doubt, he practically withdrew that instruction when he added the words, "save that the government has the right to rely on the prima facie presumption arising from the possession of the inhibited drugs;" for, in the second paragraph of his charge, he had in effect told the jury that the finding of the drugs where the defendant admitted they were found, and about which fact there was no controversy, raised such a presumption of guilt as would warrant the jury in convicting the defendant. It seems to me that the court below in substance charged the jury that the defendant was guilty because the opium was found in the room where he slept. It also seems to me that the court placed the burden of proving his innocence upon the defendant; whereas, after the defendant had testified, and denied any knowledge of the possession of the drug, then the case was like any other criminal trial, and the burden was upon the government to satisfy the jury beyond a reasonable doubt, not only of the guilty possession of the drug, but of its purchase, sale, dispensing, or distribution, and the following request of the defendant for instructions should have been given by the court, to wit:

"The jury are further charged that a person charged with the commission of a crime is presumed to be innocent, and that presumption follows him throughout every stage of the prosecution. * * * There is no shifting of the burden of proof. It remains upon the government throughout the trial. The evidence may shift from one side to the other, and the government may establish such a state of facts as must result in a conviction, unless the presumption they raise be met by evidence; but when the evidence is all in, if, upon a consideration of it as a whole, the jury entertains a reasonable doubt as to the guilt of the accused, they must find him not guilty, as the government has not sustained the burden of establishing his guilt beyond a reasonable doubt. The accused is not required to prove his innocence."

Holding these views, I think a new trial should be awarded.

SENICK v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. February 17, 1921.)

No. 1862.

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Frank Senick was convicted of violating Harrison Narcotic Act, § 1, as amended by Revenue Act 1918, § 1006 (Comp. St. Ann. Supp. 1919, § 6287g), and he brings error. Affirmed.

R. T. Thorp and J. L. Broudy, both of Norfolk, Va., for plaintiff in error.
Hiram M. Smith, Sp. Asst. U. S. Atty., of Richmond, Va.

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

PER CURIAM. In so far as the questions which the plaintiff in error seeks here to raise are of substance, they have been answered adversely to his contentions by our opinion in Pierriero v. United States, 271 Fed. 912, handed down at this term.

Affirmed.

DERMOTT LAND & LUMBER CO. v. WALTER A. ZELNICKER SUPPLY CO.*

(Circuit Court of Appeals, Eighth Circuit. March 9, 1921.)

No. 5651.

1. **Sales ⟸124—Rescission for breach does not require surrender of profits made.**

   Where a contract for the sale of the material in a logging railroad, to be delivered by the seller, was rescinded by the purchaser after part performance for failure of the seller to make further deliveries, and the purchaser brought suit for the balance of an advance payment made, the seller *held* not entitled to credit for a profit made by the purchaser on retail of the material delivered.

2. **Contracts ⟸266(1)—Rule as to restoration of consideration on rescission to be equitably applied.**

   The rule that a party who rescinds a contract shall return what he has received thereunder is to be applied in accordance with equitable principles, and is not to be strictly construed, where the rescission was for breach by the other party.

Lewis, District Judge, dissenting.

Appeal from the District Court of the United States for the Eastern District of Arkansas; Jacob Trieber, Judge.

Suit in equity by the Walter A. Zelnicker Supply Company against the Dermott Land & Lumber Company. Decree for complainant, and defendant appeals. Affirmed.

Williamson & Williamson, of Monticello, Ark., and John M. Moore, W. B. Smith, J. Merrick Moore, and H. M. Trieber, all of Little Rock, Ark., for appellant.

L. E. Sawyer, of Hot Springs, Ark., and Randolph Laughlin, of St. Louis, Mo., for appellee.

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

*Rehearing denied June 21, 1921.

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

CARLAND, Circuit Judge. Appellee commenced this action at law to recover money which it had paid to appellant in advance as a part of the consideration of a contract executed by it and appellant August 10, 1918, and modified by a supplemental contract dated February 19, 1919, which contract appellee had rescinded for the failure of appellant, after partial performance, to perform in full. After issue joined, it appearing that an accounting would be necessary, the cause was by consent transferred to the equity docket and thereafter proceeded with as a cause in equity. On final hearing a decree was entered in favor of appellee for $20,513.23, being the amount sued for, with interest. Appellant claims that the trial court erred in not allowing a credit to it in the sum of $4,124.96, and in the allowance of interest. The basis of appellant's claim is as follows:

By the original contract between the parties appellee purchased and appellant sold a logging railroad and its equipment for the sum of $122,500, to be paid as set forth in the contract. The different items making up the logging railroad were stated in the contract. The purchase price was to be paid as follows:

"Said purchase price of one hundred twenty-two thousand five hundred dollars ($122,500.00), less any abatement thereof or deductions therefrom as hereinbefore provided, shall be paid by the purchaser to the seller in the manner and at the times following, that is to say, twenty-two thousand five hundred dollars ($22,500.00) at the time of the execution and delivery of this agreement, ninety thousand dollars ($90,000.00) in installments at the rate of forty-five dollars ($45.00) per gross ton for all rails delivered and loaded f. o. b. cars as aforesaid, according to sight drafts drawn by the seller on the purchaser, with bills of lading attached, or as deliveries are made on the ground as aforesaid, then according to the weight of such rails so delivered on the ground; and the balance, if any, but not exceeding ten thousand dollars ($10,000.00), upon tender of the purchaser taking the remainder of said rails, track material and equipment hereby sold to and purchased by the purchaser."

The property was to be delivered by January 10, 1919. It was not so delivered. The failure of appellant to deliver was the cause of the supplemental agreement of February 19, 1919. This supplemental agreement extended the time of delivery and contained this language:

"The purchase price under said contract of August 10, 1918, is amended from $122,500.00 to $104,500.00. The reduction of $18,000.00 is to be absorbed by reducing the price per ton on drafts covering rail delivered hereunder from $45.00 per ton, as stated in said contract of August 10, 1918, to $35.00 per ton. If more than 1,800 tons are delivered, the drafts for additional tonnage shall be made at $45.00 per ton, and if less than 1,800 tons are delivered, the unabsorbed balance of the $18,000.00 reduction shall be paid by the seller to the purchaser forthwith upon completion of this contract."

[1] Appellant failed to complete the delivery of the property sold, but did deliver 635.75 tons of rail, accessories, and material, and also 17 logging cars. Appellee paid for the property delivered in all $27,128.30; $23,949.55 was paid on invoices, and $3,178.75 by absorption from the initial deposit of $22,500. For log cars appellee paid $2,250. It sold the property delivered for a net advance, as appellant claims,

of $4,124.96. Deducting the sum of $3,178.75, the amount absorbed from the initial deposit, there would remain $19,321.25, for which sum appellee brought suit, less a small deduction of $5.63 for certain angle bars. Appellant insists that there should be deducted from the sum sued for the sum of $4,124.96, being the difference between what appellee paid for the property delivered and what it sold it for. It also claims that the contract of August 10, 1918, as modified by the contract of February 19, 1919, was an entire and indivisible contract; that, if appellee chose to rescind, it must return to appellant all that it received on the contract, including the profit above specified; that appellee could not rescind without it rescinded in toto. On the other hand, appellee claims that the contract was divisible, and that the manner in which the payments for material delivered were to be made showed either that the contract was divisible or that when these different installments of material were made and paid for that fact removed the particular installment from the operation of the contract, and that so far as deliveries were made they must be left out of consideration, leaving the contract to be rescinded as to the property not delivered. We are not disposed to enter into a discussion as to whether the contract was entire and indivisible or not. This is not an action in which appellee is asking the court to rescind the contract. It exercised that right itself, as it lawfully could, and no complaint is made as to its right to do so.

[2] It is now simply suing the appellant for the money paid in advance under the contract. Whether a contract is rescinded by a party to the same, or pursuant to a judgment of a court of equity, the settlement between the parties must be made in accordance with equitable principles. In this case appellant, which defaulted in the performance of the contract, and therefore is in the wrong, is asking a court of equity to award it profits made by the party who was wronged. The rule that the party who seeks to rescind a contract shall return whatever he has received thereunder, like other rules of justice, must be so applied in the practical administration of justice as shall best subserve in each particular case the undoing of wrong and the vindication of right. Roberts v. James, 83 N. J. Law, 492, 85 Atl. 244, Ann. Cas. 1914B, 859. Some of the earlier cases enforced the rule with much strictness, but the trend of the later cases is in favor of a more reasonable and equitable application of the rule. Corse v. Minnesota Grain Co., 94 Minn. 331, 102 N. W. 728; Sisson v. Hill, 18 R. I. 212, 26 Atl. 196, 21 L. R. A. 206; Bostwick v. Mutual Life Ins. Co., 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; Bell v. Anderson, 74 Wis. 638, 43 N. W. 666; Potter v. Taggart, 54 Wis. 395, 11 N. W. 678.

Appellant, having received payment for the property delivered in accordance with the terms of the contract, has received what the parties agreed was the value of the property delivered. Upon what principle of equity is the wrongdoer to receive, not only the agreed value, but in addition the profit made by the party not in fault by its own labor and expense. We do not think that justice requires appellee to

account for what the property delivered sold for. This being so, it was entitled to interest on its claim.

The decree of the trial court is affirmed.

LEWIS, District Judge. My dissent rests upon two propositions relied on by appellant, which I think should have been applied in this case:

First, the purchase and sale was of all the material (excluding only cross-ties) in a logging railroad, including rolling stock at an agreed gross price. Deliveries were to be made by the seller in installments as ordered, and on each delivery a payment down was made by the buyer. A small per cent. of these payments was taken out of an advanced deposit of $22,500 with the seller, made by the buyer when the contract was executed, and the balance was paid over on each delivery. Thus the contract was entire and indivisible, and could not be split up into as many contracts as the number of deliveries to be made; and in that event rescission must be in toto. Cresswell Co. v. Martindale, 63 Fed. 84, 86, 11 C. C. A. 33; Consumers' Bread Co. v. Flour Mills, 239 Fed. 693, 152 C. C. A. 527; Mining & R. Co. v. Brown, 56 Colo. 301, 312, 138 Pac. 51; 13 C. J. 623.

Second, the buyer rescinded after several deliveries and failure to make more, and then sued the seller for the unapplied balance of the deposit, $19,315.66. The case was submitted on stipulated facts, in which the seller admitted the balance of the deposit in its hands, but claimed that inasmuch as there had been rescission of the contract it should be allowed $4,124.96, as the reasonable value of the goods delivered, over and above what it had been paid for them—that it be put in statu quo. The court declined to deduct the amount claimed, which was practically conceded as a matter of fact, from the balance of the deposit. I think this was error. Lyon v. Bertram, 20 How. 149, 15 L. Ed. 847; Kauffman v. Raeder, 108 Fed. 171, 47 C. C. A. 278, 54 L. R. A. 247; Eclipse Bicycle Co. v. Farrow, 199 U. S. 581, 587, 26 Sup. Ct. 150, 50 L. Ed. 317; 24 A. & E. Enc. of Law, 645, and cases.

That is the only error assigned, and to that extent I think the judgment should be modified.

BRYANT v. CHARLES L. STOCKHAUSEN CO., Inc., et al.

In re GENERAL SHIPBUILDING CO., Inc.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1921.)

No. 1845.

1. Bankruptcy ⇐264—Court has discretion to refuse to confirm sale for less than three-fourths of the appraised value.

Under Bankruptcy Act, § 70b (Comp. St. § 9654), requiring property of the bankrupt to be sold subject to the approval of the court when practicable, and not sold otherwise than subject to such approval for less than 75 per cent. of its appraised value, the court had discretion to refuse to confirm a sale on the property at public auction, where the best bid was only 41½ per cent. of the appraised value.

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

2. Bankruptcy ⊜264—Discretion held to have been wisely exercised in refusing to confirm sale.

The action of the District Court in exercising its discretion to refuse to confirm a sale of property for 41½ per cent. of the appraised value, when a subsequent offer for 50 per cent. of such value had been received, will not be disturbed on petition to review.

3. Bankruptcy ⊜264—Highest bidder at sale only makes offer subject to confirmation.

The highest bidder at an auction sale of the property of a bankrupt, whose bid was only 41½ per cent. of the appraised value of the property, did not thereby buy the land, but only offered to buy it, and his offer was unaccepted until it should be confirmed by the court, so that he cannot complain of the court's refusal to confirm the sale to him.

Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Alexandria, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of the estate of the General Shipbuilding Company, Incorporated, bankrupt. Petition by Arthur H. Bryant against the Charles L. Stockhausen Company, Incorporated, and Louis N. Duffey, trustee in bankruptcy, to superintend and revise in matter of law an order of the District Court confirming a sale of the bankrupt's property to the Charles L. Stockhausen Company, Incorporated. Order affirmed.

J. K. M. Norton, of Alexandria, Va., for petitioner.

Frank E. Elder, of Washington, D. C., and Gardner L. Boothe, of Alexandria, Va., for respondents.

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

WEBB, District Judge. This cause is before us on a petition to superintend and revise. The petitioner, Arthur H. Bryant, alleges that Louis N. Duffey, a trustee in bankruptcy of the bankrupt General Shipbuilding Company, Incorporated, and as such trustee, offered certain real property belonging to the bankrupt for sale at public auction on the 3d of March, 1920; that the sale was widely advertised, experienced auctioneers secured, and the real estate was struck off to David Bayliss, agent of the petitioner, for the sum of $28,500, plus the assumption of the payment of two deeds of trust on the property, aggregating $13,000, making the total price $41,500; that the trustee reported the sale on March 10, 1920, and recommended the confirmation thereof; that the petitioner complied with the terms of sale, and paid the trustee $4,150, and has been ready and willing to pay the balance of the purchase price; and that, instead of prompt action being taken on the trustee's report of the sale, on April 6 an upset bid of $50,000 was made for the said property, and a check for $5,000 of C. L. Stockhausen was accepted as a guaranty of the upset bid; that the petitioner, having learned that there would be a resale of the property, filed his petition in the United States District Court for the Eastern District of Virginia for review, praying that the sale at which he was purchaser be confirmed.

The Charles L. Stockhausen Company, respondent, and Louis N. Duffey, trustee of the bankrupt's estate, answered separately the petition. The judge of the District Court for the Eastern District of Virginia heard the petition on the 24th of April, 1920, and rendered judgment in part as follows:

"This proceeding came on this the 24th of April, 1920, to be heard on the papers formerly read, and upon the petition of Arthur H. Bryant, the purchaser of the real estate of the bankrupt heretofore offered for sale, and described in these proceedings, notice of the finding of which was made returnable to this date, upon the upset bid of C. L. Stockhausen for the said real estate, upon proofs adduced orally and by affidavits upon said petition, upon the application of said upset bidder, and upon the answers filed to said petition, and was argued by counsel.

"On consideration whereof, the court, being of the opinion that under all the circumstances it would be unfair to the creditors of the bankrupt's estate to confirm the sale to the said Bryant at the price bid by him, doth decline to do so, and doth accept the said upset bid of the said C. L. Stockhausen, and doth order that the bidding for the sale of said real estate be reopened, the same at the future sale to be started at the upset bid aforesaid of the said C. L. Stockhausen."

The court then specifically describes the land to be sold, and says it shall be offered—

"by the trustee, Louis N. Duffey, for sale at public auction in the city of Alexandria, upon the terms and conditions heretofore prescribed for the making of the same, save and except that at such resale the bidding for the property shall start at the upset bid aforesaid, and the trustee will give notice of the time, place, and terms of said sale by publication daily, except Sunday, for ten days," etc.

Pursuant to said order of the court, the land was advertised and the sale was had on May 22, 1920, at which sale the land in question was struck off to Charles L. Stockhausen Company, Incorporated, at the price of $50,600, it being the highest bidder. The said Stockhausen Company fully complied with the terms of sale, and the trustee asked for confirmation of same, and accordingly the court adjudged, ordered, and decreed that the sale be fully ratified, approved, and confirmed, and the trustee was directed to execute a deed to said Charles L. Stockhausen Company to the land in question.

Before the first sale was made, the real estate was duly and properly appraised at a value of $100,000; but the highest bid on the property was that of the petitioner at a price of $41,500. At a meeting of the creditors held at the office of the referee in bankruptcy for the purpose of receiving a report of the trustee of the result of the first auction, the attorney for C. L. Stockhausen Company, one of the respondents herein, appeared and offered, in the event of a resale of the property, to start the bidding at $50,000. The creditors thereupon voted unanimously in favor of a resale, and the referee thereupon refused to approve the alleged sale reported by the trustee for $41,500. The trustee thereupon advertised the property of the bankrupt to be sold on April 29, 1920, and on April 10, 1920, Arthur H. Bryant, the petitioner on review, filed his petition in the District Court for the Eastern District of Virginia, praying that the trustee be required to report the sale of March 3, 1920, to the court for proper action, and that the sale might

be confirmed to the petitioner as above set forth. The District Judge, on the 24th of April, 1920, heard the evidence and argument of counsel, and refused to confirm and approve the sale of March 3, 1920, but instead ordered the real estate to be resold at public auction, which public auction was held on the 22d of May, 1920, when C. L. Stockhausen Company bought the real estate for the sum of $50,600, being the last and highest bidder for same, which sale was duly approved and confirmed by the United States District Court for the Eastern District of Virginia, sitting at Richmond, on the 1st day of July, 1920. The petitioner excepted to the order of the court approving the resale, and filed his petition for review on July 10, 1920.

[1] The sole question to be decided by this court is whether or not the court below abused its discretion in refusing to confirm the first sale, at which the petitioner was the last and highest bidder. In such matters the Bankruptcy Law gives the District Court discretion, and section 70b, of the National Bankruptcy Act (Comp. St. § 9654) is particularly relied upon by the respondent in justifying the action of the District Court, which section reads as follows:

"All real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value."

The appraised value of the real estate in question was $100,000. At the first sale it brought only $41,500, which was only 41½ per centum of the appraised value of the land. It is clear that the District Court below was warranted in refusing to approve the first sale, both by exercising the discretion given it in such matters and because the real estate did not bring 75 per centum of the appraised value. The court below recognized that the chief purpose of bankruptcy proceedings is to protect the interests of the creditors, and in its judgment declared "that under all the circumstances it would be unfair to the creditors of the bankrupt's estate to confirm the sale to the said Bryant at the price bid by him" (at the first sale), and thereupon the court declined to confirm said sale.

[2, 3] The court below was merely exercising a proper discretion in such matters, and this court will not disturb the exercise of that discretion, because it seems to have been wisely and properly exercised in this case. The petitioner cannot complain because he was not confirmed as the purchaser. He did not buy the land at the auction sale. He only offered to buy it, and that offer was only an unaccepted offer until it should be confirmed by the court, and this confirmation was refused by the court below.

We therefore hold that there was no error in the action of the court below, and no abuse of its discretion in refusing to confirm the first sale and in ordering a second sale.

Affirmed.

UNITED STATES v. INTERNATIONAL SILVER CO.

(Circuit Court of Appeals, Second Circuit. March 21, 1921.)

No. 141.

1. **Aliens ⟸56—Implied offer to employ held to make aliens "contract laborers" and to encourage migration.**
   Letters written to aliens residing in Canada, in which defendant stated it was looking for skilled and unskilled labor, stating the wages for each, and asking when the aliens would report for duty, impliedly offered employment to the aliens, and solicited them to migrate, so that they were contract laborers within Immigration Act 1907, § 2, who were encouraged to migrate to the United States contrary to section 4.
   [Ed. Note.—For other definitions, see Words and Phrases, Second Series, Contract Laborer.]

2. **Aliens ⟸56—"Encouraging" migration of contract laborers is not limited to prepaying transportation.**
   Under Immigration Act 1907, § 4, making it a misdemeanor to prepay the transportation, or in any way assist or encourage the migration of any contract laborer into the United States, a letter asking such contract laborers, who had stated they were ready to start at once, if assured of employment, when they will report for duty, is a manifest encouragement, and the section is not limited to encouragement by prepaying transportation of the contract laborers, but extends to encouragement in any way.
   [Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Encourage.]

3. **Aliens ⟸56—Replies to letters of inquiry by aliens held violation of contract labor provisions.**
   Replies by an employer of labor to inquiries from aliens as to the possibility of securing employment, in which the employer stated he was in need of labor and would pay specified wages therefor, and inquired when the aliens would report for duty, are violations of the contract labor provisions of Immigration Act 1907, §§ 2, 4, 5 and not mere courtesies.

In Error to the District Court of the United States for the District of Connecticut; Edwin S. Thomas, Judge.

Action by the United States against the International Silver Company to collect a penalty for violation of the Immigration Act. Judgment for defendant, on sustaining demurrer to the complaint (255 Fed. 694), and the United States brings error. Reversed.

Edwin L. Smith and Allan K. Smith, both of Hartford, Conn., for the United States.

Ralph O. Wells, of Hartford, Conn., for defendant in error.

Before WARD, ROGERS, and MANTON, Circuit Judges.

WARD, Circuit Judge. This is an action by the government to collect the penalty provided in section 5 for violation of section 4 of the Immigration Act of 1907 (34 Stat. 898).

The complaint contained two counts. The first alleged that Mrs. George C. Pearson, a citizen of Great Britain, residing in Nova Scotia, on or about February 29, 1916, wrote to the defendant which operated

a factory at Meriden, Conn., seeking employment for herself as a hand burnisher, and also inquiring whether the defendant had positions open for men, as her husband and son likewise wished employment. March 9, 1916, the defendant answered this letter as follows:

"Dear Madam: Referring to yours of the 29th ult., we are in need of hand burnishers that have had experience on the general line of hollow ware, such as tea ware, waiters, meat dishes, cake baskets, sandwich trays, nut bowls, etc., made of German or nickel silver, also white enamel. We are also looking for unskilled men. Our female help in the burnishing line average from 12½c. per hour to 20c. per hour; unskilled labor 17½c. to 25c. per hour. The girl's minimum wages is 12½c. per hour. If you were in the States, and applied to us for a position, we could place you."

March 15 George C. Pearson answered the defendant's letter to the effect that his wife was unable to accept employment, but that he and his son were ready to start at once, if assured of employment by the defendant. March 20, 1916, the defendant replied as follows:

"Dear Sir: Referring to yours of the 15th, will say the conditions stated in your letter are satisfactory and we will keep a place open for Mrs. Pearson. Kindly advise when you will report for duty."

The complaint went on to allege that on or about April 4, 1916, George C. Pearson migrated from Nova Scotia to Meriden; that by means of the aforesaid express and implied promise of employment the defendant knowingly assisted, encouraged, and solicited the immigration of the aforesaid alien into the United States, he not being exempt under the last two provisions of section 2 of the act. The second count set up the same allegations as to George C. Pearson, Jr. Each count prays judgment against the defendant in the sum of $1,000.

The defendant demurred to both counts, and the District Judge summarized the demurrers as follows:

"(1) That the complaint does not allege that the said George C. Pearson was a contract laborer.

"(2) Or that the defendant had knowledge that George C. Pearson was a contract laborer.

"(3) That there is no allegation that the defendant prepaid the transportation or in any way assisted or encouraged the importation or migration of the said George C. Pearson.

"(4) That the same correspondence claimed to constitute the solicitation also constitutes the encouragement.

"(5) That the defendant made no definite offer of employment to said George C. Pearson.

"(6) That the acts done by the defendant were not contrary to the spirit of the statute."

He sustained the first and second grounds of demurrer on the theory that the act excludes only contract laborers; i. e., persons who had been solicited to migrate by offers of employment, express or implied, and that the only penalty provided is for knowingly assisting, encouraging or soliciting such persons to migrate into the United States. The government took this writ of error to the judgment in favor of the defendant on the demurrers.

The material provisions of the act of 1907, which are also the same in the act of 1910 (36 Stat. 263, c. 128), are as follows:

"Sec. 2. That the following classes of aliens shall be excluded from admission into the United States: * * * Persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled: * * * And provided further, that skilled labor may be imported if labor of like kind unemployed can not be found in this country: And provided further, that the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants."

"Sec. 4. That it shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act.

"Sec. 5. That for every violation of any of the provisions of section 4 of this act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States."

[1, 2] It seems to us quite plain that the defendant's answer of March 9, 1916, to Mrs. Pearson's letter of February 29 was an implied offer of employment to both Mrs. Pearson and her husband and son and a solicitation to them to migrate to this country to perform labor here. They were consequently contract laborers within section 2 of the act. Furthermore, the defendant's reply of March 20, 1916, to George C. Pearson's letter of March 15 was an encouragement to both Pearson and his son to migrate to the United States within section 4 of the act. That section is not limited to encouragement by prepaying transportation of contract laborers but extends to encouragement "in any way." Asking contract laborers, who said they were ready to start at once if assured of employment by the defendant, when they will report for duty is a manifest encouragement. Both these contract laborers did migrate to the United States after receiving the letter.

[3] Counsel argued that these replies of the defendant to the letters of the aliens were mere courtesies and as such did not violate either the letter or the spirit of the statute. They rely for this on the case of Botis v. Davies (D. C.) 173 Fed. 996, which arose under the Act of March 3, 1903, 32 Stat. 1213, containing an entirely different provision. It excluded aliens—

"whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes; but this section shall not be held to prevent persons living in the United

States from sending for a relative or friend who is not of the foregoing excluded classes." Section 2.

It was no doubt to correct the liberality of the act in this respect that the provision was repealed by section 43 of the act of 1907 and the much stricter provision enacted in its place. We are quite clear that the defendant violated the act as charged in each count both in letter and in spirit.

The judgment is therefore reversed.

LIBERTY OIL CO. v. CONDON NAT. BANK et al.

(Circuit Court of Appeals, Eighth Circuit. March 9, 1921. Rehearing Denied May 12, 1921.)

No. 5642.

1. **Appeal and error ⇐237(6)—Sufficiency of evidence not reviewable, where not raised in trial court by motion.**
   Where an action at law is tried to the court by stipulation, the question whether the evidence is sufficient to sustain a general finding by the court is reviewable in the appellate court only when it was raised in the trial court by motion to find the facts or to declare the law.
2. **Interpleader ⇐33—Judgment of interpleader ends proceeding.**
   Where, in an action at law, the answer of defendant is in the nature of a bill of interpleader, an order bringing in other parties as defendants and payment of the fund in controversy into court by the original defendant ends the interpleader proceeding, and the case may then proceed between the adversary parties, either at law or in equity, as the nature of the case may require.

Hook, Circuit Judge, dissenting.

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

Action at law by the Liberty Oil Company against the Condon National Bank and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Charles G. Yankey, of Wichita, Kan., and Frederick W. Lehmann, of St. Louis, Mo. (Harry E. Karr and Edward M. Hammond, both of Baltimore, Md., on the brief), for appellant.

John J. Jones, of Wichita, Kan. (J. H. Keith, of Coffeyville, Kan., on the brief), for appellees.

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

CARLAND, Circuit Judge. Appellant commenced this action as an action at law against the Condon National Bank to recover the sum of $100,000, which the bank held on deposit to be paid to either appellant or appellees as the terms of a contract between them should be or not be performed. The case, although an action at law, has been brought here by appeal, instead of by writ of error. Section 1649a, U. S. Comp. Stat. (39 Stat. 727), reads as follows:

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

"No court having power to review a judgment or decree rendered or passed by another shall dismiss a writ of error solely because an appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, but when such mistake or error occurs it shall disregard the same and take the action which would be appropriate if the proper appellate procedure had been followed."

We therefore disregard the mistake, and take the action which would be appropriate, if the proper appellate procedure had been followed. The bank in its answer made the following allegations:

"That heretofore, and on the 24th day of May, 1918, the Liberty Oil Company, Incorporated, entered into a written contract with the Atlas Petroleum Company, a corporation, C. M. Ball, Isadore Litman, P. G. Keith, and J. H. Keith, a copy of which contract is attached to plaintiff's petition, marked Exhibit A, reference to which contract is hereby made, as a part hereof, as fully and to the same extent and with like effect as the herein full set out. * * *

"That in accordance with and under and by virtue of said Exhibits A and B attached to plaintiff's petition, plaintiff paid to this defendant on the 24th day of May, 1918, the sum of one hundred thousand dollars ($100,000), which said sum said defendant now has in its possession and under its control; that this defendant has no interest whatever in said sum of $100,000, except to see that the same is passed into the hands of the parties entitled thereto, and to discharge itself of all liability under said instrument in writing, copy of which is attached to plaintiff's petition, marked Exhibit B.

"That the plaintiff herein has demanded of the defendant the said sum of $100,000, and that the said Atlas Petroleum Company, C. M. Ball, Isadore Litman, P. G. Keith, and J. H. Keith have likewise and also demanded that the defendant herein pay and deliver to them the said $100,000, so deposited with this defendant under said Exhibit B of plaintiff's petition.

"This defendant, not knowing who is justly entitled to said sum of $100,000, has heretofore refused to pay or deliver the same to either the plaintiff or the said Atlas Petroleum Company, C. M. Ball, Isadore Litman, P. G. Keith, and J. H. Keith, and now asks that the said Atlas Petroleum Company, C. M. Ball, Isadore Litman, P. G. Keith and J. H. Keith, and each of them, be made parties to this cause, and brought into this action, and required to set up their claim to said sum of $100,000."

The case subsequently came up for hearing upon the petition of appellant and the answer of the bank. The court ordered that appellees other than the bank be made parties to the action and that they should set up their claim or interest in the fund in controversy within 20 days. Appellees other than the bank by answer and cross-petition set forth their claim to the fund in controversy. Appellant answered the cross-petition. The bank paid the money into court and had nothing further to do with the controversy. The action between appellant and appellees other than the bank proceeded as an action at law, as it had been commenced. Seven months after issue joined the case was heard by the court, a jury being duly waived, under the statute allowing a jury to be waived in law actions. The court found generally for the appellees other than the bank, and awarded judgment in their favor for the $100,000 and interest then on deposit in the registry of the court. No equitable right or claim to the fund was pleaded by either appellant or appellees other than the bank.

[1] The only error insisted upon in this case is the sufficiency of the evidence to support the judgment, it being claimed that the evidence

showed that appellees other than the bank did not furnish an abstract of title to the real estate upon which the leases sold were given that was marketable, there being an alleged defect in what is known as the Crippen, Lawrence & Co. tract. The question as to whether the evidence was sufficient to justify a finding in favor of appellees other than the bank was in no wise raised in the trial court, either by a request to find the facts or to declare the law. The evidence is in the record in the form of a bill of exceptions, a document unknown to a court of equity. The bill of exceptions does not disclose any ruling upon any request to find the facts or declare the law by the trial court.

[2] On writ of error, which ought to have been the process by which the case was removed to this court, our power to review is confined to rulings of the trial court in matter of law. No such rulings having been assigned and argued, there is nothing for this court to do, except to affirm the judgment below. Assignment of error No. 13, in relation to the admission of evidence, is not argued. It is claimed, however, that in some way the answer by the bank changed what was a proceeding at law into a proceeding in equity triable here de novo. We think this view is erroneous for the following reasons:

Assuming that the answer of the bank has the same standing as a bill of interpleader under section 274b, Judicial Code (38 Stat. 956 [Comp. St. § 1251b]), we can assume further that the answer was an equitable defense or proceeding, but that proceeding ended when the court ordered appellees other than the bank to be made parties. The bank paid the money into court and went its way, released from all liability. The proceeding at law between the other parties went on. It is well settled that when a judgment of interpleader is rendered it puts an end to that proceeding. The parties who are ordered to interplead may commence an action at law or in equity as the facts warrant. In this case the action at law had been commenced and proceeded on to judgment. That the order directing appellees other than the bank to be made parties to the suit commenced by appellant was an end of that proceeding is suported by Daniell's Chancery P. & P. vol. 2, p. 1568; Lynch v. St. John, 8 Daly (N. Y.) 142; Feldman v. Grand Lodge, A. O. U. W., 64 Hun, 636, 19 N. Y. Supp. 73; Hechmer v. Gilligan, 28 W. Va. 750. Of course, if it shall be claimed that the proceeding by the bank was in accordance with the laws of Kansas, the same result follows, because Code provisions in regard to interpleader are merely substitutes for the original bill in equity and are governed by the same principles. Atchison v. Scoville, 13 Kan. 17.

The proper procedure in actions at law tried by the trial court, where a jury is waived, has been stated at almost every term of this court. The cases bearing upon the subject, both in the Supreme Court and this court, are cited in Mason v. U. S., 219 Fed. 547, 135 C. C. A. 315, and in many cases since that case was decided; the last being U. S. v. A., T. & S. F. Ry., 270 Fed. 1, decided Jan. 12, 1921.

Judgment below affirmed.

HOOK, Circuit Judge, dissents.

McWILLIAMS BROS., Inc., v. DIRECTOR GENERAL OF RAILROADS (two cases).

(Circuit Court of Appeals, Second Circuit. March 2, 1921.)

Nos. 156, 157.

1. **Towage ⇐11(1)—Tug bound only to reasonable skill, care, and diligence.**
A towing tug is a bailee for hire, and as such bound to exercise only reasonable skill, care, and diligence, dependent on the circumstances of the particular case.

2. **Towage ⇐11(1)—Master of tug bound to know dangers of channel.**
The master of a towing tug is bound to know the channel and its currents, and dangers which are known generally to men experienced in its navigation.

3. **Towage ⇐11(8)—Tug liable for injury to tow.**
A tug *held* liable for injury to a barge from sunken wrecks over which she was towed, where the presence and position of the wrecks were known, and the channel was of sufficient width to avoid them.

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

Suits in admiralty by McWilliams Bros., Incorporated, against the Director General of Railroads, operating the Pennsylvania Railroad and the steam tug P. R. R. 35. Decrees for libelant, and respondent appeals. Affirmed.

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

Herbert Green, of New York City, for appellee.

Before WARD, ROGERS, and MANTON, Circuit Judges.

ROGERS, Circuit Judge. Testimony on these two cases was taken on the same day in the court below. By stipulation of counsel it was agreed that the testimony taken in each might be used in the other. The trial disposed of both cases in a single opinion; the vital point in each case being the same. The cases were heard in this court together, and they will be determined here in one opinion.

The libel in the first case was against the Pennsylvania Railroad Company and against all persons lawfully intervening for their interests therein. In the second case it was filed against the steam tug P. R. R. 35, her boilers and engines, and against all persons lawfully intervening for their interests therein. And on the same day that the libels were filed the court entered an order in each case, on motion of the proctors for the respondent and for the Director General of Railroads, and with the consent of the proctor of the libelant, that the Director General of Railroads (operating Pennsylvania Railroad) be substituted as respondent in the place and stead of the Pennsylvania Railroad, with the same force and effect as if the suit had originally been brought against him.

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

The Pennsylvania Railroad Company filed a petition under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvii) in each case to implead M. J. Mulqueen and William Molyneaux, owners, respectively, of the wrecks of the coal boats M. J. Mulqueen and George W. Chambers, with which the Red Rose collided. Repeated efforts to obtain service upon Mulqueen and Molyneaux were fruitless, and process was returned as not found. A decree was entered in favor of the libelant in both cases. In the first case it was entered in the sum of $2,066.03. In the second, the sum was $302.28.

In both cases the injury complained of was to the barge Red Rose. In the first case the injury was done on January 22, 1918. In the second case it occurred on March 11, 1918. In both cases the barge was in a tow which the respondent's tugs were hauling through the channel leading from South Amboy, N. J. The claim is that the barge was carelessly and negligently dragged over two wrecked and sunken boats lying in the channel, and which the respondent knew were there, and knew that they were a danger and menace to any tows hauled through those waters. The sunken boats were the Mulqueen and Chambers, already referred to.

The dredged channel in which the wrecks lay is 300 feet wide, and the wrecks, the District Judge found, were on the upper side of it, and could not have diminished the width of the channel by more than 40 feet at the most. The wrecks had been in that position since January 12, 1918, which was ten days before the first injuries complained of happened, and two months before the second injuries. And the District Judge has also found that their presence there was known to the Pennsylvania Railroad tugmasters. That they had this knowledge is beyond question. The day after the Mulqueen and Chambers were sunk the evidence shows that the Pennsylvania Railroad Company had actually marked the spot with a spar buoy, but that it had been carried away. At the time the injuries occurred the wrecks were unmarked.

[1] The sole question is whether the tugs were navigated with that degree of care which the known conditions imposed upon them. It is elementary that in every contract of towage it is impliedly agreed that the tug will use proper skill and diligence, and that she will not unnecessarily by negligence or mismanagement imperil her tow. The highest degree of skill is not required, for she is not a common carrier; neither is she an insurer. She is merely a bailee for hire. As such she is simply bound to exercise reasonable skill, care, and diligence. Eastern Transportation Line v. Hope, 95 U. S. 297, 24 L. Ed. 477; The John G. Stevens, 170 U. S. 113, 126, 18 Sup. Ct. 544, 42 L. Ed. 969. From what has been said we must be understood as meaning that the degree of skill, care, and diligence for which the tug is liable is dependent upon the peculiar circumstances of each particular case and of the special hazards of the waters traversed. Societe des Voiliers Francais v. Oregon R., etc., Co. (D. C.) 178 Fed. 324.

[2] The master of the tug is bound to know the channel and its usual currents, and dangers which are known generally to men experienced in its navigation. The Inca (D. C.) 130 Fed. 36, aff'd 148 Fed. 363,

78 C. C. A. 273. And he must exercise that degree of care, caution, and maritime skill which prudent navigators usually employ in similar services. In all such cases the burden rests upon the libelant to prove affirmatively that the tug is in fault. The Winnie, 149 Fed. 725, 79 C. C. A. 431.

[3] We think that in the instant cases the burden has been sustained and that it affirmatively appears that those in charge of the tugs failed to exercise due care. The wrecks of the sunken Mulqueen and Chambers were known and must be regarded in the same way that known, but uncharted, rocks would be. It would be the duty of a competent navigator to keep his tug and tow off of an obstruction in the channel, the existence and place of which he knew. The only thing which could excuse him in such a case would be vis major, and there is no suggestion of that in either of the cases now before us. The tug captains were bound to avoid these wrecks, the existence and location of which they knew, if the ordinary skill and competency of their class rendered such avoidance possible. The testimony in this case disclosed that such avoidance was possible. Many coal tows passed these wrecks in safety during the winter and early spring of 1918. The Pennsylvania Company and the Director General were using this channel constantly for its long tows, both going and coming, light and loaded, and did so successfully avoiding collisions.

In The Wyomissing, 228 Fed. 186, 142 C. C. A. 542 this court said:

"If the tow strikes a rock in the channel, as the District Judge found in this case, the claimant is bound to show that the rock was an unknown obstruction."

And in Lehigh Valley Transportation Company v. Knickerbocker St. Co., 212 Fed. 708, this court said that a tug—

"is bound to know, not only what appears upon government charts, but whatever is known to persons in the habit of navigating the waters in question. But for striking a rock uncharted and unknown to local navigators the tug is not responsible."

In the instant cases the obstructions caused by these wrecks were admittedly well known to navigators and to those in charge of the tugs that had the Red Rose in tow; and if due care had been exercised the tugs would have had no difficulty in keeping away from the wrecks in a 300-foot channel, with the wrecks on the upper edge of it, and not diminishing it at the most more than 40 feet.

Decrees affirmed in both cases.

HAMILTON RIDGE LUMBER CORPORATION v. SOUTHERN COTTON OIL CO.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1840.

Injunction ⟸59(1)—Logs and logging ⟸3(1)—Contract construed, and held one for sale of standing timber, breach of which may be enjoined.

A contract by which in terms defendant sold to complainant all its timber of certain kinds situate in South Carolina, to be cut and delivered by defendant at complainant's mill, the purchase price to be measured by the logs, which were to be measured and paid for as delivered, *held* one for the sale of standing timber, which, under the law of South Carolina, carries an interest in real estate, and a breach of which by defendant may be enjoined.

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

Suit in equity by the Southern Cotton Oil Company against the Hamilton Ridge Lumber Corporation. From an order refusing to dissolve a preliminary injunction, defendant appeals. Affirmed.

Lewis C. Williams, of Richmond, Va., and B. A. Hagood, of Charleston, S. C. (Williams & Mullen, of Richmond, Va., and Hagood, Rivers & Young, of Charleston, S. C., on the brief), for appellant.

Julian Mitchell, of Charleston, S. C. (Mitchell & Smith, of Charleston, S. C., on the brief), for appellee.

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

KNAPP, Circuit Judge. This appeal turns on the construction of a contract entered into July 19, 1918, by Hamilton Ridge Lumber Corporation, defendant below, and Southern Cotton Oil Company, complainant below, the material parts of which may be thus summarized:

First, the defendant, party of the first part, leases to complainant, party of the second part, at a nominal rental, its sawmill property at Estill, S. C., known as its "hardwood mill," for the term of three years from August 1, 1918, with the right to put in additional machinery for the manufacture of logs into staves and heading, and to remove the same at the end of the term. Then follow provisions which we quote in full:

"The party of the first part hereby sells to the party of the second part all the white oak, red oak, water oak and other oaks of the same species as mentioned above, and all red or sweet gum timber, suitable for making tight barrel staves and heading, belonging to the party of the first part and situate in the state of South Carolina, to be delivered by the party of the first part to the party of the second part on deck at the mill of the party of the first part situate near Estill, in the state of South Carolina, on the lands hereinabove described and leased, and usually known as the party of the first part's 'hardwood mill.'

"The party of the second part agrees to pay the rental as aforesaid and to pay for all of said oak logs the sum of twenty ($20.00) dollars per thousand

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

feet, Doyle's rule, log measure, and to pay for all of said red or sweet gum logs, sixteen and 50/100 ($16.50) dollars per thousand feet, Doyle's rule, log measure, as is hereinafter set forth."

Subsequent paragraphs relate to the size and length of logs, measurement and inspection of same, time and method of payment, and the settlement of disputes between the parties. The contract further provides that defendant is to deliver and complainant accept not less than 15,000 feet or more than 20,000 each day, Sundays and holidays excepted, and either party failing so to do is to pay the other a stated sum per thousand as liquidated damages. Provision is also made for extending the term beyond three years, on the basis of the market value of staves and heading, if the timber is not all removed within that time.

It appears that defendant's property was covered by a mortgage or deed of trust securing an issue of bonds held by the Magnolia Pine & Cypress Company, and it became necessary to have the consent of that company to the proposed arrangement. Accordingly, on the day the contract was executed, an agreement was made by the parties thereto and the bondholder, which recites that the party of the first part (defendant) "desires to enter into an agreement with the party of the third part (complainant) for the sale of all the oak and red or sweet gum timber of the first party [defendant] to be delivered to said party of the third part at the hardwood mill of the party of the first part," etc., and gives the required consent.

Passing over what occurred in the meantime, it suffices to state that in April, 1920, defendant ceased the delivery of logs to complainant at the hardwood mill, but instead cut more or less oak and gum timber which it carried to another mill and converted to its own use, taking the position:

"That the alleged contract, if ever valid, has been broken by the Southern Cotton Oil Company and that the Hamilton Ridge Lumber Corporation is under no further obligations by reason thereof."

Shortly afterwards plaintiff brought this suit, in which, after notice and hearing, a preliminary injunction was granted. Defendant thereupon filed an answer and then moved to dissolve the injunction and dismiss the bill. From the order of denial this appeal is taken.

The pleadings and supporting affidavits, one on each side, raise sharp issues of fact, the determination of which on final hearing may decide the case, but with which we are not now concerned. The only question here is whether the court below was warranted in continuing the injunction pendente lite, and that question depends, as said at the outset, on the proper construction of the contract. It has long been the law of South Carolina that a contract for the sale of standing timber carries an interest in the land, interference with which may be enjoined by a court of equity, and that an action to enforce specific performance of such a contract is within the scope of equity jurisdiction. Therefore, if the contract in suit be a contract for the sale of the timber therein described, it is not to be doubted that a temporary injunction was rightfully granted.

Without indulging in profitless discussion, we may say at once that

in our opinion the contract in question is (1) a contract in express terms for the sale of timber, as appears from the paragraph above quoted; and (2) in conjunction therewith, and for the purpose of making the sale more valuable to defendant, an executory contract for service, namely, to cut and deliver the logs at so much per foot. In other words, there is an outright sale of the specified timber, the vendor reserving the privilege, presumably for profit, of cutting the timber into logs, and agreeing to payment for the timber on the basis of named sums per thousand feet of logs. Under the contract, therefore, the timber belongs to plaintiff, and defendant's only right therein is the right to cut it for and deliver it to plaintiff at the hardwood mill; it has no right to divert the timber to other purposes.

The case at bar seems clearly distinguishable, by marked difference of facts, from Hutchison v. N. Y. & P. Co., 229 Fed. 510, 143 C. C. A. 578, apparently much relied upon by defendant. In that case the plaintiff (vendor) was not concerned with the disposition of the timber; here plaintiff has bought the timber and defendant has contracted to cut it for plaintiff and deliver it at the designated mill, the purchase price to be measured by the logs as delivered. There the vendor's compensation depended on the results of the vendee's operations; here the vendor's compensation depends upon the results of its own operations, up to its entire holdings of oak and gum suitable for staves and heading. Moreover, in this case plaintiff has leased defendant's mill and equipped it with additional machinery, on the faith of defendant's promise to cut and deliver the timber for plaintiff's exclusive use; and it results in short that defendant, by failure to cut and deliver plaintiff's timber as agreed, has lost the right to cut it and become liable in damages for that which it has cut and misappropriated.

We need only add our conclusion that on the case now presented plaintiff is entitled to equitable relief, because without adequate remedy at law, and that the court below was right in awarding the preliminary injunction, although it may not on final hearing, on the ground of inconvenience or otherwise, decree specific performance of the contract.

Affirmed.

NORTH BRITISH RUBBER CO., Limited, v. RACINE RUBBER TIRE CO. OF NEW YORK, Inc.

(Circuit Court of Appeals, Second Circuit. February 23, 1921.)

No. 166.

1. **Patents ⇐15—Design patent cannot be granted to protect trade-mark rights.**

   A design patent for a design for a tire cannot be used to identify the patentee's anti-skidding device, and thereby in effect operate as a trade-mark.

2. **Patents ⇐15—Articles not subject to design patent, if appearance cannot matter to anyone.**

   Some articles of manufacture are incapable of being the subjects of design patents, for want of reason to suppose that their appearance can ever really matter to anybody.

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

3. Patents ⇐15—Design for mechanical product patentable, if invention relates to design.
It is not necessarily a fatal objection to a design patent that the design is exhibited upon a mechanical product devoted to utilitarian purposes, provided the design is the result of invention; but the invention must relate to the design, and be distinguishable from that which contrived the mechanical product for commercial purposes.

4. Patents ⇐157(1)—Questions of infringement and invention determined by considering design as a whole.
A patented design must be looked at as a whole, and both invention and infringement be decided by considering the entity, and not dissecting it, for purposes of hostile criticism.

5. Patents ⇐180—Design patent, differing but slightly from earlier efforts, must be given narrow scope.
When a design patent, like any other patent, shows but small difference from the efforts of earlier inventors, it must be accorded a narrow scope.

6. Patents ⇐328—45,092, for design for tire, held invalid.
The Johnson design patent, No. 45,092, for a design for a tire, consisting of a raised ridge extending around the tire and having extensions forming crosses and diamonds or squares, *held* invalid as an effort to secure a monopoly of the mechanical excellences thought to inhere in the peculiar arrangement of ridges and hollows, or to prevent the making of tires like those patented in another country by mechanical patent.

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

Suit by the North British Rubber Company, Limited, against the Racine Rubber Tire Company of New York, Incorporated. From a decree for defendant, plaintiff appeals. Affirmed.

Suit is upon the design patent (45,092) issued to Alexander Johnson, of Edinburgh, Scotland, on December 30, 1913; application filed August 1, 1913. The patent covers a "design for a tire," concerning which the application says: "The tire tread consists of a raised central strap or ridge extending continuously around the tire and having extensions forming crosses and diamonds or squares arranged alternately with the crosses and at uniform distances apart."

On this disclosure is based a single claim, which merely repeats the words above quoted. The accompanying drawing exhibiting the design reveals a clincher tire of any ordinary construction, having superimposed upon its smooth surface the circumferential strap or ridge above referred to, which strap intersects at regular intervals a cross in the form of an X, while between these regularly disposed crosses are extensions of the central ridge forming the "diamonds or squares" above referred to, and so disposed that each side of every square has the arm of a cross parallel with it and separated therefrom by a hollow as deep as is the height of the superimposed mass of rubber, forming ridge, crosses, and squares.

Six months after Mr. Johnson applied for this American design patent, he filed application for a British mechanical patent (2,887 of 1914). This application reveals the identical thing covered by the Johnson patent in suit, but it is described in terms of mechanics, instead of terms of appearance. The specification declares that the invention consists in providing "a distinctive pattern or tread, which will give the maximum life possible, and at the same time prevent skidding or side-slip." Reference is then had to a drawing which is almost identical with that of the American patent, and of the thing pictured it is said that "in all positions of the tire and in all directions of motion the resistance to skidding is effective, owing to the sides of the hollow portions [between the diamond and cross-arm] being in opposition to such skidding,

the sides of the [hollow portion] radiating in all directions." The plaintiff herein is the owner both of the British patent and the one in suit.

Defendant manufactures a so-called "non-skid" tire, which discloses the circumferential ridge or strap with X's bisected thereby at regular intervals, but between the arms of the X crosses are no squares or diamonds, but there are raised triangles, separated alike from the cross-arms and the circumferential strap by rather deep excavations. In effect upon the eye the continuity of the central strap is far more marked than in plaintiff's design.

The District Court dismissed the bill on the ground of noninfringement. Plaintiff appealed.

Kenyon & Kenyon, of New York City (Alan D. Kenyon, of New York City, of counsel), for appellant.

E. Clarkson Seward, of New York City, and Wm. O. Belt, of Chicago, Ill., for appellee.

Before ROGERS, HOUGH, and MANTON, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The evidence is plain that the prime object of the plaintiff's tire is not to please the eye, but to accomplish physical or mechanical desire, viz. to prevent skidding. The question that any instructed person would ask on examining the Johnson tire is not, "How does it look?" but "What will it do?" Rowe v. Blodgett, 112 Fed. 61, 50 C. C. A. 120. Nor is it doubtful that the purpose next in importance is to identify plaintiff's anti-skidding device, and thereby in effect operate as a trade-mark; a purpose for which the patent law cannot be used, as was also held in the case just cited.

[2] It has been well said that there are some "articles of manufacture * * * incapable of being the subjects of design patents, for want of reason to suppose that their appearance can ever really matter to anybody" (Foster v. Tilden, etc., Co., 200 Fed. 56, 118 C. C. A. 284), and the tread of a motor tire intended for the hard usage of roads, and contact with every species of dirt, comes very close to the class referred to.

[3] Yet it is not necessarily a fatal objection to a patent of this class that the design itself is exhibited upon a mechanical product devoted to utilitarian purposes, provided that the design per se is (inter alia) the result of invention. Dietz v. Burr, 243 Fed. 594, 156 C. C. A. 290. But the invention must relate to the design and be distinguishable from that which contrived the mechanical product for commercial purposes.

[4, 5] It is not denied that the prior art contains examples of non-skidding tires fully revealing the circumferential central ridge of plaintiff combined with bisected raised crosses (Whitlock, 1,013,085; Wittenberg, 1,069,365); but it is said truly that the design must be looked at as a whole, and both invention and infringement be decided by considering the entity and not dissecting it for purposes of hostile criticism. But when a design patent (like any other) shows but small difference from the efforts of earlier inventors it must be accorded a narrow scope. Weisgerber v. Clowney (C. C.) 131 Fed. 477.

Whether adding squares or diamonds to that which the central ridge bisected amounted to invention, or whether a tire is so utilitarian as

not to offer fit subject-matter for a design patent, are questions as to which the evidence is so limited, that we forbear opinion, and will for argument's sake assume the affirmative with appellant.

[6] But the result below must be affirmed, on the ground that this patent is a plain effort to secure, under the guise of a design, a monopoly of the mechanical excellences thought to inhere in the peculiar arrangement of ridges and hollows resulting from the revealed combination of strap, crosses, and squares.

Put in another way, the only purpose of this design patent is to secure in the United States the right of preventing others from making tires like those patented in England by a mechanical patent. This cannot be done, and the effort invalidates the patent. Royal, etc., Co. v. Art Metal Works, 130 Fed. 778, 66 C. C. A. 88.

The foregoing renders it unnecessary to express opinion as to infringement; i. e., similarity.

Decree affirmed, with costs.

OLIVIERI v. HINES, Federal Agent.

(Circuit Court of Appeals, Third Circuit. April 16, 1921.)

No. 2588.

1. **Carriers ⇐318(5)—Evidence held to show negligence in leaving open vestibule opposite to side on which passenger was intending to alight.**
In an action for personal injuries to a passenger, who fell through the open vestibule of a moving train, evidence *held* to show that the door through which he fell was on the side of the train opposite to the side on which he was to alight, so that the carrier could have been found negligent in leaving that door open, though it would not have been negligence to have opened the door on the other side in preparation for the stop at the station where plaintiff was to alight, and which had already been announced.

2. **Carriers ⇐318(5)—Proof that passenger fell from moving train and thereafter had injuries is evidence they resulted from fall.**
Proof that a passenger fell from a train moving at a speed of 40 to 50 miles per hour, and that when he recovered consciousness he was in the hospital suffering from serious injuries, is sufficient to warrant finding his injuries resulted from the fall, without direct testimony to that effect.

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

Action by Michael Olivieri against Walker D. Hines, Federal Agent. Judgment of nonsuit, and plaintiff brings error. Reversed, and new trial awarded.

Smith, Paff & Laub, of Easton, Pa. (Hobart S. Bird, of New York City, of counsel), for plaintiff in error.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant in error.

Before BUFFINGTON, WOOLLEY, and DAVIS, Circuit Judges.

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WOOLLEY, Circuit Judge. This writ brings here for review a judgment of nonsuit entered in an action for personal injuries.

On the night of the accident, the plaintiff was a passenger upon a vestibuled train of the defendant, moving on the south-bound track toward Birdsboro, his destination. When about a mile or a mile and a half away, a trainman passed from car to car announcing the station. The station at Birdsboro was on the west, or right hand, side of the train with reference to the direction in which it was moving. There was no platform on the east, or left hand side, beyond the other track. On hearing his station called, the plaintiff arose from his seat and followed the trainman to inquire of him the place at which he should get off, as the station platform was short. The plaintiff passed from the car into an unlighted vestibule and was thrown through an open door, sustaining injuries of which he complains in this action.

At the trial, the plaintiff charged negligence to the defendant upon two grounds: one, in opening the vestibule door before making the stop at the station; the other, in opening the door prematurely, seeking to invoke the law of negligence applicable to leaving open a vestibule door between stations. 2 Shearman & Redfield on Neg. (6th Ed.) § 524; 4 Elliott on Railroads (2d Ed.) § 1589a; Bronson v. Oakes, 76 Fed. 734, 22 C. C. A. 520.

The learned trial judge disposed of the case on the theory that the announcement of the station, which was the passenger's destination, was an invitation to him to get ready to alight, and was also notice to him that everything was in readiness for him to alight, including an open vestibule door on the side of the train from which it was intended he should descend. As the evidence was not sufficient to prove a premature opening of the door and as there was no evidence that the door had been carelessly left open during the run between stations, the learned trial judge (charging the plaintiff with notice of the danger of a door opened for his exit, given him by the call of his station) entered judgment of nonsuit on a finding of no evidence of negligence on the part of the defendant.

[1] The trouble in this case is not with the law which the trial judge applied to the facts, for with the law we find ourselves in accord. It is with the facts to which he applied the law. It is quite evident from reading the opinion of the trial judge, rendered on the motion to take off the nonsuit, that his impressions of the facts of the case were the same as ours at the argument on review, namely: that the vestibule door through which the plaintiff fell was on the "right hand side," or the station side, of the train, opened to permit passengers to alight. But after a careful reading of the record, and upon reargument had on our motion, it appears that the plaintiff fell out of an open vestibule door, not on the station side, or the "right hand side" of the train with reference to the direction of its movement, but on the left hand side away from the station platform.

The mistake of fact into which we think the trial court fell, and into which this court at the first argument certainly fell, was due to confusion arising from the expression "right hand side," used by the

plaintiff when testifying, and the failure of the court below, and later, of this court, to note that the plaintiff was seated in the forward passenger car, in a position where his right hand was also the right hand side of the train, that, on the call of the station, he arose, *turned around* and walked into the vestibule in the *rear* and that thereafter he described by his own right hand what was actually the left hand side of the train. This reversal of the plaintiff's position changed the described location of the open door and accordingly changed the law of the case, for unless there was evidence that the vestibule door, leading not to the station side, but down to the north-bound track on the other side, had been opened to permit passengers to alight, or unless there was evidence of custom to that effect, of which the plaintiff had knowledge, it cannot be said that in the announcement of the passenger's destination there was notice to him that the vestibule door on that side had been opened. There are two statements in the plaintiff's testimony possibly susceptible of the construction that this door had been opened for the station stop. They are these:

"I went to look for the conductor, so as to ask him what side I should get off, as the platforms at Birdsboro are short."

"I came to find the conductor, because I did not know the place I had to get off there. You see you have got a very short platform there, and sometimes you get off in the middle of the track and a train is coming on the other side. One night I was right in the middle of the track and a freight was coming on the other side and it pretty nearly hit me."

Obscure and ambiguous as these statements are, they are susceptible of still another interpretation, namely: That, because of the reference in each to the short platform on what we may call the right hand side of the train, the plaintiff was seeking the conductor to inquire the place he should get off on that side with reference to the platform. Therefore, we think, in the absence of explanation by the defendant, the case is left with enough evidence to charge the defendant with negligence in having open a vestibule door on what appears to have been the wrong side of the train, and that, in consequence, error in this regard was committed in entering nonsuit.

[2] But the defendant maintains that, even so, the judgment of nonsuit should be sustained on the ground that the evidence for the plaintiff is barren of proof to show what happened to him between the time he fell from the train and the following morning when he regained consciousness in a hospital, contending that the same burden is on the plaintiff to prove that the injuries resulted from the accident as to prove that the accident resulted from negligence. Patton v. Railroad Co., 179 U. S. 663, 21 Sup. Ct. 275, 45 L. Ed. 361. A fall from a train moving from forty to fifty miles an hour, followed by serious injuries to a man previously sound, is some evidence on which a jury might find that the injuries resulted from the fall.

The judgment below is reversed and a new trial awarded.

LEVY v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. February 19, 1921. Rehearing Denied April 16, 1921.)

No. 2608.

1. **Internal revenue ⟸45—Officer of corporation making false amended return for income tax subject to penalty.**
While amended or corrected returns are not expressly provided for in Income Tax Act Sept. 8, 1916, as amended by Act Oct. 3, 1917 (Comp. St. 1918, § 6336a et seq.), such returns are allowed and received, and tax assessments are based thereon, and an officer of a corporation who makes a false return in its behalf, though denominated an amended return, with intent to defeat or evade the assessment required by the act, is subject to the penalty imposed by Act Oct. 3, 1917, § 1004 (Comp. St. 1918, § 5896b).

2. **Perjury ⟸9(2)—Proof of taking of oath before officer authorized to administer it essential.**
In a prosecution for perjury under Criminal Code, § 125 (Comp. St. § 10295), proof both that defendant made a false oath and that the person before whom it was taken was an officer authorized to administer it, is essential to conviction.

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

Criminal prosecution by the United States against Jacob S. Levy. Judgment of conviction, and defendant brings error. Affirmed in part.

Jacob Aronson, of New York City, and William B. Gourley, of Paterson, N. J., for plaintiff in error.

Elmer H. Geran, U. S. Atty., of Jersey City, N. J., and Samuel I. Kessler, Asst. U. S. Atty., of Newark, N. J., for the United States.

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

WOOLLEY, Circuit Judge. The Pioneer Overall Company was engaged in the manufacture of overalls. Jacob S. Levy was its treasurer. Under circumstances relevant to the issue and properly submitted to the jury, but not necessary to repeat in this review, Levy, in September, 1918, made a return of income and excess profits taxes owing by his corporation for the year 1917. In form it was a new return; in name an "amended return." In this corrected or amended return, Levy showed that the amount of the inventory at the end of the tax year was $76,925.39 and the tax due was $595.03. Internal Revenue officers, after investigating the corporation's accounts, were of opinion that the inventory should have been $122,359.33 and that the tax due was upwards of $24,000. Levy explained that the item of $76,925.39 in the return was the value of the inventory at cost, that $100,125.39 was the inventory at market value, and that on this basis the tax return was right. In this situation, clouded by facts indicating intent to evade the tax, Levy was arrested, and on indictment charging different offenses by two counts he was tried, convicted and sentenced. Thereupon he sued out this writ of error.

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[1] Both in the trial court and in this court Levy insisted that his conviction under either count cannot be sustained, mainly because the offenses which the counts charged relate to an amended return of income and excess profits taxes when, as he urges, no return of that character is known to the law. While amended or corrected income tax returns may not be prescribed by the statute, they are nevertheless allowed and received by the Treasury Department in the administration of the Income Tax Law, and on such returns taxes are assessed by the Commissioner of Internal Revenue. When so assessed, these are the taxes which under the law are charged against and collected from the taxable. That Levy made such a return, by name and in fact, that it contained a material false statement, and that he endeavored thereby to establish his corporation's taxes at less than the correct amount, has been proved by the verdict of the jury.

[2] The offense charged against Levy by the first count was perjury, defined by the Federal statute as a false oath "taken * * * before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered." 35 Stat. L. 1111, § 125 (Comp. St. § 10295). In proof of this count the Government offered in evidence the amended tax return purporting to show that Levy, as treasurer of the corporation, had taken an oath before a Commissioner of Deeds for the State of New Jersey, who, by the indictment, was described, substantially in the words of the statute, as a "person and officer competent and authorized by law to administer an oath." The Government rested without proof either that the oath was taken before the named Commissioner of Deeds or that a Commissioner of Deeds for New Jersey was qualified to administer an oath. The averment that an oath had been administered and the averment of the qualification of the one administering it, were material averments of the count charging perjury. Upon the Government's failure to prove them, Levy's conviction on that count cannot be sustained. United States v. Curtis, 107 U. S. 671, 2 Sup. Ct. 507, 27 L. Ed. 534.

The offense charged by the second count was that Levy willfully and unlawfully attempted to defeat and evade the income and excess profits tax imposed by statute, in violation of the Act of Congress of September 8, 1916, as amended by Act Oct. 3, 1917, 40 Stat. 325, c. 63, § 1004. The material part of the applicable section reads as follows:

"* * * Whoever evades or attempts to evade any tax imposed by this Act * * * shall be subject to a penalty. * * *" Comp. St. 1918, § 5896b.

While falsity in the amended return was an element of the offense, perjury was not involved; the essence of the offense was an act with intent, together amounting to an attempt, to defeat and evade a tax assessment by a false and fraudulent return. This offense embraces an attempt to defeat or evade a tax yet to be assessed as well as an attempt to defeat or evade a tax already assessed. We are of opinion that in the trial on this count the court committed no error in its rulings on evidence and instructions on the law and that the facts are sufficient to sustain the verdict.

The jury returned a verdict of "guilty on every count" and the

court sentenced Levy to "one year in the Passaic County Jail on each count, the sentence to run concurrently." As the sentence was on each count and as his conviction under the second count is sustained, Levy must serve the sentence on that count. Although the concurrent running of the sentence on each count takes from him any practical value of our finding that his conviction on the first count cannot be sustained, Levy's sentence under the second count stands and remains valid.

Therefore the judgment of the court below is to this extent affirmed.

WEISMAN v. UNITED STATES.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1921. Rehearing Denied April 1, 1921.)

No. 2841.

1. **War ⟸33—Did not cease on the day of the Armistice.**
   The war did not cease on the day of the Armistice.
2. **Indictment and information ⟸61—Indictment need not allege state of war, which is judicially noticed.**
   In a prosecution for injuring a telegraph line operated by the United States and used in furtherance of transportation of war materials and troops, the indictment need not allege that the United States was at war at the time the alleged offense was committed, for the court will take judicial notice of that fact.
3. **War ⟸4—Wire in telegraph line for railroad operation is part of "war premises" or "war utilities."**
   Wire, which formed part of a telegraph line then being operated by the United States and used as an aid to the transportation of war material and troops of the United States, cannot be distinguished from "war premises," or "war utilities," so that the stealing of such wire may be punished as an injury to war utilities.

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

Meyer Weisman and others were convicted of injuring a telegraph line operated by the United States and used as an aid to transportation of war material and troops, and defendant Weisman brings error. Affirmed.

Horace L. Dyer, of St. Louis, Mo., for plaintiff in error.

A. B. Dennis, of Danville, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

EVANS, Circuit Judge. Defendant Meyer Weisman was indicted, along with others, and convicted on one count of an indictment charging him with having "willfully and feloniously" injured—

"a certain telegraph line then and there being, which said telegraph line was then and there the property of the Louisville & Nashville Railroad Company, a corporation, and was then and there in the possession and under the control of and operated by the United States, and which said telegraph line was then and there being used in connection with and as an aid to the transportation of

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war material and troops of the United States in the carrying on said war, and as a means of communication to the military forces of the United States, by then and there stealing, taking, and carrying away about 5,000 feet of No. 9 copper line wire, which said copper line wire was then and there being used for the carrying of messages in connection with the operation of the Louisville & Nashville Railroad, and which said railroad was then and there engaged in the transportation of war material and troops of the United States in the carrying on of said war."

Two of the other defendants pleaded guilty, while a fourth was acquitted.

While numerous errors are assigned, we are not favored by counsel with an argument in support of any of them. Under the title of "Brief of the Argument" counsel has restated the assignment of errors changing the language but slightly. Although raising legal questions, we are not favored by counsel for either side with the citation of a single authority.

Notwithstanding the failure of counsel to assist the court in disposing of the questions, we have carefully gone over the assignment of errors, and will consider the questions presented under the headings: (a) The sufficiency of the indictment; (b) rulings during the trial; (c) the sufficiency of the evidence to support the verdict.

[1] The first and third headings may be considered together, because, if we correctly understand counsel's position, it is that the indictment fails to show this country was at war at the date (September 30, 1919) the offense is alleged to have been committed. In other words, we are asked to hold that the war ceased on the day of the Armistice. The contrary is held in Hamilton v. Kentucky Distilleries, 251 U. S. 146, 40 Sup. Ct. 106, 64 L. Ed. 194; C. A. Weed & Co. v. Lockwood, 266 Fed. 785.

[2] The contention is further made that the indictment fails to allege that the United States was at war. While this allegation is not necessary, for the court will take judicial notice of that fact (Prize Cases, 67 U. S. [2 Black] 635, 17 L. Ed. 459; Nueces Valley Town Site Co. v. McAdoo [D. C.] 257 Fed. 143), it sufficiently appears in the indictment, though inserted somewhat parenthetically.

[3] Nor can we sustain the assignment of error that distinguishes between "war premises or war utilities" and "copper line wire" used as part of a telegraph line "which was then and there being used in connection with and as an aid to the transportation of war material and troops of the United States in carrying on said war." The evidence justifies us in concluding that the 5,000 feet of copper line wire was used as a part of the telegraph system operated by the United States in connection with the operation of the Louisville & Nashville Railroad, and that defendants cut and carried it away.

The testimony of the two defendants who pleaded guilty amply supports the verdict.

The errors dealing with the instructions are not well taken. No requested instruction was submitted, and none of the assigned errors in the instructions as given were called to the court's attention, either at the time the charge was given or later.

The judgment is affirmed.

LOWERY et al. v. UNITED STATES.

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

No. 2839.

Commerce ⊜33—Stolen coal held not an interstate shipment.

Where coal intended for railroad use was transported by the railroad between two points in the same state on a slip bill, which gave those points as the place of shipment and destination, the shipment was not interstate, though thereafter a bill of lading was made out in which a destination in another state was given, but which was altered before the coal was moved thereunder, so that a conviction for stealing the coal while in interstate shipment cannot be sustained.

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

Fred Lowery and another were convicted of stealing coal from an interstate shipment, and with being in possession of the coal, knowing it to have been stolen from an interstate shipment, and they bring error. Reversed.

Horace L. Dyer, of St. Louis, Mo., for plaintiffs in error.

A. B. Dennis, of Danville, Ill., for the United States.

Before BAKER, EVANS, and PAGE, Circuit Judges.

PAGE, Circuit Judge. This is a writ of error prosecuted by the plaintiffs in error to reverse a judgment rendered on a verdict of a jury in the United States District Court for the Eastern District of Illinois on two indictments consolidated for trial. The single count of one indictment and the first count of the other charge plaintiffs in error with stealing a carload of coal out of C., B. & Q. car No. 84964 on July 1, 1917, which coal it was averred constituted an interstate shipment of freight, consigned and in transit from Herrin Junction, Ill., to Sioux City, Iowa. The second count charged plaintiffs in error with being in possession of that same coal knowing it to have been stolen, and that it was an interstate shipment.

On June 1, 1917, the Chicago, Burlington & Quincy Railroad Company was taking for company purposes all of the coal from Mine B of Chicago & Carterville Coal Company, Herrin, Ill. On the morning of June 1, 1917, C., B & Q. car No. 84964 was loaded with coal for the company, was put into a train on the Chicago, Burlington & Quincy Railroad, and at 1:30 was taken from Herrin, in the state of Illinois, to Christopher, Ill., a town about 12 or 14 miles from Herrin, where it arrived at about 2:30 or 2:15; the car being taken from the train and put upon the siding and left there. The record shows that instructions as to how the coal should be billed were given to the office of the chief clerk at Herrin Junction at 4:15 in the afternoon. Then some time later, between that and 6:30, the bills of lading were made out. The employees had authority to give Christopher all the coal it wanted, and to change the destination on bills of lading. The record

shows that a bill of lading was made out, with Sioux City, Iowa, as the destination, but by whom or under what instructions does not appear. Some time or place, neither of which appears, Sioux City was marked out and Christopher inserted as the destination. Who did this does not appear. The bill of lading was sent by mail to Christopher a short time, perhaps a day or two, after it was made out.

The bill of lading was never delivered to the conductor. On the contrary, the only authority for carrying the car in question at all was what is called a slip bill, which was made up at Herrin Junction, with Christopher as the destination. The conductor also had the instruction of Yardmaster Howell to take two cars of coal and a car of machinery to Christopher. The customary and usual way of authorizing a conductor to carry cars, where the shipment was ready to go before the bill of lading could be prepared, was to do it by a slip bill. The record shows that, other than the fact that some one at Christopher appropriated the coal to his own use and that it was lost to the company, there is nothing unusual in the fact that it was carried to Christopher upon a slip bill or that there was delay in delivering the bill of lading beyond the time of the departure of the car or in the change in the destination of the way bill, if it was changed.

The sole question for determination here is: Did the car of coal constitute an interstate shipment? We are clearly of the opinion that it did not. Whatever may have been the intention of somebody, somewhere to send that coal to Sioux City, as originally expressed in the bill of lading, the fact remains that the transportation of the coal began at Herrin and ended at Christopher under competent and proper authority, being carried on a proper slip bill at least two hours before the bill of lading came into existence, and, so far as the Chicago, Burlington & Quincy Railroad was concerned, it never became or was the subject of transportation after the bill of lading came into existence. The fact that a destination outside of the state of Illinois was at one time written into the bill, even if wholly unexplained, does not overcome the facts with reference to actual carriage of the coal.

The judgment is reversed.

MARKEY et al. v. BRUNSON.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1820.

Sales ⇐284(1)—Variation from guaranteed percentage in fertilizer held not breach of guaranty.

In a contract for the sale of fertilizer guaranteed to contain stated percentages of ammonia, phosphate, and potash, "or equivalent to ammonia and potash," in which the price was fixed at so much per unit of each element, and the value of the phosphate was almost negligible compared with the value of the ammonia and potash, deficiencies in the quantity of phosphate, more than offset by excess quantities of ammonia and potash, so that the fertilizer shipped was worth more than sold, do not establish a breach of guaranty, which prevents recovery of the purchase price by the seller.

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

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

Action by Frank S. Markey and another, copartners in business under the firm name of the Independent Pulverized Manure Company, against Peter C. Brunson. Judgment for defendant on directed verdict, and plaintiffs bring error. Reversed.

William H. Grimball, of Charleston, S. C. (Whaley, Barnwell & Grimball, of Charleston, S. C., on the brief), for plaintiffs in error.

Arthur R. Young, of Charleston, S. C. (Hagood, Rivers & Young, of Charleston, S. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges.

KNAPP, Circuit Judge. By contract of June 20, 1918, plaintiffs in error, plaintiffs below, sold to defendant 500 tons of ground sheep manure, to be delivered in equal monthly quantities from October to December. The contract was in writing and contained this provision:

"Guarantee: Two per cent. ammonia, 3 per cent. B. P. L., and 3 per cent. potash, or equivalent to ammonia and potash, respectively; moisture not to exceed 15 per cent."

The price to be paid was stated as follows:

"Price: Five dollars and fifty cents ($5.50) per unit of ammonia, ten cents ($.10) per unit of B. P. L., and two dollars ($2.00) per unit of potash, f. o. b. cars Omaha, Nebr."

In December six carloads were shipped, aggregating about 190 tons, which defendant rejected as not conforming to the contract; and in April, 1919, plaintiffs brought this suit. Analysis of the shipment showed the following for each of the several carloads:

1. Ammonia	2.83	4. Ammonia	2.16
Bone phosphate	2.99	Bone phosphate	2.05
Potash	3.52	Potash	2.95
2. Ammonia	2.64	5. Ammonia	2.13
Bone phosphate	2.67	Bone phosphate	2.05
Potash	2.70	Potash	3.38
3. Ammonia	2.30	6. Ammonia	2.07
Bone phosphate	2.36	Bone phosphate	2.40
Potash	3.12	Potash	3.05

The court below sustained defendant's contention, saying:

"I rule that that contract does not mean you can make up deficiencies in one by the excess in the other. I hold that that contract on the face of it is repugnant to the idea. I will instruct the jury that there is really no controversy; I don't regard that as a tender. * * * I hold that no performance of the contract has been shown."

A verdict for defendant was accordingly directed, and plaintiffs sued out writ of error.

We are of a different opinion. The subject of sale was a natural product, the exact content of which could not be known, and some variation from the stated percentages must necessarily have been in contemplation. The words "or equivalent to ammonia and potash, re-

spectively," meant, and could only mean, as the almost negligible quantity of B. P. L. (bone phosphate) indicated, that the elements of chief importance and desire were ammonia and potash, and that slight deficiences of one element were to be regarded as compensated by equivalent excess of another. As appears to us, the variations from the contract standard of the shipment in question were quite insufficient to justify rejection. Each of the six carloads had more than 2 per cent. of ammonia. Four of them had more than 3 per cent. of potash; one was a little below and one very slightly below that percentage; and both of these shortages were more than made up by excess of ammonia. Moreover, the insignificance of the phosphate is shown by its trifling cost, only 10 cents a unit, as compared with $5.50 for ammonia and $2 for potash. We cannot believe that defendant had the right to refuse the shipment because of a little deficiency of phosphate amounting at the most to barely 30 cents a ton.

This conclusion is supported by taking into account the value of the rejected shipment. A ton of product of just the guaranteed percentages would come to $17.30 at the contract price; the six carloads tendered were all of greater value, ranging from $17.72 to $22.89. It would seem that defendant was offered a better article, on the whole, than plaintiffs had agreed to deliver.

In short, giving the contract a practical construction, we are constrained to hold that, as respects conformity to the guaranty, the shipment in dispute was a good delivery. The record raises no other question, and none has been considered.

Reversed.

BRYDON v. BIG VEIN COAL CO. OF WEST VIRGINIA.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1819.

Mines and minerals ⊂=59—Finding that coal delivered by lessee was unmerchantable held to defeat his right to accounting and injunction against rescission.

In a suit by a lessee of coal properties, who had contracted to sell to his lessor a stated quantity of coal, for an accounting for coal delivered under the contract, and an injunction against an attempt to cancel the lease, a finding by the trial court, based on sufficient evidence, that the coal delivered was not merchantable, so that defendant was justified in refusing to accept it, sustains a decree for defendant, regardless of whether the coal came from the source required by the contract.

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by Howard P. Brydon against the Big Vein Coal Company of West Virginia. Decree for defendant, and complainant appeals. Affirmed.

Hugh Warder, of Grafton, W. Va., and D. Lindley Sloan, of Cumberland, Md., for appellant.

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

Joseph Addison and Randolph Barton, Jr., both of Baltimore, Md. (William MacDonald, of Keyser, W. Va., on the brief), for appellee.

Before KNAPP and WOODS, Circuit Judges.

KNAPP, Circuit Judge. On September 11, 1916, the appellee, Big Vein Coal Company of West Virginia, leased certain coal mining properties to the appellant, Brydon, for the term of three years, with option to him of renewal for two years more. At the same time Brydon contracted to sell to the appellee, at stated prices, 900 tons of "Shaw" coal per month until the 31st of March, 1917. A supplemental agreement, evidenced by letters exchanged, extended the latter contract to the end of the lease. Afterwards a controversy arose in regard to this contract, and in August, 1918, appellee brought suit for specific performance and other purposes. On December 9th of that year this suit was settled, and an agreement entered into which provided that appellant should pay $4,500 for damages to that date for nonshipment of coal, that the contract of September 11, 1916, was a binding contract on both parties, and that it was to remain in full force during the term of the lease.

Following this settlement Brydon resumed the shipment of coal and did ship 26 cars, which were rejected because the coal was not merchantable. The result was appellant's refusal to ship any more coal and appellee's refusal to give further orders. Thereupon, in March, 1919, appellant brought this suit. The bill alleges in substance that appellee failed to perform the contract on its part by refusing without cause to receive and pay for the 26 cars, and by refusing to furnish appellant with orders for further shipments; alleges a profit of 60 cents per ton on the coal which appellee had agreed to take under the contract; and further alleges that the appellee intended, if possible, to cancel appellant's lease on account of unpaid royalties. An injunction is prayed for restraining the appellee from attempting to cancel the lease, and it is further prayed that an accounting be had between the parties and a decree ordered for the contract price of the coal shipped and for appellant's prospective gains and profits by reason of the appellee's refusal to accept the shipments. The answer alleges that the 26 cars were properly rejected, because the coal was of such inferior quality as to be practically worthless, and sets up the amounts due at the time for royalties under the contract. The trial court found in effect that the appellee was justified in refusing to accept the 26 cars, because the coal was not merchantable, and in January, 1920, entered a decree in favor of appellee for $4,525, from which this appeal is taken.

The case requires but a word of comment. Passing the question whether the rejected cars contained Shaw coal, which appellee denies, it is enough to say that the coal actually shipped, from whatever source it came, was found by the trial court to be of such extremely inferior quality as not to be merchantable, and therefore not a good delivery. Ample testimony supports this finding and the record furnishes no ground for setting it aside.

It follows that the decree must be affirmed.

THE HESPEROS.

SOELBERG v. JASON NAVIGATION CORPORATION et al.

(Circuit Court of Appeals, Fourth Circuit. February 1, 1921.)

No. 1849.

Collision ⇐69—Steamship in fault for collision, though dragging anchor.

A decree finding a steamship in fault for a collision caused by dragging her anchor during a high wind and drifting against another anchored vessel *held* supported by the evidence.

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

Suit in admiralty for collision by the Jason Navigation Corporation against the steamship Hesperos; Albert Soelberg, master and claimant. Decree for libelant, and claimant appeals. Affirmed.

For opinion below, see 257 Fed. 438.

Leon T. Seawell, of Norfolk, Va. (R. M. Hughes, Jr., and Hughes, Little & Seawell, all of Norfolk, Va., on the brief), for appellant.

Braden Vandeventer, of Norfolk, Va. (Hughes, Vandeventer & Eggleston, of Norfolk, Va., on the brief), for appellee Jason Navigation Corporation.

Francis S. Laws, of Philadelphia, Pa. (Lewis, Adler & Laws, of Philadelphia, Pa., and John W. Oast, Jr., and Oast, Kelsey & Jett, all of Norfolk, Va., on the brief), for appellee Alexander Sprunt & Son.

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

PER CURIAM. On June 8, 1918, the American steamship Jason, loaded with cotton and spelter, anchored in the James river about a quarter of a mile or more off and slightly above the Warwick Machine Company's pier at Newport News, Va. Three days later the Norwegian steamship Hesperos, light, anchored to the westward of and some three ships' lengths ahead of the Jason. Both vessels were brought in and placed by licensed pilots. On June 12th a southwest wind arose, which gradually increased. At 2 p. m. it blew 28 miles an hour. Later in the afternoon it diminished somewhat, but about 9:30 in the evening developed into a severe squall, attaining for a few minutes a velocity of 60 miles an hour, and for about a minute a velocity of 68 miles. Blown by this gale, the Hesperos dragged anchor and crashed into the port side of the Jason, to the great damage of the latter and its cargo, for the recovery of which the owners brought suit. From a decree in their favor the Hesperos appeals.

It was virtually admitted at the trial, and there is no proof to the contrary, that the Jason was not at fault. This being so, responsibility rests on the Hesperos, unless the collision was the result of inevitable accident, which is the defense set up. The case, therefore, turns on a question of fact which the court below has decided against the ap-

pellant. We are satisfied, after careful examination of the record, that the learned District Judge reached the right conclusion, and find no occasion to enlarge upon what he has said. The decree is accordingly affirmed on his opinion.

Affirmed.

NORTHRUP NAT. BANK v. TITLE GUARANTY & SURETY CO.

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

No. 5341.

Appeal and error ⊜850(4)—In case tried by court, where there were no requests, and sufficiency of proof was not attacked, there is nothing for review.

In an action tried by the court on waiver of a jury, on an agreed statement of facts, supplemented by evidence, where no special findings were made, and plaintiff requested no finding in its favor, and no declarations of law responsive to the agreed statement and the evidence, and the sufficiency of the proofs was not challenged in any way, there is nothing for review in the Circuit Court of Appeals.

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

Action by the Northrup National Bank against Title Guaranty & Surety Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Baxter D. McClain, of Tola, Kan. (A. L. Berger, of Kansas City, Kan., on the brief), for plaintiff in error.

Wendell H. Cloud, of Kansas City, Mo., for defendant in error.

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

HOOK, Circuit Judge. This was an action at law tried by the court below upon waiver of a jury. There was an agreed statement of facts, which did not, however, cover all of the essential issues in the case, and it was therefore supplemented by oral testimony and other evidence. At the conclusion of the trial the court made a general finding for defendant and rendered judgment in its favor. No special findings of fact were made. The plaintiff made no request for a finding in its favor, nor for declarations of law responsive to the agreed statement and the evidence. The sufficiency of the proofs before the court to sustain the general finding and judgment was not challenged in any way. The sole complaint now made is that the court below erred in its finding and judgment.

It has long been established by the Supreme Court and by this and other Circuit Courts of Appeals that in the above circumstances the statute leaves no question open for review. There are so many decisions to this effect in this court, some of them quite recent, that it is needless to cite them.

The judgment is affirmed.

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

THE SUN.

(District Court, E. D. Pennsylvania. April 19, 1921.)

No. 63.

1. **Admiralty ⇐76—Libelant, foreign government, held not entitled to open commission on grounds of impossibility of framing interrogatories because witnesses were abroad.**

   On a libel to recover from a steamship damages to a shipment of eggs, where the issues were not complicated nor unusual, and the libelant was a foreign state, a mere showing that the libelant's proctors here were not able to frame interrogatories, because the documentary evidence and the witnesses were abroad, is not sufficient to put on respondent the burden of taking testimony on open commission, since the libelant can undoubtedly ascertain the facts necessary to enable the proctors to frame the interrogatories.

2. **Admiralty ⇐76—Common usage adopted in admiralty requires commission on interrogatories.**

   The taking of depositions upon interrogatories is in accordance with the common usage adopted for such depositions in United States courts by Rev. St. § 866 (Comp. St. § 1477), as established by admiralty rules of the District Court 31–40, and with new admiralty rule 46, promulgated by the Supreme Court (267 Fed. xvii), which provide for the taking of testimony orally in open court, except as otherwise provided by statute and agreement of the parties.

In Admiralty. Libel in rem by the Swiss Confederation against the steamship Sun. On motion of the libelant for dedimus potestatem to take testimony of witnesses abroad upon an open commission. Motion denied, without prejudice to libelant's right to take out a commission upon interrogatories.

Henry Escher, Jr., and P. Randolph Harris, both of New York City, and Joseph W. Henderson, of Philadelphia, Pa., for plaintiff.

Lewis, Adler & Laws, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. This is an action in rem brought by the Swiss Confederation against the steamship Sun to recover damages for loss upon 12,000 cases of eggs shipped by the steamship Sun from New York to Genoa, Italy, alleged to be due to negligence in the manner of loading, stowing, and taking care of the merchandise and to the unseaworthiness of the steamship. The Sun Company is the owner and claimant.

In order for the purposes of the motion to prove the facts in connection with the shipment, the condition of the eggs at that time, at the time of the arrival at Genoa, the alleged unseaworthiness of the vessel, and the loss to the libelant, affidavits of the Swiss Minister to the United States and one of the proctors for the Swiss Confederation have been filed, setting forth reasons why it is necessary to take the testimony of certain witnesses abroad upon an open commission. They set forth the impossibility of procuring the presence of the witnesses at the trial in this court, and that reason is convincing of the necessity of taking the testimony of the witnesses abroad. The necessity for

taking the testimony upon an open commission, however, is not apparent.

[1] The fact that the proctors here are not able to frame interrogatories, because the documentary evidence and the witnesses are abroad, is not a satisfactory reason for putting an additional burden upon the respondent. The libelant is a sovereign state, and it is undoubtedly within its power to ascertain for its proctors here facts upon which its case is based and upon which its interrogatories can be framed.

[2] The issues in the case are not complicated nor unusual in their nature. I am of the opinion, therefore, that an ordinary commission with interrogatories will be entirely adequate and will protect the rights of both parties. This is in accordance with "common usage" under section 866 of the Revised Statutes (Comp. St. § 1477), as established by rules 31 to 40 of the Admiralty Rules of this court, adopted April 1, 1901, and is in accordance with rule 46 of the new Admiralty Rules promulgated by the Supreme Court, to take effect March 7, 1921 (267 Fed. xvii), which provide for the taking of testimony orally in open court, except as otherwise provided by statute or agreement of parties.

The motion is therefore denied, without prejudice to libelant's right to take out a commission upon interrogatories in accordance with "common usage" as established by the rules of this court.

FRIEDLANDER v. POSTAL-TELEGRAPH CABLE CO.

(District Court, N. D. Ohio, E. D. January 31, 1921.)

No. 10616.

1. **Courts ⇐372(5)—Validity of limitation of liability for negligence in transmitting telegram is question of general law.**
   The right of a telegraph company to contract for a limitation of its liability for negligence in the transmission of an intrastate telegram, in the absence of any state statute, is a question of general jurisprudence, on which the federal courts are not controlled by the decisions of the state courts.

2. **Telegraphs and telephones ⇐54(5)—Limitation of liability for transmitting unrepeated telegram valid.**
   In the absence of the statute to the contrary, a telegraph company can contract for limitation of liability for its negligence in transmitting an unrepeated telegram.

At Law. Action by Max Friedlander against the Postal-Telegraph Cable Company. On demurrer to the second defense of the answer. Demurrer overruled.

N. M. Greenberger and J. D. Hotchkiss, both of Akron, Ohio, for plaintiff.

Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, for defendant.

WESTENHAVER, District Judge. Plaintiff demurs generally to the second defense of the answer. This defense pleads the usual lim-

itation of liability of a telegraph company for damages due to negligence in transmitting unrepeated messages. In support of the demurrer it is urged that the message, being received in Cleveland to be transmitted to Akron, Ohio, is an intrastate message and is governed by the law of Ohio.

[1] This contention will be true only if there is in force a statute of Ohio declaring such conditions limiting liability null and void. There is no such statute in Ohio. Sections 9182, 9183, and 9185, G. C., are the only sections remotely bearing on this proposition, and they do not so provide. The decisions of the Supreme Court of Ohio, so far as they may be said to declare a rule of decision on the subject, are not binding on the United States courts, for the reason that the question involved is one of general jurisprudence, as to which the United States courts ascertain and declare the law for themselves, and not local law as to which the rule of decision of the state is adopted and followed. See Swift v. Tyson, 16 Pet. 1, 10 L. Ed. 865; B. & O. R. R. v. Baugh, 149 U. S. 369, 13 Sup. Ct. 914, 37 L. Ed. 772; Western Union Telegraph Co. v. Sklar (6 C. C. A.) 126 Fed. 295, 61 C. C. A. 281.

[2] Defendant urges that Telegraph Co. v. Griswold, 37 Ohio St. 301, 41 Am. Rep. 500, which holds such a stipulation limiting liability for damages due to the negligent transmission of a telegram to be null and void, has been modified by B. & O. R. R. Co. v. Hubbard, 72 Ohio St. 302, 74 N. E. 214, holding valid stipulations limiting liability in a live stock contract, and by Western Union Telegraph Co. v. Wisner, decided by the State Court of Appeals of Lucas county, but not reported, holding valid such a stipulation in a telegram. Whether this is true, we need not inquire, since it is settled law in the United States courts that these stipulations are valid and binding, and, for the reasons above stated, declare the law, which must be followed in this court. Primrose v. Western Union Telegraph Co., 154 U. S. 1, 14 Sup. Ct. 1098, 38 L. Ed. 883; Western Union Telegraph Co. v. Sklar, supra.

The demurrer will be overruled. An exception may be noted.

ROSENBERG et al. v. UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION.

(District Court, D. Oregon. November 1, 1920.)

No. L–8637.

Removal of causes ⇐19(8)—Action against Emergency Fleet Corporation removable; "corporation of United States."

The United States Shipping Board Emergency Fleet Corporation, incorporated pursuant to an act of Congress (Comp. St. §§ 8146a–8146r) under the laws of the District of Columbia, also enacted by Congress, is a corporation of the United States, and an action against it is removable as involving a federal question.

At Law. Action by Isadore Rosenberg and Joseph Rosenberg, partners as the Rosenberg Iron & Metal Company, against the United States Shipping Board Emergency Fleet Corporation. On motion to remand to state court. Denied.

Platt & Platt and Hugh Montgomery, all of Portland, Or., for plaintiffs.

MacCormac Snow, of Portland, Or., for defendant.

WOLVERTON, District Judge. This is an action in replevin, to recover possession of certain bills of lading which, it is alleged, the defendant wrongfully detains from plaintiffs. The cause was instituted in the state court, and is here on removal. Plaintiffs have interposed a motion to remand the cause to the state court, and the question for decision arises on this motion. The sole inquiry is whether there is a federal question involved in the controversy. If, so, the removal was properly allowed. If not, the cause should be remanded.

A brief reference to the manner of defendant's organization, and the functions it was designed to perform, will readily afford basis for solution. The Shipping Board was established by act of Congress of September 7, 1916 (39 Stat. 728 [Comp. St. §§ 8146a–8146r]), with authority, with the approval of the President, to construct and equip, or to purchase, lease, or charter vessels suitable for use as naval auxiliaries or army transports, or for other naval or military purposes, and to make necessary repairs on and alterations of such vessels. By section 11 of the act (section 8146f), the Shipping Board is, when in its judgment it is deemed necessary, authorized to form, under the laws of the District of Columbia, one or more corporations for the purchase, construction, equipment, lease, charter, maintenance, and operation of merchant vessels in the commerce of the United States.

In pursuance thereof, and so authorized thereby, the Shipping Board incorporated the United States Shipping Board Emergency Fleet Corporation, under the general incorporation laws of the District of Columbia. These laws were adopted by act of Congress. The organization and incorporation were, therefore, not only in pursuance of a law of Congress expressly authorizing the same, but in pur-

suance also of an incorporation statute provided by Congress. Nothing is plainer than that the defendant is a corporation of the United States. It has long been settled that a suit against such a corporation is a suit arising under the laws of the United States. Such a suit is proper for removal from the state court into a federal court. Osborn v. United States Bank, 9 Wheat. 738, 823, 6 L. Ed. 204; Pacific Railroad Removal Cases, 115 U. S. 1, 11, 5 Sup. Ct. 1113, 29 L. Ed. 319. These authorities have been followed without question ever since their enunciation.

A federal question being involved, the motion to remand will be denied.

C. F. BALLY, Limited, v. QUAKER CITY CORPORATION.

(District Court, E. D. Pennsylvania. March 18, 1921.)

No 6560.

Principal and agent ⇐103(9)—Signing of order by salesman not an acceptance, creating a "contract of sale."

An order for merchandise, given by plaintiff and signed by one as salesman for defendant, *held* not to constitute a "contract of sale."

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

At law. Action by C. F. Bally, Limited, against the Quaker City Corporation. Finding for defendant. On motion for new trial. Denied.

John Cadwalader, Jr., and A. M. Beitler, both of Philadelphia, Pa., for plaintiff.

Conlen, Brinton & Acker, of Philadelphia, Pa., for defendant.

THOMPSON, District Judge. The sole question arising upon this motion is whether the paper writing, designated a "sales order," upon which the plaintiff declared, is a contract. After a thorough and a painstaking examination of the authorities cited by counsel, and both sides have shown commendable industry in gathering together the cases upon the subject, I am still of the opinion that the paper in question does not constitute a contract of sale between the parties.

The question is not whether it is sufficient under the statute of frauds to support an action, if there were parol or other evidence to show acceptance by the defendant. It cannot be said that the order was accepted because Hunneman had authority to bind the defendant. There is nothing on the paper, nor in the evidence, to show that when he signed the paper he was exercising that authority. He signed as "salesman."

The paper on its face is a mere order, which, in the absence of acceptance, does not constitute a contract. There are many cases holding that a memorandum to the effect that some commodity has been "sold" to a purchaser, signed by one authorized to sign it, constitutes a contract of sale; also many cases where, upon an order being given

and there being circumstances indicating acceptance by the vendor, it is held upon acceptance the contract is complete, and either party may sue thereon.

I fail to discover among the authorities cited any well-reasoned case in which a paper such as the one in question has been held to be a contract. The common law is the result of a development in which custom and practice among merchants play an important part. It may be that in time authorities carrying weight will determine that, when one acting as a salesman and having authority to accept an order, signs it as salesman, a binding contract has been entered into between the parties.

I must decline, however, to take such advanced ground, unsustained by authority, inconsistent with settled ideas of what constitutes a contract, and with the probability of establishing a dangerous doctrine, by which merchants sending out drummers to take orders will be trapped into incurring liability without having the intention of binding themselves by an acceptance of the orders.

Seeing no reason for reconsidering the conclusions reached at the trial, the motion for a new trial is denied.

PUGET SOUND POWER & LIGHT CO. v. CITY OF SEATTLE et al.

(District Court, W. D. Washington, N. D. April 23, 1921.)

No. 235.

1. **Dismissal and nonsuit ⇐53(1)—Suit which had become moot should be dismissed on any showing of that fact.**

Though there is a question as to the propriety of considering an affidavit on motion to dismiss the bill, a suit should be dismissed in the interests of the public and the court whenever the controversy has become moot, regardless of how that issue is presented or suggested.

2. **Municipal corporations ⇐955(2)—Political activities of mayor against bond payments not acts of city, and though of evidential value are not to be considered on motion to dismiss for want of equity.**

In a bill to compel a city to comply with its contract provisions for securing the payment of bonds, allegations that the mayor had been carrying on a campaign to intimidate city officers and cause default in the payment of the interest and the repudiation of the bonds, even though such activities may have evidential value as bearing on the attitude of the city, cannot be considered in determining motion to dismiss the bill for want of equity, since the acts of the mayor are not the acts of the city which in matters of that character can under its charter speak and act only by ordinance.

3. **Municipal corporations ⇐954—Payment of interest into special fund month before due held contract requirement.**

In an ordinance authorizing the issuance of bonds, a section whereby the city irrevocably obligated itself to pay into a special fund from the gross revenues of its street railway system before each installment of interest falls due a sum equal thereto, and requiring the city treasurer one calendar month prior to the date on which the interest became due to set aside the amount thereof, the provision for setting the interest aside one month before due is part of the contract obligation binding on the city and not merely a directory provision.

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

4. Action ⇐9—Suit to compel city to set aside fund for interest on bonds not moot in view of contention that city need not pay interest into special fund at time fixed, though installment due has been paid.

In a suit to compel specific performance of a city's obligation to set aside in a special fund from the revenues of its street railway system the amount of the interest on its bonds one month before such interest became due, a contention by the city that the requirement of payment into such fund at the time specified was directory and not obligatory, which amounted to a threat to treat the fund in the same manner when future installments fell due, affects the market value of the bonds, so that the fact that the city had paid the interest installment then due into such fund does not render the controversy moot.

5. Municipal corporations ⇐955(1)—Equity can enforce contract of city to provide fund for payment of interest on bonds.

Equity can specifically enforce the provisions in a contract whereby a city obligated itself to pay from the gross revenues of its street railway system a sufficient amount to meet an installment of interest into a special fund for that purpose one month before payment is due, where the city contended that provision was directory, which amounted to a threat to disregard it when future installments fell due, since such enforcement does not interfere with the governmental activities of the city and removes a cloud upon the bonds and avoids a multiplicity of actions in which the damages would be difficult of ascertainment.

In Equity. Suit by the Puget Sound Power & Light Company against the City of Seattle and others. On defendants' motion to dismiss the bill, on the ground that complainant is not entitled to equitable relief. Motion denied.

James B. Howe, Hugh A. Tait, and John H. Powell, all of Seattle, Wash., for complainant.

Walter F. Meier, Corp. Counsel, and Thomas J. L. Kennedy, Robert H. Evans, and Charles T. Donworth, Asst. Corp. Counsels, all of Seattle, Wash., for defendants.

CUSHMAN, District Judge. Complainant, a Massachusetts corporation, sues the defendant city, its comptroller and treasurer. The matter is now before the court upon defendants' motion to dismiss the bill upon the ground that the complainant is not entitled to equitable relief.

The bill avers that complainant was the owner of and operated a street car system in the city of Seattle; that, in 1918, during the war, complainant was pressed by the government and the city to make additions to its system which it had not the means of making; that in September, 1918, the city offered complainant $15,000,000 in utility bonds for the property, which it accepted; that, after the enactment of an ordinance authorizing the purchase and issuance of such bonds, a taxpayers' suit was brought in the state court to test the validity of the purchase and the proposed bonds. The particular attack being made was that the general revenues of the city would have to meet the charges of operation and maintenance if the gross receipts from the operation of the street car system proved insufficient to meet the bonds, interest, and other charges. In both the lower and Supreme Court the

bonds were held valid. Twichell v. Seattle, 106 Wash. 32, 179 Pac. 127.

That, at the date of this decision, the street car property was still in the possession of the complainant, being subject to outstanding mortgages, which complainant was obligated to discharge; that complainant transferred the property, as agreed, the trust companies holding the mortgages released them, and received the bonds as security, substituted for the released mortgages; that $15,000,000 of complainant's notes so secured mature June 1, 1921; that the interest on the utility bonds of the city is to be applied to the payment of the interest on such notes; that, since such transfer of the property, the city has been in possession and operation of the street car system transferred, receiving therefrom approximately gross revenues of $18,000 per day.

That Ordinance No. 39025, authorizing the utility bonds, provides that—

"Sec. 5. * * * The city treasurer of the city of Seattle shall, semiannually, one calendar month prior to the date upon which any interest, or principal and interest, shall become due, set aside and pay into such fund from the gross revenues of the entire municipal street railway system of the city of Seattle, now belonging to it, including the additions, betterments and extensions herein provided for, and any street railway property which it may hereafter acquire, with the equipment thereof, a sum equivalent to the amount of interest so falling due, upon all bonds issued hereunder, and then outstanding, and annually one calendar month prior to the first day of March in each and every year, beginning with the year 1922, and to and including the year 1938, the sum of eight hundred thirty-three thousand dollars ($833,000), and one calendar month prior to the first day of March, 1939, the sum of eight hundred thirty-nine thousand dollars, ($839,000), as the principal of such bonds falls due, and until all of such bonds with interest thereon be fully paid, and such fixed amounts out of such gross revenues are hereby pledged to such semiannual payments of principal, and shall constitute a charge upon such gross revenues superior to all charges whatsoever, including charges for maintenance and operation, save and except the charges upon such revenues heretofore created for the payment of principal and interest of one hundred thousand dollars ($100,000), Seattle Municipal Street Railway Bonds, 1917, authorized by Ordinance No. 37851, as amended by Ordinance No. 37923; and save and except the charges upon such revenues heretofore created for the payment of principal and interest of five hundred fifty thousand dollars ($550,000), 'Railway Extension Bonds, Series A, 1918,' authorized by Ordinance No. 38666, and save and except the charges upon such revenues sufficient to pay warrants drawn upon the city railway fund of the city of Seattle issued prior to the taking effect of this ordinance."

That, between the 31st of March, 1919, and the 17th day of February, 1921 (the bill of complaint herein having been filed February 21, 1921), the city received in gross revenues from the operation of the purchased property upwards of $7,000,000, being more than enough to pay all charges prior to complainant's, the interest on the utility bonds and even several installments of the principal—

"But, notwithstanding such fact, such gross revenue has been applied to the building of an extension and to the payment of the cost of maintenance and the operation of the municipal street railway system of the city. On the 1st day of March, 1921, six months' interest on the issue of $15,000,000 of utility bonds will be due and payable and by the terms of the ordinance authorizing such bonds the city is obligated, in case the gross revenues derived from the operation of the system were sufficient, to pay into the special fund created

by such ordinance the sum of $375,000, but such sum has not yet been paid into such special fund although the gross revenues received by the city from the municipal street railway system were more than sufficient to pay all prior charges and to pay such interest, and to pay the amount of such interest into such special fund 30 days prior to the 1st day of March, 1921; but the mayor of the city has recommended that instead of the gross revenues derived from such system being paid into such special fund the same should be diverted and in part applied to the payment of interest on $790,000 of utility bonds issued under Ordinance No. 39492, entitled, * * * which last-named bonds are expressly made subordinate to the $15,000,000 issue of bonds hereinbefore mentioned, and which $790,000 issue of utility bonds were sold by the city in the public bond market after it had operated the property for five months or more."

The bill further avers that certain named parties have combined to have a suit instituted to have the $15,000,000 bond issue decreed payable only out of the net revenues of the property and to enjoin the payment of interest due March 1, 1921, and the principal until after the payment of maintenance and operation charges, and that the mayor of the city has been carrying on a campaign for the purpose of intimidating certain city officers and bringing about the default in the payment of the interest on such bonds and their repudiation; that the persons so combining have, with other persons, instituted a suit in the state court to subordinate the payment of interest and principal to claims that are subordinate to the bonds; that complainant is not a party to those suits, but such persons may attempt to involve complainant in such suits in order to prevent its being heard in this court; and further that—

"If, by reason of the efforts of the mayor and certain other persons who have combined with him to bring about a default in the payment of interest on the fifteen million dollar issue of bonds, which interest is payable on the 1st day of March, 1921, a default should occur in the payment of such interest, the entire issue of $15,000,000 of bonds will be known as a defaulted issue, and bonds which the company now has deposited with the trustees hereinbefore named, as collateral security, will be depreciated millions of dollars and the company may be placed in a position where it will be unable to have such trustees sell such bonds prior to the 1st day of June, 1921, and apply the proceeds upon the notes secured thereby, and the company will suffer great and irreparable injury and damage exceeding in value the sum of $3,000 exclusive of interest and costs and exceeding many millions of dollars, as well as the injury and damage which will be immediately caused by the nonpayment of the $375,000 of interest on such bonds, which interest is payable March 1, 1921. If the city treasurer places in the special fund the gross revenues from the municipal street railway system, which should have been placed in such fund on the 29th or 30th of January, 1921, or if he should place in such fund the gross revenues of the municipal street railway system received during the month of February, 1921, there would be sufficient funds to pay such interest on the 1st day of March, 1921."

Complainant avers that this will result in irreparable injury to it; that its only remedy is by injunction, forbidding the diversion of the gross revenues from the special fund and commanding their payment into such fund. Complainant asks for a temporary and permanent injunction in accordance with the averments made, for specific performance, and specially prays:

"* * * That in the event any attempt should be made by any taxpayer to sue it in the superior court of the state of Washington or in any other court

than the District Court of the United States for the Western District of Washington, it shall be granted leave to amend this complaint so as to enjoin all persons so attempting to sue it from suing it in such manner as to divest this court of complete jurisdiction of the rights which the plaintiff has to assert against the city and its officers; and that the plaintiff have such other and further relief as the equities of the case may require, and to your honors may seem meet."

A restraining order having been issued by this court February 21st, upon the filing of the bill, on February 25th, the affidavit of the defendant city treasurer was filed herein, which affidavit avers:

"I am now, and for more than nine years last past have been, the duly elected, qualified and acting treasurer of the city of Seattle, a municipal corporation, and in my official capacity I am, together with the city of Seattle, a defendant in the above entitled action.

"On the 1st day of February, 1921, pursuant to the provisions of Ordinance No. 39025 of the city of Seattle * * * I began to set aside and pay into the 'Municipal Street Railway Bond Fund, 1919,' created by said ordinance, from the gross revenues of the entire municipal street railway system of the city of Seattle, a sum sufficient to pay the interest accruing March 1, 1921, upon the issue of Municipal Street Railway bonds in the principal sum of $15,000,000.

"On the 11th day of February, 1921, I was served with a temporary restraining order, issued by the superior court of the state of Washington for King county, in cause No. 149200, wherein S. B. Asia and others were plaintiffs, and the city of Seattle, myself, and one other were defendants, which restraining order enjoined affiant and the other defendants from placing the gross earnings of said street railway system in the 'Municipal Street Railway Bond Fund, 1919,' created by said Ordinance No. 39025, and further restraining the defendants from placing the gross earnings of said street railway system into any fund other than the street railway fund unless all charges incurred in the operation of said system were first paid. On said 11th day of February, 1921, said fund contained $167,481.61. Pursuant to said restraining order, I thereafter held said gross revenues in the unapportioned street railway collections account, and refrained from paying further sums into said bond fund until the said restraining order was dissolved.

"On the 25th day of Febuary, 1921, the date to which said restraining order was continued in effect, said restraining order was abandoned by the plaintiffs in said cause No. 149200 and stricken. As soon as said restraining order became ineffective, I paid into said municipal street railway fund, 1919, created by said Ordinance No. 39025, from said unapportioned street railway collections account above referred to, the sum of $207,518.39, making a total of $375,000, being the amount of interest which will be due and payable upon said $15,000,000 bond issue on March 1, 1921, and by telegraph transmitted the said $375,000 (together with other sums) to the fiscal agency of the state of Washington located in New York City, to wit, the Equitable Trust Company, 37 Wall street, to be paid out upon presentation of the interest coupons attached to said $15,000,000 issue in accordance with the terms of said ordinance.

"On the 21st day of February, 1921, I was served with a motion for a temporary injunction in the above entitled cause, in which the plaintiff seeks an interlocutory injunction restraining the defendants herein from using any portion of the gross revenues derived from the municipal street railway system for the payment of interest upon other bond issues until the amount necessary to pay the interest upon the $15,000,000 bond issue accruing on March 1, 1921, be paid. As already stated herein, I have paid into the special fund referred to in said motion the sum of $375,000, being the amount of interest due upon said $15,000,000 bond issue on March 1, 1921, and have transmitted the same to the fiscal agency of the state of Washington in New York City for payment in accordance with the terms of said bonds and said Ordinance No. 39025."

[1] There doubtless is a question as to the propriety of considering the showing made by the affidavit on a motion to dismiss the bill; but, if the cause has become entirely moot by the payment of the installment of interest due March 1st, in the interests of the public and the court, it would be the latter's duty to consider such a question at any stage of the proceeding, however presented or suggested, and, if it is certain that only a moot question remains, to dismiss the suit in order to devote the time and effort which would be required for its consideration to other public business.

[2] While the allegations of the bill concerning the mayor's activities may have evidential value, merely as a circumstance bearing on, and to some extent explaining the action and attitude of the defendants, yet, upon the consideration of the present motion, and in view of the conclusion reached, no weight is to be attached to this averment. The city, in matters of this character, speaks and acts by ordinance. Section 18, art. 4, Seattle City Charter; Hotel Cecil Co. v. Seattle, 104 Wash. 460, 469, 177 Pac. 347.

Upon the motion to dismiss, defendants contend that there is an adequate remedy at law; that the questions involved have become moot because of the payment, March 1st, after the institution of this suit, of the interest then falling due. They further contend that no duty devolved upon the defendant city to set aside and create a calendar month prior to March 1st a special fund to meet such interest.

Logically, the last contention should be first considered, for, if defendants are right in that, it obviates any necessity for considering the other two questions.

[3] As a part of the contention upon this point, the court is asked to take notice of the entire Ordinance No. 39025 quoted in part by complainant in its complaint, and to take particular notice of that part of paragraph 5 of the ordinance preceding that above quoted. In view of this contention the portions of paragraph 5 material to be considered are:

"There shall be, and is, hereby created and established, a special fund to be called 'Municipal Street Railway Bond Fund, 1919.' THE CITY OF SEATTLE * * * DOES HEREBY IRREVOCABLY OBLIGATE AND BIND ITSELF TO PAY into such fund out of the gross revenues of such municipal street railway system, and all additions, betterments to, and extensions of, such system, at any time hereafter acquired, BEFORE each semiannual installment of interest falls due, a sum equal to such semiannual installment of interest upon all such bonds then outstanding and unpaid. * * * Such fund is to be drawn upon for the sole purpose of paying the principal and interest of such bonds from and after the date of such bonds and so long as obligations are outstanding against such fund. *The city treasurer of the city of Seattle shall*, semiannually, *one calendar month prior to the date upon which any interest, or principal and interest, shall become due, set aside and pay into such fund.* * * *"

Defendants' contention is that the only thing to which the city is bound by the foregoing is indicated by the capitalized portion of the above, and that the italicized portion of the above section, upon which complainant relies, is merely a directory provision inserted for the guidance of the city treasurer and is in no sense a contractual provi-

sion to be invoked for complainant's benefit and protection; that is, that the city is only obligated to pay from the gross earnings into the special fund an amount equal to the interest at any time before the same falls due.

This is not a reasonable interpretation of the ordinance. Under the circumstances, a substantial time "before" the interest due date must have been in contemplation, else of what advantage could the proviso be? The calendar month proviso further on in the ordinance is simply making the preceding more specific and prescribes how long before the due date the city was obligated to set aside this special fund. Such certainty would be, not only for the advantage of the complainant, but might save the city, itself, some embarrassment as this and longer periods of time prior to the due date might be contended for by various and changing bondholders.

The gross earnings produced from the property were mortgaged by this arrangement to secure, not only the payment, but the prompt payment of the bonds and interest and the city's right and power in handling and disposing of such earnings is limited in accordance with Ordinance No. 39025. It, certainly, is of advantage to the complainant to have the specific money set aside in the hands of a bonded officer, an individual trustee, or quasi trustee, a calendar month prior to the due date. Whether the advantage be great or small, it is only that which the city contracted to do. Holding the money in trust, it is bound to handle it in the manner agreed. Complainant, in selling its property, had a right to dictate such provisions for what it considered its protection, and whether fancied or real makes no difference.

Reaching this conclusion in the main disposes of defendants' other contentions.

[4] The defendant city, by asserting that it was right in refusing to set aside the special fund a calendar month prior to the due date, asserts, in effect, that it will do the like in the future as it sees fit.

The specific performance prayed is not only payment to complainant of money, but the providing, setting aside, preserving, and keeping intact of a specific fund from a general fund covered by complainant's equitable mortgage, securing and making more certain the prompt payments by so doing.

[5] Were it not for the city's contention that it has a right to disregard the calendar month requirement of section 5 of the ordinance, mandamus, under section 8008, it might plausibly be argued, provides an adequate remedy at law, where the money had not been paid into the special fund, although the city held the money in trust for complainant.

Not only because of the cloud upon the bonds and the funds, general and special, from the earnings of the property, but because of the uncertainty arising from this contention and because of the difficulty of measuring the damage arising from such a breach and the multiplicity of actions to be avoided by a suit for specific performance, it is clear that equity has jurisdiction to that end. Thompson v. Emmett Irr. Dist., 227 Fed. 560, 142 C. C. A. 192; Union Pac. Ry. Co. v. Chicago, etc., Ry. Co., 163 U. S. 564–600, 16 Sup. Ct. 1173, 41 L. Ed.

265; Kilbourn v. Sunderland, 130 U. S. 505, 9 Sup. Ct. 594, 32 L. Ed. 1005; Franklin Tel. Co. v. Harrison, 145 U. S. 459, 12 Sup. Ct. 900, 36 L. Ed. 776; Joy v. St. Louis, 138 U. S. 1, 11 Sup. Ct. 243, 34 L. Ed. 843; Vickrey v. City of Sioux City (C. C.) 104 Fed. 164; Board of Com'rs v. Tollman, 145 Fed. 753, 772, 76 C. C. A. 317.

The court's attention has been called to a number of cases which are clearly distinguishable from the present suit; the distinction being, in the main, that the present is not a suit to compel or have the court undertake the performance of any high act of sovereignty, as the assessment or collection of a tax, but, rather, the compelling of performance of a contract provision as to the disposing and handling of money already collected, or after the same has been collected, such money arising from a particular source, that is, from the earnings of complainant's former property. The following résumé of these cases will show this distinction:

In Walkley v. City of Muscatine, 6 Wall. 481, 18 L. Ed. 930, the court was asked to enjoin the levy of taxes for the payment of a judgment recovered. Mandamus was held to be the proper remedy. No question was there involved of preservation of security for the payment of a debt, or the creation of security for its payment, or the right to enforce any contract provision regarding the handling of a security.

The case of Heine v. Board of Levee Commissioners, 19 Wall. 655, 22 L. Ed. 223, was one where it was held that a judgment recovered upon bonds and a return of no property found was necessary to establish that plaintiff had a valid claim before mandamus would issue to compel the levy and collection of taxes.

The validity of the bonds of the issue now before this court has been established, at least as to the parties now in court, by the decision of the Supreme Court of the State of Washington above cited. The present is not a suit to compel the levy and collection of a tax, but rather one by the vendor of property to compel the vendee to preserve available, against the day of payment, security stipulated in the contract of sale and arising out of the earnings of the property sold, itself.

Thompson v. Allen County, 115 U. S. 550, 6 Sup. Ct. 140, 29 L. Ed. 472, was a case where, after judgment obtained on certain bonds and the failure of mandamus thereon because no one would qualify as tax collector of the county, the court held that it was not in the power of a court of chancery to create a tax collector. The court held:

"The inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, a misfortune often attendant upon all remedies, but that in its nature or character it is not fitted or adapted to the end in view; for, in this sense, the remedy at law is adequate, as much so, at least, as any remedy which chancery can give."

The effect of this is to hold that the law court which rendered the judgment was as well qualified to perform the necessary function as a court of equity; that the law court through its sheriff or marshal is as well qualified to collect the taxes as a receiver appointed by a court of chancery.

The case of Yost v. Dallas County, 236 U. S. 50, 35 Sup. Ct. 235, 59 L. Ed. 460, is one of the numerous railroad bond tax cases arising in Missouri, and the court therein reaches the same conclusion as that arrived at in the last case, but does so by a different route; instead of holding that a court of equity did not have such a power in any case, the court holds, in effect, that the machinery provided by the state for the collection of a tax to pay the bonds was a part of the contract, and that for the court to collect the taxes through its appointee would be to make a contract for the parties. That this is the effect of the decision is shown by the following from the syllabi:

"The right given in bonds issued by a county pursuant to legislative authority to have a tax levied, collected and applied to their payment, is to have such tax levied and collected in the manner provided by statute, and courts cannot substitute their own appointee in place of one contemplated by the act.

"Even where the state court by mandamus has directed the officers of a county to levy and collect a tax as required by the state statute and apply it to the payment of a judgment for defaulted bonds, and they have failed to do so, the federal court has not jurisdiction to appoint a commission to levy, collect and apply the tax.

"Until the highest court of Missouri otherwise construes Rev. Stat. § 11417, Missouri, giving the Circuit Court power to enforce by mandamus or otherwise an order of the county court to have a tax assessed, this court will not construe the words 'or otherwise' as authorizing the court to collect the tax itself, but as only allowing the resort to other means besides mandamus to compel the county court to do so."

Hennessy v. Woolworth, 128 U. S. 438 (9 Sup. Ct. 109, 32 L. Ed. 500), has no application, as shown by the following syllabus:

"In this case, it not being clearly established that the wife assented to the agreement for the sale of her real estate of which a specific performance is sought to be enforced, though the assent of the husband is shown, the decree is refused."

That Whitehead v. Shattuck, 138 U. S. 146 (11 Sup. Ct. 276, 34 L. Ed. 873), has no application is shown by the following syllabus:

"When the right set up by the plaintiff is a title to real estate, and the remedy sought is its possession and enjoyment, that remedy should be sought at law, where both parties have a constitutional right to call for a jury."

McCabe v. Matthews, 155 U. S. 550, 15 Sup. Ct. 190, 39 L. Ed. 253, has no application. That was a case which concerned a contract for the sale of an interest in real estate worth $300 when made, and where there had been a delay in asserting a right under the contract for nearly nine years after notice of repudiation of the contract by the defendant, during which time the property had increased in value to $15,000. Specific performance was refused on account of laches.

In Blue Point Oyster Co. v. Haagenson (D. C.) 209 Fed. 278, the contract of which specific performance was denied was to run over a period of 20 years and required, among other things, that the oysters sold should be of a certain quality and a certain quantity in each sack. To enforce specific performance of such a contract, the decree would require supervision by the court of such details in the operation of a business as it was unsuited to perform and which might be too burden-

some in its nature, and, for that reason, specific performance was denied.

Defendants mainly rely upon the decision of the Supreme Court in Raton Water Works Co. v. Raton, 174 U. S. 360 (19 Sup. Ct. 719, 43 L. Ed. 1005). The effect of this decision is fairly indicated by the syllabus, which is:

"The waterworks company contracted with the municipal corporation of Raton to construct and maintain waterworks for it, and the corporation contracted to pay an agreed rental for the use of hydrants for 25 years. The works were constructed, and the corporation issued to the company, in pursuance of ordinances, warrants for such payments falling due once in every six months. Subsequently the corporation repealed the ordinances authorizing payment of the warrants, and passed other ordinances in conflict with them, whereupon the corporation refused to pay the warrants which had accrued and others as they became due. Thereupon the company filed this bill to enforce the payments of the amounts of rental already accrued, and as it should become due thereafter. Held, that the remedy of the company upon the warrants was at law, and not in equity, and that the court below should have dismissed the bill, without prejudice to the right of the company to bring an action at law."

In that case the town had undertaken to avoid the whole 25-year contract. It was refusing, because of avoiding ordinances, to pay anything either for accrued rent or rent to accrue. In such a situation a remedy at law exists, but in the present suit the city is not refusing to pay. It has failed or refused to safeguard payment by creating a security for which it had contracted, at the time, and as promptly as it had contracted to create it, and by its contention that it was right in so refusing, or so doing, it justifies the conclusion that it will, as to future accruing payments, continue so to do as it sees fit.

In Buzard v. Houston, 119 U. S. 347, 7 Sup. Ct. 249, 30 L. Ed. 451, there was no question of the effect of defendant's action upon repeated and recurrent obligations to arise in the future. The court held that, where there had been misrepresentations in connection with the sale of chattels, the remedy at law for deceit was adequate; that—

"It is not in every case of fraud that relief is to be administered by a court of equity."

A part of the relief prayed in that case was the setting aside of an assignment and the reinstatement of the assigned contract with defendant, out of which plaintiff had been tricked and of which the court says:

"* * * If the exchange of the contracts was procured by the fraud alleged, it would be no more binding upon the plaintiffs at law than in equity; and in an action of deceit the plaintiffs might treat the assignment of the contract with Mosty as void, and, upon delivering up that contract to the defendant recover full damages for the non-performance of the original agreement." 119 U. S. at page 353, 7 Sup. Ct. at page 252, 50 L. Ed. 451.

In Cruickshank v. Bidwell, 176 U. S. 73, 20 Sup. Ct. 280, 44 L. Ed. 377, it was sought to restrain the collector of customs from refusing a tea importer possession of imported teas on the ground that the act of Congress purporting to give the collector authority so to do, when such tea did not measure up to a certain standard, was unconstitutional. It was said:

"The matter in dispute was averred to be 'the value of the said teas and the right to import teas.'" (176 U. S. at page 81, 20 Sup. Ct. at page 284, 44 L. Ed. 377)—as to teas already imported and held by the collector for destruction.

The court further said:

"Nor was there any averment of injury by reason of the condemnation of these teas other than the loss of the teas themselves."

The value of such teas was the measure of relief, and there was, of course, an adequate remedy at law to that extent.

As to contemplated future importations, the court said:

"The allegations in respect of apprehended deprivation of the right to import and deal in teas were that complainants intended to import from time to time other invoices of teas and that the collector threatened to take possession of and hold them in the exercise of authority under the act of Congress in the same manner as the particular teas in question. This was in effect to assert a vested right to import and deal in teas which might be impure and unwholesome, and which were at all events, inferior to the uniform standards 'of purity, quality and fitness for consumption' fixed by the Secretary. The law does not prohibit the importation of teas coming up to the standards, and it is difficult to perceive the elements of irreparable injury in the denial of permission to import inferior teas.

"Manifestly the seizure of importations of teas purchased after the approval of the act and the establishment of regulations and standards thereunder, publicly promulgated and known to complainants, because falling below the standards prescribed, *could inflict no other injury than what it must be assumed was anticipated*, and the interposition of a court of equity cannot properly be invoked, under such circumstances, to determine in advance whether complainants, if they imported teas of that character, could escape the consequences on the ground of the invalidity of the law." 176 U. S. at page 82, 20 Sup. Ct. at page 284, 44 L. Ed. 377. (Italics ours.)

The effect of this is that the right to import property to be purchased is not property, and, further, that it is not a vested right in property at the time of the enactment of the law, and that in so far as future purchases and importations are concerned, their rejection will be anticipated by the one contemplating purchase and the injury resulting may be either avoided by not purchasing or undertaking importations or else accepted and assumed. The court also held that the unconstitutionality of the law, alone, does not give a right to injunctive relief.

The motion to dismiss will be denied.

In re GUARY.

(District Court, S. D. New York. March 11, 1921.)

1. **Aliens ⟸61—Alien wife of alien husband cannot become naturalized citizen.**

The alien wife of an alien husband cannot become a naturalized citizen of the United States.

2. **Aliens ⟸68—Petition for naturalization must be "duly verified" before clerk.**

Under Naturalization Act June 29, 1906, § 4, subd. 2 (Comp. St. § 4352), requiring a petition for admission to citizenship to be "duly verified,"

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

such verification must be made before the clerk of the court or his authorized deputy as is required of the declaration of intention by paragraph 1 of said section.

[Ed. Note.—For other definitions, see Words and Phrases, Duly Verified.]

3. Aliens ⊂=68—Service of notice on district attorney in naturalization proceeding sufficient.

Service on the district attorney of notice of a motion by petitioner for naturalization *held* sufficient.

Naturalization. In the matter of the petition of Margaret Guary for admission to citizenship. Petition denied.

Patterson, Eagle, Greenough & Day, of New York City (Carroll G. Walter, of New York City, of counsel), for petitioner.

Merton A. Sturges, of Chicago, Ill., Chief Naturalization Examiner, opposed.

KNOX, District Judge. On September 13, 1913, Margaret Guary filed in this court her declaration of intention to become a citizen of the United States. She was, and still is, the wife of Paul Guary, an alien, whom she married in the year 1907, at Pittsburg, Pennsylvania.

Paul Guary was born in Hungary, and is now thought to live there. He and petitioner lived together in Pittsburg until 1912, at which time they separated. Petitioner then came to New York, and has since resided here. In 1913 Paul Guary commenced an action for divorce, or separation, from his wife upon the ground of desertion. No defense was interposed to the action. The same, however, was never brought on for trial, and no decree of divorce was granted therein. The same year Paul Guary returned to Hungary, and at last accounts was residing there. Since 1913 he has not contributed to the support of his wife, nor has he communicated with her. One child was born of petitioner's marriage to a former husband, and this child now resides with the mother. Petitioner herself was born in Hungary and emigrated to the United States from Rotterdam, Holland, on or about May 5, 1905.

Upon September 2, 1920, she presented in duplicate, to the deputy clerk of this court, in charge of naturalization, a petition for naturalization containing an amplified statement of the foregoing facts together with the necessary statutory allegations. At the time she tendered the clerk the fees required by law, and requested that the said petition be filed as the petitioner's application for citizenship. The clerk refused to accept the fees and to file said petition upon the ground that it appeared upon the face thereof that petitioner was a married woman whose husband was an alien, and whose marriage relation to her husband had not been dissolved by death or decree of court, and that, consequently, she was not a person entitled to be naturalized. When said petitions were first presented to the clerk the same had not been signed or sworn to by petitioner, and she thereupon offered to sign the same, and requested the clerk to take her affidavit. He declined so to do.

Petitioner then appeared before a notary public in this city, and subscribed and swore to said petitions. After so doing they were again presented to the clerk for filing, who once more declined to receive and file them. Thereupon petitioner gave notice of motion to the clerk of court and to the United States attorney for this district that she would upon the 9th day of September, 1920, move the court for an order requiring the clerk thereof to file said petition as prayed for in her supporting affidavits. It will be noted that no notice was given to any representative of the Department of Labor.

This motion came on for hearing before Judge Manton, then sitting in the District Court; and, there being no appearance in opposition thereto, the motion was granted, and the clerk was directed to receive from the petitioner the fees required by law and to file the petition presented to him by petitioner on September 2, 1920, and thereupon to proceed with the same as required by law. The order further provided that the filing of the petition be made by physically annexing the original of said petition, together with the notice of motion and affidavits in the order recited, and the order itself, to the page of the volume of petitions for naturalization then in use by the clerk next succeeding the page embodying the last petition filed with him prior to the presentation of the petition in question. It was further ordered that such filing be deemed to have been made as of the date when said petition was first presented to the clerk, to wit, September 2, 1920.

Attached to the petition were the statutory affidavits of two witnesses who certified to their acquaintance with the petitioner and their knowledge of her residence in the United States for the requisite period, and to their personal knowledge that petitioner was a person of good moral character and attached to the principles of the Constitution of the United States.

In due course petitioner's application for admission to citizenship came before me upon the naturalization calendar, and she, together with her witnesses, were present in open court. When the case was called objection was made to petitioner's admission to citizenship by the Department of Labor upon the grounds (1) that the petition was not on the regulation printed blank in the bound volume of petitions for naturalization; (2) that the petition was not verified before the clerk or one of his deputies, but before a notary public; (3) that the notice of motion, made by the petitioner as hereinbefore recited, was not given to the Naturalization Bureau of the Department of Labor; and (4) that if petitioner were to be granted citizenship she would have an alien husband.

[1] I first consider the objection last above stated, and I am clearly of the opinion that the petitioner must have her application for citizenship denied. The question here presented was squarely raised in the Circuit Court of Appeals for this circuit in United States v. Cohen, 179 Fed. 835, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829. It was there held that the alien wife of an alien husband cannot become a naturalized citizen of the United States. It would, indeed, be an anomaly if the wife of an alien husband could become a citizen of the United

States, when by section 3 of the Expatriation Act of March 2, 1907 (Comp. St. § 3960), it is expressly provided that any American woman who marries a foreigner shall take the nationality of her husband. It is true that said section further provides that at the termination of the matrimonial relation an American woman may resume her citizenship, if abroad by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

It will be noted that an American woman may resume her citizenship only at the termination of her marital relation with an alien. To legally terminate such relationship either death or decree of a court of competent jurisdiction must intervene. In the present instance the marital relation between petitioner and her alien husband continues; and, notwithstanding, counsel for petitioner, upon the authority of Williamson v. Osenton, 232 U. S. 619, 34 Sup. Ct. 442, 58 L. Ed. 758, attempts to distinguish this case from that of the United States v. Cohen, supra. I cannot agree that the distinction is a valid one.

In Williamson v. Osenton, supra, the wife of a citizen of West Virginia had separated from her husband in the last-mentioned state and gone to Virginia with the intention of there making her home. She subsequently brought suit in the United States District Court for West Virginia against a citizen of West Virginia not her husband. The question arose, and was certified to the Supreme Court, as to whether the wife, when she began her suit, was a citizen of Virginia in such sense as to be entitled to maintain her action in the District Court of the United States for the Southern District of West Virginia. It was held that a wife who has justifiably left her husband may acquire a different domicile from his not only for the purpose of obtaining a divorce from him (Haddock v. Haddock, 201 U. S. 562, 26 Sup. Ct. 525, 50 L. Ed. 867, 5 Ann. Cas. 1), but for other purposes, including that of bringing an action for damages against persons other than her husband. In the course of its opinion the Supreme Court said that the identity of husband and wife is a fiction now vanishing. This is doubtless true as respects matters of jurisdiction in the bringing of civil suits and as to a wife's competency as a witness against her husband, and perhaps in other particulars.

It is, nevertheless, the fact that the discussion in the Supreme Court in Williamson v. Osenton, supra, was in terms of domicile rather than of citizenship. In that case the wife was none the less a citizen of the United States because she had a domicile in, and was a citizen of, a state different from that of her husband. I am of opinion that there is a marked difference between the diversity of citizenship which exists as between a citizen, for example, of the state of New York and a citizen of the state of New Jersey (both of whom are citizens of the United States) and the diversity of citizenship which exists as between a citizen of the United States and a citizen of a foreign country. Support for this view is to be had in Marks v. Marks (C. C.) 75 Fed. 321, where it was said that persons may be citizens of the United States

without being citizens of any state. In fact, the Supreme Court itself, in the Slaughterhouse Cases, 16 Wall. 36, 21 L. Ed. 394, held that there is a citizenship of the United States and a citizenship of a state, which are different from each other.

Domicile and citizenship within a particular state have a bearing upon the place where the fundamental rights, privileges, and immunities belonging to a citizen of the United States may be claimed or asserted; but such domicile and state citizenship, in my opinion, fall far short of entitling the wife of an alien husband to be admitted to national citizenship. I accordingly hold that the authority of United States v. Cohen, supra, upon the proposition here involved, is in no way impaired or qualified by Williamson v. Osenton, supra.

[2] What has been said would be sufficient to warrant a denial of the petition; inasmuch, however, as the Bureau of Naturalization strongly objects to the sufficiency of the petition itself, it may not be improper to make some observations thereon. By the act of June 29, 1906 (34 Stat. 596), Congress provided an elaborate system under which the details of naturalization proceedings are to be carried out. The law specifies the forms whereon declarations of intention and petitions for naturalization shall be made; it is declared how such papers shall be filed, bound, numbered, and indexed; and in the execution of these features of the law, the clerk of court is charged with no little responsibility.

By section 4 of the act (Comp. St. § 4352) the declaration of intention shall be made upon oath "before the clerk of the court, or his authorized deputy." In another paragraph of the same section it is said that a declarant, "not less than two years nor more than seven years after he has made such declaration of intention * * * shall make and file, in duplicate, a petition in writing, signed by the applicant * * * and duly verified. * * *" The government, through the Bureau of Naturalization, takes the position that the words "duly verified" mean a verification before the clerk of the court or his duly authorized deputy, and not before a notary public or other officer, and that the context of the section and its relation to what precedes makes such construction reasonable and proper. With this contention I agree.

It seems to me that, if it once be declared lawful for these petitions to be verified before persons not specifically charged with the administration of the naturalization law, the way is opened for the gravest kind of frauds. I shall not stop to comment upon the history of the administration of the law prior to the enactment of the present statute, further than to remark that formerly the opportunity for fraud was greater than it now is. If it be true that, when petitioner presented herself to the clerk of the court and asked to make, file, and to be sworn to the petition, and that official refused to act, petitioner's remedy, it seems to me, was not to make a typewritten petition, swear to it before a notary public, and ask to have such petition filed, but was to institute, as against the clerk, such proceedings as are appropriate to compel the performance by a subordinate officer of a ministerial duty. Had this been done, it is doubtless possible that the present

petition would have been presented upon the statutory forms and all other requirements of the act complied with.

The matter complained of is, in my judgment more than one of form; the possibilities arising from a departure from the statutory requirements are such as to readily convince me that much of substance is involved. The necessity of a strict compliance with the requirements of the Naturalization Act is emphasized by what was said by the Supreme Court in United States v. Ness, 245 U. S. 319, 38 Sup. Ct. 118, 62 L. Ed. 321. Nevertheless, in view of the government's default upon the return day of petitioner's motion for an order directing the clerk to receive and file the instance petition, I am not disposed, to petitioner's prejudice, to vacate that order. If the government desires such relief it should, I think, make application therefor to the judge who made the order.

[3] The Bureau of Naturalization explains the default upon the ground that it did not receive notice of petitioner's motion, and that such notice should have been given. I will not so hold. Under section 11 of the Act of June 29, 1906 (Comp. St. § 4370), the United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings. The section is silent as to the officer through whom such appearance is to be made. Section 15 (Comp. St. § 4374) expressly provides for the appearance of the United States attorney in certain cases. The Supreme Court in the Ness Case, supra, said that the sections are intended to provide cumulative protection to the United States. I think, therefore, that the matter of appearances upon behalf of the government and the relationship of officers charged with responsibility under the act as between themselves should be a matter of departmental regulation, rather than of court decision.

Petitioner's application for citizenship is denied.

WICHITA WATER CO. v. CITY OF WICHITA.

(District Court, D. Kansas, Second Division. February 5, 1921.)

No. 104–N.

1. **Equity ⇐409—Finding of special master on conflicting evidence not set aside, except for cogent reasons.**
   Courts are slow to set aside findings of fact made by a special master on conflicting testimony, except for very cogent reasons.

2. **Waters and water courses ⇐183(5)—Proper method of ascertaining market value of water system purchased by city stated.**
   Where a city, electing to purchase a waterworks system under a contract with the water company, is bound to pay the fair market value of the system as a going system, the replacement or reproduction method of ascertaining such fair and reasonable market value is proper, when a fair and reasonable amount for the going value is added, and there is deducted such reasonable sum as will fairly and justly measure the difference in value between a new plant so reproduced and the depreciated value of the old plant.

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

3. Waters and water courses ⊂=183(5)—In computing cost of replacing system purchased by city, cost of cutting and replacing pavement improperly excluded.

Where a city, electing to purchase a waterworks system under a contract with the water company, was required to pay the fair market value of the system as a going system, it was error to exclude, in computing the replacement cost, the cost of cutting and replacing pavements over the water mains, though the pavement was laid by the city since the water mains were laid by the company.

In Equity. Suit by the Wichita Water Company against the City of Wichita. On exceptions to the report of a special master. Exceptions sustained in part, and case re-referred to the master, with directions.

W. R. Voorhis, of New York City, and David Smyth and Vermilion, Evans, Carey & Lilleston, all of Wichita, Kan., for plaintiff.

Robert C. Foulston, of Wichita, Kan., for defendant.

POLLOCK, District Judge. It having been heretofore determined the city had elected to purchase the waterworks system built and owned by plaintiff in said city under the provisions of the ordinance contract between the parties, it became necessary to determine the purchase price which in equity and good conscience complainant should receive and the city pay. Hence, for the purpose of ascertaining this amount as of date December 1, 1917, Hon. John S. Dean was appointed special master. The order of appointment, regarding the ascertainment of value, reads as follows:

"It is further ordered that John S. Dean be and he is hereby appointed special master, to take and hear the proof as to the fair market value of the system of waterworks described in the bill of complaint, situate in the city of Wichita, Kansas, regarded as a going waterworks system, employed for the purpose of furnishing said city and its inhabitants with water, as of date December 1, 1917, and of the amounts expended by the plaintiff in the operation of said waterworks system since the date of purchase by the city, including amounts paid for taxes, extensions, repairs, and betterments, and the amounts received by the plaintiff in the operation of said plant, and the amounts due from the defendant on account of the purchase of said property, and all matters connected therewith, including any sums due for hydrant rentals. And the said special master shall take said proofs and make his return to this court, and file his findings of fact thereon in the office of the clerk of this court, on or before the 20th day of September, 1919."

In pursuance of this order the special master proceeded to take the voluminous proofs offered by the respective parties, to a consideration of the same, to hear arguments of solicitors for the respective parties, and to the making of an exhaustive report on the same. On the coming in of this report many exceptions thereto were taken by both parties, and said exceptions have now been submitted on printed abstracts of the record, briefs, and arguments of solicitors, and come now on for determination.

It is found by the special master the fair and reasonable market value of all the property of complainant, as of date December 1, 1917, was the sum of $1,600,000. On behalf of the Water Company it is urged

this sum is far below the market value of the property as of the day named, and by the defendant city that the same is largely in excess of the true price and sum the city should be compelled to pay.

[1] I have read and considered the report of the special master, and the reasons given by him for the ultimate conclusion reached, and have read the exceptions taken thereto, and the briefs and arguments of solicitors thereon. In determining a matter of this character it is well for courts to bear in mind the master, who hears the evidence and has the witnesses present before him, has a better means of judging of their credibility and of the true worth of their testimony than a reviewing court can possibly obtain from a cold record of the proceedings. Hence it comes about, as to questions of fact found on conflicting testimony by a special master, courts are slow to set aside except for very cogent reasons. The question of merit presented by the exceptions taken generally is: Did the master, in making his estimate as to the true value of the property, proceed along those well-beaten paths trod out by the authorities? If so, did the master fairly determine the true reasonable market value of the property as of the date named?

As I understand the report of the master, he proceeded to inquire what sum of money it would have taken to replace the property of the complainant, which the city is to purchase, on the date to which the inquiry relates, December 1, 1917, including therein an item of $150,000 as the value of an established going concern; that the replacement value was ascertained by the master to be $2,157,781, spot cash. From this sum he deducted for depreciation, occasioned by long use, wear and tear, corrosion, crystallization of materials, etc., an amount not stated, and to this sum added what it would have cost the city in the building of a new plant to have cut paving and macadam work, with depreciation thereto added, making a total of both these items, $616,354.75, and placed his judgment as to the true market value of the property on the day named at $1,600,000, in round numbers.

[2] There can be no doubt whatever but that the replacement or reproduction method of ascertaining the fair and reasonable market value of a public utility property, such as is involved in this case, is the established method employed in the making of such ascertainments, if, as was done by the master in this case, a fair and reasonable amount for its going value be added, and, having thus determined the replacement value from such aggregate sum, there is deducted such reasonable sum or sums as will fairly and justly measure the difference in value between the new plant so reproduced, with new materials used in the reconstruction, and the depreciation in value of the old plant, occasioned by long use, erosion, corrosion, and electrolysis of the mains, obsolescence, and, in short, all and everything which tends to lessen the life of the plant or depreciate the value of the old as compared with the cost of the newly constructed system. Denver Union Water Co. v. City and County of Denver et al., 246 U. S. 178, 38 Sup. Ct. 278, 62 L. Ed. 649; Des Moines Gas Co. v. Des Moines, 238 U. S. 153, 35 Sup. Ct. 811, 59 L. Ed. 1244; City of Omaha v. Omaha Water Co., 218 U. S. 180, 30 Sup. Ct. 615, 54 L. Ed. 991, 48 L. R. A. (N. S.) 1084; City of Knoxville v. Knoxville Water Co., 212 U. S.

1, 29 Sup. Ct. 148, 53 L. Ed. 371; Minnesota Rate Cases (C. C.) 184 Fed. 765.

[3] In my judgment, from an examination of the record in this case, the master did, in accordance with this established rule, proceed to find the replacement value of the property involved in this controversy, including therein a reasonable sum for its going value as a business concern, and the amount so found and stated is well within the proofs, and is a fair, equitable, and just value as of the date to which the inquiry relates, December 1, 1917, considering, as must be done in such estimation, the then cost of labor, materials, and all other things required in the doing of the work of replacing the system. However, the question of merit raised on the exceptions is: Did the special master proceed in the making of deductions from the replacement cost as by him ascertained and stated, in accordance with the established practice in such cases, as shown by his report? In this respect the report reads:

"I have also included the cost of cutting and replacing pavements existing over mains on December 1, 1917, since, in the construction of a new plant in the location of the old one, it would be necessary to cut and replace all pavements over existing mains, as now located. It does not follow, however, that the cost of cutting and replacing pavements over existing mains constitutes an item to be considered in arriving at the market value of the property. The fact that it would be necessary to incur this expense in the construction of a new plant does not add to the value of the property as it now exists. The earning capacity of the plant is not enhanced by the fact that the city has seen fit to construct pavements over the mains, since their installation by the plaintiff. This I understand to be the view of the Supreme Court of the United States, as expressed in the case of Des Moines Gas Company v. Des Moines, 238 U. S. 153. The valuation in that case was for rate-making purposes, but I think the rule has equal application in sales cases."

Now, while it is true, in the case of Des Moines Gas Co. v. Des Moines, supra, the Supreme Court did exclude from the replacement value of the plant involved in that case the cost of placing mains, pipes, etc., underneath the paving and macadam work of the city, yet the question in that case was one of just rates of service to be charged the consumers of gas, and was not one as to the fair market value of the plant involved therein, based on its replacement theory. To have replaced or reconstructed the system of waterworks involved in this controversy in the city of Wichita on the date mentioned would have required the cutting and restoring of a large amount of paving concrete, asphalt and other solid materials. To have done this would have taken much labor and at an expenditure of a large amount of money. Why, then, must not this increased cost of reproduction be computed in the cost of replacement? Any method or system of reasoning employed in mathematical calculations or computations, if sound in principle, must hold good in its last analysis and ultimate conclusion. If not, it is unsound in principle and should not be adopted.

To my mind, the fact the city had done this paving, macadamizing, etc., since the water mains were laid by the water company, would be no ground for excluding this item from the computation. If the city were doing the work of replacement, it would be required to do pre-

cisely the same amount of cutting and restoring the paving, macadam, etc., as would a private company. Suppose by some freak of nature the soft loam soil through which the pipes of the Wichita waterworks system were laid had hardened, since they were laid, into granite rock. The value of the water furnished through the mains to the consumer might not for this reason be thus increased; but the value of the plant based on any theory of reproduction or replacement must have been thereby increased, for, in order to replace or reproduce, it would have required the expenditure of a large amount of money in cutting and blasting the granite.

It follows that the exceptions taken to the report of the special master in excluding this item of replacement must be sustained. As the precise amount of this cost of replacing the system of waterworks in dispute as of the named date cannot be ascertained from the master's report on file in the case, the case will be re-referred to the master with directions:

(1) To ascertain and state from the proofs the fair and just market value of the complainant's property as of December 1, 1917, based upon the reproduction or replacement cost as of said date, including the cost of cutting and replacing of such paving, macadam, and other like work as would be required to be done on said date to have reconstructed the system; (2) to ascertain from the proofs and state what fair and reasonable sums should be deducted from the replacement value so ascertained for depreciation in the value of the old plant, taking into consideration, in so doing, the age of the present plant, the kind, quality, nature, and condition of the materials therein, and all and every other thing and element that impairs its use in the rendering of adequate service for which it was designed and used, or which tends to lessen the life of the plant, or in any manner impairs or lessens its true, fair market value on the date named. The difference between the replacement cost of the system so ascertained, and the amount of depreciation in value so determined, should, to my mind, be the fair market value of the plant on the day it is found the city elected to take it over.

To this extent the exceptions taken are sustained. In all other respects they are overruled and denied, and the matter is re-referred to the special master for a further finding in accordance with the conclusions here reached.

UNION SULPHUR CO. v. REID, Sheriff, et al.

(District Court, W. D. Louisiana. December 13, 1920.)

No. 45.

1. **Taxation ⟸338—Mined sulphur held assessable as movable property, and not as part of realty.**
   Sulphur, which had been removed from underground in a liquid state and allowed to solidify, is not part of the realty, but was properly assessed as movable property, though it was in such large blocks it would have to be blasted before it was loaded for shipment.
2. **Taxation ⟸319(2)—Assessment appealed from is presumed to be correct.**
   The assessment of property for taxation is presumed to be correct; the burden of proof which devolves upon the actor in all litigation being emphasized by the necessity of overcoming the presumption that the Legislature properly exercised its taxing power, and that taxing officers did not violate their sworn duty.
3. **Taxation ⟸611(6)—Evidence held not to show property was assessed at more than its real value.**
   In a suit to restrain the sale of sulphur mine for taxation, which plaintiff claimed was based on an overassessment, computation of the value of the plaintiff's property by an expert mining engineer and economist, though theoretically correct, *held* not to show the property was assessed above its real value, in view of discrepancies between the figures as to price and profit, adopted by the expert, and the past experiences of the company.
4. **Taxation ⟸40(8)—Undervaluation of other property must be intentional and habitual, to establish unconstitutional discrimination.**
   To establish discrimination in the assessment of property, contrary to the state and federal Constitutions, evidence that other property was undervalued in certain instances is not sufficient; but it must be shown that the undervaluation of such other property was intentional, systematic, and persistent.
5. **Taxation ⟸611(6)—Evidence held not to establish intentional discrimination in assessment.**
   Evidence that oil lands in the state were assessed under a rule which made their total valuation less than their production for the year, and that the assessment of agricultural lands was 71 per cent. of the sale price of such lands, including credit as well as cash sales, *held* not to show such discrimination against the assessment of a sulphur mine, which was assessed at not to exceed its real value under a rule applied to salt mines, which were the only other similar property in the state, in view of testimony of plaintiff's own witness that the board of state affairs had, since its organization, been making an honest effort to assess all property at full cash value, as required by the state Constitution.

In Equity. Suit by the Union Sulphur Company against H. A. Reid, Sheriff of Calcasieu Parish, La., and others, to restrain the sale of property for taxes. Decree rendered, denying relief sought.

A. P. Pujo, of Lake Charles, La., and J. T. Kilbreth and Chas. Neave, both of New York City, for plaintiff.

A. V. Coco, Atty. Gen., L. E. Hall, Asst. Atty. Gen., and E. R. Kaufman and J. A. Williams, both of Lake Charles, La. (Harry P. Sneed, of New Orleans, La., of counsel), for defendants.

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

JACK, District Judge. This suit is brought by the Union Sulphur Company to secure a reduction in the assessment of its property in the parish of Calcasieu. Since 1903 it has been engaged in the mining of sulphur by means of a patented process known as the Frasch method. The mine, which covers an area of about 62 acres, was closed early in 1919, and operations have not yet been resumed. The deposit usually referred to as sulphur, but technically known as brimstone, in contradistinction to sulphur in pyrites, is in a strata in the form of a dome. If an ordinary water bowl were filled with earth, and then buried in the ground in an inverted position, the vessel would be a fair representation of the sulphur-bearing rock in the mine. The top of the dome extends to within about 500 feet of the surface. Wells, similar to oil wells, are bored into the deposit and by means of superheated water the sulphur is liquified and pumped to the surface of the earth, where it is congealed in large bins. When the sulphur hardens, the sides of the bins are removed leaving enormous cubes of sulphur. Later it is broken into pieces by blasting, and loaded into cars for shipment. As the brimstone is extracted, the ground above sinks, and it becomes necessary to fill in the surface depression. During the past few years this filling process has been discontinued, and there is now a circular depression extending around the mine, which it will be necessary to fill when operation is renewed.

On January 1, 1919, there had accumulated in the stock pile 939,158 tons of sulphur, graphically described by Mr. Walter R. Ingalls, an eminent mining engineer and economist, as "the greatest accumulation of an elemental substance that the hand of man had ever gathered together." In its rendition to the assessor, the plaintiff combined in one item the sulphur deposit underground and the sulphur in the stock pile, and placed thereon a value of $9,979,961.50, which, together with the mining machinery, valued at $374,145.02, made an aggregate total valuation of $10,354,106.52. The final assessment fixed by the State Board of Affairs was $13,916,275 for the stock pile of sulphur and $15,500,000 for the mine and machinery, making a total of $29,416,275.

The plaintiff, claiming that it had been overassessed in round figures $19,000,000, paid into court the amount of taxes which would be due on an assessment equal to its rendition, which taxes were accepted by the collector without prejudice to the rights of the state and parish to demand payment of the balance claimed to be due, $362,181.20. A temporary restraining order, enjoining the sale of the property for the payment of taxes alleged to be due, was issued, and the question now presented is the validity of the assessment.

It is alleged that, although there are certain fair, reasonable, and well-known principles and methods for determining the actual cash value of mining properties, which are regularly employed for that purpose by mining engineers, economists, and taxing authorities, that the defendants neglected and refused to apply any of such standard principles and methods, but by the application of arbitrary, unreasonable, and discriminatory methods, different from those employed in the assessing of other taxpayers of the same class, assessed plaintiff's property at a

sum three times its actual cash value; that the collection of taxes based on said assessment would constitute a taking of plaintiff's property without due process of law, and would be a denial to plaintiff of the equal protection of the law, in violation of the Constitution of the state of Louisiana and of the Fourteenth Amendment to the federal Constitution; that said assessments are unconstitutional and void, in that they are discriminatory, and the result of "an intentional, habitual, and systematic overvaluation" of plaintiff's property, whereas the property of other taxpayers of the same class is not in like manner over valued.

The prayer of the bill is that the tax collector be enjoined from selling plaintiff's property, and that the assessment of same be declared void, and that defendants be ordered to cancel such assessment, thus removing the cloud upon plaintiff's title, and, in the alternative, that the assessment be reduced to such amount as may be reasonable and proper.

The answer denies that the assessment was erroneous or irregular, and, on the contrary, avers that it was fair and just. It avers that defendants did use fair, reasonable, and well-recognized methods and principles in determining the actual cash value of the property, and specially denies that the assessment was discriminatory, or the result of any intentional, habitual, and systematic overvaluation of complainant's property.

The state Constitution provides that—

"Taxation shall be equal and uniform throughout the territorial limits of the authority levying the tax, and property shall be taxed" in a manner "directed by law: * * * Provided, further the assessment of all property shall never exceed the actual cash value thereof; and provided, further, that the taxpayers shall have the right of testing the correctness of their assessments before the courts of justice." Const. art. 225.

By Act 170 of 1899, as amended by Act 130 of 1902, the "actual cash value" is declared to mean the price at which such property would sell for cash in the ordinary course of business.

[1] The mined sulphur, though requiring blasting in loading for shipment, is not a part of the realty. Like mined coal, it is movable property, and was properly assessed as such, separately from the mine and machinery. The plaintiff was assessed as of date January 1, 1919, with 914,501 tons of such sulphur at $15.22 per ton, being the average amount carried and the average price received during the year 1918. This average amount was 24,657 tons less than the amount actually on hand and subject to assessment January 1, 1919, and the average 1918 price was $4.78 less per ton than it was selling for on that date; the price fixed by the government of $22 per ton being then in effect.

The mine was assessed in 1919 for the same amount as in 1918. The manner in which the assessment for 1918 was made is thus set forth in a letter of the board to the president of the police jury of Calcasieu parish:

"We determined this value by taking the average yearly production of the mine for the past ten years. The figures furnished us by the Sulphur Company show that in the past ten years they have produced 4,148,299 tons of

sulphur. The average production would therefore be 414,829 tons. The Sulphur Company also furnished us a statement showing that they make an average net profit of $5.65 per ton on sulphur. In order to determine the value of the mine, we capitalized the average yearly net profit by 15 per cent. This gave us a total valuation of $15,625,000. In order to have the amount in round figures, we took off of this value $125,000, and made it, in round figures, fifteen and a half million dollars."

It is urged that, as during the year 1918 there was taken from the mine 918,700 tons of sulphur, it was thereafter worth considerably less, and hence that the assessment for 1919 was wholly arbitrary. The valuation of the mine, it is claimed, should not have been based on the past production and profits, but on its expected future production and ability to make profits. Mr. Ingalls, heretofore referred to, placed on the stand by plaintiff, and asked if there were any generally recognized fundamentals or principles of mine valuation, thus succinctly described what is known as the Hoover method, so called because advocated by Mr. Herbert Hoover in a treatise on the subject:

"A. There is just one principle that is commonly accepted and agreed upon, and that principle may be expressed in a very few words; it is simply the capitalization of expected earnings reduced to present value, and allowing for the return of the principal invested—the last being in recognition of the fact that a mine is always a wasting asset. There is nothing new in that principle; it has been employed in the valuation of mines, to my own knowledge, for the last 35 or 40 years, I should say; anyway, as far back as the '80's. * * * It involves the determination of the quantity of ore or valuable mineral existing, or to be expected, in the mine; next, the determination of the annual earnings to be expected from production during the period of the life of the mine, as shown by the determination of the quantity existing.

"In the determination of the annual earnings there are three factors: First, the quantity of production; next, the market price that can be forecasted as being realizable; and, third, the cost of production. The annual earnings having been determined, and the number of years for which those annual earnings can be expected to continue having also been determined, it becomes a matter of mathematical computation as to the present value of such annual earnings. For such a computation it is necessary to assume a rate of interest on the investment, or on the worth of the property, that would correspond with the risks involved in the particular enterprise; and it is necessary, furthermore, to figure a further rate of interest that will produce a sinking fund that will return the principal upon the exhaustion of the mine—the last being in recognition of the fact that a mine is a wasting asset, and that the ore, once taken out of it, is gone forever, and is never in any way replaced."

From the logs of the 546 wells drilled, Mr. Ingalls was enabled to ascertain the general shape of the sulphur-bearing rock, and to estimate the cubical content, and, from such data, to determine approximately the original brimstone content of the mine, estimating to a depth of 1,300 feet, below which it appears it is unprofitable to mine, and, by deduction of the sulphur extracted up to date, to estimate the amount of available sulphur remaining underground. His figures were: Original brimstone content, 10,349,436 tons; extracted to January 1, 1919, 5,813,792 tons; remaining on that date 4,535,644 tons. This estimate of the original content is just about 1,000,000 tons more than that of the Channing Commission, which made an estimate for the government shortly after our entrance into the World War, and, I think, is a liberal

one. Mr. Ingalls says, in making it, he considered that he "had gone to the very limit of engineering daring."

Having determined the estimated quantity of sulphur remaining in the mine, and the life of the mine on a basis of extraction of 250,000 tons yearly, he estimated the probable actual sale of sulphur, its probable selling price, and probable cost of production, and from these, the mine's probable net earnings. The net earnings he capitalized on the basis of 14 per cent. net return on the investment, and 3½ per cent. for a sinking fund to return the capital, a total of 17½ per cent., thus reaching the conclusion of a total valuation of the mine and stock pile from ten to twelve million dollars.

Ingalls' method of valuation of the mine, including sulphur above ground, is thus specifically stated:

"A. * * * I will read in detail what may be taken as a sample of the basic computation. The basis of computation is a net yield of 14 per cent. on the principal, and reinvestment of sinking fund at the rate of 5 per cent.; liquidation of surplus stock of sulphur, 750,000 tons, at the rate of 250,000 tons per annum, at $10 per ton f. o. b. mine; 250,000 tons per annum at $10 per ton produces $2,500,000. Deducting expenses for breaking and loading and for taxes as estimated, $475,000, gives annual net realization of $2,025.000. The present value of $1 per annum for three years at 5 per cent. is $2.72325; the present value of $2,025,000 per annum for three years is therefore $2,025,000, multiplied by the factor of 2.7+, or $5,514.581. Now, in order to obtain that realization, it is, it has been, it would be—give it the form of the verb that you please—necessary to shut down the mining plant for the period of three years, corresponding with this estimate, during which period of idleness it is going to suffer deterioration to the extent of half a million dollars, as I estimated it. That deterioration is a charge against the liquidation of the surplus stock of sulphur. Deducting that charge give a value of $5,014,581 as the present value of the 750,000 tons of surplus stock of sulphur. Understand, please, when I say 'present value,' without further explanation, that I mean value as of January 1, 1919. The sulphur remaining in the mine was 4,535,644 tons. Period of production at 250,000 per annum, 18 years; selling price, $10; cost of production, $6.10; profit per ton, $3.90; annual profit, 250,000 tons times $3.90, or $975,000. Net yield, estimated 14 per cent. Required for sinking fund at 5 per cent., 18 years, 3.5546 per cent. Gross yield required, 17.5546 per cent. Annual earnings of $975,000, capitalized at the rate of 17.5+ per cent., $5,554,100. The above, however, is the value after the lapse of three years, for the reason that realization cannot begin until the surplus stock of sulphur has been liquidated. It is therefore not a present value, but a value deferred for three years. The present value of $1 that cannot be realized for three years is 86.384 cents. The present value of $5,554,100, realizable after the lapse of three years, is therefore $4,797,854. Now, in stressing or pushing production during the period of war, filling of the surface of the mine was neglected to the extent of 2,500,000 cubic yards, according to my own measurements. That filling is something that is owing to the mine; it must be done in order to permit production to proceed. I estimate the cost of that filling at 30 cents per cubic yard, $750,000 as the debt to the mine on that account, deducting which gives a present value for the mine of $4,047,854. As I stated yesterday, a quantity of sulphur that I estimated at 189,158 tons must be carried continuously as a working stock to the end of the life of the mine. At that time, at the end of the mine, after the lapse of 22 years, as herein estimated, that working stock is reckoned as having a net value—deducting charges for breaking and loading, taxes and general expense—as having a net value of $9.30 per ton. The present value of $1 realizable after the lapse of 22 years, is 34.185 cents; the present value, therefore, of 189,000 tons at $9.30 per ton, times the factor of 34.185 is $601,372. Summarizing, then, we have

750,000 tons of surplus sulphur, $5,414,581, which I put into a round figure as $5,400,000; 189,158 tons of working stock of sulphur, $601,317, which I put at $600,000 as a round figure. The value of the mine itself, $4,047,854, which I put, for a round figure, at $4,000,000; total, $9,663,807, which I put at a round figure of ten million dollars. Now, as I said, this is a basic and a typical computation. Values might be reckoned differently within moderate limits, according to the different conditions that might arise. At the time that I made this valuation, I foresaw certain differences in conditions that might arise through modifications of the method of working the mine or otherwise; and I foresaw that such differences might increase the value of the mine to a round figure of twelve million dollars. I reported, consequently, that in my opinion, the value of this mine—and I mean by that, not only the mine, but also the surplus stock of sulphur as I explained yesterday—I rendered the opinion that the value of the mine, in my judgment, as of January 1, 1919, was from ten million dollars to twelve million dollars. By that I mean that I would advise a purchaser to give ten million dollars for it. I would further advise him to go up to twelve million dollars, if he had to do it and he wanted it badly enough; but above twelve million dollars I would not go. My range of valuation of this property, on January 1, 1919, taking all things into consideration, was from ten to twelve million dollars."

From the foregoing it will be noted that he divided the mined sulphur into two lots, 189,000 tons as working stock, and 750,000 tons as surplus stock. The property he then valued as follows: Working stock, $600,000; surplus stock, $5,400,000; mine, including machinery, $4,000,000.

Counsel for the defendant, if they do not specifically admit, at least do not contest the correctness of the estimate of the sulphur remaining in the mine, which, I think, may be accepted as being as near accurate as engineering skill can determine. While counsel does not question Ingalls' figures and estimates as an engineer, they do take issue with him as an economist on his forecasts and figures as to future prices, cost of mining, profits, etc.

Having estimated the total quantity of sulphur above and below ground, Ingalls next determined the life of the mine on the basis of a production and sale of 250,000 tons a year. This reduced production and sale from that of previous years being based on the annulment of the Frasch patents, and the fact that there are now two competing companies operating similar mines at Freeport and Matagouda, Tex., whereas, previously, plaintiff enjoyed a monopoly, having to compete only with imported sulphur in the form of pyrites. On the 1st of January, 1919, however, the Frasch patents had not yet been annulled. On the contrary, they had been affirmed by the lower court and the case was pending on appeal. Furthermore, the Freeport mine had, in disregard of the patents, been in competition with plaintiff since 1914.

The amount of sulphur sold each year during the 11 years immediately preceding 1919 is shown by the following table, which likewise shows the price, profit per ton, and total profit on the product f. o. b. cars at the mine. During only two of these years were the sales as low as 250,000 tons. Of course, the sales during the period of the war would not be a fair criterion, as sulphur was used very largely in the manufacture of munitions:

Year.	Tons Sold.	Average Price.	Average Profit.	Total Profit.
1908	209,281.985	$17.312	$11.874	$ 2,484,800.48
1909	236,053.345	17.872	13.354	3,152,574.91
1910	254,984.479	18.088	13.046	3,326,480.65
1911	264,819.850	18.116	11.631	3,079,765.03
1912	302,341.700	17.374	14.176	4,285,719.92
1913	299,215.225	18.133	13.740	4,111,092.93
1914	301,904.852	18.222	13.367	4,034,846.33
1915	212,187.045	17.810	12.724	2,699,712.31
1916	507,712.991	17.761	12.957	6,513,842.34
1917	657,397.302	18.409	13.496	8,872,146.72
1918	858,847.311	20.791	15.159	13,028,265.09
Totals	4,099,746.085			$55,589,246.71
Average	372,704.189	$18.562	$13.559	$ 5,053,567.90

The average price for future sales, Mr. Ingalls fixed at $10 per ton, being the price at which it was selling when he gave his testimony, but less than half the price fixed by the Government, $22, at which it was selling on January 1, 1919. The least price it had brought in the 11 years previous was $17.312, in 1908.

The cost of production he estimated at $6.10, leaving the net profit $3.90, whereas the average net cost for the past 11 years, including 1911, when the witness states conditions of operation were bad, was only $4.816. During the years 1917 and 1918, when wages were everywhere at their highest, and all kinds of work very expensive, the cost was only $4.577 and $5.215, respectively. With the termination of the war, one might have foreseen a decline in the price of sulphur, but with a corresponding decrease in the cost of production. No good reason is shown to have apprehended an increase in the cost of production during the remainder of the life of the mine, estimated at 22 years, including delay in resuming operation, nor did there appear sufficient reason to have forecasted such a steep decline in profits because of the decreased demand for sulphur and the addition of one competitor. The average net profits for the preceding 11 years had been $13.559 per ton.

Ingalls' estimate of loss by deterioration in the machinery during a 3-year forecast of inoperation exceeds by over $125,000, the total value of the machinery as valued by plaintiff in its rendition of its property to the assessor. In estimating the cost of filling, he gives no figures as to the cost of such work in the past.

Mr. Ingalls' plan and principles for valuation are sound in theory, and are probably the best that could be devised as a basis for a sale. One purchasing or selling mining property must look far ahead, and anticipate future events and conditions, and this he must do at his peril, as the price, once fixed and paid, is final. But in the assessment for taxation of such properties the situation is different. The assessor is guided by conditions as they exist at the time of the assessment, and is not required to hazard an opinion on future prices and cost of production which might increase or decrease the value of the property. Assessments are made annually, so from year to year they may be raised or lowered as new conditions may warrant.

The Hoover system, it seems, has been adopted, for the purpose of assessment, by two states only, Michigan and Minnesota, and in these states for iron mines alone, not for copper and other mines. The usual method of assessment for mining properties is on the basis of the market value of the stock. Such method cannot be applied in the case at bar, for the reason that none of the stock has recently been sold or quoted on the market. Even though the method be entirely applicable and feasible in the appraisement of property for taxation, there is a wide latitude for variance in the estimate of future prices, cost of production and profits, especially where the time is to cover 22 years.

The plan adopted by the Louisiana tax authorities is in force in Arizona. It is by no means perfect, in fact, if applied to a mine in which the ore was almost exhausted, it would work a great injustice. The greater the past production and consequent profits of a mine, the less may be expected in future aggregate production and profits, as, in the language of Mr. Ingalls, a mine is a wasting asset. Such past production and profits, however, do afford a fair basis for the estimate of future annual production and profits up to the exhaustion of the mine, subject, of course, to such changing conditions as may be foreseen.

There is not, after all, a great difference between the application of the methods of the state board and those applied by Mr. Ingalls. Both capitalize earnings—the board, past earnings, which may be a basis for estimating future earnings; Ingalls, future earnings, estimated on his own conclusions as to future conditions. The board figured on the basis of 15 per cent. capitalization; Ingalls, on only 14 per cent. net earnings. The board, however, did not include any percentage for a sinking fund to take care of the principal. Ingalls included 3½ per cent., making a total of 17½ per cent., or 2½ per cent. more than that of the board. At the time the assessment was made, the contents of the mine had not been definitely determined, though the board did have the estimate of the Channing Commission, which, however, is shown to have been a million tons short of the real contents of the mine as estimated by Ingalls. The board, therefore, was not in position, at that time, to estimate accurately the life of the mine, and to make the proper allowance for a return of present value. It may be that the assessment of 1919 should not have been the same as in 1918, after the extraction of 918,700 tons of sulphur, for which no allowance was made; but it likewise may be that the 1918 assessment was too low, rather than that the 1919 assessment was too high.

The court is more interested in results than in methods. If there were a substantial agreement between the state's figures and Ingalls' as to prices and cost of production, there would not be a very material difference in the capitalization. The question for the court to determine is: Was plaintiff's property overvalued in the light of conditions—not as they now exist—but as they existed on January 1, 1919? At the time of the assessment, the record showed that the mine had produced during the past 11 years, nearly 5,000,000 tons of sulphur, yielding a profit of over $55,500,000. With over 4,500,000 tons still in the ground, Mr. Ingalls' valuation of the mine at $4,000,000 places future

promise in glaring disproportion to past performance. Furthermore, that valuation does not square with plaintiff's action in claiming and receiving, in settlement of its income tax with the federal government, a depletion allowance of $2.80 for each ton of sulphur taken from the mine. At this rate, the sulphur in the mine would be worth, in round figures, $11,700,000, which, with the value of the machinery, would aggregate a figure in excess of $12,000,000 as against the $4,000,000 now urged as a fair assessment for the property.

[2] Under well-settled jurisprudence, both state and federal, the assessment appealed from is presumed to be correct. Pons v. Board of Assessors, 118 La. 1101, 43 South. 891; Sunday Lake Iron Co., v. Wakefield Tp., 247 U. S. 350, 38 Sup. Ct. 495, 62 L. Ed. 1154. The rule is thus well expressed in Judson on Taxation, p. 739:

"The burden of proof which devolves upon the actor in all litigation is emphasized in tax litigation; that is, in litigation involving the legality of taxation, in that the litigant must overcome the presumption that assumes the validity of the exercise of legislative power and the further presumption when acts of taxing officers are complained of, that such officers do not violate their sworn duty."

[3] Plaintiff's evidence, I think, fails to establish as against this presumption, the contention that its assessment exceeds the real value of its property; but it is urged that there has been a discrimination against plaintiff—that other property in the state of the same class is not assessed at its full value. This charge is leveled particularly at the assessment of oil lands and of agricultural lands.

Oil wells are bored in a manner similar to those of the sulphur mine, but there is this important difference in the two minerals. The sulphur deposit is in solid form, and its location, therefore, fixed; whereas, oil is a liquid, and of a fugitive character, consequently it is impossible to estimate the amount of oil under any given area, as was estimated the amount of sulphur in the mine. Oil lands could not, therefore, be assessed by the Hoover method. It is contended, however, that the same methods which were applied to oil lands might have been used in the assessment of the sulphur mine, and, if they had been, the assessment would have been, in round figures, only $5,500,000. The rule adopted for the valuation of oil lands is to multiply the average daily production for the first month of the year by the value of 100 barrels of oil on the 1st day of January. No reason is given for such a rule, but it is stated that it is used in buying and selling oil lands. As a result of assessment under this rule, the total assessment of all of the oil lands of the state aggregated only $3,362,848 in 1918, and $5,689,182 in 1919, although the report of the Department of Conservation shows that such lands produced, in round figures, 17,300,000 barrels of oil in each of those years. If $1.50 per barrel, which seems to be a fair average, be taken as the value, such annual production of oil was worth approximately $25,000,000. Clearly these lands are worth more than this small fractional part of the value of the oil taken from them; but it is impossible to say at just what percentage of their real cash value they were assessed.

To prove the contention that the agricultural lands of the state were undervalued, the plaintiff employed Mr. Zack B. Broussard, formerly an inspector for the State Board of Affairs, to have prepared under his supervision lists and tables showing the sale of all such lands, not including judicial sales, in all of the parishes of the state during the years 1918 and 1919. Agricultural lands are divided by the board for assessment into three classes, the minimum value of each class being fixed by the board for the guidance of the local assessor. A comparison of the assessment of such lands with the price they brought at sale shows that the lands in 1918 were assessed at only 71 per cent. of such selling price, and for the year 1919 at only 64 per cent. The sales in the lists and tables included credit sales, as well as cash sales, so that they do not necessarily reflect the actual cash value. The evidence is such, however, as to convince the court that these lands are not assessed at their full cash value, though the percentage may be considerably higher than that figured on all sales, both cash and credit. No evidence was offered as to undervaluation of any other class of property.

[4] In a suit for reduction of assessment, it is not sufficient to prove merely the undervaluation of certain other classes of property. Such undervaluation must be intentional and habitual. State of New York v. Barker, 179 U. S. 284, 21 Sup. Ct. 121, 45 L. Ed. 190. The whole subject is fully reviewed in Greene v. Louisville & Interurban R. R. Co., 244 U. S. 499, 37 Sup. Ct. 673, 61 L. Ed. 1280, Ann. Cas. 1917E, 88. That case involved the assessment of the franchise of the defendant company at its full value, whereas all other property in the state was valued on a 60 per cent. basis; such undervaluation having been intentional, systematic, and persistent. The Supreme Court sustained the lower court in its decree enjoining the collection of the excess portion of the tax on an assessment based on a higher percentage of real value than that on which other property was assessed. 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. (Under section 171 of the Constitution, the rate of taxation may be varied by the General Assembly from year to year, according to requirements.) 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."

It will be noted that the decree was based on the fact that the discrimination was intentional, systematic, and persistent. In the more recent case of Sunday Lake Iron Co. v. Wakefield, 247 U. S. 352, 38 Sup. Ct. 495, 62 L. Ed. 1154, the court held that, while the plain-

tiff's mine was assessed relatively higher than other lands within the county, although the statute enjoined the same rule for all, it was unable to conclude that the evidence established that the state board entertained any purpose or design to discriminate, or that its action was not incompatible with an honest effort, in new and difficult circumstances, to adopt valuations not relatively unjust or unequal.

While recognizing the principle that intentional, systematic undervaluation by state officials of other taxable property contravenes the constitutional rights of one taxed upon the full value of his property, citing Raymond v. Chicago Union Traction Co., 207 U. S. 20, 28 Sup. Ct. 7, 52 L. Ed. 78, 12 Ann. Cas. 757, the court added:

"It is also clear that mere errors of judgment by officials will not support a claim of discrimination. There must be something more—something which in effect amounts to an intentional violation of the essential principle of practical uniformity. The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party. Head Money Cases, 112 U. S. 580, 595; Pittsburgh & Ry. Co. v. Backus, 154 U. S. 421, 435; Maish v. Arizona, 164 U. S. 599, 611; Adams Express Co. v. Ohio, 165 U. S. 194, 229; New York State v. Barker, 179 U. S. 279, 284, 285; Coulter v. Louisville & Nashville R. R. Co., 196 U. S. 599, 608; Chicago, Burlington & Quincy Ry. Co. v. Babcock, 204 U. S. 585, 597."

[5] The State Board of Affairs, in passing on the appeal in plaintiff's case, finally assessed the property in accordance with the system then in effect in Arizona, and according to the same rules by which the two salt mines in the state were assessed, the only two other properties exactly in the same class. The members, themselves, of the state board, denied any intention to discriminate against plaintiff, and the evidence of Mr. Broussard, who was in its employ until 1919, is, in effect, that when he was first employed, property was assessed on a basis of 50 per cent. of its value, but that it had been the honest effort of the board to list all property at 100 per cent.

"Q. Has it not been the honest effort of the Board of State Affairs, since its organization, and especialy at the time you were employed by the board, to list all property in Louisiana at its cash value? A. Surely it had; that was my understanding when I worked for the board. * * *

"Q. You don't know, Mr. Broussard, how much increase has been made by the Board of State Affairs in the valuation of all property in Louisiana, since that board was organized, do you? A. There was a considerable increase, Mr. Sneed; but I don't know the exact figures.

"Q. It has a great deal more than doubled in three years, has it not? A. Yes, sir; there was a multiple of increase, but I don't remember it.

"Q. But all property—everything went up? A. Everything went up.

"Q. It is more than double? A. More than double; possibly merchandise class of property was more than trebled.

"Q. And produce went way up? A. Yes, sir.

"Q. In other words, the Board of State Affairs has made a constant, earnest, and uninterrupted and continued effort to get all property in Louisiana assessed at its actual cash value? A. They certainly have."

Referring to the fact that Mr. Broussard was assessor of his parish from 1909 to 1912, he was asked at what proportion of its cash value the property was carried on the assessment rolls, and replied 33⅓ per cent. Asked how it was now carried on those rolls, he replied: "I think they call it 100 per cent."

Until recently no serious effort was made to comply with the constitutional provision that all property should be assessed at its full cash value. Throughout the state there was gross inequality and lack of uniformity, resulting from the varying standards of the different assessors. The task of raising all assessments to a 100 per cent. basis, and thus securing that equality and uniformity which is the purpose of that provision of the Constitution, is, indeed, a difficult one, and one which requires time and persistence on the part of the assessing authorities, and patience and forbearance on the part of the assessed.

If an honest effort is now being made by the Board of Affairs to place the assessment of all property in the state on a 100 per cent, cash value basis, as stated by Mr. Broussard, who is in a position to know, and for whose veracity plaintiff vouches, the court should hesitate long before undoing its partially completed work. Such action on the part of the court could only be warranted where the evidence clearly showed that the board was in bad faith; that it was not making a bona fide effort to assess all property at its full value, but, while assessing plaintiff's property on that basis, was intentionally, systematically, and persistently undervaluing all other property, or at least the greater portion of all other property.

The evidence shows, at most, but a small proportion of the total property of the state to be underassessed, and fails to show any property of the same class as that of plaintiff to be undervalued. If the great mass of the property in the state is now assessed at is full value—and there is no evidence to the contrary—the board has made good progress during the brief time which has elapsed since its creation in 1916. The court will expect that such inequalities in assessment as have been shown to exist by the evidence in the trial of this case will be corrected as promptly as circumstances will permit.

A decree will be entered, rejecting plaintiff's demands

G. B. MARKLE CO. v. LEHIGH VALLEY R. CO.

(District Court, E. D. Pennsylvania. March 29, 1921.)

No. 7312.

Commerce ⇐91—Interstate Commerce Commission may award reparation for damages accruing after filing of complaint.

On a complaint filed with the Interstate Commerce Commission under Interstate Commerce Act, § 13, as amended (Comp. St. § 8581), the Commission has power to award reparation to the petitioner on account of unjust rates paid after the filing of the complaint and to the time of the determination and award, and in an action under section 16 (Comp. St. § 8584[2]) to enforce its award, its finding and order are evidence of the damages accruing after as well as before the filing of the complaint.

At Law. Action by the G. B. Markle Company against the Lehigh Valley Railroad Company on an award of the Interstate Commerce Commission, tried with two other cases. Judgments for plaintiffs.

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

Allen S. Olmsted, 2d, and Wm. A. Glasgow, Jr., both of Philadelphia, Pa., for plaintiff.

Maurice Bower Saul, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The parties to this cause waived the right to a trial by jury, and it was accordingly tried by the court. Along with it were tried other cases against the same defendant on the same general facts and raising the same question, as follows: Pardee Brothers & Co., Incorporated, June Sessions, No. 7314; Alan C. Dodson et al., June Sessions, No. 7366. By stipulation the evidence is to be treated as the evidence in each case, except, of course, that bearing upon the sum for which judgment is to be entered.

We have appended to this opinion formal findings of fact and conclusions of law, and restrict ourselves now to a discussion of the questions raised at the trial. There is one main question involved, and that a sharply defined and very narrow one. According as it is ruled, other subsidiary questions may arise. Subject to these the main question is decisive of the whole case. The question raised and discussed may be thus stated:

Statement of the Question Involved.

Is the report of the Interstate Commerce Commission, awarding reparation to the plaintiff, evidence of that part of the reparation which accrued after the date on which complaint was filed with the Commission?

History of the Controversy.

The plaintiff was a shipper of coal from the Lehigh district to Perth Amboy. The defendant is the railroad carrier which made the haul. For this the plaintiff was charged at certain rates, which it protested as excessive, and on July 2, 1913, filed a formal complaint asking the Commission to so find, and after finding a rate (all in excess of which was unreasonable) to award reparation to complainant for the unjust rates which the complainant had up to that time paid, and all which it might thereafter pay up to the time of award. The Commission found the sum due by way of reparation covering both the period after complaint made and before. There are other features of the proceedings before the Commission which may bear upon the question involved.

The defendant made answer to the complaint, and the parties went fully into their proofs. In the course of the proceedings the stipulation (which is a usual one) was made that the question of the reasonableness of the rates should be first determined, and the question of reparation and the sum to be allowed to complainant be deferred until this first question was determined. This course was followed, and, the unlawfulness of the rates and complainant's right to reparation having been found, the parties without objection went into the usual investigation to determine the sum which should be awarded to complainant by way of reparation.

An award was made by the Commission, after full argument and the submission of elaborate briefs. There is no doubt, and the finding

is formally made, that the defendant had full notice, and knew what the claim was which was made, and sought to meet it by an effort to reduce the sum to be awarded.

The Present Action.

The defendant refused to pay the sum awarded, and the plaintiff thereupon brought this suit in conformity with the Act of Congress. At the trial the plaintiff offered the findings of the Commission and its report in evidence, and there (so far as affects the question which we propose to consider) rested. The defendant offered no evidence.

Discussion.

On this statement of the evidence no question would be raised of the right of the plaintiff to judgment for the full sum claimed, except for the fact (appearing by the evidence), to which we have already alluded, that the sum awarded included reparation for unreasonable rates charged after the filing of the original petition and complaint. If the basis of calculation by which the Commission reached the sum awarded was wrong, this overcomes the legal effect of the report as prima facie evidence that the sum awarded is due, and the finding of the sum due must be made upon the other facts in evidence. Pennsylvania v. Jacoby, 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. 165. If the defendant is right in its contention, the award is for about twice what it should have been.

It is to be observed that we are concerned with two things: One is the award of the Commission; the other, the judgment to be entered in the present action. It is because of this of value to inquire into the nature of each. The acts of Congress recognize two tribunals to which the injured party may apply for redress. One is the Commission; the other is the court. When he applies to the Commission he has the option of limiting the prayer of his petition to the one subject of rates or of adding a prayer for reparation. If he exercises his first choice, and only a rate finding is made, he must then bring his action in the courts, as he would bring any other action, using the finding of the Commission as evidence (as indeed it is the only evidence) of the unreasonableness of the rates, and establishing by other evidence the money measure of his injury. Whatever judgment is recovered in such action is a judgment in all respects as is any other judgment. If the complainant exercises his second choice, by asking for reparation, and it is awarded, the defendant of course may pay the award. If payment is made, the award is to all intents and purposes a judgment, to which the doctrine of res adjudicata is applicable, and the complainant is concluded thereby.

The complainant cannot, however, enforce the collection of the award by execution process. In this respect it is not a judgment. To enforce payment the complainant is driven to his action at law, which is then based upon the award, the only value of which to the plaintiff (other than the finding of unreasonableness) is that the report of the Commission and its findings are made prima facie evidence of the sum due, and he may tax counsel fees as part of his costs. The practical

result is that the award is or is not a judgment as respects the defendant at his election. As respects the complainant, the award is conclusive against him but not in his favor. If the defendant does not accept the award, it is not a finding of the sum due the complainant, but merely evidence of what is due him, which he may offer in an action at law. In other respects, it has only the effect which it would have had, if no reparation had been asked.

The occasion and need for making this disparity between the rights of the parties is obvious. The complainant in the instant case, as has already been stated, asked for and was awarded reparation which the defendant refused to pay, and this action was brought. With the evidence limited as it is to the report of the Commission and its findings, the sole question is that indicated of whether the plaintiff is restricted in its recovery to the amount of the freights paid before the first complaint made to the Commission.

We find ourselves in accord with the general propositions of law upon which the argument of counsel for defendant proceeds. It is the particular proposition, to which the general propositions are urged to lead, which we cannot accept. This proposition is that a complainant before the Commission is limited to the legal injury which he has suffered, and in consequence his prayer for reparation can relate only to the freights he has actually paid within the two years preceding his complaint. If this proposition be sound, it follows that he must file a fresh complaint within every succeeding two-year period. If the Commission were restricted, as the courts are, to causes in which the plaintiff has a legal cause of action, and were subject to all the limitations of procedural law, the proposition advanced might be accepted.

Just here we think is the weak, or rather the missing, link in the chain of the argument. The Commission is wholly the creature of the act of Congress. Primarily it is an administrative body, and although there have been committed to it judicial functions, these are incidental to its main duties, and in the performance of none of its work has it been hampered by any of the requirements of a system of procedural or of pleading forms, except those of the simplest and most necessary character.

The fallacy in the argument addressed to us lies in the assumption that the test of the right to complain to the Commission is the same test which the common law applies to a right or cause of action at law. Every action at law is based upon a legal injury suffered. The damages may be nominal, or they may be substantial; but there must be a legal injury, which has been sustained by the plaintiff, or he has no cause of action. If, therefore, this plaintiff could have brought and sustained an action at law upon the averment that he had paid rates which were unreasonable, he would have been limited in any judgment recovered to what he had averred he had thus paid. In other words, his cause of action (if that were a good cause of action) arose as and when he made the payments. Louisville v. I. C. C., 246 U. S. 638, 38 Sup. Ct. 408, 62 L. Ed. 914.

If the right to complain to the Commission was in this respect of the nature of a right to an action at law, the conclusion we are asked

to draw might well follow; but (and here is the crux of the argument) it is not, and does not even partake of this nature. It is, on the contrary, of a wholly different nature, has an entirely different purpose, and is merely preparatory to the action which may be brought in the courts. It was without doubt devised as a substitute for an action at law, and if there had been no constitutional obstacle in the way would just as surely have been made exclusive. If the test of the right to this remedy were the same as the right to a legal action, such a complainant would be without remedy, or at least any which he could apply. This is for the same reason the complainant is forced to go in the first instance to the Commission. It is because without the finding of unreasonableness he has no legal cause of action, or none which he can prove. His right of action is based upon this, and the only evidence of it is the finding of the Commission. Texas v. Abilene, 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; Texas v. American, 234 U. S. 138, 34 Sup. Ct. 885, 58 L. Ed. 1255.

At the time of complaint made to the Commission, there is no cause of action in the legal sense, nor is the complaint of a legal injury, because none can be proven until the Commission has acted. The petition, in the first instance, merely avers an offense against the policy of the law on the part of the carrier, in that it is charging unreasonable rates and invokes the jurisdiction of the Commission to so find. It then may add the complaint of an injury to the complainant and ask for an award of reparation. In an untechnical sense the complaint is both of a past and continuing wrong, neither of which is a legal injury in the technical common-law sense. The power of the Commission to function is derived from the act of Congress. The power to inquire into and find what is just reparation is no more dependent upon the existence of an accrued legal right of action at the time the complaint is filed than is the power to find the rates to be unreasonable dependent upon the existence of a legal right of action.

The whole argument of defendant is based upon the thought that the proceedings before the Commission are governed by all the technical rules which apply in a common-law action, and that the award must have all the formalities of a judgment. The thought is born of a wrong conception of what the award is. As already pointed out, it is not a judgment unless the defendant elects to make it such by paying it. If he refuses to pay, it is nothing more than prima facie evidence of the amount of the damages. It may be attacked, as it may be supported, by other evidence. Even in the strictest view of the common-law rights of the plaintiff, all that is required is that what is claimed shall have been due at the time of action brought. The full sum claimed is due before suit is brought at law, so that the defense does not have even technical justification or support.

Our view, however, is that this technical view is not the proper one. The complaint was of a substantial wrong, although not of a technical legal injury. The injurious act was a continuing one, and the relief should be as broad as the wrong. It was therefore logical and proper in the complainant, and as we think in conformity with the act of Congress, to include in his prayer for an award everything past, pres-

ent, and to accrue to which he could prove himself entitled. Inasmuch as the petition might be limited to a finding in respect to rates, or might include reparation, the carrier has a right to notice of what is asked, and the scope of the claim for reparation, in order that its fact merits may be met. No special form of this complaint feature of the petition is prescribed. It meets all the requirements, if it gives to the opposing party all the information which will enable him to prepare his defense. The rulings of the Commission and of the courts confirm this. Michigan v. Freight Rates, 27 Interst. Com. Com'n R. 36; Woodward v. Railroad, 15 Interst. Com. Com'n R. 172; Dickerson v. Railroad (C. C.) 187 Fed. 878.

We do not see, under the facts of this case, that the two-year limitation has any special relation to the question raised. It was without doubt the purpose of Congress to protect carriers against stale complaints and claims. To this end the power is withheld from the Commission to entertain complaints which are over two years old. This is a limitation of power or a condition of its exercise, not merely a statute of limitation, which it is the privilege of the carrier to plead, and which may be waived or tolled. Phillips v. Grand Trunk, 236 U. S. 662, 35 Sup. Ct. 444, 59 L. Ed. 774.

The limitation of the allowance of reparation to cases in which it is asked is likewise a limitation of power. The first is an imperative call upon the complainant to move promptly, but neither of them is any limitation of the power of the Commission to deal with reparation cases in which a complaint has been filed in time. It is, of course, true that the Commission has no power to award reparation on its own initiative, and can only do so on complaint; but after a complaint, such as was filed in this case, has once been filed, there is a complaint before the Commission to meet and cover every unjust exaction, not only those made before the petition was filed, but every one thereafter made, as soon as it is made, just as fully as if a new formal complaint had been filed after every such payment was made.

We find nothing in the act of Congress, under any construction which can be given it, which requires the filing of more than one complaint, if the first one is broad enough to cover, and gives fair notice of, the claim which is eventually allowed, and there is certainly nothing practically gained by mere formal repetitions of claims and notices once given, accepted, understood, and acted upon by the party concerned.

The conclusion reached is that the original petition contained a complaint which justified the Commission in acting, and indeed required it to act, upon the prayer for reparation, and supports the finding which the Commission made. Counsel for plaintiff has other positions upon which he takes his stand with a confidence which may be justified, if the ground upon which we have rested the right of the plaintiff to recover be untenable; but, entertaining the view which we have taken and presented with perhaps unnecessary fullness, we see no need to add to the length of an already overlong opinion by discussing them.

One or two more or less formal matters require disposal. Objections were made to the admission of evidence. These were all made

to raise the question we have discussed. It was impossible to rule these questions as questions of evidence without ruling the question to which the evidence related. Because of this, and because the objections were within the spirit of equity rule 46, we received the evidence subject to the objections. The objections are now formally overruled, the evidence admitted, and exceptions in each and every instance allowed to defendant. Exceptions are also allowed to the answers to requests for findings of fact and conclusions of law, and to the findings made and conclusions reached, and also to the entry of judgment in each case.

The parties can doubtless agree upon the sums for which the judgments are to be rendered in accordance with this opinion, and they will be entered accordingly. To make definite the dates of the judgments, none are now entered; but we retain control of the cases for the purpose of entering judgment, and reserve also the allowance of counsel fees, in order to tax the same as part of the costs.

EBERSOLE et al. v. McGRATH, Collector of Internal Revenue.*

(District Court, S. D. Ohio, W. D. October 5, 1920.)

No. 2862.

1. **Statutes ⇐245—Imposing taxes strictly construed in favor of the citizen.**
A statute imposing taxes is not to be extended by implication beyond the clear import of the language used, and in case of doubt is to be construed most strongly against the government and in favor of the citizen.

2. **Powers ⇐41—Appointee under power takes from donor of power.**
It is the general rule of the common law that the appointee of an estate takes from the original donor, and not from the donee of the power.

3. **Powers ⇐41—Appointed estate under general power subject in equity to debts of donee's estate.**
Where a power of appointment is general, the appointed estate is subject in equity to the debts of the donee's estate, but only in case his own estate is insufficient.

4. **Internal revenue ⇐8—Property passing under appointment by donee of power not subject to estate tax.**
Property left in trust by the will of a testator who died prior to 1916, the income to be paid for life to a son with power to the son to dispose of the remainder by will, which power he exercised after 1916, *held* not subject to tax under Estate Tax Act Sept. 8, 1916, § 202 (Comp. St. § 6336½c).

At Law. Action by William V. Ebersole and others, executors of the will of Omer T. Glenn, deceased, against Stephen McGrath, Collector of Internal Revenue. Judgment for plaintiffs.

John V. Campbell and Edward D. Schorr, both of Cincinnati, Ohio, for plaintiffs.

R. T. Dickerson, Asst. U. S. Atty., of Cincinnati, Ohio, and Wayne Johnson, Solicitor of Internal Revenue, and M. F. Mitchell, Sp. Atty., Bureau of Internal Revenue, both of Washington, D. C., for defendant.

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

*Appeal dismissed 272 Fed. 1022.

PECK, District Judge. On demurrer to the petition.

This is an action to recover the amount of a succession tax paid under protest. The question presented is whether the exercise by will by Omer T. Glenn, deceased, of a power of appointment under the will of his father, William Glenn, who died prior to the enactment of the estate tax law of 1916, whereby Omer T. Glenn, the donee of the power, was given a right of support and maintenance from the income of a trust estate for life without power of anticipation but with power of disposing by will of the remainder to vest upon the death of his surviving brother and sisters, which power he exercised after the passage of the said act, is subject to the succession tax therein prescribed.

The answer is to be found by the interpretation of section 202, c. 463, of the Act of September 8, 1916 (Comp. Stat. § 6336½c). The pertinent portion is as follows:

"The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated:

"(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and is subject to distribution as part of his estate.

"(b) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title. * * *"

[1] The subject is approached under guidance of the canon that:

"In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specificially pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen." Gould v. Gould, 245 U. S. 151, 38 Sup. Ct. 53, 62 L. Ed. 211.

It is claimed by the defendant: First, that the appointed estate is within the language of subdivision "a," as being an interest in the property of the decedent at the time of his death, which after his death was subject to his debts, the costs of administration, and to distribution as part of his estate; and, second, that it is an interest in property of which the decedent has made a transfer in contemplation of, or intended to take effect in possession or enjoyment, at or after his death, within the meaning of subdivision "b."

[2, 3] It is the general rule of the common law, subject to certain exceptions, that the appointee of an estate takes from the original donor and not from the donee of the power. Chanler v. Kelsey, 205 U. S. 466, 27 Sup. Ct. 550, 51 L. Ed. 882; Sugden on Powers (8th Ed.) p. 470. It is equally well settled that where the power of appointment is general, the appointed estate becomes assets subject in equity to the creditors of the donee upon his death. Brandies v.

Cochrane, 112 U. S. 344, 5 Sup. Ct. 194, 28 L. Ed. 760; Johnson v. Cushing, 15 N. H. 298, 41 Am. Dec. 694; Rogers v. Hinton, 62 N. C. 101; Clapp v. Ingraham, 126 Mass. 200; 3 Williams on Executors (9th Ed.) p. 128; Sugden on Powers (8th Ed.) p. 474; 4 Kent, Com. 338; 22 Am. & Eng. Ency. of Law (2d Ed.) 1146. The rule has been rejected in Pennsylvania. Commonwealth v. Duffield, 12 Pa. 277. It is subject to certain limitations. It does not apply as against bona fide purchasers for value from the appointee (Patterson v. Lawrence, 83 Ga. 703, 10 S. E. 355, 7 L. R. A. 143), nor until the testator's own assets are fully exhausted (Emmons v. Shaw, 171 Mass. 410, 50 N. E. 1033), nor in favor of creditors who were such before the execution of the power. (Sarah Wales' Administrator et al. v. Lora Bowdish's Executor et al., 61 Vt. 23, 17 Atl. 1000, 4 L. R. A. 819). It is an equity in favor of creditors, in whose behalf the donee should, and in equity must, appoint the estate, and does not go generally to the title to the estate.

In Fleming v. Buchanan, 3 De G., M. & G. 976, the rule was thus stated by Lord Justice Knight-Bruce:

"Resort is to be had to property of that description only in favor of the creditors, to prevent their being unpaid, and therefore that such property should not be resorted to until all the testator's estate, in a more accurate sense of the word, has been exhausted in payment of debts. Such I take it to be the rule, and the course of administration. Specific legacies must if necessary suffer, as well as every other claimant of an interest in property which is strictly the testator's."

This language was declared to be an accurate statement of the law in Beyfus et al. v. Lawley, 72 L. J. Ch. 781 (House of Lords), by Lord Lindley, where, in sustaining the equity of creditors, it was said:

"The property appointed in such a case is treated as assets of the testator exercising the power, and the assets so appointed are regarded as property bequeathed by him. When I say assets I do not mean general assets, but assets nevertheless applicable to the payment of the appointor's debts after all his own property has been exhausted. Again, personal property appointed by will under a general power, although not a legacy for all purposes, is treated as personal estate bequeathed by him."

In Jenney v. Humphries, 6 Maddock, 264, it was stated thus:

"When there is a general power of appointment by will, and an appointment is made, the appointee is a trustee for creditors; but it is not for creditors at the time of the execution of the will, but at the death of the testator."

In Townshend v. Windham, 2 Ves. 1, it was held that a court of equity would regard the appointed estate as part of the appointee's estate after his death for his creditors; that to permit the appointment so as to defeat the creditors would work a fraud upon them.

[4] The precise state of facts involved in the instant case was presented in Lederer v. Pearce, 266 Fed. 497 (C. C. A. 3), affirming Pearce v. Lederer (D. C.) 262 Fed. 995, and the right to impose the tax was there denied. But that case, which arose in Pennsylvania, was ruled on the specific ground that the rule that the appointed estate is subject to the creditors of the donee's estate has been abrogated in that state, and the law there settled to be the contrary. In Ohio there

was not, at the time of the death of Omer T. Glenn, either statute or, so far as appears, decision upon the subject, and it must therefore be presumed that the general rule was in force.

It has also been held, although perhaps it may not be said to be so well established, that the executor of the donee is entitled to take possession of, and administer, the appointed estate. It was so distinctly ruled in Olney v. Balch, 154 Mass. 318, 322, 28 N. E. 258. However, this appears to be merely a doctrine of convenience. In Emmons v. Shaw, supra, 171 Mass. at page 411, 50 N. E. at page 1034, it is said:

"It is also settled that for purposes of administration, it is more simple and convenient that the property should be administered by the executor of the will of the party exercising the power."

See, also, Hayes v. Oatley, 14 L. R. Eq. Cas. 1; Hoskins Trusts, L. R. 5 Ch. Div. 229; same, L. R. Ch. Div. 281.

The foregoing authorities, while tending to support the contention of the defendant, do not give a satisfactory affirmative answer to the question: Was the estate appointed by Omer T. Glenn an interest therein of the decedent "at the time of his death" which after his death was subject to distribution "as part of his estate"? Assuming that it did constitute, in a restricted sense, assets subject to debts, and even subject to expenses of administration (although no case has been pointed out which goes that far), and that for convenience it might properly be administered by his executor, yet was it, in strictness and for the purposes of the succession tax, part of his estate? This question is, in the last analysis, substantially that raised by the second contention above referred to, to wit, that the exercise of the power of appointment by the will of the donee was a transfer of an interest in property made by the decedent in contemplation of death.

The defendant relies most strongly upon Chanler v. Kelsey, supra, The question considered there, however, was not whether the exercise of such a power of appointment was a transfer of the donee's estate within the meaning of a law such as that now under consideration, but whether it was an act upon which a state could lay a succession tax without violation of the Fourteenth Amendment and without impairing the obligation of a contract. By the law of the state of New York there construed it was declared that the exercise of the power of appointment should be "deemed a transfer" taxable as though the property belonged to the donee. The Court of Appeals of New York had held that the tax was laid upon the exercise of the power of appointment by will "as an effective transfer for the purposes of the act." At page 478 of 205 U. S., at page 554 of 27 Sup. Ct. (51 L. Ed. 882), the Supreme Court say:

"As in Orr v. Gilman, 183 U. S., supra, we must accept this decision of the New York Court of Appeals holding that it is the exercise of the power which is the essential thing to transfer the estates upon which the tax is imposed. That power was exercised under the will of Laura Delano, a right which was conferred upon her under the laws of the state of New York and for the exercise of which the statute was competent to impose the tax in the exercise of the sovereign power of the legislature over the right to make a disposition of property by will."

Upon reflection it seems clear that the conclusion there reached was not that the execution of a power was generally to be deemed a transfer or conveyance for all purposes or that the estate appointed was to be deemed that of the donee, generally speaking, but that, for some purposes, the execution of the power does constitute a transfer so as to warrant the Legislature of a state to declare it such for the purposes of taxation. I do not understand that decision to abrogate the general rule of the common law, but to hold that a state may properly do so by statute. The statute now under consideration, therefore, must be construed in the light of the common law. U. S. v. Sanges, 144 U. S. 310, 12 Sup. Ct. 609, 36 L. Ed. 445; Schick v. U. S., 195 U. S. 65, 69, 24 Sup. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585. In State v. Sullivan, 81 Ohio St. at page 95, 90 N. E. at page 149 (26 L. R. A. [N. S.] 514, 18 Ann. Cas. 139), the court say that a statute "must be read and construed in the light of the common law in force at the time of its enactment, and the Legislature will not be presumed or held to have intended the repeal or modification of a well-settled rule of the common law then in force, unless the language employed by it clearly imports such intention."

In recognition of the common-law rule that the appointee takes from the donor and not from the donee of the power, it has been generally, and, indeed, so far as can be found, without exception, held that a succession tax is not applicable to the exercise of such power of appointment unless made so by express language. Thus, the estate tax acts of the United States of 1898 (30 Stat. 464), of New York of 1892 (Laws N. Y. 1892, c. 399), of Massachusetts of 1891 (St. Mass. 1891, c. 425), and the second section of the Act of Great Britain of 1853, as well as the act of Pennsylvania, were severally construed not to cover the exercise of a power of appointment; express language to that effect not being present. Fidelity Trust Co. v. McClain (C. C.) 113 Fed. 152; affirmed 122 Fed. 1020, 57 C. C. A. 679; Matter of Harbeck, 161 N. Y. 211, 55 N. E. 850; Emmons v. Shaw, supra. The act of Massachusetts construed in the last case seems to have been quite as broad as that now considered. Acts of Massachusetts 1891, c. 425, § 1, quoted in Balch v. Shaw, 174 Mass. at page 147, 54 N. E. 490. See, also, Commonwealth of Pennsylvania v. Williams' Executors, 13 Pa. St. 29; 37 Cyc. 1566.

In Attorney General v. Mitchell, 6 Q. B. Div. 548, section 2 of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), was under consideration. It provided:

"Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation" shall be the subject of a tax.

The question there was whether the exercise of a power of appointment was such "a disposition of property" by reason of which the beneficiary became entitled. And it was held that the appointees de-

rived their interest from the original settlor, the donor of the power, and not from the donee, the appointor.

In Attorney General v. Pickard, 3 Meeson & Welsby, 551, the case was the converse, viz., the crown sought to tax the appointment as a legacy under the will of the original donor of the power. In sustaining the tax it was said by Lord Abinger that the general rule, that interests created by the execution of a power take effect precisely in the same manner as if created by the instrument which gives that power, was subject to only three exceptions: (1) Where the question of the time of vesting of the appointee's estate becomes important; (2) when the instrument executing the power has not been duly registered; and (3) when the execution of a power to convey lands is under such circumstances as to make the conveyance fraudulent (as against creditors) under the statute of Elizabeth. Affirmed 6 Meeson & Welsby, 348.

Suppose, in the present case, that the donor, William Glenn, had died after the passage of the act. There is no doubt that the transmission of the estate in question would have been subject to the tax, notwithstanding the appointee remained yet to be named. Now, if the tax be also imposed upon the nomination of the appointee by the donor's son, Omer, it would be twice taxing what was, at common law, but one succession. That the common-law view may be rejected, and the appointment regarded as a separate transmission by statutory enactment to that effect, is settled. Chanler v. Kelsey, supra. But is there to be found in the act now under examination language sufficiently clear to import an intention to so modify the then existing rule of the common law?

The language of Chief Baron Pollock in Re Barker, 7 Hurlstone & Norman, 108, seems to be peculiarly applicable and in consonance with the rule of construction in Gould v. Gould, supra. It is:

"The subject has a right to say, 'whatever may be the apparent substance of the transaction, technically I derive my interest, not from the person exercising the power of appointment, but from the person who created the power.' We ought not to hold that the subject must pay the larger rate of duty because the transaction is capable of being viewed in different lights. The legal effect of the transaction is, that the person taking the benefit under the power takes it, not from the person exercising the power, but from the person creating it."

To give the act the defendant's interpretation would be to make the appointment subject to the tax in those states in which the appointed estate is regarded as assets for creditors, and not in others, as Pennsylvania, where the contrary rule obtains. Yet by the terms of the act the amount paid creditors is exempt. The net estate only is its object. The result would be that the estate, where subject to diminution by creditors, would also be subject to the tax, but, where free of creditors, would be free of the tax. It was held in Pearce v. Lederer, supra, that this inequality of result did not prevent the exemption of the appointed estate from taxation in Pennsylvania, where it is not subject to creditors, as has been seen. But in that case it was unnecessary to go beyond that point and determine whether the appointed estate was in strictness an estate of the donee. And in making the latter determina-

tion, now required, it would seem that a construction which would lead to an inequality as among the citizens of the several states in bearing the burden of the tax should not be favored.

It seems, therefore, to come to this: If the words "the interest therein of the decedent at the time of his death which after his death is subject to distribution as part of his estate" be given a liberal construction, the defendant should prevail. But if this language be strictly construed, as seems proper, the plaintiff is entitled to have the tax refunded, for, speaking with exactness, the estate appointed was not the interest of decedent at the time of his death, nor part of his estate.

It is urged by the government that the subsequent amendment of February 24, 1919 (chapter 18, § 402, Comp. Stat. § 6336¾c), subjecting the appointment to the tax, must be considered as declaratory and explanatory of the prior act. But this would seem to be no more than an admission of doubt as to the former intention of Congress, and of that doubt the citizen sought to be taxed is entitled to the benefit. And furthermore, the inference would be rather that the former act was insufficient. Matter of Harbeck, supra, 161 N. Y. at page 217, 55 N. E. 850.

Reading, then, this act in the light of the common law, and bearing in mind that its provisions are not to be extended beyond matters specifically pointed out, and that doubts are to be resolved in favor of the citizen, it is held that the exercise of a power of appointment by will is not within the meaning of the act in question.

It follows that the demurrer to the petition will be overruled, and as the government has stated that it does not desire to further plead, the plaintiff will have judgment for the amount claimed.

ELLIOTT v. UNITED STATES et al.

(District Court, N. D. Ohio, E. D. December 9, 1920.)

No. 563.

1. **Army and navy ⊂=51½, New, vol. 12A Key-No. Series—Secretary of Treasury not proper defendant in suit for war risk insurance.**
   In a suit to determine the right of several claimants to installments due on a war risk insurance certificate issued to a soldier, the Secretary of the Treasury is not a proper party defendant.

2. **Army and navy ⊂=51½, New, vol. 12A Key-No. Series—Suit to determine right to war risk insurance held equitable.**
   War Risk Insurance Act, § 402 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu), authorizing an action against the United States on certificate of war risk insurance, includes any form of action, legal or equitable, appropriate to the facts in the case, and a suit by a claimant against the United States and an adverse claimant to have the right of the plaintiff to the installments determined, in which the United States had brought in as defendants two other possible claimants, presents equitable issues rather than legal, so that it will not be transferred to the law side of the court.

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

3. **Army and navy ⟸51½, New, vol. 12A Key-No. Series—War Risk Insurance Act permits change of beneficiaries but not revocation.**
War Risk Insurance Act, § 402 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu), giving insured the right to change the beneficiaries without their consent, merely authorizes insured to make a change in the beneficiaries, but does not authorize him to cancel the certificate or revoke the designation of beneficiaries without the designation of a new beneficiary.

4. **Army and navy ⟸51½, New, vol. 12A Key-No. Series—Void designation of new beneficiary does not defeat right of original beneficiary.**
Where an applicant for war risk insurance had properly designated his mother as beneficiary, a subsequent designation by him of a wife, which was void because both the soldier and the designated wife were then married to others, does not have the effect of nullifying the designation of the mother as the beneficiary, and she is entitled to the insurance notwithstanding the attempted change.

5. **Army and navy ⟸51½, New, vol. 12A Key-No. Series—Recognition of child held not to show designation of mother as beneficiary was in trust.**
Where the designation by a soldier of a wife as beneficiary of his war risk insurance was void because both parties were then married to others, the recognition by the soldier of a child as his own is not sufficient to show that his designation of the child's mother as the beneficiary was intended to be in trust for the child, who could have been designated as beneficiary under War Risk Insurance Act, § 402 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu), and Gen. Code Ohio, § 8591.

In Equity. Suit by Ruth Elaine Elliott, a minor, by her next friend, Adeline M. Elliott, against the United States of America, David F. Houston, Secretary of the Treasury, and another, in which the United States had Adeline M. Elliott and another made parties defendant. Motion to dismiss suit as to defendant David F. Houston sustained, motion to transfer the cause to the law side of the court denied, and decree entered determining that defendant Mary Cecelia Elliott is the beneficiary of the war risk insurance involved.

Herrick, Hopkins, Stockwell & Benesch, of Cleveland, Ohio, for plaintiff.

Paul Howland, of Cleveland, Ohio, for defendant Mary Cecelia Elliott.

William J. Dawley, of Cleveland, Ohio, for defendant Anna Maguire Elliott.

Harry L. Eastman, Asst. U. S. Dist. Atty., of Cleveland, Ohio.

WESTENHAVER, District Judge. This action was brought originally against the United States of America, David F. Houston, Secretary of the Treasury, and Mary Cecelia Elliott, and involves conflicting claims to the war insurance of Andrae Hugh Elliott, an enlisted man of the United States military forces, who was killed in France December 21, 1918. The controversy arises under the War Risk Insurance Act of October 15, 1917, as later amended by act June 25, 1918 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, §§ 514a, 514kk et seq.). The insurance certificate was issued, and the disposition of the proceeds thereof is to be made under section 402 (Comp. St. 1918, Comp. St. Ann. Supp. 1919, § 514uuu). This section, so far as material, is as follows:

"That the director, subject to the general direction of the Secretary of the Treasury, shall promptly determine upon and publish the full and exact terms and conditions of such contract of insurance. The insurance shall not be assignable, and shall not be subject to the claims of creditors of the insured or of the beneficiary. It shall be payable only to a spouse, child, grandchild, parent, brother, or sister, and also during total and permanent disability to the injured person, or to any or all of them. The insurance shall be payable in two hundred and forty equal monthly installments. * * * Subject to regulations, the insured shall at all times have the right to change the beneficiary or beneficiaries of such insurance without the consent of such beneficiary or beneficiaries, but only within the classes herein provided. If no beneficiary within the permitted class be designated by the insured, either in his lifetime or by his last will and testament, or if the designated beneficiary does not survive the insured, the insurance shall be payable to such person or persons, within the permitted class of beneficiaries as would under the laws of the state of the residence of the insured, be entitled to his personal property in case of intestacy."

February 12, 1918, Andrae Hugh Elliott applied for insurance pursuant to this and other sections, in the sum of $10,000, designating in his application his mother, Mary Cecelia Elliott, as beneficiary, and certificate No. 1,124,697 was issued to him. April 20, 1918, by an application properly executed, he attempted to change the beneficiary, naming therein Adeline Agnes Elliott as the new beneficiary, and giving her relation to him as that of wife. May 17, 1918, the Bureau of War Risk Insurance acknowledged receipt of this application for change of beneficiary and advised that the records of the Bureau had been marked accordingly and that the change was effective from April 20. A marriage ceremony between the insured and Adeline Manegie, the new wife, was performed in North Carolina, where the insured was then stationed, April 17, 1918. She was at this time legally married to another who was then living and from whom she did not obtain a divorce until the latter part of 1919. The insured had also, on June 6, 1910, been married to one Anna Maguire, and it is claimed that she also is still living and that no divorce had ever been obtained. The plaintiff was born October 5, 1918. No question is made but that the insured is her father, and in his lifetime acknowledged her as his child.

Upon the filing of this bill, the defendant the United States applied for and obtained an order requiring Anna Maguire Elliott, the first wife and widow of the insured, and one Emma Belcher Elliott, another person alleged to have later been married to the insured and from whom he had never been divorced, and the new wife, Adeline M. Elliott, to be made parties defendant. Emma Belcher Elliott does not appear and makes no claim. Anna Maguire Elliott, being insane, appears by her conservator, and has filed an answer and cross-petition asserting her marriage to the insured and that no divorce has ever been granted, and makes claim for the entire proceeds. Adeline M. Elliott appears and answers and waives any claim on her own behalf, but claims the entire proceeds as an alleged trustee for the plaintiff. Mary Cecelia Elliott, the mother of the insured and the original beneficiary, also appears and answers, claiming to be the only beneficiary and entitled to the entire proceeds. The Bureau of War Risk Insurance, having duly considered these several claims, has made a ruling that Mary Cecelia Elliott is the

only person interested in the proceeds and entitled to the monthly installments payable on account thereof.

[1] Two preliminary motions are submitted by the United States, which may be briefly disposed of. One is that David F. Houston, Secretary of the Treasury, is not a proper party defendant and that the cause should be dismissed as to him. This motion is well taken and is sustained.

[2] The other motion is to transfer this cause to the law side of the court. This motion, when submitted at the hearing, was reserved, and all parties agreed that in the event this court held this action to be legal and not equitable and that it should be so transferred, the case should be submitted to the court without a jury for decision on the evidence to be presented. This motion is not well taken, and is overruled. The relief sought in the original bill is to restrain the payment of the monthly installments to Mary Cecelia Elliott, to declare and establish the right of the plaintiff thereto, and to procure a mandatory injunction to compel payment to plaintiff in accordance with her right as thus established. The order made on motion of the United States, requiring new defendants to be made and requiring them to appear, answer, and assert their several claims, is the equivalent of equitable relief by a bill of interpleader. The affirmative relief sought in the several answers is not for a money judgment, but is, rather, equitable than legal in nature. The action against the United States, authorized by section 405 of the War Risk Insurance Act, obviously includes any form of action, legal or equitable, appropriate to the facts of the case. In my opinion, the issues framed and the relief sought are equitable rather than legal.

The paternity of the plaintiff being conceded, and the insured being at the time of his enlistment and death a resident of Ohio, section 8591, G. C. of Ohio, makes plaintiff a person who is entitled to the insured's personal property in case of intestacy notwithstanding the marriage of plaintiff's father and mother may be absolutely null and void. The fact that Adeline Manegie, the plaintiff's mother, was married and undivorced at the time of her marriage to the insured, makes that marriage null and void, even though the insured's first wife, Anna Maguire Elliott, may not then have been living and undivorced; hence it is unnecessary in this aspect of the case to inquire whether sufficient proof is offered to show that the Anna Maguire Elliott who appears by her conservator is the lawful first wife of the insured. Adeline M. Elliott, the latest wife, it is conceded, is not a person entitled to be designated as a beneficiary under section 402 of the War Risk Insurance Act. The several claimants, therefore, are the plaintiff, the infant child of the insured, and the last wife; the first wife, Anna Maguire Elliott; and the mother and original beneficiary, Mary Cecelia Elliott.

[3] Plaintiff's right rests on the contention that the designation of Adeline M. Elliott, the new wife, as beneficiary, completely revokes and cancels the original designation of Mary Cecelia Elliott as a beneficiary, and that inasmuch as the new beneficiary is not a person within the permitted class, the insured had died without designating any lawful beneficiary, and that the insurance passes to the plaintiff under the

terms of the last sentence of section 402 above quoted. The opposing contention is that the designation of the new wife is only an attempted change of beneficiary, and, being wholly null and void because of her ineligibility to be a beneficiary, is null and void for all purposes, and leaves the original designation in full force and effect. The question thus presented is not free from difficulty, but upon a careful examination of the provisions of the War Risk Insurance Act and an examination of the law relating to beneficial and mutual societies, I am of opinion that the contention last cited is the sound one. Section 402 is the only part of the War Risk Insurance Act pertinent to this question. This section has been amended and re-enacted, but its provisions as above quoted have always been the same. An examination of the other sections seems to me to furnish no aid in construing section 402. My conclusion rests primarily upon the terms of this section, but is supported also by the law as announced and applied in analogous situations arising under the insurance law. The insurance, it is provided by this section, shall be payable only to a spouse, child, grandchild, parent, brother, or sister. The insured, when making application therefor, is obviously expected to name in his application a beneficiary who is within this class. The law as well as the certificate reserves to the insured the right to change beneficiaries without the consent of those previously designated. The law as well as the regulations contemplates only a change of beneficiary and not a surrender and cancellation of the certificate or the making of any new or further contract of insurance. The right reserved is the right to change, not to cancel or revoke. The right to change implies, and of course includes, the right to revoke; but the law seems to restrict the manner and method of thus changing or revoking. The change, while it may be made without the consent of the beneficiary, can only be to another within the classes provided in the act; that is, the right to change, as well as the actual revocation and change, seems to be restricted to a right to designate a new beneficiary within the permitted class. It does not seem to be contemplated that once a certificate is issued and a designation made, the insured may merely cancel or revoke that designation, reserving either a right to make a new designation at some future time or by a last will and testament. Certainly the Bureau of War Risk Insurance would not have recognized an attempted cancellation or revocation except as a result of the designation of a new beneficiary. No regulation has been made permitting the cancellation of a certificate once issued, for the purpose of terminating the contract of insurance or as a means of changing beneficiaries or destroying the rights of an original beneficiary. It seems to me that a change of beneficiary is authorized and permitted only by actually designating a new beneficiary within the eligible class.

[4] If this be true what then is the effect of the later designation of an ineligible person? Is it to be treated as an effective revocation of an originally valid designation, even though it is wholly null and void for the purposes for which it was intended? It does not seem to me that it can have this effect. What the insured did, and all that he did, was to attempt to change beneficiaries. If this attempted change is

null and void and therefore ineffective for the purpose intended, it cannot logically have another and different effect and be valid for another and different purpose. An original valid designation, it seems to me, is not thereby canceled or invalidated.

The general rule of law applicable to beneficial and mutual societies is that, if the attempted change is invalid and ineffective for any reason, the rights of the original beneficiary are not affected and the original designation remains in force. This rule is supported by numerous authorities and has been applied in many cases, including some in which the original certificate designating the beneficiary was surrendered and a new certificate designating an ineligible beneficiary was issued. See 4 Cooley's Briefs on Insurance, 3776; Elsey v. Odd Fellows Mutual Relief Association, 142 Mass. 224, 7 N. E. 844; Smith v. Boston & Main R. R. Relief Association, 168 Mass. 213, 46 N. E. 626; Coyne v. Bowe, 23 App. Div. 261, 48 N. Y. Supp. 937, affirmed 161 N. Y. 633, 57 N. E. 1107; Supreme Council v. McGinness, 59 Ohio St. 531, 53 N. E. 54; Sturges v. Sturges, 126 Ky. 80, 102 S. W. 884, 12 L. R. A. (N. S.) 1014; National Union v. Keefe, 263 Ill. 453, 105 N. E. 319, Ann. Cas. 1915C, 271; Grace v. Northwestern Mutual Relief Association, 87 Wis. 562, 58 N. W. 1041, 41 Am. St. Rep. 62; Williams v. Fletcher, 26 Tex. Civ. App. 85, 62 S. W. 1082. The law as established by these cases is so far the prevailing and the settled rule that it is not a far-fetched inference that the authors of section 402 had it in mind when framing the section and used language which was intended to incorporate that rule in the War Risk Insurance Act.

Certain cases are cited on behalf of plaintiff which, it is said, are in conflict with the cases above cited. Those mainly relied on are Alfsen v. Crouch, 115 Tenn. 352, 89 S. W. 329; Carson v. Bank, 75 Miss. 167, 22 South. 1, 37 L. R. A. 559, 65 Am. St. Rep. 596; Grand Lodge v. Mackey (Tex. Civ. App. decided October 16, 1907) 104 S. W. 907. In addition thereto, I have examined others, including the following: Luhrs v. Supreme Lodge, 54 Hun, 636, 7 N. Y. Supp. 487; Cullin v. Knights of Maccabees, 77 Hun, 6, 28 N. Y. Supp. 276. In some respects the reasoning of these cases conflicts; but, conceding all that may properly be claimed for them, they do not, it seems to me, call for a different conclusion upon the facts of this case.

They may be taken as holding that when the charter and by-laws of a benefit society, or the law under which a mutual insurance company is organized, authorizes and permits the surrender and cancellation of a certificate or contract of insurance and the issue of a new one to a new beneficiary without the consent of the original beneficiary, all the rights of the original eligible beneficiary are terminated, even though the new beneficiary cannot take because not within the eligible class. They are based upon the proposition that when the charter or the law authorizes or permits the insured to cancel or surrender a certificate without the consent of the beneficiary and this is what he does, then all rights arising under the original certificate are terminated. The conflict between these cases and others supporting the prevailing rule

is as to the effect in the given case of the surrender of the certificate and the reissue of a new one. In some of those cited in support of the prevailing rule, a holding is made that if the surrender and cancellation is permitted or is made for the purpose only of changing the beneficiary, it is ineffective as a revocation of the original designation unless a valid new designation is made. The solution of this question is made to turn on a close scrutiny of the terms of the constitution and by-laws of the society or of the statutory law, as applied to the special facts in each case; but in all cases in which it is held that the rights of the original beneficiary are terminated notwithstanding the new beneficiary is ineligible, the holding is based upon the proposition that the original certificate was canceled in a manner authorized and permitted by law or charter.

For this reason, the cases relied on by plaintiff fail in pertinency to the facts of this case. Section 402 does not contemplate a surrender and cancellation of the original certificate, and the insured did not, in fact, attempt to surrender or cancel the original certificate, but merely applied for and obtained a change of beneficiary. Under a charter or law embodying the provisions of section 402 and upon the facts such as are here present, showing an attempt merely to designate a new beneficiary who is ineligible, I find no case which holds that an original valid designation does not remain in force despite the ineffectual effort to change the beneficiary. The difference in the class of cases and in the result reached may be emphasized by reference to certain of the cases. Thus, in Williams v. Fletcher, supra, and Grand Lodge v. Mackey, supra, both decided by the Texas Civil Court of Appeals, it was held in the former that an ineffective designation of a new beneficiary without surrendering and canceling the original certificate did not operate to revoke an originally valid designation, whereas in the later case such a result was held to have followed because the original certificate was surrendered and canceled and a new one issued. The same diverse result appears in Covne v. Bowe, supra, and Luhrs v. Supreme Lodge, supra, both decided by the Supreme Court of New York.

[5] The contention that the new beneficiary was designated as trustee for the plaintiff, then unborn, is not supported by any evidence. That which is offered tends only to show a recognition by the insured of the plaintiff's relationship to him. The insured merely designated his new wife as beneficiary; he declared no trust in favor of any one, and he cannot be said to have intended anything except that which he did, namely, to make a change of beneficiary. The hardship of plaintiff's situation furnishes no sufficient reason for unsettling the law, a hardship, moreover, which is somewhat tempered by the beneficent provisions of sections 300 and 301 of the same act.

A decree will be entered in conformity to the conclusions herein stated, ascertaining and determining that Mary Cecelia Elliott is the only true beneficiary under certificate 1,124,697, issued to Andrae Hugh Elliott February 12, 1918, and is entitled to the monthly installments payable thereon, as provided by the law, and that her title be quieted, and that plaintiff and all other parties are forever barred from assert-

ing and maintaining any action against her or the United States under and by virtue of said certificate of insurance. No holding is made as to the disposition of any installments remaining unpaid in the event Mary Cecelia Elliott shall die before all shall have become due and payable.

THE INLAND.

(District Court, E. D. New York. March 10, 1921.)

1. **Seamen ⇐33—Wrongful discharge entitles to penalty, though not in presence of shipping commissioner.**

Where the captain, who has authority under Rev. St. § 4511 (Comp. St. § 8300), to hire and discharge seamen, wrongfully discharges men without taking them before the shipping commissioner, as required by statute, the discharge, though illegal, is not void, but releases the men from their obligations to the vessel, and entitles them to recover the penalty for wrongful discharge prescribed by Rev. St. §§ 4527, 4529 (Comp. St. §§ 8318, 8320).

2. **Seamen ⇐33—Refusal to accept compromise proposed by commissioner defeats right to penalty.**

Where seamen who had been discharged by the captain before the termination of the voyage took up with the shipping commissioner the matter whether they were entitled to the statutory penalty, and the commissioner determined the penalty should not be inflicted and attempted to work out a compromise by having the captain retain the men at full pay, the refusal of the men to accept the proposed compromise defeated their right to the penalty, or any other right except to receive wages if they consented to discharge before the commissioner.

In Admiralty. Libel by Leo Ryder and others against the Steamship Inland to recover penalty for wrongful discharge. Libel dismissed.

Frederick R. Graves, of New York City, for libelants.

Kirlin, Woolsey, Campbell, Hickox & Keating, of New York City, for respondent.

CHATFIELD, District Judge. The libelant Ryder and six other seamen signed articles at Providence, R. I., for a trip to a coal port in the United States and return. Upon reaching New York the vessel was compelled to go to dry dock. After being on the dock, the chief engineer told some of the men of the engineering force that they would be laid off the next day as a matter of economy, until they were ready to go to sea. This was said to be by direction of the company, with the approval of the captain. The chief engineer notified the men at 5 o'clock on the afternoon of Friday, June 11, 1920. The next morning some of the men had a talk with the captain, in which conversation he offered them 11 days' wages for June and asked them to sign off. They refused, and demanded extra pay for one month in accordance with R. S. U. S. § 4527 (Comp. St. § 8318). The captain did not agree, and after conversation with a delegate of the union, who came on board, the men went back to their quarters. On the following

Monday morning, as had been suggested by the delegate, they all proceeded before the shipping commissioner, who adjourned the matter till the next day, when the captain, the delegate, and the libelants took the matter up. The shipping commissioner held that the men should go back to work and that the vessel must retain them for the voyage. But no formal decision under section 4554 (Comp. St. § 8343) was made. The following day, which would be Wednesday, the libelants left the ship, and the shipping commissioner thereupon advised the captain to mark them as absent without leave at the time of sailing. They were then marked off as deserters.

There is no serious dispute as to the facts. The vessel was a coasting vessel, and the statutes, which in terms apply to voyages to foreign ports, were made binding through being set forth in the articles signed before a shipping commissioner. 26 Statutes, 320 (Comp. St. § 8293), as amended. Under R. S. U. S. §§ 4526–4551 (Comp. St. §§ 8317–8340), in such a case discharge must be before the shipping commissioner according to statute, and by section 4527 a penalty of one month's wages is granted for wrongful discharge.

In the case of Hughes v. Southern Pacific Co. (C. C. A. S. D. N. Y.) 273 Fed. —, decided on the ——— day of ———, 19—, it was held that an attempted discharge by a chief engineer, who was seeking to arrange the work in his own department, was not in fact a discharge, either lawfully by the shipping commissioner or unlawfully by the captain, inasmuch as this engineer had not the authority to discharge the libelant. The libelant in that case, having left the ship and refused to return (although the attempted discharge by the chief engineer was disavowed, and the engineer directed to continue his duty before the libelant had done more than send his trunk ashore), the libel was dismissed on the ground that there had been no wrongful discharge.

In the present case the respondent contends that the situation is like that in the Hughes Case, supra, and that the libelants were never actually discharged. The libelants, on the other hand, contend that they were wrongfully discharged by the captain, and that therefore they were entitled to stand upon their wrongful discharge and demand the statutory penalty, including double pay for waiting time. Section 4529.

[1] The captain has authority under section 4511 (Comp. St. § 8300) to hire and to discharge his men. If there could be no discharge of any kind except before a shipping commissioner, then a seaman, wrongfully discharged and left stranded in a foreign port, might upon his return to the United States be confronted with the proposition that he had not been discharged and had deserted, inasmuch as the shipping commissioner had not passed upon his case.

The procedure before the shipping commissioner is a precautionary measure, for the protection of the rights of both parties; but either party may wrongfully ignore the procedure intended for his protection and violate his contract, just as he may violate a statute defining a crime if he does the prohibited acts. If a seaman deserts, he can be marked off, even though he has not gone before the shipping commissioner and notified him of the leaving. If he is put off the ship, and

in fact discharged, in the sense that the relation of master and servant is severed, the master of the ship may be responsible for the consequences thereof, for the very reason that he has not taken the matter before the shipping commissioner, so as to be protected by due process of law. In the Hughes Case it fortunately turned out for the ship that the preliminary or attempted discharge was abortive, and the consequences were undone before the master of the ship was rendered liable for any act on his own part. The question at issue was not whether the master or the employer might be responsible for the damages inflicted by their servant, the engineer who attempted to discharge the man; the question was rather whether the discharge was valid.

[2] In the present case, the matter which was taken before the shipping commissioner was not to determine whether the discharge was valid, but whether, upon a proposed discharge, admittedly irregular in procedure, the man had become entitled to a penalty. The shipping commissioner evidently determined that the situation was not one where any penalty should be inflicted, and attempted to work out a compromise, by having the captain retain the men with full pay. This the men refused to accept, and thereby lost any right, except to receive the wages due, if they consented to discharge before the commissioner.

The libelants, therefore, are not entitled to recover such penalty as would be incurred upon a wrongful discharge.

Libel dismissed, without costs.

In re WEIDENFELD.

(District Court, E. D. New York. March 10, 1921.)

Accord and satisfaction ⇐23—Remedy for default specified in agreement not exclusive.

Where a written agreement for settlement of a judgment provided that notes given by the debtor should be secured by a confession of judgment for the full amount of the original judgment, on which judgment might be entered in case of default, the fact that such confession was not executed *held* not to deprive the creditor of a right of action for breach of the contract by failure to rent the notes.

In Bankruptcy. In the matter of Camille Weidenfeld, bankrupt. On review of order of referee expunging claim of the estate of John Byone, deceased. Reversed.

See, also, 257 Fed. 872.

Marshall S. Hagar, of New York City, for the motion.

Frederick W. Frost, of New York City, opposed.

GARVIN, District Judge. The referee has made an order expunging a claim for $588,416.45, filed against the estate of the bankrupt herein by the estate of John Byrne, deceased, which order is now before the court for review. The facts are admitted. On April 11,

1907, Frank P. Byrne, Elizabeth M. Byrne, and Frank Sullivan Smith, as executors of the will of John Byrne, deceased, recovered a judgment against Weidenfeld (the bankrupt herein) and two others for $395,745.82. Negotiations in connection with a settlement resulted in an agreement in writing under seal, dated April 20, 1909, between the executors and Weidenfeld, by which both parties assumed certain obligations. The executors duly performed all that they were required. This agreement provided in part as follows:

"Second. The payment as aforesaid of the entire principal and interest of all the promissory notes above recited and amounting in the aggregate to one hundred and fifty thousand dollars ($150,000) shall be further secured by a confession of judgment to be delivered at the time of the payment of the twenty-five thousand dollars ($25,000) cash above mentioned, and which shall conform to the provisions of the Code of Civil Procedure, and which shall provide for the entry of judgment as upon contract against Camille Weidenfeld, the second party, for the entire amount of the judgment for three hundred ninety-five thousand, seven hundred forty-five and 82/100 dollars ($395,745.82) aforesaid, with the interest thereon, less any payments made under the provisions of this agreement which shall be applied upon the amount due for principal and interest thereon as of the date hereof; such confession of judgment shall be in the form hereto annexed and made a part of this agreement. The second party or his legal representatives, three months prior to the date at which such confession of judgment shall cease to be effective under the provisions of the Code of Civil Procedure, will execute and deliver to the first parties or their assigns a further confession of judgment in proper form under the provisions of the Code of Civil Procedure as they shall then exist for the longest period permitted thereby as security for the payment of the principal and interest of such promissory notes as aforesaid then remaining due, and shall continue so to protect said debt by such confession of judgment in advance of the successive expirations of such periods of evidence, if any, until such promissory notes and the interest thereon are fully paid and discharged according to the terms thereof. Upon any default by the second party or his legal representatives in the performance of this covenant respecting such confession of judgment the entire amount remaining due upon the original judgment shall immediately become due and payable notwithstanding this agreement and judgment may be entered forthwith against the second party therefor. This security by confession of judgment, however, shall not in any manner prevent or interfere with the rights and remedies of the first parties upon such promissory notes in the ordinary course. The obligations of second party created hereunder are founded upon contract."

Weidenfeld delivered the confession of judgment at the time the $25,000 was paid, but never thereafter delivered any further similar confession. The executors did not file the confession which they received, and it expired under section 1275 of the Code of Civil Procedure of the state of New York, which provides:

"At any time within three years after the statement is verified, it may be filed with the county clerk of the county of which the defendant was a resident at the time of making such statement, or, where the sum, for which judgment is confessed, does not exceed $2,000, exclusive of interest from the time of making the statement, with the clerk of the City Court of the City of New York, provided, however, that the defendant at time of making such statement was a resident of the city of New York. Thereupon the clerk must enter, in like manner as a judgment is entered in an action, a judgment for the sum confessed, with costs, which he must tax, to the amount of $15, besides disbursements taxable in an action, If the statement is filed with a county clerk, the judgment must be entered in the Supreme Court; if

it is filed with the clerk of another court, specified in this section, the judgment must be entered in the court of which he is clerk. But a judgment shall not be entered upon such a statement, after the defendant's death."

The learned referee has determined that the agreement constituted an accord and satisfaction between the parties and that by the failure of the executors to file the confession of judgment and to begin suit on the notes within the periods allowed by law they have lost all rights against the estate of the bankrupt. The executors contend that, whether or not the agreement was an accord and satisfaction, which they dispute, it was under seal and therefore their right of action to recover damages upon breach by Weidenfeld is not barred for 20 years.

It will be observed that it is provided by the agreement in paragraph "second," supra:

"Upon any default by the second party or his legal representatives in the performance of this covenant respecting such confession of judgment the entire amount remaining due upon the original judgment shall immediately become due and payable notwithstanding this agreement and judgment may be entered forthwith against the second party therefor."

The referee has held the meaning of this paragraph to be that the only judgment which was available to be entered forthwith was upon the confession of judgment, as no other judgment was then in contemplation or mentioned which could be entered. If this be conceded, and if it be further conceded that the agreement of April 20, 1909, constituted an accord and satisfaction, I am unable to agree with the conclusion that upon default by Weidenfeld there was no right of action for damages against him for breach of contract. The agreement does not provide for the filing of the confession of judgment forthwith, as the only remedy available to the executors, and it appears to be the intent of the parties to fully protect the rights of the executors with respect to Weidenfeld's indebtedness to them. To hold that an actual breach of the contract carried with it no right of action for damages can hardly be said to be in harmony with such intent.

There is, of course, no question but that a claim based upon a sealed instrument is not barred by the statute of limitations until 20 years have lapsed. New York Code of Civil Procedure, § 381.

If these conclusions are correct, it follows that the order of the referee must be reversed, and the estate of John Byrne be given an opportunity to prove the claim, if it desires to submit further proof, with permission to the trustee to be heard and offer evidence in opposition.

THE COSTILLA.

THE HELEN B. MORAN.

(District Court, E. D. New York. January 18, 1921.)

Collision ⇐96—Excessive speed in front of slip.

A collision between a steamship coming up close to a vessel anchored outside a Brooklyn pier just below a slip and a barge in tow coming out from the slip *held* due solely to the fault of the steamship in going at full speed so close to the anchored vessel that she could not see the tug and tow in time to avoid the collision; it being shown that the tug blew her whistle on leaving the pier.

In Admiralty. Suit for collision by Anna D. McMullen, owner of the barge Hornbeek, against the steamship Costilla, with the tug Helen B. Moran impleaded. Decree for libelant against the Costilla.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Leroy W. Ross, U. S. Atty., of Brooklyn, N. Y., for the Costilla.

Park & Mattison, of New York City, for the Helen B. Moran.

GARVIN, District Judge. On May 31, 1919, the Helen B. Moran started to tow the barge Hornbeek from the Amity Street slip, Brooklyn, intending to go up through the East River. Just at the south of the slip the Ettina (called the Cornelia by the Costilla's witnesses), a large boat, lay at anchor, her bow down the river. The Moran passed the Ettina astern, and as she started to swing up the river the Costilla, owned by the claimant, came up the river quite close to the Ettina. When the Costilla observed the Moran and her tow, she stopped, but was not able to avoid colliding with the barge Hornbeek, which was in the tow. The owner of the Hornbeek filed a libel against the Costilla, owned by the United States of America, who has brought in by petition the steam tug Helen B. Moran.

I am of the opinion that the Costilla, proceeding at full speed aided by a strong flood tide, was negligent in selecting a course so close to the Ettina that she could not see a tug and tow coming out of the Brooklyn slip from behind the Ettina's stern in time to avoid taking the steps necessary to prevent a collision. The testimony offered in behalf of the Costilla, by her chief officer, is that she was not going at full speed; but his entire testimony with respect to her speed is far from satisfactory. He testified, too, that it took his boat three hours to go from Bedloe's Island to the place of collision, which, unexplained, is incredible.

The captain of the Moran testified that he blew a long whistle as he was leaving the pier. His testimony is not discredited, and I see no reason for rejecting it. When he saw the Costilla, he made every effort to avoid the accident. It is true that the chief officer (or mate) of the Costilla testified that he heard no whistle; but it does not seem likely that he was paying a great deal of attention to what was going

on inshore, as he thought the Ettina, which was at anchor, was proceeding down stream. It is perfectly obvious that the accident could not have happened unless the Ettina was at anchor, or else the Costilla should have seen the Moran leaving the slip before the Ettina cut off her view.

The fact that the tug had come out into the river, and that the tow (not the tug) was struck, indicates that the Costilla must have been going at a high rate of speed, or else that her navigating officer was careless in permitting her to approach so close to the tow. United States Exhibit No. 2, made by the mate of the Costilla, demonstrates clearly that such a collision as is there portrayed could not have occurred, unless the Costilla was proceeding very rapidly, without observing conditions astern of the Ettina.

There will therefore be a decree in favor of the libelant and against the Costilla. The petition of the United States of America is dismissed.

ACME SCOW CORPORATION v. PHŒNIX SAND & GRAVEL CO. et al.

(District Court, E. D. New York. January 14, 1921.)

Shipping ⊂=54—Charterer liable for injury to scow from unsafe berth.

Where a scow was taken by the charterer as near to the pier of a contracting company, where it was to be unloaded as it could go at the state of the tide, and when the tide rose was hauled nearer by the contracting company, until it grounded where it was left overnight, and was injured by settling on an uneven bottom when the tide fell, the contracting company *held* primarily, and the charterer secondarily, liable for the damage.

In Admiralty. Suit by the Acme Scow Corporation against the Phœnix Sand & Gravel Company, succeeded by the Goodwin Sand & Gravel Company, with the Degnon Contracting Company impleaded. Decree for libelant against both respondents.

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Foley & Martin, of New York City, for charterer.

Parker & Aaron, of New York City, for Degnon Contracting Co.

GARVIN, District Judge. The Acme Scow Corporation has filed this libel against the Phœnix Sand & Gravel Company for damages sustained by libelant's scow, while in the possession of the Phœnix Sand & Gravel Company, on or about December 24, 1917. The Goodwin Sand & Gravel Company is the successor of the Phœnix Sand & Gravel Company and has taken its place herein by appropriate amendments.

The respondent claims that it was without negligence, and that the damage was caused either through the fault of the Degnon Contracting Company, which has been brought in by petition, under the fifty-ninth rule in admiralty (29 Sup. Ct. xlvi), or the captain of the scow, who is claimed by the respondent to have been the agent of the libelant.

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

The libelant chartered its scow Roy, with a scowman, to the Phœnix Sand & Gravel Company. Thereafter, and on December 24, 1917, this scow, with a cargo of sand and gravel, was taken by a tug hired by the respondent to the foot of Sixth street, Brooklyn. It was left in Gowanus Canal, some 200 or 300 feet from its destination, the pier of the Degnon Contracting Company, as the water was too low to take it any further. Thereafter, as the tide rose, the scow was hauled towards the pier or dock of the Contracting Company by the latter's men, the captain of the scow assisting. When it could be taken no further, on account of shallow water, it was left aground overnight, with the result that, as the tide fell, it listed off and sustained the injuries for which the libel was filed.

The testimony is conflicting as to whether the captain of the scow had anything to do with its movements, except to act as a watchman. Upon this conflict, the court finds that the captain was no more than a mere watchman and that, in whatever he did to assist in taking the boat to her final destination, he acted in behalf of the charterer, and not of the libelant.

An additional question of fact is involved. The respondent contends that the scow was hauled toward the plant of the Degnon Contracting Company by the latter's men (assisted, perhaps, by the scowman), and that the Contracting Company failed to provide a safe berth, thus becoming liable. Daly v. New York Dock Co., 254 Fed. 691, 166 C. C. A. 189. The Contracting Company offered testimony that the captain of the scow (or scowman) actively co-operated and consented to move the boat; but after hearing and seeing the witnesses, the court accepts the testimony of the scowman that the employees of the Contracting Company were in charge of and directed the moving. The Degnon Contracting Company is therefore held primarily liable and the respondent secondarily liable. White v. Upper Hudson Stone Co., 248 Fed. 893, 160 C. C. A. 651.

Decree accordingly with reference to a master to compute the damage.

THE LAKE GRADAN.

MURPHY v. FEDERAL SUGAR REFINING CO.

(District Court, E. D. New York. January 21, 1921.)

Collision ⟸71(2)—Navigation held negligent.

A steamship, which grounded within 50 feet of the consignee's wharf, where she was to discharge, and in pulling off went ahead at full speed, and continued such speed until she ran into another vessel at the wharf 150 feet away, *held* solely in fault for the collision. The failure of the consignee to provide a berth which the ship could safely reach *held* not a proximate cause of the collision.

In Admiralty. Suit for collision by Daniel J. Murphy, owner of the barge No. 65, against the steamship Lake Gradan, with the Federal Sugar Refining Company impleaded. Decree for libelant against the Lake Gradan.

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

Macklin, Brown, Purdy & Van Wyck, of New York City, for libelant.

Leroy W. Ross, of Brooklyn, N. Y. (Robert Phillips and John Hunter, Jr., both of New York City, and Arthur J. Longfellow, of counsel), for claimant.

Ernest A. Bigelow, of New York City, for impleaded respondent.

GARVIN, District Judge. This libel has been filed by the owner of barge No. 65 to recover for damages sustained by that barge when she was struck and injured by the Lake Gradan, a vessel owned by the respondent.

The undisputed facts show that on April 18, 1919, the Lake Gradan, laden with a cargo of sugar consigned to the Federal Sugar Refining Company at Yonkers, N. Y., was proceeding under its own steam in charge of a Sandy Hook pilot up the Hudson river to Yonkers, for the purpose of discharging its cargo at the wharf of the Federal Sugar Refining Company. Arriving at about 8 o'clock in the evening, the Lake Gradan, about to dock, ran aground at a point approximately 50 feet from the wharf of the Sugar Refining Company, and about 150 feet from the barge No. 65, which was moored at a wharf of the latter company, just north. The Lake Gradan first went astern; still aground, a 6-inch line was put from her bow aft to the dock, and she went ahead at full speed. Very shortly her line parted and she drove forward into barge No. 65.

After the libel was filed, the respondent brought in by petition the Federal Sugar Refining Company, claiming that the latter was responsible for the accident for failing to provide a safe berth for the Lake Gradan. While the Refining Company was under a duty to furnish such a safe berth, and under ordinary circumstances would be held responsible for any damage to a vessel going aground as did the Lake Gradan, the testimony discloses that after the line was put out to the dock the engines of the Lake Gradan, going ahead at full speed, cleared her from the obstruction on the bottom, and that thereafter for an appreciable period of time she continued at full speed ahead. Under this state of facts it cannot be held that the Sugar Refining Company must respond for the damage to the barge. Such damage is too remote to be chargeable against the Sugar Refining Company. The negligence which was the proximate cause of the accident was that of the respondent, in keeping the engines of the Lake Gradan at full speed ahead, after the boat had floated, until a 6-inch manila hawser broke, with a barge only 100 to 150 feet off her bow.

The petition of the respondent the United States Shipping Board must be denied, and the libel dismissed as to the Sugar Refining Company. There will be a decree against the United States Shipping Board, with the usual reference to compute the damages.

BROWNING v. JOHNSON.

(Court of Appeals of District of Columbia. Submitted March 17, 1921. Decided April 4, 1921.)

No. 1407.

1. **Patents ⇐91(4)—Evidence held to show prior conception and reduction to practice by junior applicant.**
   Evidence in interference proceedings *held* to establish a conception and reduction to practice of the invention in issue by the junior applicant at a date long prior to the earliest date alleged by the senior applicant for his conception of the invention.
2. **Patents ⇐91(4)—Evidence held to show senior applicant derived invention from junior.**
   Evidence that the junior applicant conceived the invention long prior to the date claimed by the senior applicant, and that he exhibited it to a patent solicitor, who showed it to the senior applicant, *held* to show that the senior applicant derived his invention from the junior applicant, and was not an original inventor.
3. **Patents ⇐90(2)—Neither applicant nor assignee can charge party from whom they derived the invention with laches.**
   Where the evidence in interference proceedings showed that the senior applicant was not an original inventor, but that he derived the invention from the junior applicant, neither the senior applicant nor his assignee can charge the junior applicant with lack of diligence or laches, or estoppel by public use.

Appeal from the Commissioner of Patents.

Interference proceeding between John Bailey Browning and Eldridge R. Johnson. From a decision awarding priority to the latter, the former appeals. Reversed.

Melville Church, of Washington, D. C., and George W. Case, Jr., of New York City, for appellant.

Richard Eyre and William H. Kenyon, both of New York City, for appellee.

VAN ORSDEL, Associate Justice. The invention in interference relates to a talking machine with the mechanical parts inclosed in a cabinet. Prior to the invention in issue, the amplifying horn was situated on top of the reproducing mechanism and exposed to view. The present invention was designed to inclose the amplifier in the cabinet in such manner that it would give forth sufficient volume of sound. It also contemplates a plurality of doors to regulate the sound issuing from the amplifier. The issue is in a single count, as follows:

"The combination with sound reproducing means, of a co-operating amplifier, a cabinet inclosing the major portion of said amplifier and provided with an opening, of substantially the same size as the delivery end of said amplifier, and means to vary the quality of the reproduction at will on either side of said cabinet."

The party Johnson filed his application January 12, 1906, on which a patent was issued January 11, 1910. The party Browning filed his ap-

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

plication January 18, 1908. Browning copied the claims in issue from the Johnson patent in June, 1915, at the suggestion of the Patent Office, for the purpose of interference.

[1] It appears that Browning, in 1897, prepared a rough drawing on the back of a dance card, disclosing the invention in issue. This was signed by Browning and certified to by two competent witnesses. This alone, we think, established conception and disclosure. This was followed, however, by other drawings and the construction of certain rough models, which clearly disclosed the invention. As Johnson's alleged conception is 1903, and the earliest date to which his proof will entitle him, is May, 1905, it must be held that Browning was the first to conceive and disclose the invention in issue.

It will be observed that we are here dealing with long periods of time. The action of neither party is indicative of great diligence. Browning conceived in 1897, reduced to practice by the construction of commercial machines at Kansas City, Mo., where he was then located, in the latter part of 1907, filed in 1908, and presented the present claim in response to the suggestion of the Patent Office in 1915. Johnson conceived in May, 1905, filed in January, 1906, put machines on the market, through his assignee, the Victor Talking Machine Company, in August, 1906, presented his claim corresponding to the present issue in December, 1909, and was awarded a patent January 11, 1910.

[2] But these dates are of little importance, since the case turns upon the single question of originality. Was Johnson an original inventor, or did he derive the invention from Browning? Browning entered the employ of the Victor Talking Machine Company, of which Johnson was the president, in 1901. His position was that of inspector of motors, indicating to some extent, at least, skilled knowledge of the business. In the summer of 1900, Browning, in company with his wife, took what is known as "Sketch Exhibit No. 7," which is a complete disclosure of the invention, to Mr. Horace Pettit, of Philadelphia, to ascertain the cost of procuring a patent. Pettit was at that time attorney for Johnson, and, after the organization of the Victor Talking Machine Company in 1901, he became its attorney, and continued such until the date of his death in 1914. The price named by Pettit for procuring a patent seemed high to the Brownings, and they expressed a desire to take time to consider it. Pettit suggested that the sketches be left with him and he would submit them to a client of his, a Mr. Johnson, of Camden, who was engaged in the business of manufacturing talking machines. Browning then attempted to induce a friend by the name of Stafford to take an interest in the invention and furnish the money necessary to secure a patent. To this end, Browning and Stafford visited Pettit's office to consult him with reference to the procuring of a patent. Pettit informed them that he had laid the matter before Johnson, but had failed to interest him in the invention; that a patent could be procured, but that they would not be able to market the machines, because of certain other existing patents. Following this interview, Stafford, who had taken further time to consider the matter, wrote Browning the following letter:

"2073 E. Elkhart St., Philadelphia, Penna. Oct. 20, 1900.

"Friend John: Your letter received. I think the price Mr. H. Pettit asks for securing us the patent on the two drawings he returned to you is too much. I don't understand his remarks about getting a patent, and not be allowed to sell the talking machine on account of some other patent. This probably explains why he was unable to interest his client, E. Johnson, that he mentioned. I will be over to see the machine next week and discuss the matters more fully. Sincerely yours,

"Rob."

These facts are positively testified to by Browning and his two corroborating witnesses. They are also strongly supported by corroborating circumstances. Browning also testifies to three disclosures, at least, of the invention to Johnson and to other officers of the Victor Talking Machine Company between 1901 and 1905. Johnson, on the excuse of sickness, failed to testify. Pettit was dead when the testimony was taken, and while others named by Browning in connection with the disclosures testified, no positive denial was interposed by any one of them in reference to the disclosure of the invention to Johnson and his associates. Unless we are to discredit by the wholesale competent witnesses who stand unimpeached, this record overwhelmingly discloses that Johnson derived the invention from Browning. Hence neither he nor his associates are entitled to benefit from the monopoly conferred by the patent.

[3] This disposes of the case, since neither Johnson nor his assignee is in position to charge Browning with lack of diligence, laches, or estoppel by public use, as has been attempted.

The decision is reversed.

Reversed.

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.

MEMORANDUM DECISIONS

BALTIMORE & O. R. CO. v. LAMBERT RUN COAL CO. (Circuit Court of Appeals, Fourth Circuit. August 12, 1920.) No. 1846. Appeal from the District Court of the United States for the Northern District of West Virginia, at Philippi. Herbert R. Preston and A. Hunter Boyd, Jr., both of Baltimore, Md., and Geo. M. Hoffheimer, of Clarksburg, W. Va., for appellant. Rush C. Butler and Frank E. Harkness, both of Chicago, Ill., John A. Howard, of Wheeling, W. Va., Blackburn Esterline, Sp. Asst. Atty. Gen., and P. J. Farrell, Chief Counsel Interstate Commerce Commission, of Washington, D. C., for appellee.

PER CURIAM. Decree of District Court (267 Fed. 776) reversed. Order allowing appeal to Supreme Court filed September 10, 1920.

CHICAGO BONDING & SURETY CO. v. CENTRAL DREDGING CO. (Circuit Court of Appeals, Sixth Circuit. January 6, 1921.) No. 3424. In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Bulkley, Hauxhurst, Saeger & Jamison, of Cleveland, Ohio, for plaintiff in error. Calfee, Fogg & White, of Cleveland, Ohio, for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

DULUTH REFINING CO. et al. v. OWEN et al. (Circuit Court of Appeals, Eighth Circuit. April 8, 1921.) No. 5848. Appeal from the District Court of the United States for the Eastern District of Oklahoma. James J. Mars, of Sapulpa, Okl., for appellants. Irwin Donovan, of Muskogee, Okl., for appellees.

PER CURIAM. Appeal docketed and dismissed, with costs, under rule 16 (188 Fed. xi, 109 C. C. A. xi), on motion of appellees.

ERIE R. CO. v. HODGES. (Circuit Court of Appeals, Sixth Circuit. March 8, 1921.) No. 3490. In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, and Hine, Kennedy, Manchester, Conroy & Ford, of Youngstown, Ohio, for plaintiff in error. Anderson, Lamb & Osborne, of Youngstown, Ohio, and J. J. Tetlow, of Cleveland, Ohio, for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

ERIE R. CO. v. HODGES. (Circuit Court of Appeals, Sixth Circuit. March 8, 1921.) No. 3491. In Error to the District Court of the United States for the Eastern Division of the Northern District of Ohio; D. C. Westenhaver, Judge. Cook, McGowan, Foote, Bushnell & Lamb, of Cleveland, Ohio, and Hine, Kennedy, Manchester, Conroy & Ford, of Youngstown, Ohio, for plaintiff in error. Anderson, Lamb & Osborne, of Youngstown, Ohio, and J. J. Tetlow, of Cleveland, Ohio, for defendant in error.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

ESCOLAR v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. April 6, 1921.) No. 3647. In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Diego Escolar

was convicted of unlawfully dealing in morphine, and he brings error. Affirmed. Jose A. Morales, of New Orleans, La. (Jose A. Morales and Henry J. Rhodes, both of New Orleans, La., on the brief), for plaintiff in error. Henry Mooney, U. S. Atty., of New Orleans, La. (William J. O'Hara, Asst. U. S. Atty., of New Orleans, La., on the brief), for the United States. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. The judgment in this case is affirmed.

HIGGINS OIL & FUEL CO. et al. v. DELANEY et al. (Circuit Court of Appeals, Fifth Circuit. February 2, 1921.) No. 3530. Appeal from the District Court of the United States for the Western District of Louisiana; George W. Jack, Judge. Suit in equity by the Higgins Oil & Fuel Company and others against J. B. Delaney and others. Decree for defendants, and complainants appeal. Affirmed on opinion below. 263 Fed. 931. S. L. Herold and J. A. Thigpen, both of Shreveport, La., for appellants. John S. Richardson, of Homer, La., and W. D. Goff, of Arcadia, La., for appellees. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. For reasons stated in the opinion rendered by the District Judge (263 Fed. 931), the decree in this case is affirmed.

JUMPER et al. v. BELMONT. (Circuit Court of Appeals, Fourth Circuit. February 1, 1921.) No. 1885. Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston. Frank G. Tompkins, of Columbia, S. C., for appellants. Frank R. Frost, of Charleston, S. C., for appellee.

PER CURIAM. Cause docketed and dismissed, on motion of appellee.

KIMBALL v. ELAM et al. (Circuit Court of Appeals, Eighth Circuit. January 7, 1921.) No. 211. Petition to Revise Order of the District Court of the United States for the District of Kansas. Paul H. Kimball and Webster W. Kimball, both of Parsons, Kan., for petitioner. W. P. Dillard, of Ft. Scott, Kan., for respondents.

PER CURIAM. Petition to revise dismissed, with costs, on motion of respondents.

In re Application of the KINSEY MFG. CO. and the Willys Overland Company for instructions to the District Court of the United States for the Northern District of Ohio, Western Division, to reopen the interlocutory decree and further consider the case, after filing of mandate from this court in the case of Troy Carriage Sunshade Company v. Kinsey Manufacturing Company and Willys Overland Company, 247 Fed. 672, 159 C. C. A. 574. (Circuit Court of Appeals, Sixth Circuit. February 14, 1921.) No. 3529. Wilber Owen, of Toledo, Ohio, Chester H. Braselton, of Dayton, Ohio, and E. B. Whitcomb, for petitioners. Allen & Allen, of Cincinnati, Ohio, for respondent.

PER CURIAM. Application denied.

LAMSON BROS. et al. v. RAINBOLT. (Circuit Court of Appeals, Eighth Circuit. January 3, 1921.) No. 5629. In Error to the District Court of the United States, for the District of Nebraska. Francis A. Brogan, Alfred G. Ellick, and Anan Raymond, all of Omaha, Neb., for plaintiffs in error. F. H. Gaines and E. G. McGilton, both of Omaha, Neb., for defendant in error.

PER CURIAM. Writ of error dismissed, at costs of plaintiffs in error, on motion of plaintiffs in error.

McDANIEL v. CHITWOOD, U. S. Atty. (Circuit Court of Appeals, Fourth Circuit. February 8, 1921.) No. 1859. In Error to the District Court of the United States for the Western District of Virginia, at Harrisonburg. R. B. Stephenson and George A. Revercomb, both of Covington, Va., for plaintiff in error. Jos. H. Chitwood, U. S. Atty., of Roanoke, Va., for defendant in error.

PER CURIAM. Cause dismissed, under rule 20, in accordance with agreement of attorneys

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MARTIN v. LITTLE ROCK BASEBALL ASS'N et al. (Circuit Court of Appeals, Sixth Circuit. January 7, 1921.) No. 3457. Appeal from the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. W. C. Cherry, of Nashville, Tenn., and A. J. Donelson, of Memphis, Tenn., for appellant. Charles Jacobson and X. O. Pindall, both of Little Rock, Ark., for appellees.

PER CURIAM. Reversed and remanded, with instructions to dismiss the bill without prejudice.

MARVIN v. FORAN. (Circuit Court of Appeals, Eighth Circuit. February 10, 1921.) No. 5770. Appeal from the District Court of the United States for the District of Colorado. G. Dexter Blount and Harry S. Silverstein, both of Denver, Colo., for appellant. Edwin H. Park, of Denver, Colo., for appellee.

PER CURIAM. Appeal dismissed, at costs of appellants, per stipulation of parties.

O'DWYER et al. v. TOLEDO TRACTION, LIGHT & POWER CO. (Circuit Court of Appeals, Sixth Circuit. February 9, 1921.) No. 3461. Appeal from the District Court of the United States for the Western Division of the Northern District of Ohio; John M. Killits, Judge. Allen J. Seney, Ex-Pros. Atty., and Roy R. Stuart, Pros. Atty., both of Toledo, Ohio, for appellants. Tracy, Chapman & Welles, of Toledo, Ohio, for appellee.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

OLSEN et al. v. OLSEN. (Circuit Court of Appeals, Eighth Circuit. March 14, 1921.) No. 5733. In Error to the District Court of the United States for the District of Minnesota. George T. Olsen, of St. Peter, Minn., and Henry N. Somsen, W. H. Dempsey, and H. H. Flor, all of New Ulm, Minn., for plaintiffs in error. Stan D. Donnelly, of St. Paul, Minn., for defendant in error.

PER CURIAM. Writ of error dismissed, without costs to either party in this court, per stipulation of parties.

OMAHA CONE MACH. CO. v. AMERI-CONE CO. (Circuit Court of Appeals, Eighth Circuit. February 18, 1921.) No. 5516. Appeal from the District Court of the United States for the Southern District of Iowa. Willard Eddy, of Omaha, Neb., and Albert E. Dieterich, of Washington, D. C., for appellant. Ralph Orwig and W. P. Bair, both of Des Moines, Iowa, and H. A. Toulmin, of Dayton, Ohio, for appellees.

PER CURIAM. Appeal dismissed, at costs of appellant, per stipulation of parties.

ROBERTSON, State Revenue Agent, v. INGRAM-DAY LUMBER CO. (Circuit Court of Appeals, Fifth Circuit. April 13, 1921.) No. 3676. Appeal from the District Court of the United States for the Southern District of Mississippi; Edwin R. Holmes, Judge. Suit by Stokes V. Robertson, State Revenue Agent, against the Ingram-Day Lumber Company, brought in a Mississippi state court. Removed to federal court. Decree for defendant, and complainant appeals. Reversed, with instructions to remand to the state court. F. C. Hathorn, of Hattiesburg, Miss., for appellant. W. A. White, of Gulfport, Miss., for appellee. Before WALKER, BRYAN, and KING, Circuit Judges.

PER CURIAM. There is no material difference between this case and the case of Robertson, State Revenue Agent, v. Jordan River Lumber Co. (C. C. A.) 269 Fed. 606. Following the decision in the just-cited case, the decree in this case is reversed, with instructions to the District Court to remand the same to the state court.

SPADRA CREEK COAL CO. et al. v. EXCELSIOR COAL CO. (Circuit Court of Appeals, Eighth Circuit. January 17, 1921.) No. 5718. Appeal from the District Court of the United States for the Western District of Arkansas. James B. McDonough, of Ft. Smith, Ark., for appellants. G. O. Patterson, of Clarksville, Ark., and Joseph M. Hill and Henry L. Fitzhugh, both of Ft. Smith, Ark., for appellee.

PER CURIAM. Appeal dismissed, with costs, per stipulation of parties.

SPADRA CREEK COAL CO. et al. v. OZARK COAL CO. (Circuit Court of Appeals, Eighth Circuit. January 17, 1921.) No. 5717. Appeal from the District Court of the United States for the Western District of Arkansas. James B. McDonough, of Ft. Smith, Ark., for appellants. G. O. Patterson, of Clarksville, Ark., and Joseph M. Hill and Henry L. Fitzhugh, both of Ft. Smith, Ark., for appellee.

PER CURIAM. Appeal dismissed, with costs, per stipulation of parties.

STANDARD OIL CO. v. FEDERAL TRADE COMMISSION. (Circuit Court of Appeals, Sixth Circuit. January 11, 1921.) No. 3475. Petition to Revise an Order of the Federal Trade Commission. Niman, Grossman, Buss & Holliday, of Cleveland, Ohio, for petitioner. Marvin Farrington, of Washington, D. C., Acting Chief Counsel for the Federal Trade Commission, for respondent.

PER CURIAM. Dismissed, pursuant to stipulation of counsel.

WINKELMAN v. UNITED STATES. (Circuit Court of Appeals, Eighth Circuit. December 22, 1920.) No. 5771. In Error to the District Court of the United States for the Eastern District of Missouri. A. Samuel Bender, of St. Louis, Mo., for plaintiff in error. James E. Carroll, U. S. Atty., of St. Louis, Mo.

PER CURIAM. Writ of error docketed and dismissed, without costs to either party in this court, on motion of plaintiff in error.

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⇐1148 (U.S.C.C.A.N.Y.) Denial of separate trial reviewable only for abuse of discretion.—Soblowski v. U. S., 294.

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